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Reasoning in War Crimes Judgements in Bosnia and Herzegovina:

Challenges and Good Practices

A report of the Capacity Building and Legacy Implementation Project

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Introduction

The judgement is the most awaited-for, visible, and lasting aspect of a trial. In war crimes[1] proceedings in particular, the judgement, on the one hand, constitutes the peak point in administering justice for the actors involved in the trial, while on the other hand, it has a far wider impact. It can have reverberating effects on the communities involved and their understanding of past atrocities, on politics, on the development of national and international law, on society at large - even beyond geographical boundaries - and on history.

Further in relation to the wider effects, the kind of war crimes verdicts issued, especially by domestic courts in a post-conflict society, can be a significant indicator for outside observers of the ability of the justice system as a whole to process such sensitive cases in a fair manner. And when one considers that the justice system does not function in a vacuum, these verdicts can also be an indicator of how other branches of government function to support the justice system to fight impunity. For example, the executive is largely responsible for allocating necessary resources, while the legislative branch is responsible for ensuring that clear laws are in place. Hence, war crimes verdicts can reflect to some degree on whether post-conflict institution-building is carried out successfully or not.

Such a view is based on the opinion of the Consultative Council of European Judges (CCJE), which has indicated that the quality of a judicial decision is influenced by multifarious factors: not only by those "internal" to the justice system, such as the

1 The term "war crimes" is generally employed in this Report as an umbrella term that includes offences falling into the categories of genocide, crimes against humanity, or violations of the laws and customs of war.

professionalism of judges and the manner in which they conduct the proceedings, but also by other "external" ones. Such external factors are the quality of legislation, the adequacy of human and material resources allocated to the justice sector, the quality of services and submissions by other actors in the justice system, and the availability of effective legal training.[2]

In Bosnia and Herzegovina, approximately 315[3] verdicts in war crimes proceedings have been rendered to date by both the Court of Bosnia and Herzegovina (Court of BiH) and the entity courts, while many more are expected in the coming years. But little public or professional discussion has ensued about their ability to be accessed and easily understood. In fact, it appears that reference to domestic jurisprudence does not take place in a systematic manner, while many professionals mention that war crimes judgements are not read widely among colleagues. Questions among interested professionals have arisen mainly regarding the high percentage of overturned verdicts on appeal, wondering what the reasons for this might be. One cause for this seems to be related to the lack of sufficient reasoning and coherent expression of a panel's findings.

Assessing a judgement on its face in relation to its drafting and logical reasoning is something that many have not been comfortable doing, unless they have an interest in the case or are involved in it. This might be because such an assessment is often mistaken for passing an evaluation on the merits too; indisputably the latter is a job that belongs to the judge. Another reason for the reluctance, even of jurists, to say that they do not understand a judgement can be the embarrassment of admitting that they do not comprehend the legal argumentation of a court. Nonetheless, legal professionals are increasingly open about this challenge and have begun discussions on how to improve this output of the justice system. The CCJE, apart from peer review and self-evaluation by judges, also encourages the participation of "external" persons (i.e. lawyers, prosecutors, law faculty professors, citizens, national or international non-governmental organisations) in the evaluation of judicial decisions.

2 See the recent Opinion no. 11 (2008) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the quality of judicial decisions, CCJE(2008)5, 18 December 2008, paras. 10 ff, available at ‹https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2008)OP11&Language=lan English&Ver=original&Site=COE&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3#RelatedDocuments›, last accessed October 2009. The Opinion is available in local language at ‹http://pravosudje.ba/csd/›, last accessed October 2009. The Consultative Council of European Judges is an advisory body of the Council of Europe on the independence, impartiality, and competence of judges. The Consultative Council of Europe is comprised exclusively of judges and demonstrates the key role that the judiciary plays in democracy and the rule of law.

3 According to the OSCE Mission's statistics: from 2004 to December 2009, a total of 130 first-instance verdicts have been rendered (Court of BiH: 47, RS: 24, FBiH: 56, Brcko: 3) and a total of 104 final verdicts (Court of BiH: 39, RS: 12, FBiH: 50, Brcko District: 3). Between 1992 and 2004, a total of 40 first-instance verdicts were rendered (RS: 1, FBiH: 38, Brcko:1) and a total of 41 final verdicts (RS:1, FBiH: 39, Brcko:1).

It stresses, of course, that such external evaluation must not be used as a method of compromising judicial independence or the integrity of the judicial process.[4]

Furthermore, the public which is interested in the outcome of a war crimes verdict may feel disillusioned if an accused is convicted or acquitted on the basis of legal theories or arguments that they do not easily understand. Facilitating as much as possible their access to and understanding of the legal reasoning that yielded a particular result regarding the fate of an accused can enhance the court's transparency, and strengthen the trust in the justice system.

Therefore, it may be timely to seize the opportunity to make certain remarks on distinct aspects of verdicts that an independent observer may be in a position to identify, with the aim to assist the authorities to capitalise on developed good practices and to find ways to improve remaining challenges, with full respect for the principle of judicial independence. It should be stressed that the present report, which reflects the perspective of independent observers with legal background, does not intend to analyse the substance of the verdicts or second-guess the merits of courts' findings. Indeed, it does not seek to challenge the principle that the assessment of the intrinsic quality of judicial decisions should only take place through the appellate and other means of review provided by law, as also highlighted by the CCJE. Rather, it focuses on encouraging discussion about how the courts can ameliorate their judgements' ability to be more easily read and understood, as well as to be more clearly reasoned.

Moreover, it should be underlined that the examples used in this report are merely indicative and their inclusion does not imply that they are the best, worst, or only cases noted for the issue they illustrate, nor does it imply that a court reviewing these would necessarily find that the specific verdicts should be revoked. In terms of methodology, particularly with relevance to Section II on Challenges and Good Practices on the Clarity and Reasoning of Judgements, the findings herein are based on analysis of the Court of BiH English translations of the official verdicts issued in the national languages, as well as on interviews with Court of BiH judges. The report uses primarily Court of BiH judgements rendered in 2008 and 2009 because they are greater in number from entity judgements and therefore demonstrate best a trend of positive developments and best practices. Court of BiH war crimes cases have also been the focus of the CBLI project. In accordance, entity courts are advised to take the matters raised under consideration, in so far as their own judgements may suffer from similar deficiencies as those raised here.

Overall, the report should make clear that while most judgements do not necessarily violate the requisite standards of clarity and reasoning, they would benefit from improvements in certain domains. And even though challenges remain, there have been noteworthy positive developments in the reasoning and presentation of war crimes judgements in BiH that are certainly significant to disseminate and capitalise upon.

4 See Opinion no. 11 of the CCJE, *supra* footnote 2, para. 70.

I) International Standards and Domestic Law on Judgements

a) International Fair Trial Standards

No human rights instrument refers explicitly to the *right to a clear and reasoned judgement*. But it is submitted that the interests of justice cannot be achieved unless a decision is fully reasoned since fair trial rights, such as the right to appeal, under Article 6 of the European Convention on Human Rights are realised by way of a clear and reasoned judgement.[5] While much discretion is left to the states and to their legal culture on how to shape their verdicts and how to carry out the decision-making process, this discretion is not absolute. Seemingly, there is an increasing trend both to ensure that judicial decisions are of high quality, as well as to strengthen the mechanisms that evaluate and improve this quality.[6]

More specifically, the following fair trial standards are generally applicable to the verdict:

- It is upheld that the obligation to give reasons for its decisions is inherent in the *notion of a competent, independent and impartial tribunal*.[7]
- Giving reasons for a legal decision also safeguards *against arbitrariness* and the appearance of unfairness, since a verdict without justification may not be, but would certainly appear to be arbitrary.[8]
- Frequently, the right to a reasoned verdict is associated with the *right to appeal*, because in order to be able to use the latter effectively and present arguments, the appellant must have the opportunity to examine the reasons on which the judgement is founded; and these must be presented with sufficient clarity.[9]
- Furthermore, the Human Rights Committee has reviewed the failure to provide a reasoned judgement under the *right to be tried without undue delay*.[10]

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5 See Stefan Trechel, *Human Rights in Criminal Proceedings*, (Oxford University Press, 2005), pp. 102-3. Also Opinion no. 11 of the CCJE, *ibid*, para. 3.

6 The fact, as is mentioned later, that the CCJE has devoted considerable parts of its opinions on how to improve judicial decisions is certain evidence of this.

7 See Office of the High Commissioner for Human rights (OHCHR), *Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers*, page 134, available at ‹http://www.ohchr.org/Documents/Publications/training9chapter4en.pdf›, last accessed October 2009 (hereinafter OHCHR Manual). Also see the implicit view of the CCJE Opinion no. 11, *supra* footnote 2, para 4.

8 See Trechel, *supra* footnote 5, pp. 103-4.

9 See European Court of Human Rights (ECtHR), *Hadjianastassiou v. Greece*, Judgement, 16 December 1992, para 33. But the need to a reasoned judgement applies also in cases which cannot be further appealed; see Trechel, *supra* footnote 5, p. 103.

