

Chapter 3

Legal Reform and Institution Building (in the Context of National and International Security)

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Introduction

The aim of this chapter is to discuss the issue of security in relation to the criminal justice system and its capacity to address main contemporary security threats at national as well as European and global levels. Such a wide approach emerged from the initial findings of the research problem. It became obvious that a holistic approach had to be taken into account first and foremost. Although this chapter deals with the national aspect in the second part of the text, namely, with regard to legal reform in Bosnia and Herzegovina, it will argue that any serious national security issue will, more often than not, spill over the state border and may ignite global or regional tensions and reactions. And vice versa, a broader global or regional interest may affect a national security crisis in many ways. The current political instability in Bosnia and Herzegovina or security crisis in the Kyrgyz Republic is not exclusively a national issue, but presents a serious problem for the EU, the USA and NATO, as well as for neighbouring countries. And vice versa, prevailing global interests may determine the fate and scope of a national security issue: in some cases a national security crisis may be left in isolation and ignored or in some other cases be brought from its micro framework to international attention. For example, the security situation in Myanmar can be left forgotten for decades, but the same level of crisis in Cyprus or Lebanon could become a regional issue or a global problem almost overnight.

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Global Aspects

It was on these premises that in 2004 the UN General Assembly adopted a document entitled “A more secure world: our shared responsibility.”¹

The starting point of the document is making the case for collective security: “The case for collective security today rests on three basic pillars. Today’s threats recognize no national boundaries, are connected, and must be addressed at the global and regional as well as the national levels. No State, no matter how powerful, can by its own efforts alone make itself invulnerable to today’s threats. And it cannot be assumed that every State will always be able, or willing, to meet its responsibility to protect its own peoples and not to harm its neighbours.”²

Arguing for a “new security consensus,” the report does not depart from the central principle of the UN Charter, according to which the sovereign equality of member states³ is fully recognised and respected. It acknowledges that if there is to be a new security consensus, it must start with the understanding that the front-line actors in dealing with all the threats we face, new and old, continue to be individual sovereign States.

However, it can be argued that the awareness of monumental contemporary threats and their potential global impact on security and stability in the world gave rise to moving from “international” to “collective” security thinking. Collective security, as a goal, can be interpreted as a step forward in bringing the notion of security to a higher level than it is foreseen by the spirit of Chapter VII of the UN Charter. The vocabulary of the Charter does not speak about “collective security” in its often repeated mantra on “international peace and security.” Though collective measures are mentioned in Article 1, the same (collective) meaning is not attached to the measures elaborated in Chapter VII. The above difference has not been discussed in the literature on the UN Charter and is open to interpretation. In international law, the word “international” may include any situation or act that is not national or unilateral. However, to apply the notion of “global” would require a higher level of threat, strategy, agreement, etc.

According to some authors, collective security is seen as a compromise between the concept of world government and a nation-state-based balance of power system, where the latter is seen as destructive or not a good enough safeguard for peace and the former is deemed yet unaccomplishable at the present time.⁴

While Kelsen, writing in 1957, seems not to distinguish between collective and international security,⁵ it appears that contemporary terminology tends to

¹Report “A More Secure World: Our Shared Responsibility” submitted to the UN Secretary-General in 2004, by the High-Level Panel on Threats, Challenges and Change. UN Doc. A/59/565, 2 December 2004.

²Ibid., p. 11.

³UN Charter, Art. 2 (1).

⁴Inis Claude: Collective Security as an Approach to Peace, in *Classic Readings and Contemporary Debates in International Relations*, ed. by Goldstein, Williams and Shafritz. Belmont CA: Thomson Wadsworth (2006), pp. 289–302.

⁵Hans Kelsen: *Collective Security under International Law*. The Law Book Exchange Ltd. (2001), p. 1.

explain the problem of security in terms of a *collective* strategy rather than an international one. This may be an attempt to break from the legacy of the Cold War when “international” implied the consensus between the two superpowers that has affected and emanated from UN resolutions.

In the twenty-first century, more than ever before, no state can stand wholly alone. Collective strategies, collective institutions and a sense of collective responsibility are indispensable. But before anything else, we need to be acutely aware and concerned about security threats and the risk they impose on the global world. It is important for any debate on these issues to agree on the substance of the meaning of security. It may mean many things to many actors in different situations. For an international organisation, security will involve all aspects of international peace and stability. For a state, security issues arise from the day-to-day fighting of organised crime and threats against individuals and state institutions. It can be said that peace and security have a much broader meaning than was understood in the years following World War II, namely, preventing international armed conflicts. Today, peace and security are closely associated with human rights and fundamental freedoms. On one hand, a secure and peaceful environment, free of any threat or terror, is condition *sine qua non* for the implementation of international human rights instruments and relevant national legislation.

