



# THE IMPACT OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR YUGOSLAVIA ON WAR CRIME INVESTIGATIONS AND PROSECUTIONS IN SERBIA

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# ABOUT DOMAC

**THE DOMAC PROJECT** focuses on the actual interaction between national and international courts involved in prosecuting individuals in mass atrocity situations. It explores what impact international procedures have on prosecution rates before national courts, their sentencing policies, award of reparations and procedural legal standards. It comprehensively examines the problems presented by the limited response of the international community to mass atrocity situations, and offers methods to improve coordination of national and international proceedings and better utilization of national courts, inter alia, through greater formal and informal avenues of cooperation, interaction and resource sharing between national and international courts.

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## EXECUTIVE SUMMARY

The subject of this report is the ICTY impact on three areas of concern to the DOMAC project in Serbia: rates of prosecutions, changes to criminal law and capacity development. It is one out of three case-studies on ICTY impact (the additional case-studies concerned Croatia and BiH).

The significance of Serbia as a case study on ICTY's impact lies in the deep rooted antagonism it developed against the ICTY since the Tribunal's establishment in 1993. The resulting difficult relationship between Serbia and the ICTY represents the most complex modality of interaction of international/national justice systems and is therefore very useful for identifying potential points of cooperation.

A main conclusion of this study is that the ICTY has been instrumental in generating domestic war crimes proceedings in Serbia, not by way of persuasion but by way of creating a political reality which, after the regime change in 2000, Serbia could not stand up to. This is the ICTY's foremost influence on national war crimes proceedings. The disconnect between Serbia and the ICTY probably could not have been helped during the Milosevic regime, and it is doubtful whether adequate outreach on the part of the Tribunal could have helped resolve the perceived conflict between the interests of the two. Relative to this state of things, the contribution of the ICTY to domestic war crimes prosecutions has been quite impressive. Once the ICTY began to realize the necessity of identifying local needs of the Serbian judicial system and to cultivate a positive working relationship with Serbian institutions entrusted with war crimes prosecutions, it has managed to export expertise – as well as evidence – thereby enhancing and complementing the limited Serbian capacity to process war crimes.

It should be emphasized that the limited capacity of the Serbian system does present a challenge to further ICTY contributions. In this sense it is important to acknowledge that the ICTY also constitutes one contributing factor to the unpopularity of war crimes proceedings, which, in turn, explains the lack of support and allocation of resources to the Serbian war crimes system. The net result is that despite the professional level of the proceedings, that system produces no more than ten judgments per year and does not prosecute high ranking members of the former Serbian leadership.

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# LIST OF ABBREVIATIONS

ARBiH.....	Army of BiH
BiH.....	Bosnia and Herzegovina
CC.....	2006 Serbian Criminal Code
DOS.....	Democratic Opposition of Serbia
DS.....	Serbian Democratic Party
EU.....	European Union
HDZ.....	Croatian Democratic Community
HLC.....	Humanitarian Law Center
IBA.....	International Bar Association
ICTY.....	The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991
JNA.....	Army of the SFRY
KLA.....	Kosovo Liberation Army
OTP.....	Office of the Prosecutor
PJP.....	Special Police Units
RPE.....	ICTY Rules of Evidence and Procedures
RSK.....	Serb Republic of Krajina
RS.....	Republika Srpska
SFRY.....	Socialist Federal Republic of Yugoslavia
SSP.....	the Serbian Socialist Party
SAA.....	EU Stabilization and Association Agreement
SAP.....	EU Stabilization and Association Process
SAO.....	Serbian Autonomous District
SC.....	UN Security Council
1976 SSFRY CC.....	1976 Criminal Code of the Socialist Federal Republic of Yugoslavia
TO.....	Territorial Defense
UNMIK.....	UN Mission in Kosovo
VH.....	The Croatian Army
VHO.....	The Serb-Croatian Army
VJ.....	Army of the FR Yugoslavia
VRS.....	Army of the Republika Srpska
WCC.....	Serbian War Crimes Chamber
WCIS.....	Serbian War Crimes Investigation Service

WC law..... The Law on Organization and Competence of Government Authorities in War Crimes Proceedings (War Crimes Law)

WCP..... Serbian War Crimes Panel

WCPO..... Serbian War Crimes Prosecutor's Office

WCWSU..... Serbian War Crimes Victims and Witnesses Support Unit

# 1. INTRODUCTION

The focus of the report is the examination of the interaction between Serbia and the ICTY and the impact the former has had on war crimes proceedings in the latter. Serbia is one of a series of case-studies conducted by DOMAC analyzing the ICTY's influence on domestic prosecutions in the countries most effected by the wars surrounding the disintegration of the Socialist Federal Republic of Yugoslavia. Other studies concerned Croatia and Bosnia and Herzegovina.