10 See the OHCHR Manual, *supra* footnote 7, p. 134.

- Very importantly, providing sufficient reasons strengthens the *justifiability and acceptability of the verdict before the parties* and it is also seen as part of the *right to be heard*, since it demonstrates to the parties expressing their views on facts and law in the proceedings that these have been duly considered.
- Equally significantly, a reasoned judgement promotes the transparency of the court and its acceptability by the public, and is therefore connected to the *right to a public trial*.
- Last but not least, it is underscored that clear judgements promote *legal certainty* to guarantee the predictability of the content and application of legal rules.[11] This is quite important also for rendering the legal principles in a verdict accessible and clear to the legal profession, as evidence of the status of case-law on a matter.

As to more detailed standards that a verdict's reasoning should meet in order to be considered as sufficient, it is stated that case-law has been rather vague and of no substantial help to the domestic judge or to the party appealing the reasoning as insufficient.[12] For instance, the European Court of Human Rights (ECtHR) has found that the determination of whether a court has failed to state reasons depends on the circumstances of the case or on the nature of the decision.[13] But, in framing the question a little further, the ECtHR has stated that a reasoned judgement "cannot be understood as requiring a detailed answer to every argument."[14] Which would suggest, rather, that reasons must be given in answer to every argument put forward by the party, when this could be relevant for the decision or otherwise decisive for the outcome of the case.[15]

Other opinions of persuasive nature give a little more practical guidance on the matter. The CCJE has dealt with this issue in its opinions, devoting one of them exclusively to the quality of judicial decisions. It has deemed that to be of high quality, a judicial decision must meet a number of requirements, the basic ones being clarity and reasoning.[16]

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11 See the Opinion no. 11 of the CCJE, *supra* footnote 2, para. 47.

12 See Trechel, *supra* footnote 5, pp. 106-7.

13 Namely the diversity of the submissions that a litigant brings forward, as well as the differences existing in the states with regard to statutory provisions, customary rules, legal opinion and the presentation of judgements. See, *Hiro Balani v. Spain*, ECtHR Judgement, 9 December 1994, para. 27.

14 See *Van der Hurk v. the Netherlands*, ECtHR Judgement, 19 April 1994, para 61.

15 See DJ. Harris, M. O'Boyle, and C. Warbrick, Law of the European Convention on Human Rights (Butterworths, 1995), p. 215.

16 See Opinion no. 11 of CCJE, *supra* footnote 2. Moreover, see Opinion no. 7 (2005) of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on "justice and society", 25 November 2005, available at ‹https://wcd.coe.int/ViewDoc.jsp?Ref=CCJE(2005)OP7&Sector=secDGHL&Language=lanEnglish&Ver=original&BackColorInternet=FEF2E0&BackColorIntranet=FEF2E0&BackColorLogged=c3c3c3›, last accessed October 2009.

b) Domestic Law

BiH law reflects a number of these standards in its criminal procedure codes, which are clarified to some extent in the relevant commentary. The contents of a verdict are outlined in Article 290(1) BiH Criminal Procedure Code (BiH CPC). In general, there should be an introductory part, the enacting clause, and the reasoning. Each of these parts must contain specific information outlined in the rest of the provision, which also include the reasoning regarding the sentence.

As to the standards of reasoning, Article 290(6) and (7) BiH CPC give some direction on what is expected from the court. In general, in the *reasoning part* of a verdict, the court should present its reasons for each count, stating specifically and completely the facts it has found proven or not and on which grounds, as well as the reasons it based itself upon when ruling on legal matters.

The provisions outlining the grounds of appeal in connection to the verdict provide further guidance on the standards of reasoning. For instance, Article 297(1)(k) BiH CPC states that it constitutes an essential violation of the criminal procedure provisions "if the wording of the verdict was incomprehensible, internally contradictory or contradicted the grounds of the verdict or if the verdict had no grounds at all or if it did not cite reasons concerning the decisive facts."

II) Challenges and Good Practices On the Clarity and Reasoning of Judgements

Monitoring findings indicate that court decisions can greatly benefit from using clearer format and language. Apart from the fact that approximately 35%[17] of Court of BiH verdicts are overturned based on shortcomings in their wording and reasoning, a number of judges interviewed for this report do not hide that many judgements could have been written in a more understandable manner.[18]

Clarity is significant in order to make a verdict, and generally the application of the law, accessible and foreseeable. Verdicts with clear format and language can also make the justice system more efficient, since they can save the parties and the appellate court time and effort when reviewing them. Similarly, clear appellate judgements can assist the parties and panels in other cases to be aware of the development of jurisprudence. They can then use existing good arguments in their motions or build better ones if they wish to change the case-law. And to close the circle, well-reasoned motions on behalf of the parties prompt the court to justify its judgement better.

17 See below footnote 37.

18 As expressed during interviews with numerous Judges of the Court of BiH conducted by the Mission either for the specific purpose of drafting this Report or in exercise of its regular activities.

The CCJE has opined that "all judicial decisions must be intelligible, coherently organised, drafted in clear and simple language – a prerequisite to their being understood by the parties and the general public. This requires them to be coherently organised with reasoning in a clear style accessible to everyone."[19] This body has recognised that each judge may opt for a personal style and structure or make use of standardised models if they exist. However, the CCJE has recommended that judicial authorities compile a compendium of good practices in order to facilitate the drafting of decisions.[20]

In the same spirit, as regards the language used in a verdict, the commentary to domestic law mentions that "literature emphasises the style of writing the reasoning of a verdict and its language composition. It is believed that besides the legal education and familiarity with the concrete case, it is also necessary to have writing skills and correct use of grammar."[21]

Despite these standards, it appears that legal professionals are mainly self-taught on how to draft legal documents, as they do not receive substantial training on legal drafting. Only a few *ad hoc* initiatives have ever taken place, which were greatly appreciated and induced appetite for more.

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19 See Opinion no. 11 of CCJE, *supra* footnote 2, paras 32-33. Moreover, see Opinion no. 7 (2005), *supra* footnote 16, paras 56-60. The latter Opinion further states that:

> "[...] in some European countries, judges believe that very short judgments reinforce the authority of the judgment; in some other countries, judges feel obliged, or are obliged by the law or practice, to explain extensively in writing all aspects of their decisions.
>
> 58. Without having the aim to deal in depth with a subject which is heavily influenced by national legal styles, the CCJE considers that a simple and clear judicial language is beneficial as it makes the rule of law accessible and foreseeable by the citizens, if necessary with the assistance of a legal expert, as the case-law of the European Court of Human Rights suggests.
>
> 59. The CCJE considers that judicial language should be concise and plain, avoiding - if unnecessary - Latin or other wordings that are difficult to understand for the general public [footnote omitted]. Legal concepts and rules of law may be quite sufficiently explained by citing legislation or judicial precedents.
>
> 60. Clarity and concision, however, should not be an absolute goal, as it is also necessary for judges to preserve in their decisions precision and completeness of reasoning. [...]"

20 See Opinion no. 11 of CCJE, *ibid*, recommendation (l) under "Main Conclusions and Recommendations."

21 See the Commentary to Article 290(6) BiH CPC in Hajrija Sijerčić-Čolić, Malik Hadžiomerović, Marinko Jurčević, Damjan Kaurinović, Miodrag Simović, *Commentaries on the Criminal Procedure Code of Bosnia and Herzegovina* (Council of Europe / European Commission, Sarajevo, 2005).

a) Issues regarding the Form of a Verdict and its Style of Reasoning

i) General Format

As stated above, written verdicts in BiH follow a structure comprising of an introductory part, the enacting clause (or pronouncement), and the reasoning.[22] In most verdicts, these are the main three chapters that may be distinguished from one another. Furthermore, Article 290(6) and (7) BiH CPC, coupled by the commentaries, provides some guidance as to what needs to be assessed in the reasoning.

But domestic law cannot be considered as particularly helpful in guiding judges on how to structure their reasoning in practice. Rather, judicial practice has played some role in this, developing a sort of general structure, but showing great tolerance towards a judge's writing skills and style. While the traditional structure of reasoning may have remained unchallenged as regards short judgements in regular criminal cases, the particularities of war crimes proceedings have highlighted its shortcomings.

Following the tradition, most verdicts dedicate great length to describing the arguments of the parties, procedural motions, the evidence adduced, and the law, while giving comparatively very little space to the parts where the judge matches the relevant facts to the relevant law in order to establish the veracity of the charges.[23] In war crimes cases, verdicts typically reach 30 to 50 pages or even exceed 100 or 300 pages. The reasoning part of war crimes verdicts has frequently been particularly complicated and lengthy, encompassing multiple counts and accused. What has been more challenging, in terms of the ability to easily read and research a verdict, is that they rarely used separate sections for each different part, count or accused, thus obliging the readers to skim through each paragraph of the document in order to find what they seek. All the while certainly running the risk of missing important information sought, since it was not uncommon to integrate the description of the facts and the conclusion of the panel under a title that is not very enlightening.