On the other, security threats around the world, including terrorist alerts in particular, have had a serious impact on civil and political rights of individuals. Many governments are no strangers to hastily restricting civil liberties and fair trial guarantees while addressing serious security risks. Ill prepared to find the balance between the real threats to peace and security on one hand and full respect for civil liberties and fundamental freedoms on the other, some governments pushed constitutional limits to the extreme by trivialising the rule of law requirements and human rights guarantees. This trend can be illustrated by a number of cases of torture of detainees, either by the practice of rendition or by blunt use of force or inhumane treatment in police stations, as well as by tightening the laws which regulate the length of detention in a pre-trial period. Finally, the security sector, as a rule, jumped on the opportunity to create an atmosphere of fear and suspicion and to question certain democratic standards that our generation has taken for granted. These are also peace and security issues, but these are often pushed aside by the emergency of an immediate threat. The tension between the two concepts, i.e., human rights in the context of peace and security versus immediate terrorist threat and emergency measures, has been quite palpable and become the new “way of life” in all democracies since September 11.

In Europe in particular, large-scale aggression against a sovereign state seemed rather improbable following the fall of the Berlin Wall. But then the outbreak of conflict in the Balkans was a reminder that war has not disappeared from the continent. Over the last decade or so, no region of the world has been untouched by armed conflict. Although, speaking in general terms, our generation has enjoyed 65 years of global peace, numerous internal conflicts have been spilling over the national borders and keep challenging international peace and security. The fact that most of these conflicts have been within rather than between states and most of the victims have been civilians should not make the international community any more complacent.

Instead, the world faces new threats which are more diverse, less visible and less predictable. Once labelled an “iron curtain,” the big divide between Western and Eastern Europe has gradually become blurred, and state borders have increasingly opened, departing from the Cold War faster than some had predicted.⁶ Modern technology and new communication techniques have been overcoming even the most rigorously controlled societies, making state borders across the world more porous than ever.⁷ However, this trend is making internal and external aspects of security indissolubly linked and interactive.⁸

With the globalisation of world politics, post-Cold War awareness of indivisible security and the collapse of the sphere-of-interest-driven bipolar international affairs, it became clear that transnational organised crime is a menace to states and societies, eroding human security and the fundamental obligation of states to provide for law and order. In identifying global threats, the UN resolution emphasised that combating organised crime “serves the double purpose of reducing this direct threat to State and human security, and also constitutes a necessary step in the effort to prevent and resolve internal conflicts, combat the spread of weapons and prevent terrorism.”⁹ The awareness of global security issues is a big step forward towards a comprehensive and coordinated approach to strategising preventive policies and measures. It can be argued that the world interaction amongst states, including other stakeholders in global politics, has reached the level where any event or process that leads to large-scale death or lessening of life chances and undermines states as the basic unit of the international system is a threat to international security.¹⁰

Turning to the problem of prevention, Resolution A/59/565 defined six clusters of threats with which “the world must be concerned now and in the decades ahead:

- Economic and social threats, including poverty, infectious diseases and environmental degradation
- Interstate conflict
- Internal conflict, including civil war, genocide and other large-scale atrocities
- Nuclear, radiological, chemical and biological weapons
- Terrorism
- Transnational organized crime”¹¹

⁶“In the last few decades, many countries in different regions would have moved from dictatorship to democracy... All are now wrestling with their repressive pasts... It is still too soon to say with certainty what works (200 years from now, it will still be too soon),” in: *The Haunted Land: Facing Europe’s Ghosts After Communism*—by Tina Rosenberg. Vintage Books 1996, pp. 397–398.

See also: *The World After Communism*—by Robert Skidelsky. Macmillan 1995, pp. 160–172.

⁷See Chapter 9—by David P. Forsythe, in: *Human Rights in the New Europe*—by Forsythe (ed.). University of Nebraska Press 1994, p. 174.

⁸See *The External Dimension of EU Justice and Home Affairs: Governance, Neighbours, Security*—by Thierry Balzacq. Palgrave Macmillan 2009.

⁹Para. 165.

¹⁰As repeatedly noted in the UN Document A/59/565, referred to above (Note 1).

¹¹Para. 166.