Serbia was involved in the war in Croatia as a constituent republic of the SFRY; in the BiH conflict as the dominant republic of the FRY; and in the Kosovo conflict as an independent state. To varying degrees, it was involved for many atrocities committed during these conflicts, atrocities which revolved mostly around ethnic domination of territories that once made up the former Yugoslavia. More than any other state or entity connected with these atrocities, Serbia bore the brunt of the international community's condemnation for the crimes and was transformed into a pariah state.

The ICTY was established by the UN Security Council in 1993 as a means to halt the widespread atrocities connected with the conflicts in the former Yugoslavia and to confront the culture of impunity that pervaded the Balkans in general, and Serbia in particular. It was immediately resented by Serbia, whose political and military leaderships were implicated in the crimes, a sentiment that has endured to this day and has hampered cooperation between the two.

## 1.1. OBJECT OF THE REPORT

The object of the current report is to identify and analyze the impact of the ICTY on domestic war crimes proceedings undertaken by Serbia.

The significance of the Serbian case is that it represents the most complex modality of interaction of international/national justice systems. Serbia's negative stance vis-à-vis the ICTY has constituted the biggest challenge to the legitimacy and effectiveness of the Tribunal. This has had adverse effects on the work of the Tribunal which for years struggled to obtain evidence and suspects which Serbia kept unavailable to it. Whether Serbia's perception of the ICTY has had the same advert consequences for domestic war crimes proceedings, however, is an altogether different question and it is what this case-study has as its purpose to examine.

## 1.2. STRUCTURE OF REPORT

In line with all of DOMAC country case-studies, the report's structure is composed of six substantive chapters. Chapter 2 briefly describes the conflicts and the atrocities that accompanied them. Chapter 3 looks at the state of the Serbian judicial system before, during and in the aftermath of the conflicts. Chapter 4 describes the manner in which that legal system was used to respond to the atrocities. Chapters 3 and 4 thus set out the starting point for the identification of subsequent influence: a dysfunctional judicial system, constrained by political dictates and corruption, which was neither able nor willing to hold adequate war crimes trials, specifically against those bearing the most responsibility for the atrocities – Serbian political and military leadership.

Chapter 5 goes on to specify the proceedings undertaken at the ICTY with respect to the atrocities for which Serbia and Serbian nationals have been responsible. These proceedings targeted high ranking Serbian leaders which Serbia failed to prosecute.

Chapter 6 then turns to examine the interaction between the ICTY and Serbia. It describes the initial period of the relationship during which the mutual antagonism was created and the challenges that were thereupon created and impeded cooperation which might have been beneficial for both systems. It further describes subsequent developments in the policies of Serbia and the ICTY towards each other which finally allowed for a more constructive and holistic approach to war crimes proceedings.

Chapter 7 then analyzes how the different points of interaction described in the preceding chapters affected (for better and worse) domestic war crimes proceedings in Serbia: rates of war crimes prosecutions, changes in applicable law to war crimes, and developments in the capacity of the Serbian legal systems to process war crimes. Chapter 8 brings forth the main conclusions and lessons.

## 1.3. METHODOLOGY

The findings of the report are based on three types of resources:

- **Empirical research**

The report draws on research compiled by the different work packages of the DOMAC Project, specifically, WP 3 (responsible for collecting and analyzing data on national rates of investigations, prosecutions and sentencing) and WP 2 (responsible for identifying normative impact on domestic legislation).

Indeed, the current case-study on Serbia is but one out of ten country reports that are the products of WP 5, responsible for the contextualizing of and concretizing the research undertaken in other WPs so as to "produce a nuanced perspective on the combined effect of different levels of cross-influence between the national and the international and the actual problems encountered in the process."<sup>1</sup>

- **Primary resources**

Resources by different Serbian ministries; Serbian legislation; Serbian case-law; and ICTY case-law.