For example, in a first-instance verdict of 35 pages in 2008,[24] for an arguably not so complicated case involving two accused and two charges for crimes against humanity, the reasoning part comprised of 33 pages. This part did not number the paragraphs

22 Article 290(1) BiH CPC.

23 In the words of an appellate judge dealing with war crimes, at present there appear to be two forms of reasoning used in BiH: The first form, being more descriptive, recalls every piece of presented evidence but lacks or has a minimal assessment of the evidence, facts, and law. The judge indicated that such a verdict may not stand revocation upon appeal. The second form of reasoning, which the judge preferred, has more analysis and focus, containing all the important information for the case and an assessment of how exactly this relates to the charges [Interview with an Appellate Judge of the Court of BiH on 5 October 2009]

24 See the First Instance Verdict of the Court of BiH in the case of Ranko Vuković and Rajko Vuković, 4 February 2008.

and did not have any visible division between the various matters addressed therein, other than the following sentences *in lieu* of a title: "The Prosecutor presented the following evidence:" on page 4, "The Court established such state of facts on the basis of the following:" on page 9, and "The application of the substantive law:" on page 30.

More recently in 2009, a first-instance panel addressed the responsibility of two defendants for multiple counts of crimes against humanity and war crimes in a verdict of 110 pages.[25] The document does divide the different concepts into sections and has paragraph numbers, although not page numbers. Considering its length, and absence of a table of contents, an observer needs to skim through to identify the issues of interest. For instance, although the Prosecutor alleged as modes of liability of the first accused the application of joint criminal enterprise as well as that of co-perpetration according to Article 29 BiH CC,[26] the verdict seems to accept expressly only the former.[27] This can be seen at the beginning in its enacting clause and at the end in a section dedicated to joint criminal enterprise. It is not, however, easy for a reader to figure out where in the verdict the court expressly discusses whether Article 29 BiH CC was applicable and what the court's holding on this point is.[28]

It can certainly be understood that precision and completeness is required in order to reflect the complex legal matters and the large quantity of evidence that a court is called to assess. But certain judges have deemed that sometimes there is over-inclusion of information in the main body of the verdict, thus possibly overburdening the document.[29] It has been submitted that, in order to make judgements less overwhelming, information not connected closely to the matters in dispute may be omitted, condensed, or annexed after the main body of the judgement. And *vice versa*, when an important issue is at stake, it should be fleshed out as visibly as possible in the judgement.[30]

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25 See the First Instance Verdict of the Court of BiH in the case of *Krsto Savić and Milko Mučibabić*, dated 24 March 2009.

26 See, *ibid*, p. 1 and para. 435.

27 I.e. pp.12 and paras. 435 and 473.

28 Although in para. 430 the Verdict does refer to wording used by prior domestic case-law that dealt with the relation between Article 29 BiH CC and joint criminal enterprise (see the Appellate Verdict of the Court of BiH in the case of *Mitar Rašević and Savo Todović*, 6 November 2006, p.27), it does not make there a concrete reference to how it applies this case-law in the case at hand.

29 I.e. enumerating or summarising all evidence presented, procedural actions, or closing arguments of parties is something that a reader may normally skip to get to the analysis. Over-inclusion may be owed in part to a defensive attitude on the part of the judges. According to the words of an interviewed judge, in the old system in BiH, the first instance panel was essentially required to present evidence "indefinitely" – understood in the sense of recounting all the evidence presented at trial – so as to establish the facts and avoid revocation of its judgement on appeal [Interview with a Trial Judge of the Court of BiH on 23 October 2009].

30 This reflects the general opinion of judges interviewed and referred to in specific by interview date throughout this Report.

Particularly over the past year, what can be discerned is a notable improvement in the clarity of the form and structure that Court of BiH verdicts have in war crimes cases.[31] Among other developments, judges pointed out in a positive manner that many verdicts have begun using a table of contents, clear sections and subsections, paragraph numbers,[32] and annexes. The structure of how information is dealt with has also notably evolved in some judgements, seemingly in a conscious attempt to ensure that a judgement goes more quickly to the crucial points of dispute. It seems that there is a trend towards providing more analytical judgements, rather than overly descriptive ones, by using arguments, facts, law and conclusions in a tight package for each of the crucial points concerned.

ii) Language

Like the aforementioned issues with the structure, the language and expressions used in many judgements have been hardly accessible to the reader, requiring many readings before one can grasp the concept that a panel wishes to convey. The manner in which a verdict's paragraphs are formulated, the words chosen to describe some concepts, and the absence of terms clearly indicating similarity or difference can be confusing, particularly when a court endeavours to clarify legal theory. For instance, the below verdict explains the interrelation and differences between the notion of co-perpetration under Article 29 BiH CC, participation in a Joint Criminal Enterprise (JCE), and accessory liability as an aider under Article 31 BiH CC:

> "The distinction between co-perpetration and participation in a JCE is that a larger degree of contribution (that is, more decisive) is required for co-perpetration. On the other hand, the acts of a participant in a systemic JCE carry more weight than those of an aider as the latter only has knowledge of the intent of the principal offender whereas a participant in a JCE shares the intent of the principal offender [references omitted]. Therefore, if an Accused is aware of a system of ill-treatment and agrees to it, it may be reasonably inferred that he has intent to contribute to that system and accordingly be regarded as a co-perpetrator in a JCE and not just as an aider."[33]

Considering the importance these distinctions have for domestic jurisprudence, choosing words more carefully could assist the reader to grasp more easily the notions conveyed. For example, by reading the first and last lines of the paragraph, it could be unclear at first sight whether "co-perpetration in a JCE" exists as a notion in domestic law, and if so, what is its difference from the notion of "*participation* in a JCE". And while the second sentence talks about "*participation* in a (systemic) JCE"

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31 For instance, see *Mirko Todorović and Miloš Radić* Appeals Judgement of the Court of BiH, delivered on 23 January 2009 and published on 17 February 2009, or the First Instance Verdict of the Court of BiH in the case of *Ferid Hodžić*, delivered 29 June and published 14 September 2009.

32 Paragraph numbers can be very helpful when it comes to references, also between different language texts.

33 See *Mitar Rašević and Savo Todović* Appellate Verdict, *ibid*, p. 27.

and its difference from "aiding", it concludes by comparing "*co-perpetration* in a JCE" and "aiding."

While anecdotes amongst lawyers suggest that legal language is not intended to be easily deciphered, contemporary trends clearly call for its simplification when possible.[34] Among others, making shorter sentences and paragraphs, or using fewer secondary clauses in a sentence can tangibly improve the comprehensibility of a legal text.[35] The same is done by avoiding Latin or foreign language expressions (at least not without their corresponding translation), or long legal theories without inserting relevant facts from the case.

Positive developments have also been noted in this regard, together with the adoption of clearer structure in certain verdicts of the Court of BiH. For example, judges tend to use in their judgements more straightforward language and expression, as well as shorter phrases with clearer meaning.

iii) The Assistance of Domestic Jurisprudence in Developing Standards of Reasoning

In effect, monitoring findings indicate that approximately 35% of the verdicts reviewed at the appellate level in 2008 and 2009 at the Court of BiH were revoked, in part or in whole, on the basis of a violation of Article 297(1)(k) BiH CPC, which relates to the wording and reasoning of a verdict.[36] But there are additional cases where the appellate panel did not find a related violation, but nevertheless indicated that more clarity and justification would have been preferred.

At this point it is important to make reference to recent domestic jurisprudence which can have an impact in overcoming existing challenges in the format, language, and manner of reasoning of war crimes – and other – verdicts.

The recent Appellate Judgement of the Court of BiH in the case of Mirko Todorović and Miloš Radić ["*Todorović* Appellate Judgement"] may be considered as a

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34 See Opinion no. 7 of the CCJE, *supra* footnote 19.

35 As another example of a long sentence, see: "In line with the aforementioned, this Panel found the referenced complaints which can be subsumed under the complaint that the first-instance Verdict committed the essential violation of the provisions of the Criminal Procedure Code referred to in Article 297(1)(k) of the BiH CPC t be entirely well-founded, given that the operative part of the appealed Verdict is contradictory to the reasons of the Verdict, and is *per se* inconclusive and that the Verdict does not contain the reasons at all and that the reasons referring to the decisive facts in respect of the two accused are not stated therein which *ipso facto* requires a compulsory revocation of the appealed part of the verdict, since we have here an absolutely essential violation in respect of which there is an incontrovertible assumption that it adversely effected the legality and correctness of the Verdict handed down."; see the Court of BiH Appellate Verdict in the case of *Mirko Pekez*, 29 September 2008, p. 13.