Drug trafficking has also been identified as a major security threat, having devastating effects for the state economy and public health. In some regions, the huge profits generated through this activity even rival some countries' GDP, thus threatening state authority, economic development and the rule of law.¹²

Following a high level of collective awareness and the definition of global security threats opens the way to a new consensus about the meaning and responsibilities of collective security.

There is a need to argue for consensus on the meaning of "security" in the collective context. On the face of it, the prevention of armed conflict between states would seem an easier objective—at least conceptually—than collective confrontation against transnational organised crime where it benefits at least some of the states where it occurs. Multinational action against piracy in the Indian Ocean presents fewer definitional problems than stopping environmental degradation in a poor country that is economically dependent on mining and deforestation. Addressing poverty as a matter of collective security would require not only responding to regional needs but also understanding and adapting to domestic and even local practices of service delivery.¹³

According to a Department for International Development (DFID)¹⁴ study, "(I)nsecurity, lawlessness, crime and violent conflict" are amongst the biggest obstacles to achievement of the Millennium Development Goals; they also destroy development. Poor people cite safety and security as a major concern; they say it is as important as hunger, unemployment and lack of safe drinking water.

They talk about fear of attack, injury or physical abuse, often at the hands of precisely those institutions that are meant to protect them, or as a result of violent conflict or lawlessness. They explicitly link security to personal security. Given its importance to the well-being of the poor, we believe that supporting poor people's physical security is a vital part of reducing poverty."¹⁵

In the context of the above findings, it is crucial to adopt a holistic approach in addressing poverty and helping communities in desperate situations. Although the report by the High-Level Panel (UN Doc. A/59/565) found that international institutions and States have not organised themselves to address the problems of development in a coherent, integrated way and instead continue to treat poverty, infectious disease and environmental degradation as stand-alone threats. The fragmented sectoral approaches of international institutions mirror the fragmented sectoral approaches of governments: for example, finance ministries tend to work only with

¹²Ibid. "... It is estimated that criminal organizations gain \$300–\$500 billion annually from narcotics trafficking, their single largest source of income. Drug trafficking has fuelled an increase in intravenous heroin use, which has contributed in some parts of the world to an alarming spread of the HIV/AIDS virus. There is growing evidence of a nexus between terrorist groups' financing and opium profits, most visibly in Afghanistan."

¹³I am grateful to Professor D. Gordon (CUNY) for her thoughts and examples referred to in this paragraph.

¹⁴DFID is a department of British government.

¹⁵DFID document on "Fighting poverty to build a safer world: A strategy for security and development. British Government," March 2005. Chapter 1, Paragraphs 1–4.

the international financial institutions, development ministers only with development programmes, ministers of agriculture only with food programmes and environment ministers only with environmental agencies.¹⁶

The above approach invites for a major overhaul of donors' practices as well as strengthening the adaptive capacity of governments in the most poverty stricken countries.

Instead of "ticking the boxes" of aid programmes, lender governments and international financial institutions should provide poor countries with greater debt relief, longer rescheduling and improved access to global markets. But even this major change will not yield substantial results unless a major new global initiative to rebuild local and national recipient mechanisms throughout the developing world was undertaken.

Furthermore, the resolution stresses the three basic impediments which stand in the way of more effective international responses: insufficient cooperation amongst States, weak coordination amongst international agencies and inadequate compliance by many states.¹⁷ In an ideal world, the often predictable devastating consequences of serious threats would make all actors agree on a harmonised, effective and coordinated preventive strategy. But we are still rather far from a wider consensus on the effectiveness of threats management as such, as can be drawn from the frustration implicitly expressed by the UN resolution: "Effectiveness in tackling specific incarnations of organized crime varies. Anticorruption efforts suffer from a lack of commitment and understanding about the types, levels, location and cost of corruption. In the effort to curb the supply of narcotics, successes in some countries are often offset by failures in others. National demand-reduction initiatives in the industrialized world have been similarly ineffective, and the total number of opium and heroin users has remained relatively stable over the last decade."¹⁸

The roots and socio-economic background of corruption may be different in different societies and circumstances. But one of the main reasons for pandemic corruption in post-communist countries and post-war societies lies in fragile state institutions and the legacy of informal practices in doing business and seeking ways of avoiding due process of law.¹⁹

The impediments, mentioned above, often rest on sociocultural differences in understanding the nature of threat or seriousness of its consequences. Not everyone will regard one or more of the threats identified by the UN resolution as truly being a threat to international peace and security. For example, it is well known that the global threat of HIV/AIDS took almost a generation to be recognised as a major human disease affecting millions. Some still believe that it is a horrible disease, but not a security threat, or that terrorism is a threat to some states, but not all, or that civil wars in Africa are a humanitarian tragedy, but surely not a problem for

¹⁶ Para. 55.