- **Secondary resource**

Reports by the intergovernmental and nongovernmental organizations (e.g., Amnesty International, Human Rights Watch, International Center for Transnational Justice, UNDP, Helsinki Committee, EC, ICTY); academic publications; and newspaper articles.

- **Interviews**

The large quantity of resources and information gathered in the preparation of this report has been further contextualized and complemented by the subjective accounts conveyed in interviews conducted with persons involved with war crimes proceedings in Serbia. DOMAC staff conducted three rounds of interviews. The first took place in May 2008 in Belgrade where interviews were conducted with Belgrade court's officials and judges, representatives from the war crimes prosecution's office, members of NGOs and officials from the OSCE office in Serbia.

The second round of interviews took place in January 2009 in The Hague with ICTY staff from the Outreach Program, Prosecutors office, Chambers and Victims and Witness support Unit. A third, and final, round of interviews took part in November 2009 and included interviews with judges from the war crimes chambers, NGOs members, and EU, ICTY and OSCE officials. Further

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<sup>1</sup> Y. Shany, 'Preliminary Report on case studies', available at <http://www.domac.is/media/domac/Preliminary-Report-Case-Studies.pdf>.

communications with many interviewees were held throughout 2010 and 2011.

## 2. CONFLICT BACKGROUND

### 2.1 THE CONFLICT

Serbia was involved in all the wars surrounding the disintegration of the SFRY. Between 1991 and 1995 it was involved directly and indirectly in the independence wars of Slovenia, Croatia and BiH and later, in 1998, in the war that erupted in Kosovo, one of Serbia's constituent regions.

Serbia was the largest of the six republics which made up the SFRY (the other five were Montenegro, Slovenia, Croatia, Bosnia and Herzegovina (BiH) and Macedonia) and the only republic with autonomous regions attached to it (Kosovo and Vojvodina). The Serb population was the largest population in the federation tallying over 36 percent of the general Yugoslav population.<sup>2</sup> Like most of the major ethnic groups in the federation the Serbs were not equally spread out but rather scattered throughout the whole territory of the SFRY. Specifically, only 60 percent lived in Serbia proper whereas 16 percent resided in Kosovo and Vojvodina, 16 percent in BiH and 7 percent in Croatia,<sup>3</sup> mostly in areas adjacent to the Serbian border.

Serbia's leadership since 1989 was occupied by Slobodan Milosevic, who in 1989 took over the League of Communists of Serbia and later in 1990 was elected as President. His party, the Serbian Socialist Party (SSP) took over more than 70 percent of the Parliamentary seats in the 1990 elections.<sup>4</sup> Milosevic led an aggressive nationalist agenda which saw to it that the autonomy of Kosovo and Vojvodina, which had been guaranteed in the Yugoslav constitution, be revoked in the new constitution promulgated

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<sup>2</sup> According to the last reliable census held in 1981 the Croats numbered 19.8% of the population, followed by Muslims (8.9%), Albanians (7.7%), Slovenes (7.3%), Macedonians (6%) and Montenegrins (2.6%). Self-described Yugoslavs along with smaller groups like Roma, Hungarians and Jews accounted for the other 11%. R. Petrovic, "The National composition of the population" 1983 (3) *Yug. Surv.*, p.22. The last census was conducted in 1991 during the war and is less reliable. Nevertheless, it does, by and large, correspond to the 1981 census. See R. Petrovic, "The National Composition of Yugoslavia's population" 1992 (1) *Yug. Surv.* p.12 reproduced in S.L. Woodward, *Balkan Tragedy* (1995) 35.

<sup>3</sup> R. Hodson et al., 'National Tolerance in the Former Yugoslavia' 99 *Am. J. Soc.* (1994) 1534, 1543.

<sup>4</sup> R. Thomas, *Serbia under Milosevic: Politics in the 1990s* (1998) 74.

in 1990. In doing so, Milosevic effectively took control of three out of the eight seats of the Yugoslav presidency - which up to that point was rotated between leaders of the six republics and the two autonomous regions – and with the guaranteed support of Montenegro a Serb bloc was created.<sup>5</sup> The Federal presidency, along with the federal structure, lost its power by the end of 1990 when it was clear that Croatian and Slovenian wishes to decentralize the federal government could not be reconciled with Serbian attempts at increasing centralization.<sup>6</sup>