36 Out of the 21 verdicts reviewed by the Mission, eight were revoked on the basis of Article 297(1)(k) BiH CPC. These are in the cases of *Krešo Lučić, Lazarević et al.*, *Nikola Andrun*, *Mirko Pekez et al.*, *Radmilo Vuković, Ranko and Rajko Vuković*, *Stupar et al*, and *Sefik Alić*.

landmark judgement[37] to the extent that it endeavours to elaborate and clarify the legal standards of appellate review of first-instance verdicts. It does so in connection to violations of criminal procedure, to violations of criminal law, to the assessment of the facts, and to sentencing. The judgement came at the time when there was a lack of understanding of the concrete reasons for which first-instance verdicts were revoked on appeal. This created a perception, whether justified or not, that the appellate court was not consistent in how it used the standards prescribed by law when reviewing verdicts.

The *Todorović* Appellate Judgement commences its analysis by making reference to certain *general issues*. In introducing this part, it stresses that the appellate review is limited to only those issues raised and argued by the parties on appeal. Nonetheless, it adds that, in order to promote the efficient and fair adjudication of criminal proceedings, the Appellate Panel may make observations and comments of a broader nature that can provide useful guidance and promote the efficient and effective work of the Court.[38] Admittedly, this is a function of higher courts that can greatly assist the justice system.

Under these general issues, the Judgement raises three points related to clarity and reasoning:

First, although it recognises that the first-instance verdict in question contains the grounds and reasoning necessary to be valid, nevertheless it highlights that "a more methodical, organized, and deliberate approach would have resulted in a verdict that would have allowed both parties and the Appellate Panel to expeditiously and efficiently identify the decisive facts established by the Trial Panel and examine the evidence and reasoning for those facts."[39]

Second, it criticises that the first-instance verdict only contains a cursory analysis of the elements of certain crimes and their application to the trial panel's factual findings. The Appellate Panel notes that it would have been preferable to include both a recitation of the elements of the crimes and explicit findings as to each of those elements.[40]

Third, it addresses the issue of formal errors, stating that such formal errors may not be sufficiently serious so as to invalidate the substance of the verdict. However, it

37 Although a view was expressed [Interview with Appellate Judges of the Court of BiH on 5 October 2009 and 6 October 2009] that this judgement merely reiterated the law, which a jurist should be aware of, the majority of interviews with judges revealed that this decision was found to be of significant instructive value, in guiding, on the one hand, the first-instance and appellate panels on how to reason their decisions better, and on the other hand, the parties to do the same as regards their motions.

38 See the Appellate Judgement of the Court of BiH in the case of *Mirko Todorović* and *Miloš Radić*, delivered on 23 January 2009/published on 17 February 2009, para. 10.

39 *Ibid*, para. 12.

40 *Ibid*, para 13.

urges panels to give due care and attention to ensure that merely formal errors do not raise doubts concerning the integrity and validity of the verdict.

Other war crimes appellate verdicts have also addressed the issue of reasoning, even if they did not find a violation of criminal procedure in the first-instance verdict. For example, the Appellate Panel in a war crimes case explicitly stated that:

> With respect to the application of the substantive law, the First Instance Panel provided reasoning, which according to the Appeals is insufficient. This Panel finds that it is correct that the reasoning could have and should have been more detailed, but it still meets the minimum standard, especially if it is taken into account that this is a position that has been taken by the panels of this Court several times already, […]

The Appeals Judgement deemed the same with regard to the Trial Panel's failure to reiterate the position taken by the same court as regards the relation of joint criminal enterprise and the domestic justice system.[41]

b) Issues Regarding Reference to Case-Law

Verdicts increasingly refer to case-law, although several challenges remain to be overcome. Concerning reasoning on legal matters, the CCJE highlights how useful it is for civil law systems that decisions make, where appropriate, references to national, European or international case-law, the case-law of other countries, and legal literature.[42] In civil law systems and in the BiH hybrid justice system, decisions of higher courts may not have the value of binding precedent –as in common law systems, but they certainly provide valuable guidance. This is especially in cases that raise a broader social or major legal issue. Therefore, it is recognised that the reasoning of a verdict, deriving from a detailed study of the legal issues addressed, needs to be drawn up with special care in such cases to meet the parties' and society's expectations.[43]

Furthermore, knowing and referring to case-law, especially of higher courts, is an important aspect of the obligation of judges to apply the law consistently and ensure its uniformity. However, when a court decides to depart from previous case-law, the CCJE finds that this should be clearly mentioned in its decision.[44]

What can be noted, particularly at the entity level courts, is that the domestic criminal law provisions on war crimes and the applicable criminal procedure codes form the main basis for their war crimes verdicts. While certain jurisprudence of the ICTY

41 See the Court of BiH Appellate Judgement in the case of *Željko Mejakić and Others*, Delivered on 16 February 2009/Published on 16 July 2009, paras.39 and 105.

42 See Opinion no. 11 of CCJE, *supra* footnote 2, para 44.

43 *Ibid*, para. 45.

44 *Ibid*, para. 49.

may be used, little or no reference is made to the jurisprudence of the Court of BiH - also available on its website - or of other courts in the country or region. One Court of BiH Judge[45] also indicated that he was surprised to hear colleagues at the entity level say that they were not aware of the procedural possibility to use facts established through the ICTY decisions. Such a possibility is prescribed in domestic law and can be used at both the State and entity levels. It is not employed, however, at the latter. While the reasons for this may be many, lack of awareness of this legal possibility would have been easily countered by reading closely Court of BiH judgements.

At the Court of BiH, there is much more reference to ICTY case-law and to the important jurisprudence developed by Court of BiH panels, but there are also occasions indicating that relevant case-law of the same court has not been referenced. There have also been times, when it appears that specific panels or judges take positions that seem very different or contradictory to the ones they adopted in the past. The lack of clear reference to any changes in the case-law and its limitations may create legal uncertainty.

For instance, in a recent judgement,[46] the Appellate Panel applied the previously applicable criminal code of the SFRY, as the most lenient law, in a situation where it deemed that the trial panel intended to give to the defendants the minimum punishment possible. Nonetheless, considering that, since its inception, the Court of BiH in general, as well as the appellate panels have considered the most lenient law to be the new BiH CC, one would expect that considerably more elaborate justification would be warranted in order to clarify and compare this finding with the previously established case-law. The recognition of the previous developments[47] and the specification of the difference the Appellate Panel perceived in the case at hand in comparison to other similar ones would enable legal practitioners to avoid confusion or possible misapplication of jurisprudential standards.

While the time required to get into the habit of referencing case-law may be one reason for the lack thereof in some instances, another reason appears to be the fact that war crimes jurisprudence is not always easily accessible. While there have been certain publications that provide an overview of the ICTY case-law[48] also in local language, others are not translated. For example, the ICTY Appeals Chamber Case-

45 Interview with a Trial Judge of the Court of BiH on 28 September 2009.

46 See the Court of BiH Appellate Judgement in the *Zijad Kurtović* case, Delivered on 25 March 2009 and published in September 2009, paras. 97 *ff*.

47 This includes the adjudication and review – also by the BiH Constitutional Court - of the *Abduladhim Maktouf* case, available at ‹http://www.sudbih.gov.ba/?opcija=predmeti&id=14&zavrsen=1&jezik=e›, and ‹http://www.ccbh.ba/eng/odluke/index.php?src=2›, last accessed October 2009.

48 See, for example, Human Rights Watch, "Genocide, War Crimes and Crimes against Humanity: A Topical Digest of the Case-Law of the International Criminal Tribunal for the Former Yugoslavia›, available at ‹http://www.hrw.org/sites/default/files/reports/ICTYweb_0.pdf›, last accessed October 2009.

Law Research Tool, which can be now accessed through the internet,[49] is currently available only in English. Moreover, an overview of the war crimes verdicts in BiH until 2006 is available in both languages, but more recent verdicts are not included therein.[50] And while Court of BiH verdicts can be accessed in their entirety in both English and local language through the website of the Court of BiH, there is no mechanism that can facilitate their research by key concepts or key words. Entity war crimes verdicts, especially ones from the past, may not yet be that accessible to the wider and professional public in general.[51] Furthermore, there are hardly any public or even widely disseminated internal bulletins that analyse or highlight developments in war crimes case-law in BiH, or the region.[52] Creating such tools that include both ICTY, domestic, and regional war crimes jurisprudence has been identified by practitioners as very useful and a major need.[53]

c) Issues regarding the Reasoning of Sentencing and of Compensation Claims

i) Reasoning of Judgements on the Sentence

Not only the victims and the accused, but also the public perceive justice mainly through the sentencing decision.[54] Apparently, however, sentencing occupies the least space of the analysis in a war crimes judgement. In fact, judges would admit that the sentencing process is a "mystery"[55] that a professional may be able to understand to a degree through experience, but the public may not be expected to comprehend. While a panel's discretion should be respected unless it is abused, making the sentencing decision as transparent as possible can assist the parties, the appellate court, and the public in their understanding of the sentence and in their perception that it is just. Whereas positive steps have been taken to improve the situation, four main challenges can be referred to with regards to the sentencing process for war crimes in BiH.