¹⁷ Para. 167.

¹⁸ Para. 168.

¹⁹ See D. Galligan and M. Kurkchyan: *Law and Informal Practices—The Post-Communist Experience*. Oxford University Press, 2003.

international security, or that poverty is a problem of development, but not of security at the same time.²⁰

Before turning to the regional (European) level and national criminal justice capacities, it is important to identify elements of a credible collective security system. It is widely considered that such a system could provide a framework for developing a credible response to security threats through the interaction between law enforcement and national security institutions. The UN has identified three principles of a credible and sustainable collective security: effectiveness, efficiency and equitability.²¹

In order to be *effective*, any national security system has to confront all forms of organised crime at the same time and with the same vigour. Concentrating on one (e.g. drug trafficking) and ignoring the other (e.g. illegal arms trade) would allow perpetrators to move resources and capacities across their field of operation, to switch priorities and to achieve the same results in destabilising state institutions. Often organised in fluid networks and less formal hierarchies, criminal organisations are more flexible and adaptable than cumbersome systems of interstate and intra-institution cooperation in sharing information and staging an effective security campaign in criminal investigations and prosecutions on the part of states. For that reason, a consistent and well-balanced approach to all forms of security threat is crucial.

Many countries that have emerged from decades-long communist rule found themselves ill prepared to deal *efficiently* with the new forms of criminal activity which often lead to security nightmares. Criminal laws were not prepared to tackle the “new” crimes like money laundering, trafficking of human beings, corruption and terrorism. Criminal procedure codes were still entrenched in the Napoleonic penal laws legacy, allowing for endless delays and adjournments of trials and inefficient techniques. Most of these countries have embarked on a substantial process of legal reform and had made impressive progress²² but are still struggling with the “old-guard approach” in practice and an enormous backlog of cases.

It was pointed above that security in the globalised world has to be seen as collective and, as such, indivisible. In that context, the states have no choice but to share the burden of responsibilities in addressing security threats. This brings us to the third principle of collective security — an *equitable* way of meeting the challenge of prevention. The UN resolution interprets this in the following terms: “Combating organized crime ... requires better international regulatory frameworks and extended efforts in building State capacity in the area of the rule of law.”²³

“Inadequate compliance” in implementing state commitments undertaken by accessing international treaties is a matter of general concern in international relations, as it is expressed by the UN resolution. It may come from both inability and

²⁰ See Note 15 above.

²¹ UN Resolution A/59/565, Para. 31.

²² Z. Pajic: On Judiciary and Public Perception (will be published on “Transitions Online,” by the end of 2011).

²³ UN Resolution A/59/565, Para. 171.

unwillingness to knuckle under to Western notions of what will make communities and nations safer in the long term. Defensive postures that resist the central authority to accomplish the kind of collaboration, we might all support, are likely in many parts of the world.²⁴

The international regulatory framework consists of a half a dozen of treaties, starting with the United Nations addressing organised crime and corruption.²⁵ These mechanisms and adequate institutions are designed to monitor member states' compliance with their commitments and to identify and remedy legislative and institutional deficiencies. However, more than half of the UN members have not yet signed or ratified or adequately resourced the monitoring provisions of these conventions and protocols (i.e. UN Office on Drugs and Crime). In order to share the responsibility, as well as the benefits, of collective security, it is crucial for such a system to have a central authority to facilitate the exchange of evidence amongst national judicial authorities, mutual legal assistance amongst prosecutorial authorities and the implementation of extradition requests. However, in the real world, one has to be sceptical about the prospect of arriving at agreements on many aspects of collective security without undue pressure from rich and powerful countries.

Regional (European) Aspect

Long before the European Security Strategy was published in 2003,²⁶ the first European strategic document agreed by the member states of the EU “acknowledged that their security is indivisible. That a comprehensive approach should underline the concept of security and that cooperative mechanisms should be applied in order to promote security and stability in the whole of the continent.”²⁷

The document stressed Europe’s new responsibilities, highlighting the importance of the maintenance of international peace and “of democratic institutions, respect for human rights and fundamental freedoms and the rule of law.”²⁸ It also stressed the need to “prevent economic imbalances from becoming a threat to our continent.” This approach was crucial in confirming the international (regional in this case) awareness of interaction between human rights and economic development on one hand with peace and security on the other.