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*49 S*ee ‹http://www.icty.org/sections/LegalLibrary/AppealsChamberCaseLawResearchTool2004onwards›, last accessed October 2009.

50 See American Bar Association, *War Crimes in Bosnia and Herzegovina: Final and Binding Criminal Verdicts in Bosnia and Herzegovina 1992-2006* (year of publication unspecified).

51 See however the efforts of the HJPC in uploading a variety of verdicts at ‹www.pravosudje.ba›, last accessed October 2009.

52 The periodical published by the Defence Support Section of the State Registry, the OKO Reporter, endeavours to do such a task, but it has various limitations in achieving the aim of sharing jurisprudence in a comprehensive and systematic manner.

53 For instance, see the relevant recommendation, and its background, made in the Final Report "Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer".

54 See Shahram Dana, "Revisiting the Blaškić Sentence: Some Reflections on the Sentencing Jurisprudence of the ICTY", International Criminal Law Review (4:2008), pp. 321-248, at 321.

55 Interview with an Appellate Judge of the Court of BiH on 6 October 2009.

First, and very importantly, the differences in criminal codes applied at the entity and Court of BiH for war crimes and related charges lead to inconsistencies in sentencing practices, as two varying ranges of punishment are used in parallel. Albeit significant, this issue is not elaborated herein, as it has been highlighted and analysed in the past by the OSCE Mission to BiH.[56]

Second, the part of a judgement dedicated to the sentence is sometimes the least reasoned part, despite the relevant standards requiring its justification.[57] At the national level, domestic law has a number of general principles applicable to sentencing and calls for the courts to state the circumstances that they consider in meting out punishment.[58] Increasingly, domestic jurisprudence appears to become more elaborate on how the factors relevant to punishment are assessed or should be assessed.

But the situation persists whereby certain judgements contain only a cursory description of the elements they considered in reaching a sentence, generally without stating how much weight they attach to each. Otherwise they seem to attribute value to factors that an observer cannot understand why they play such an important role in meting out the punishment. For instance, there have been cases where the facts that the accused behaved correctly during the trial and had no previous convictions had been taken into account as *exceptionally* mitigating circumstances.[59]

Third, the standards for the appellate review of the sentencing part of first-instance judgements have often not been very clear. This may create the perception that a

56 See the Report of the OSCE Mission to Bosnia and Herzegovina, "Moving towards a Harmonised Application of the Law Applicable in War Crimes Cases before Court in Bosnia and Herzegovina", August 2008, also available at ‹http://www.oscebih.org/documents/12615-eng.pdf›, last accessed October 2009.

57 In this regard, international standards on reasoning of court decisions would apply in relation to sentencing. Also see Recommendation No. R (92) 17 of the Committee of Ministers to Member States Concerning Consistency in Sentencing, Preamble and Sections A(8), C and E(1) available at the website of the CoE, ‹http://www.coe.int/t/cm/adoptedTexts_en›, last accessed December 2008. As well, it can be argued that significant practical guidance on how different factors can influence a sentence has been developed in the jurisprudence of the ICTY. This can be argued despite the fact that the sentencing practices of this Tribunal have been often questioned for their inconsistencies.

58 Domestic law asks as a general principle that the sentence be necessary and proportionate to the nature and degree of danger to the protected objects (Article 2 BiH CC); the sentencing part of a verdict should address and elaborate on the gravity of the crime and on the personal circumstances of the accused [Article 48 BiH CC], by stating the circumstances it considered in fashioning the punishment [Article 290(8) BiH CPC]. The court is further obliged specifically to present the reasons which guided it when it decided on a more severe punishment than the one prescribed, or when it decided to mitigate it, suspend it etc [Article 290(8) BiH CPC]. In promoting a little more transparency, the law requires that, in cases of concurrent criminal offences, the court should pronounce the punishment mandated for each separate offence, and then the compound sentence for all offences together [Article 290(5) BiH CPC].

59 See for instance, Appellate Judgement in the case of *Marko Skrobić*, dated 22 April 2009. Also see the *Krsto Savić and Milko Mučibabić* Verdict, *supra* footnote 25, p.108-109, which considers as *particularly* mitigating circumstances the *sum up* of the fact that the latter defendant assisted non-Serbs, together with the facts that he was 58 years old at the time of pronouncement of the sentence, as well as his proper conduct throughout the proceedings.

change in the length of imprisonment is mainly based on personal preference. For example, it can be hard to see how it can be said that the trial panel abused its discretion, when the appellate court recognises the same circumstances that the trial panel did, albeit in more detail, but finds appropriate only a slightly higher sentence.[60]

Over time, appellate panels have endeavoured to clarify sentencing rules. Among others, they have warned against double-counting of aggravating circumstances, as certain verdicts would count also in aggravation an element that was essential in constituting the crime. Or they have found that the mere fact that the accused demonstrated good behaviour in court is neither an aggravating nor a mitigating factor. More recently, appellate verdicts have highlighted that the trial panel's verdict on punishment should not be overturned without significant reasons. Namely, appellate intervention is warranted mainly when the court of appeals establishes that the trial panel abused its considerable discretion or the appellant establishes that the failure to apply all provisions relevant to punishment resulted in a miscarriage of justice.[61]

What is also frequently stated among judges, and sometimes acknowledged in the verdicts, is that judges examine the sentences passed by other panels in similar cases, in order to avoid great discrepancy in the punishments imposed.[62] Being aware of the ranges of sentences that courts impose for certain crimes is also an element that prosecutors consider when proposing a sentence in cases of plea agreements.[63] To the extent that this is indeed a factor that judges consider in some way, it can be very useful to assist the courts to have at their disposal updated and valid data as regards the punishment in cases and the different identifiable factors that the courts considered in their verdict.[64]

Last but not least, often, the prosecutor and the defence do not provide concrete and complete argumentation as to the sentencing factors that they deem the court should consider. This is not only observed through trial monitoring, but is also noted by

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60 See, for instance, the Appellate Verdict in the Court of BiH case of *Željko Lelek*, 12 January 2009, paras. 147 *ff*, and the First-Instance Verdict in the same case, 23 May 2008, paras. 51 *ff*.

61 I.e. see the Appellate Judgement of the Court of BiH in the case of *Mirko Todorović and Miloš Radić*, delivered on 23 January 2009/published on 17 February 2009, para. 182-183. Also see the extensive debate included in the *Prosecutor v. Stanislav Galić* Appellate Decision of the ICTY and its concurrent or separate opinions, available at ‹http://www.icty.org/x/cases/galic/acjug/en/gal-acjud061130.pdf›, last accessed October 2009.

62 As expressed by a Trial Judge of the Court of BiH during regular cooperation with the Mission.

63 For instance, an effort to record the sentences imposed for different kinds of crimes, so that prosecutors can be guided in plea agreement proceedings, was undertaken by the Federation Prosecutor's Office in the beginning of 2009.

64 Such databases have been developed in different contexts, such as at the ICTY Office of the Prosecutor, and at the Federation Prosecutor's Office in light of developing practical guidelines for the conclusion of plea agreements.

appellate verdicts.[65] Suggestions on the need to improve the argumentation in the motions of the parties are included more extensively under Section IV of this report.

By way of conclusion it may be said that allotting more space to analysing the circumstances which were taken into consideration and the weight they had for the court's final verdict would offer some guidance for future cases and would advance the development of a coherent and more uniform sentencing jurisprudence of the BiH courts.[66]

ii) Reasoning of Decisions on Claims for Compensation

The commentary to domestic criminal procedure also requires that decisions on secondary issues of the criminal proceedings be reasoned.[67] Such secondary decisions encompass those on property claims by injured parties and requesting material or non-material compensation from the accused in the context of the criminal proceedings. In connection to compensation claims, domestic law provides that the prosecutor should investigate and that the court is obliged to rule on such requests in the context of the criminal trial, unless doing so would unduly prolong the proceedings.[68]

It has been noted time and again that courts refer injured parties to civil proceedings in connection with this matter, every time with standard reasoning. This reasoning consists of stating that establishing facts on the amount of claims under property law would obviously require a lot of time, which would prolong the criminal proceedings.[69]

The Mission has previously reported on this matter,[70] observing that certain prosecutors and panels did not meet their legal obligation, as they did not even

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65 For instance see the Appellate Verdict in the Court of BiH case of *Jadranko Palija* which states that: "Both Appeals filed by the Defence objected to the criminal sanction imposed although the Appeals did not specify in which part the First-Instance Court incorrectly meted out the sentence or did not correctly apply provisions of the law pertaining to the sanction.", page 23-24.

66 See Robert D. Sloane, Sentencing for the "Crime of Crimes", Journal of International Criminal Justice (2007), p. 6-7.

67 Commentary on Article 290(6) BiH CPC, *supra* footnote 21.

68 Article 198(1) and (2) BiH CPC.

69 See for instance, the verdicts in the cases of *Novak Đukic* (12 June 2009), *Gordan Đuric* (10 September 2009), *Damir Ivanković* (2 July 2009), *Miodrag Nikačević* (19 February 2009), *Marko Radić et al.* (20 February 2009), *Ante Kovač* (10 July 2009), *Momir Savić* (3 July 2009). In the *Rade Veselinović* (30 June 2009) case, the injured parties were given the opportunity to state their position on claims under property law. However, the trial panel found that the facts established in the proceedings did not give sufficient grounds to render a decision on the claims under property law. Thus, it referred the injured parties to take civil action.

70 For instance see the Fourth and Fifth OSCE Reports on the case of *Mejakić et al.*, available at ‹http://www.oscebih.org/documents/14023-eng.pdf› and ‹http://www.oscebih.org/documents/14020-eng.pdf ›, and Fourth Report on the case of *Rašević and Todović*, available at ‹http://www.oscebih.org/documents/14071-eng.pdf›, all accessed last in October 2009.

inform the injured parties on their right to compensation in the context of criminal proceedings. Additionally, this standard conclusion, namely that the criminal trial would be unduly prolonged by examining these property claims, falls short of sufficient justification. This is especially true in more straightforward war crimes cases, or when the injured parties have endeavoured to make their claims more concrete and substantiated. Moreover, when one considers the length of time that criminal trials take for the presentation of evidence regarding the charges, it can be estimated that deciding on compensation would only take a fraction of that time.

It may be mentioned that the Mission has further undertaken a project to facilitate the work of justice officials, by prompting the injured parties to specify and quantify their claims, so that they can be more easily decided upon. As this initiative takes roots, it can be expected that courts will refrain from dispensing with these requests in this abstract fashion.

III) Other Challenges: The Oral Announcement and Drafting of Verdicts

a) Oral Announcement of Verdicts

Although war crimes proceedings attract great attention on the part of the public, a matter that judges seem to overlook is the fact that journalists report on the verdict only after its oral announcement. Rarely, if ever, has the issuance of a written verdict been the subject of wide public attention. Therefore, the time of a decision's oral announcement is unique when it comes to making a positive impression about the court's findings and reasoning, forming the opinion of the communities, and gaining their confidence that the outcome of the trial is just. Nonetheless, shortcomings, similar to those regarding the clarity of the written judgement, also plague its oral announcement - if not more.[71]

Frequently, oral announcements have left the public with a tenuous understanding of what has been determined. In many cases, the presiding judge reads through the charges and the court's findings, the lists of evidence adduced and accepted, the letters and numbers of protected witnesses' pseudonyms, and the numbers of the legal provisions forming the basis for the decision. So much so that neither a layman, nor a legal professional can concentrate and follow the crimes that are sanctioned in society's name or the reasons for which the court acquits a defendant. The audience is attentive only when the words "guilty", "acquitted", and the punishment are uttered.

71 The oral announcement of a verdict is envisaged in Article 286 BiH CPC.

While this dry manner of oral presentation is encountered traditionally in many systems, considering the larger impact that war crimes verdicts have on society and globally, it could be argued that there is space for the domestic courts to convey their decisions in a less mechanical and more communicative manner.

Additionally, press releases issued by courts on the verdicts have oftentimes been either too formalistic or prone to brevity, possibly in order to avoid making errors on a judgement that the public information personnel may have only just heard. It may be expected that the lack of a summary that highlights accurately, concisely, and interestingly the findings of a court can lead to unintentional errors in reporting, political manipulation of the verdict, or indifference on the part of the public.

Fortunately, there have been certain good developments in these domains, noted both at State and Entity levels.

For example, in a recent verdict announcement in a high profile case, the court endeavoured to structure its presentation in a more understandable manner, to minimise long references to evidence and law, and to explain to the public certain general principles that guided its decision. It also allowed the public to sit five minutes into reading the verdict, after pronouncing the accused guilty. Interestingly, as regards the sentence, the presiding judge explained plainly the assessment, and commented that the panel understood that the victims would find the sentence too lenient, while the accused and his family too harsh, but assured all that the court found it commensurate to the criminal responsibility established. Although the injured parties appeared very unsatisfied with the sentence, it may be argued that at least the panel showed certain sensitivity towards their reactions.[72]

Moreover, an amendment was introduced recently to the rules of procedure of the Court of BiH, requiring that the presiding judge of a panel provides the Public Information and Outreach Section of the Registry with a summary of the reasoning of a judgement. It is hoped that such a practice can further enhance the outreach efforts of the judges to speak to the public through their decisions.

b) Issues Regarding the Process of Drafting a Verdict and the Timelines Involved

Considering that war crimes proceedings can be complex and can last for years, distilling in a verdict all that a court has heard and seen over the trial is without doubt a demanding task. Traditionally, in regular criminal cases, judges would begin drafting the verdict after the completion of the case. Certain war crimes judges have stated that they cannot see how they can start drafting the verdict before hearing all arguments. But, increasingly, judges see the usefulness of beginning to draft a

72 See the oral announcement of the First Instance Verdict in Court of BiH case of *Milorad Trbić*, 16 October 2009.

summary of the arguments presented at trial for use in a verdict as soon as the trial proceedings begin.

Being able to present the verdict promptly is not only required by the right to a trial within a reasonable time, but is also dictated by the spirit of domestic law, through its tight deadlines. More specifically, the law foresees that the oral verdict must be announced immediately or within three days after it is rendered. The written verdict is to be produced within 15 days from its announcement, or within 30 days in complicated matters and as an exception.[73]

Non-compliance with these deadlines does not carry any defined sanctions, other than, concerning written verdicts, that the court president inquire into the reasons for a delay and take necessary measures to have it rendered as soon as possible. Nonetheless, the most important consequence that delaying the written verdict can have is the fact that a defendant will be released from pre-trial detention in case the judgement is not final within nine months or 15 months in complex cases after its oral announcement at first instance. Indeed, this has occurred in certain cases, under the previous criminal procedure which envisaged shorter time-limits.[74] Avoiding the repetition of these situations led the Office of the High Representative to impose the extension of the time-limit of pre-trial custody pending finalisation of proceedings.[75]

Although they have generally complied, Court of BiH panels have repeatedly expressed publicly their dissatisfaction with the tight deadline for the oral announcement of a judgement.[76] In a recent case involving genocide, after the closing arguments of the parties, the Presiding Judge notified all that the oral verdict would be announced on a specific date two weeks later.[77] As regards written verdicts, for example at the Court of BiH, these are frequently issued several months after the oral announcement.[78]

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73 Articles 286(1) and 289(1) BiH CPC.

74 See for example, the Court of BiH case of *Mirko Todorović and Miloš Radić*, where the oral pronouncement of the first instance verdict occurred on 29 April 2008. The appellate verdict was delivered on 23 January 2009 but published on 17 February 2009. In the meantime, on 29 January 2009, custody was terminated for both accused on the basis of the expiry of the nine months maximum time-limit applicable at the time. With the issuance of the written appellate verdict, the Court of BiH ordered that the defendants be committed to prison to serve their sentences. However, according to the media, the convict Mirko Todorović was not found at this place of residence and was inaccessible to the police; see BIRN, "Mirko Todorović on the Run", 15 May 2009, available at ‹http://www.bim.ba/en/166/10/18934/› last accessed October 2009.

75 See the amendment to Article 138(3) BiH CPC as effected through Article 1 of the Decision by the Office of the High Representative (OHR) Enacting the Law on Amendments to the Criminal Procedure Code of Bosnia and Herzegovina, 20 February 2009, available at ‹http://www.ohr.int/decisions/judicialrdec/default.asp?content_id=43095›, last accessed October 2009.

76 For instance, hear the audio recording of the announcement of the First-Instance Verdict in the case of *Rašević and Todović*, on 28 February 2008, where the Presiding Judge opened the session stating that the three-day deadline is too tight considering the complexity of the case.

77 See the First Instance proceedings session of 28 September 2009 in the case of *Milorad Trbić*, scheduling the oral announcement of the verdict for 16 October 2009.

78 See for instance the cases of *Mejakić and Others*, of *Rašević and Todović*, the "*Kravica*" case, etc.

While the extension of these deadlines may be one way of countering the problem, another way can be to commence drafting the verdict at the earliest possible point in time. Indeed, the ICTY has identified this as a good practice, which it has described and promulgated publicly in the recently published ICTY Manual on Developed Practices. The Tribunal has stated that: "Preliminary preparation for the drafting should begin at the outset of the case. While judges cannot rush to early conclusions prior to hearing all the evidence, there are numerous steps that can be taken early in the process, that will place the bench in the best position to prepare a reasoned, clear and concise judgement within an acceptable time frame."[79] The relevant chapter of the ICTY Manual outlines the advantages of choosing this approach, such as the fact that a good and early judgement outline can ensure that the court examines all necessary elements of a case, identifies weaknesses in the prosecution case, and avoids repetition.