²⁴ As in Note 9. See Communiqué of the 207th Meeting of the African Union Peace and Security Council, 29 October 2009. Doc. PSC/AHG/COMM. I (CCVII).

²⁵ The United Nations Convention against Transnational Organized Crime, GA Res. 55/25, 15 November 2000, and the United Nations Convention against Corruption (UNCAC), GA Res. 58/4, 31 October 2003.

²⁶ *A Secure Europe in a Better World—The European Security Strategy*. European Council, Brussels, 12 December 2003.

²⁷ *European Security: a Common Concept of the 27 WEU Countries*. Extraordinary Council of Ministers, Madrid, 14 November 1995.

²⁸ Para. 20.

The crucial novelty of the ESS (European Security Strategy) lies in the identification of threats. It identifies five major threats: international terrorism, WMD (weapon of mass destruction) proliferation, regional conflicts, failed states and organised crime. There is a strong message from the document that the distinction between internal and external security is increasingly blurred.

As it was asserted in a research document commissioned by the European Commission, “These threats are multi-faceted and interrelated, combining, for example, bad governance, weak states, poverty, human trafficking, organized crime, drug smuggling and terrorism. Their transnational nature has led nations to internationalise their security policies, intensifying cooperation and coordination in numerous areas and recognising that each of these threats requires a specific combination of means in order to be tackled successfully. Military instruments can and do play a role, but in most cases intelligence, police, judicial, economic, financial, scientific and diplomatic means will be at least as important.”²⁹

In contrast to the massive visible threat in the Cold War, none of the new threats is purely military, nor can any be tackled by purely military means. Each requires a diversified approach and use of a wide spectrum of instruments. Proliferation may be contained through export controls and attacked through political, economic and other pressures while the underlying political causes are also tackled. Dealing with terrorism may require a mixture of intelligence, police, judicial, military and other means. In failed states, military instruments may be needed to restore order and prevent sectarian violence, coupled by urgent humanitarian means to tackle the immediate crisis. Regional conflicts need political solutions, but military assets and effective policing may be needed in the post-conflict phase. Economic instruments serve reconstruction, and civilian crisis management helps restore civil government, establish law and order and consolidate state institutions.

The “security argument” was used by the EU leaders in order to gain support for the advancement of the process of EU enlargement eastwards. This may be best explained by using the constructivist approach. Thus, security is not simply a matter of survival in the face of a threat. More importantly, this approach argues that “the sense of threat, vulnerability and (in) security is socially constructed rather than objectively present or absent.”³⁰ The first consequence of the constructivist definition of security is that it extends the area of security threats to sectors other than military ones providing the ground for the process of “securitisation.”

The securitisation process assumes a conventional response to unconventional threats. The latter can be identified in a large area of sectors and can correspond to aspects such as conflict in third countries, migration, human rights abuses and natural disasters. These issues have emerged with the fall of communism and climaxed with the war in the former Yugoslavia (1991–1995) and the conflict in Kosovo (1999).

²⁹ *Research for a Secure Europe, Report of the Group of Personalities in the field of Security Research*. European Commission 2004, p. 10.

³⁰ Atsuko Higashino, For the Sake of “Peace and Security”? The Role of Security in the EU Enlargement Eastwards. *Cooperation and Conflict*, Vol. 39, No. 4, 347–368 (2004).

The process of transition from communism to democracy and from authoritarian rule to rule of law exposed one of the main security threats in modern times, state failure. In common terms, this phenomenon gave rise to corruption, abuse of power, lack of accountability, organised crime, porous borders, etc. In spite of remarkable achievement in integrating the countries that aspire to EU accession, it is obvious that the EU security strategy rests upon the states and their ability to address the main threats. The overall goals, in reality, can be achieved through a regional strategy and coordination which presupposes the process of harmonising relevant legislation and institutions for law enforcement and implementation on the national level.

The characteristics of failed states should come before the discussion on the national aspect. What is the literature of state failure and what are the ramifications? How do these general aspects relate to B&H?

Failed State as a Security Risk

As it is stressed in both strategic documents,³¹ collective security institutions are rarely effective in isolation. Multilateral institutions normally operate alongside national, regional and sometimes civil society actors and are most effective when these efforts are aligned to common goals. This is as true of mediation as it is of post-conflict reconstruction, poverty-reduction strategies and non-proliferation measures.

States are still the front-line responders to today's threats. Successful international actions to battle poverty, fight infectious disease, stop transnational crime, rebuild after civil war, reduce terrorism and halt the spread of dangerous materials all require capable, responsible states as partners. It follows that greater effort must be made to enhance the capacity of states to exercise their sovereignty responsibly.