While some judges at the Court of BiH have had the opportunity to familiarise themselves with this approach, also through training, its wider acceptance and adaptation to local circumstances is still in process. For example, in the spirit of early preparation, certain judges apply methods to classify and record evidence and arguments presented. They also ask their assistants to provide notes regarding legal matters, which can then form the basis for the judges' discussion and insertion in the verdict.[80]

Certain judicial officials pointed to the fact that making an early draft of the verdict requires supporting officers and resources that are not always available, as is the case in The Hague. However, it may be argued that such a drafting process can even better assist panels with shortage of supporting staff, so that they focus their case better early on and avoid encountering a flood of information only after the finalisation of the trial proceedings. Moreover, even for judges who benefit from supporting staff, early drafts can ensure that they keep a close eye on the development of the verdict's outline and arguments.

IV) Challenges on the Reasoning of the Parties' Motions

As the CCJE has opined, the quality of a judgement's reasoning also depends upon the quality of the parties' submissions,[81] namely the reasoned arguments that they include in order to prompt the court to find in their favour. Domestic procedure has now in general moved towards a more adversarial system. It also explicitly provides that the appellate panel shall review the verdict only insofar as it is contested by the

79 See Chapter (IX) entitled "Trial Judgement Drafting" of the ICTY Manual on Developed Practices, prepared in conjunction with UNICRI, (Turin, 2009), p. 109, para 1.

80 Interview with Trial Judge of the Court of BiH on 28 September 2009.

81 See CCJE Opinion No. 11, *supra* footnote 2, paras 15-16 and 39.

appeal, which should include reasons for its claims.[82] Domestic jurisprudence also has played an important role in encouraging the parties to be proactive in presenting convincing arguments for their case, based not only on general assertions, but also founded on relevant facts and law.

This is quite different from the approach of a purely inquisitorial system, when it relies heavily on the principle that the judge is obliged to reach the truth and on the axiom that "the judge knows the law." Justice actors generally admit that such a system can be lead to the parties presenting evidence without linking its relevance to the elements of crime, or making only general allegations about violations that the verdict made, essentially leaving it up to the judges to do the research and reach their conclusions.[83]

Under the hybrid system now applicable in BiH, it has been observed that judges have at times been accommodating with parties even when those parties present evidence in an unfocused manner and leave it up to the court to select what is most relevant for the case.

For example, in a recent verdict, the Trial Panel explicitly states that: "notwithstanding the fact that the Prosecutor has failed to indicate explicitly in the Indictment that [the defendant] was aware of a widespread and systematic attack, that conclusion can certainly be drawn from the overall wording of the Indictment's operative part [as a whole] ..."[84] The verdict later states that: "The Indictment does not explicitly specify the type of JCE [Joint Criminal Enterprise] the accused are charged with. Admittedly, in his closing argument the Prosecutor took the view that the accused are criminally liable under all three types of JCE. However, this concept of existence of all three types is not contained in the Indictment or corroborated by the presented evidence. The Court finds that all elements of the basic form of JCE ensue unequivocally from the contents of the Indictment and the presented evidence that confirmed those contents."[85]

On occasion, presenting unfocused or unsubstantiated arguments works with the courts, although it could risk jeopardising the judgement's quality as regards its reasoning and basis on concrete evidence and law. Sometimes, however, this does not work, and vague arguments are rejected or unfocused evidence leads the court to decide against accepting them. And the latter reaction appears to be the current trend among panels.[86] In fact, certain panels take the opportunity to imply quite clearly that the parties did not present evidence or arguments in order to convince the court about their claims.

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82 See Articles 306 BiH CPC and 295(1)(c) BiH CPC respectively.

83 Expressed through the numerous Mission interviews with Judges of the Court of BiH.

84 See the *Savić* and *Mučibabić* First Instance Verdict, *supra* footnote 25, para. 164.

85 *Ibid*, para. 435.

86 Also interview with an Appellate Judge of the Court of BiH on 5 October 2009.

In lieu of examples of how submissions should be reasoned, it is worth making reference to certain principles outlined in the *Todorović* Appellate Judgement, which, as mentioned earlier, elaborates on the standards of appellate review for each violation foreseen by law as the basis to challenge a verdict. In sum, this Judgement states that it is not sufficient for the appellant to simply assert a violation and a hypothetical or unsubstantiated harm. Rather, they should identify the violation properly, present well-reasoned arguments and evidence to substantiate their claim, and explain properly how this harm affected the case.

V) Debate on Dissenting Opinions

As a final note, it may be worthy to make a brief reference to a debate that is ongoing among Court of BiH judges: that of whether dissent and particularly dissenting opinions of judges in a panel can and should be made public. The discussion heightened over the last year, led mainly by certain international judges. During interviews for this report, certain national judges expressed their view that they could see the benefits of being able to publish reasoned dissenting opinions, while others maintained that this was not possible, nor wise, at least in the current political circumstances. It should be noted that national law does not presently allow for any aspect of the deliberation process to be made public, including dissenting opinions.[87]

The CCJE has stated that where they are allowed, dissenting opinions can contribute to improving the content of the decision and can assist both in understanding the decision, as well as the evolution of the law. This body has added that dissenting opinions should be duly reasoned, reflecting the judge's considered appreciation of the facts and law.[88]

In connection to the matter of making dissenting or concurrent opinions[89] public, two different sets of principles may be used to argue either for or against the acceptability of such a practice. On the one hand, the publicity of the verdict[90] can argue for the publication of a reasoned dissent, inasmuch as the dissenting opinion is considered as an integral part of the judgement. On the other hand, the principle of confidentiality

87 See Article 157 on the deliberation and voting procedures which requires secrecy as to the details of deliberations, voting and separate opinions.

88 See Opinion no. 11 of CCJE, *supra* footnote 2, paras. 51-52.

89 In short, dissent or dissenting vote refers to the opinion of a judge which is different from that reached by the majority of the judges in the panel. The dissent can pertain to the reasoning of a judicial opinion or to the reasoning and the conclusion. The dissent can become a dissenting opinion, when the judge chooses to formulate the disagreement with the majority as a more extensive opinion. A concurrent opinion is one where the judge agrees with the conclusion, but disagrees with the reasoning. See Julia Laffrangue, "Dissenting Opinion and Judicial Independence", *Juridica International* VIII (2003), pp. 162-172, at 163. This article provides a succinct overview of arguments for and against the publication of dissenting opinions.

90 Also see Article 286(4) BiH CPC.

of the minutes and voting during deliberations is used as an argument against making this available publicly, although it can be included in a sealed envelope only for the perusal of the appellate court, in case the judgement is reviewed.[91]

A number of arguments have been presented in literature against and in favour of publishing dissenting opinions. Those against include the fear that public dissenting opinions endanger the authority, legitimacy, and unity of the court; that they weaken its credibility and persuasiveness, as well as legal certainty in general; and that, by running contrary to the secrecy of deliberations, they jeopardise judges' independence and impartiality. Certain judges at the Court of BiH have stated that the circumstances in BiH, as regards the sensitive relations between the different ethnicities, are also not conducive to having judges expressed their dissent publicly. It was argued that disagreement with the majority can create the perception among the public that, rather than on the basis of professional reasons, a judge may be driven by ethnic motives in favouring or not favouring an accused.[92] Therefore, also considering the political environment, expressing dissenting opinions publicly, at least at this stage, would be unwise. It was added that, in any case, a good panel can deal with the arguments of the dissenting judge in the reasoning of the verdict.[93]

But several arguments expressed by scholars and by other judges at the Court of BiH,[94] have been favourable to publishing dissenting opinions as can be done by the BiH Constitutional Court and the ICTY. Some of the reasons invoked are that publishing dissenting opinions strengthens the authority of the court, especially since everyone knows that in a panel judges can disagree over their findings. It can assist the development of law and jurisprudence by pointing to standards that can be accepted by the appellate court and by other courts in the future. And, among others reasons, making dissenting opinions public can play a crucial role in enhancing the independence of the judges and in strengthening their accountability. This is because a dissenting judge can no longer merely oppose the findings of the majority, but would have the opportunity or be required to reason the disagreement with persuasive arguments. A reasoned dissenting opinion is also seen as the antidote to the danger that the public perceives a judge to be motivated in his or her opinion by criteria other than the ones prescribed by law.

To the knowledge of this report's authors, the debate on the publication of dissenting opinions in BiH remains at the theoretical level, since, to date, no steps have been taken to change the law. However, a recent situation that developed in Kosovo may highlight the essence of the discussion.