Since the end of the Cold War, weak or failing states have arguably become the single most important problem for international order.³² Weak or failing states commit human rights abuses, provoke humanitarian disasters, drive massive waves of immigration and attack their neighbours. Since September 11, it also has been clear that they shelter international terrorists.³³

The collapse of communism has brought about the phenomenon of failed states to the European political map. Here they are still wrestling with the communist legacy, and some of them are painstakingly going through the post-war reconstruction at the same time. The latter category is especially vulnerable to exploits by former belligerents' criminal connections and their "know-how" developed during the war, thus undermining international peace-building efforts. Entrenched corruption, the use of violence to protect criminal activities and close ties between

³¹ Notes 1 and 26.

³² Chester Crocker: "Engaging Failing States," in *Foreign Affairs* 82 (5) 2003, pp. 32–45.

³³ More in Fukuyama, op. cit., pp. 125–127.

criminal enterprises and political elites hinder establishing the rule of law and effective state institutions. International efforts in curbing illegal trafficking have been insufficient or insufficiently enforced. Ethnic tensions and ongoing political conflicts not only destroy infrastructure, including social infrastructure but also encourage criminality, deter investment and make normal economic activity impossible. It can be argued in this context that economic development is the basic precondition for peace and security. Or the other way around, the lack of development, or development falling hostage to national criminality, and its continuous paralysis are, *per definitionem*, security threats. The interaction between the two resulted in the Balkan region having been caught in a cycle of conflict, insecurity and poverty at the turn of the century.

In the European political terminology, “failed or failing” is preferred to “rogue” state, partly to differentiate itself from the US “axis of evil” rhetoric, partly to underline a comprehensive approach and the civilian component favoured by the EU. State failure is thus an aggravating environment; it empowers non-state actors and increases security risks and threats, domestically as well as externally.³⁴

But to what extent does a failed state represent a threat to European security? The basic idea behind state failure as a security risk is relatively straightforward when put in perspective. It refers to the notion that interstate conflict, local rivalry between neighbours or global competition of great powers does not represent the most serious security risks. What is happening inside a state matters more in the current context of peaceful, or even uneasy, relationships between world powers in an increasingly globalised world. Globalisation unites people, but it also creates tensions and conflicts. Economic crises, failed governance, ethnic violence and religious antagonisms are amplified by the gap between haves and have-nots. These dividing lines cross the old geopolitical system based on territories and sovereignties.

The main dimension of a failing state is an issue of human rights or human security. It refers to situations in which the domestic population is the first direct or indirect causality of state collapse or abuse. The lessons from the Balkan wars can be summarised in a few words: human values need to be defended at home and protected abroad!

However, this has to be seen in the broader context of governance. In this framework, the failed state has lost its ability to provide positive political goods to its citizens, such as the provision of an independent judicial system to adjudicate disputes, to enforce the rule of law and to protect the most fundamental civil and political rights. Such unstable situations can rapidly spill over to neighbouring countries. Collapsed or corrupt state authority can rapidly lead to chaotic situations of civil unrest, economic crises and international crime.

³⁴ Jean-Yves Haine, *The European Security Strategy: Coping With Threats*, p. 21 (The EU and the European Security Strategy: Forging a Global Europe). Ed. by Sven Biscop and Joel Andersson. Routledge, 2008.

National Aspect: The Case of Bosnia and Herzegovina

The process of transition from communism to democracy in Southeastern Europe has reached the point at which the countries of the region are embarking on a much longer journey—the transformation process. While the transition so far included dismantling of communist political structures and getting rid of one-party authoritarian rule, the transformation proves to be much more complex. It involves state building and good governance based on the rule of law principle, human rights and civil liberties, free market economy, plural democracy and, above all, sociocultural changes and acceptance of new values and responsibilities across the board.

The lesson the international community (IC) and democratic governments are still to learn is that the holistic approach to reconstruction and development is the only way to guarantee stability and peace in the region. A holistic approach simply means realising that civil liberties, safety and security, independent judiciary and good governance go hand in hand with market economies and private and entrepreneurial initiative—eventually creating conditions for a good society. Efforts and measures aimed at improving these policy areas should not be given priority over one another. Wherever the IC or local authorities tried a sector-driven approach in transitional countries, it failed or slowed down the process of transformation. This is discussed in detail below, highlighting the case of the international administration in Bosnia and Herzegovina. All these areas have to be addressed and confronted simultaneously from day one, in particular when dealing with communities struggling with post-war reconstruction as well.³⁵

This can be illustrated by the international administration failure in Bosnia and Herzegovina to approach the reconstruction of the country by implementing the holistic method in the state-building process. Instead, the international community (IC), following the Dayton Agreement (1996), wasted precious time, effort and resources in trying to achieve political settlement in the country at any cost. At the same time, crucial areas of the reconstruction process had been neglected, including reviving the economy and creating jobs, reforming the judiciary, public administration and policing and establishing the rule of law. Instead, the IC rushed towards organising the first “free and fair” elections less than a year after the war was stopped. The election project stalled the process of reforms for at least a couple of years. It became obvious soon after the elections that this genuine democratic mean, without the rule of law to speak of, simply allowed the warlords to be legitimised by being elected to the offices of power all over the country. What this led to in September 1996 was not the launching of a democratic future for Bosnia, but the permission of criminals and war profiteers to highjack the institutions of the state. It can be argued that the IC has made the same mistake in Kosovo.

³⁵ This aspect is discussed widely by Francis Fukuyama in his book *State Building—Governance and World Order in the Twenty-First Century*. Profile Books, 2004.

The remaining part of this chapter will assess the institutional capacity of the Western Balkan countries to cope with the issues of security, with emphasis on criminal justice reform in Bosnia and Herzegovina.

The ex-Yugoslav countries have gone through three consecutive phases of their legal transitions and law enforcement institutions in the past half century. The first one was the system of *law and order* which goes hand in hand with a totalitarian regime. Its legislation is usually well structured and coherent, and judicial bodies are well organised professionally and institutionally. But if this surface is scratched just a bit, the true meaning of law and order will show itself as an effective mechanism in protecting the interests of the governing ideology and durability of the ruling power. This phase was prevailing from 1945 until the fall of communism and the break-up of the Yugoslav federation.

The second phase was the “system” of *lawlessness* which brought about the high degree of arbitrariness in resolving legal disputes, disregard for human rights and, consequently, the total lack of trust in judicial institutions. Lawlessness is found in a state of war, including social chaos or failure of state institutions to offer a decent level of legal protection or access to justice to individuals and juridical persons. Consequently, state institutions become paralysed and make room for corruption and informal practices. The lawless state of affairs, in its extreme form, may encourage people to bypass judicial institutions—including police—and to take justice in their own hands.

Finally, the *rule of law* stage has been the current trend and ultimate goal in the post-communist world since 1991 or more precisely since the end of wars in the region of the former Yugoslavia. The rule of law, in its basic meaning, reflects the principle that no one is above the law. Perhaps the most important application of the rule of law is achieved when a governmental authority is legitimately exercised only in accordance with written, publicly disclosed laws adopted and enforced in accordance with established procedural steps that are referred to as due process. The principle is intended to be a safeguard against any arbitrary power exercised whether by a totalitarian leader or by mob rule. Thus, the rule of law is hostile both to dictatorship and to anarchy, or rather the other way around.

The end of war in Bosnia brought about an unprecedented power of the international administration in a sovereign country.³⁶ This resulted in the legal and judicial reform led by the UN, OHR and OSCE. The trial monitoring was introduced by OSCE, the ECHR was incorporated in the domestic legal system, the Human Rights Chamber was established as an international human rights court in situ and an OSCE ombudsman office was opened and started receiving petitions by individuals. However, the post-Dayton judiciary, including judges and prosecutors, still worked under heavy pressure by political establishment, organised crime groups as well as by the international community (IC). It was only in 2002 that the IC had fully concentrated on justice reform, providing for a comprehensive court restructuring.

³⁶See Z. Pajic: Witnessing Transition and State-Building in Western Balkans, in *Conflict and Renewal-Europe Transformed*. Ed. By H. Swoboda and C. Solioz, Nomos Verlagsgesellschaft, Baden-Baden 2007.

This was followed by the process of vetting and reappointing judges and prosecutors, which was completed in 2004 by establishing the State Court of B&H (2003) and enacting the new legislation in criminal and civil matters (respective codes, 2003–2004).

As far as new Bosnian legislation is concerned, its task was to provide for a more efficient system in addressing the criminal culture which used to prevail in the country following the war and its legacy in all walks of life. The leading principles of the law reform were expected to secure the predictability and probability of a trial, respecting and implementing international human rights standards, and rights and freedoms from the European Convention of Human Rights. Finally, it was crucial to take into account the practice of other countries in fighting crime, which domestic legal tradition had little experience of. Those were, primarily, organised crime, corruption, money laundering, tax evasion, terrorism, war crimes, etc.