91 See, for instance, Article 157 BiH CPC.

92 Interviews with Appellate Judges of the Court of BiH on 5 October 2009 and 6 October 2009.

93 Interview with an Appellate Judge of the Court of BiH on 5 October 2009.

94 Interviews with Judges of the Court of BiH conducted for this report.

In the war crimes case of *Latif Gashi and Others*, a verdict finding the accused guilty was issued at the beginning of October 2009 by a three-member panel composed of one national judge and two international judges of EULEX. It is important to note the political dimension of case, as senior Kosovar politicians promptly expressed the condemnation of the verdict. According to media reports, after the announcement of the judgement, the national judge stated publicly that he was against convicting the defendants, but was outvoted by the international colleagues. He claimed that the decision was unjust and unlawful. EULEX representatives condemned the national judge's public comments, stressing that according to Kosovo law, the opinions expressed and the positions taken by judges during their internal discussions in reaching a verdict are confidential.[95]

Commenting on this situation in the course of the research for this report, an international judge in BiH opined that a reasoned dissent could have provided a far more dignified forum to express disagreement with the majority.[96]

VI) Conclusion and Recommendations

Clear and well-reasoned judgements are essential to consistent jurisprudence, judicial accountability, and public information and support. Judges at the Court of BiH have made laudable progress over the past two years in making their judgements clearer, better reasoned, and more structured. There are certain decisions that represent best practices as a sample or guide for judges at all levels of the country to follow both as jurisprudence when interpreting law in future cases and as stylistic models when writing future verdicts.

That said, there remains much room for improvement. Court of BiH judgements are sometimes still unorganised, unclearly written, and, with particular respect to sentencing and compensation, lack well-reasoned justifications. Judgements also evince an uncertainty about the appropriate use of national or international case-law. In addition, oral pronouncements have suffered from formalism, while written verdicts have been untimely. Monitoring observations also have noted particularly lenient court treatment of prosecutors and defence counsel with respect to matters of poor clarity and reasoning.

To ensure the full utility of judgements, the BiH judiciary and other involved actors must engage in dialogue, form consensus, and take action to develop standards, practices and relevant training regimes to enhance the quality and accessibility of judgements . Important to these discussions is the consideration of related issues,

95 See the article by Lawrence Marzouk, "EU: 'Judge Broke Law in Discussing KLA Verdict'", Balkan Insight, 7 October 2009, available at <https://www.balkaninsight.com/en/main/analysis/22711/>, last accessed October 2009.

96 Email communication with a Trial Judge of the Court of BiH on 12 October 2009.

such as the appropriate and beneficial use of domestic and international case-law and the desirability of dissenting opinions.

For these reasons, the Mission submits the following recommendations to address the concerns identified above:

On the Form of a Verdict and Its Style of Reasoning:

- It is suggested that all **judges** examine closely the standards on reasoning elaborated in law and jurisprudence, as well as seriously consider the standards of appellate review highlighted in the aforementioned *Todorović* Judgement and other appellate decisions.
- It can be further recommended that the **presidents of courts**, especially of higher courts and the Court of BiH facilitate a constructive dialogue among judges on how to improve the structure and language of verdicts. The findings and instructions of appellate verdicts can significantly assist in this regard.
- The **High Judicial and Prosecutorial Council** as well as the **Associations of Judges** can further provide the impetus, support, and space for these discussions and dissemination of their findings.
- An important output that can be achieved in this context, and which can encourage harmonisation of good practices, is the development, agreement on, and dissemination of **judgement template** with corresponding directions and examples on what information should be included under each section. The **HJPC and the presidents of higher courts** could initiate such activities.
- In reiterating the recommendation of the CCJE that judicial authorities compile a compendium of good practices in order to facilitate the drafting of reasoned decisions,[97] it may be recommended that justice authorities consider developing a collection of well-reasoned judgements. The **Case Management System of the HJPC** could possibly be developed to comprise such a function, possibly managed under the auspices of a select committee of judges and other specialised jurists.
- Moreover, the **Judicial and Prosecutorial Training Centres** and other education providers should include workshops in their curricula that address judgement drafting – and other legal writing. However, in order to maximise their effectiveness, education providers should ensure that these are practical in nature and based on real verdicts and comparative examples. Training events should also be of appropriate length and frequency and targeted at both judges and legal officers.[98]

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97 See Opinion no. 11 of CCJE, *supra* footnote 2, at Recommendation (l) under "Main Conclusions and Recommendations."

98 It should be noted that a wealth of lessons learned and best practices in organising knowledge transfer events is currently reflected in the Final Report titled "Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer", produced by OSCE-ODIHR in conjunction with the UN ICTY and UNICRI, available at ‹http://www.osce.org/documents/odihr/2009/09/39685_en.pdf›, last accessed October 2009.

- **Law faculties** should ensure that trial advocacy and legal writing courses are included in the academic curricula, in order to allow young lawyers to become accustomed to drafting for professional purposes by using the highest standards of clarity and coherent organisation.

On Reference to Case-Law:

- In reiterating the opinions of the CCJE, it is recommended that **courts** use and make reference to prior jurisprudence, as appropriate. Although jurisprudence may not have a binding character in BiH, nevertheless, courts, particularly Appellate Panels, when issuing a new or differing ruling on a matter previously established should be mindful to clearly explain the reasons for this.
- **Court presidents** should ensure that there is a system in place that makes the judgements issued by their courts available as widely as possible. This is especially important when it comes to war crimes judgements, in view of the wide public and professional interest in these. Making such verdicts accessible in an easily searchable format can prove to be of great support to legal officers and judges during the decision-making and judgement-drafting processes.
- As a more sustainable and systematic solution, the **HJPC and other interested international and national actors** with relevant expertise and available means, should seriously consider developing tools that allow access to war crimes jurisprudence. Such tools should be easily searchable, and include relevant indexes, digests of decisions, and professional commentaries on them.
- As facts established in domestic war crimes verdicts grow, another beneficial use of jurisprudence in connection to factual findings can be the use of facts adjudicated by domestic war crimes verdicts. Domestic law presently allows for this procedural possibility only when it concerns ICTY judgements. The **legislative authorities of BiH** should examine to which extent such a possibility can be expanded to include facts that derive from domestic judgements.

On the Reasoning of Sentencing and of Compensation Claims:

- In what concerns sentencing decisions, it can be recommended that the **justice authorities** consider **developing a database** that reflects identifiable information regarding verdicts, at least in war crimes cases, and the punishment imposed. This could assist judges and parties in gaining a more comprehensive overview of existing cases, can contribute to the harmonisation of sentences and can prompt judicial actors to justify better any discrepancy that they feel a case merits.
- Moreover, **judges** should follow the standards of clarity and reasoning applicable for the main body of the verdict by analogy for its sentencing part, as also clarified through appellate decisions.

- **Prosecutors and defence counsel** should make full use of their role to point out concretely the aggravating and mitigating factors that they feel the court needs to consider. Their claims should be well-argued to assist the court in reaching a better reasoned decision on sentencing.
- In connection to decisions on compensation claims, it is recommended that judges and prosecutors pay more attention in meeting their legal obligations in that respect, including informing injured parties of their right to file such claims in the criminal proceedings, and both gathering evidence, and deciding on them when feasible.

On Oral Announcement of Verdicts:

- It can be recommended that **judges** pay additional attention to the aforementioned issues and endeavour to maximise the impact that the oral delivery of a verdict can have on the accused, the victims, and society. **Court presidents** can also encourage discussion among judges about best practices in this domain that can be adopted more widely.

On the Process of Drafting a Verdict and the Timelines Involved:

- Considering the increasing experience of panels in drafting war crimes verdicts, and taking into account the time-limits involved, as well as the challenges in dealing with such complicated proceedings, **judges** should be encouraged to seriously discuss good practices in this domain and to examine individually the ICTY Manual on Developed Practices.
- The **JPTCs and other education providers** should consider organising trainings, discussions, or workshops utilising the experiences described in the ICTY Manual on Developed Practices. Similarly, the possibility of engaging the expertise of the Tribunal's staff in such events should be seriously considered.
- As regards the timelines for issuing oral and written verdicts, although currently there is a general tolerance for breaches of the deadlines, the **legislative authorities** should consider extending the time-limits prescribed by law when complicated cases are at stake.

On the Reasoning of the Parties' Motions:

- The quality of the parties' motions is a significant external factor that influences the quality of a verdict. To this extent, **prosecutors and defence counsel** should strive to make the submissions and arguments as clear as possible, well-structured, and duly reasoned.
- In order to encourage such professional conduct on behalf of the parties, **judges** may also take the available opportunities in the proceedings and the verdicts to point explicitly to the deficiencies that the parties' submissions may have in connection to the clarity and standards of reasoning.

- The **JPTCs, the Bar Associations, the Defence Support Section of the State Registry, and other education providers** addressing the continuous education of the parties should ensure that their curricula encompasses practical workshops and training on trial advocacy and on how to draft clear and properly reasoned submissions.
- Likewise, **law faculties in BiH**, should include courses on trial advocacy and on drafting motions in their curriculum.