In order to achieve these aims, the reform had to look into more efficient solutions than those offered by the present legislation, while preserving the main assets of the European continental legal tradition. It was agreed by national and international experts that the common law system (often referred to as “American” or “Anglo-Saxon”) provided for more efficient and rational judicial procedure. As a result, the new Criminal Procedure Code of Bosnia and Herzegovina was enacted in 2003. It successfully intertwines the two prevailing legal traditions in the world (“Continental European” and “American”), and it has proved to be an optimal mechanism for transcending between the old and the new in the country’s struggle with all forms of criminality.

In conclusion, the ground has been laid down for criminal justice to complement the work of other state institutions responsible for fighting major threats to security in the country and implicitly in the Balkan region. However, achieving consistent implementation of laws, full independence of judges and professional conduct of law enforcement officers is a slow-moving process which frustrates public expectations and prevents confidence building in state institutions in general. Also, inconsistencies in regional effectiveness in cooperation in criminal matters are a serious drawback for a unified strategy in addressing security threats.

The conclusion needs to be more comprehensive—it only focuses on legal reform at the moment.

Concluding Remarks

If the issues referred to in this chapter were brought into the context of trans-governmental enforcement networks and international police cooperation, state functionality and capacity of its institutions would emerge as the main problem. It can be argued that the growth of transnational organised crime has been a continuous phenomenon, while dramatic transformations in the global community of states took place since the end of the Cold War. Consistent response to terrorism is challenged today by at least two post-outcomes.

First, many countries, post-communist ones in particular, regained their sovereignty or political independence and rejected their respective leaders of the bipolar world. Many of them have fallen into the category of failed states for different reasons and cannot be treated as reliable partners in trans-governmental enforcement networks who could play a credible role in international intelligence and police cooperation.

Second, it is exactly this category of (failed) states that represents an important link in the chain of international efforts in preventing acts of terrorism. It has become obvious since 9/11 that countries with questionable rule of law agenda and without credible and democratic state institutions are crucial as potentially resourceful partners in sharing security data and developing antiterrorist strategies. Today, states like Afghanistan, Bosnia, Kosovo, Pakistan and Yemen, to name just a few, have to be treated as partners in sharing information through international networks and police cooperation. This seems to be condition sine qua non for developing a meaningful and consistent security policy at the global level. It is exactly at this point that their domestic law enforcement policies and practices may prove to be incompatible with international law enforcement mechanisms. Failed state institution network is hardly consistent with international standards of rule of law, democratic principles of governance and requirements of a professional civil service. In some cases, police force, prosecution and judiciary are influenced by ethnic or religious rivalries in the country; in others, they are controlled by political parties, tribal interests or criminal organisations. As a result, such countries are unable or unwilling to work with other national and international democratic institutions and follow the procedures that are normally required in fighting organised crime.

Is there a remedy for such unbalance in the security or, more specifically, “antiterrorist partnership” and building networks? What more can be done beyond technical assistance and training programmes offered to countries in transition?

Networks have been with us for centuries, and the world of the twenty-first century is one of increasing connections. It is often pointed out that networks have become “webs of mutual dependence.” The interaction amongst states and nations has opened the new horizons for our prosperity, but also made us aware of the new threats and significant dangers to it.³⁷

It is in the context of “mutual dependence” that seeing and understanding the benefits of national and international security is the crucial incentive for any society to comply with the requirements of the strategy to achieve and protect it. The contribution of failed states should be encouraged and appreciated by the leading states and international agencies in trans-governmental enforcement networks. Failed states, in spite of everything, want to be treated as equals and to feel as co-owners of the process of international police collaboration. If this prospect was clearly opened to them, they might get more serious, responsible and determined to reach certain standards that are required in “joining the club.”

³⁷A. Ghani and C. Lockhart: *Fixing Failed States*. Oxford University Press 2008, p. 221.

Writing in a different context, a few authors argue that a key to success in the strategy development is “to identify the types of capabilities that exist among different groups and organisations in a particular place and then to create partnerships and organisational designs that can network them into collective assets.”³⁸ This sounds like a logical proposition, but it will take a consistent political will and shared responsibility in the day-to-day process of international collaboration towards a more secure world.

³⁸ Helper, MacDuffie and Sabel: “Pragmatic Collaborations,” in *Industrial and Corporate Change*, Volume 9, No. 3. Oxford University Press, 2000, p. 443.