When Slovenia and Croatia declared themselves independent in June 1991, the Yugoslav army, the JNA, was dispatched to fight on both fronts. The war in Slovenia was over in three weeks after which the JNA retreated. In Croatia, however, the JNA was fighting alongside the Croatian Serbs (SAO) and other militias attempting to separate the Serb-populated areas from Croatia in order to be unified instead with Serbia which they considered their homeland. It wasn't until December 1991 that a cease-fire was brokered by the UN and JNA forces withdrew from Croatia. In the meantime Macedonia seceded peacefully from the SFRY in September 1991. When BiH declared independence in April 1992 Serbia and Montenegro established the Federal Republic of Yugoslavia (FRY)<sup>7</sup> as the successor state to the SFRY.<sup>8</sup> Serbia, the larger and stronger of the two republics, dominated the new Federation's institutions: The SPS had a majority in the Assembly and both the prime minister and the president were from Serbia.<sup>9</sup>

The war in BiH broke out in April 1992 between the Bosnian army (ABH), the army of the Serbian entity within BiH - *Republika Srpska* (VRS) - and the Croat Defense Council (HVO). The FRY officially withdrew its forces from BiH in May 1992 but in fact left the bulk of the JNA's personnel and equipment in BiH to the VRS.<sup>10</sup> Up until 1995, the Milosevic-led FRY remained very much involved in the conflict, at the very least by

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<sup>5</sup> R. C. Nation, *War in the Balkans 1991-2002* (2003) 94.

<sup>6</sup> This is not to say that the issue of centralization of the SFRY was the cause of the disintegration of the Federation. Such causes were varied and numerous and are still subject to much debate. See Y. Dragovic-Soso, 'Why did Yugoslavia disintegrate? An Overview of Contending explanations' in L. J. Cohen & Y. Dragovic-Soso (eds.) *State Collapse in South-Eastern Europe* (2008) 1.

<sup>7</sup> Case Concerning the Application of the Convention on Prevention and Punishment for the Crime of Genocide (BiH v. Serbia & Mont.), 2007 I.C.J. 91, para 234.

<sup>8</sup> The international community did not view the FRY as the successor of the SFRY and between 1992 and 1997 it was not accepted as a member of the UN. See R. Lukic, 'From the Federal Republic of Yugoslavia to the Union of Serbia and Montenegro' in S. P. Ramet and V. Pavlakovic (eds.) *Serbia since 1989: Politics And Society Under Milosevic And After* (2005) 55.

<sup>9</sup> *Ibid.* p. 60.

<sup>10</sup> S. Woodward, *Balkan Tragedy* (1995) 262.

providing substantial military and financial support to the RS,<sup>11</sup> if not by orchestrating the war altogether.<sup>12</sup> FRY's support of the Serb entities in BiH and Croatia attracted international condemnation<sup>13</sup> which translated into far-reaching sanctions imposed by the EC, the US and the UN Security Council.<sup>14</sup> By 1993 Milosevic was finally persuaded to help influence the RS's leadership, Radovan Karadzic in particular, to engage seriously in peace-talks.<sup>15</sup> The involvement of Milosevic was pivotal and, in fact, at the peace conference in Dayton in late 1995, it was Milosevic, not Karadzic, who was representing the RS in the negotiations.<sup>16</sup> The conference was the peak of continued mediation efforts on the part of the international community since 1992, which was combined with military intervention by NATO. The agreement achieved in Dayton between Croatia, BiH and the FRY established a new framework for co-existence between the republics and put an end to the wars in both Croatia and BiH.<sup>17</sup>

The armed conflict in Kosovo erupted three years later. The first phase of fighting took place in 1998 between FRY and the KLA, the radical national liberation movement of Kosovo. The second phase involved NATO forces that sided with the KLA in an offensive against Serbia proper between March and June 1999.

Located in the south of Serbia with a predominantly Albanian population,<sup>18</sup> Kosovo was recognized in the 1974 SFRY Constitution as an autonomous province,<sup>19</sup> with an independent educational system, police force and political institutions including Parliament and Government.<sup>20</sup> The scope of its autonomy was viewed unfavorably by

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<sup>11</sup> Genocide Case, *supra* note 7, paras. 235-241.

<sup>12</sup> See the second amended Indictment of Milosevic which accused him of participating in a joint criminal enterprise to commit genocide, crimes against humanity and war crimes in BiH as well as Croatia and Kosovo. *Prosecutor v. Milosevic*, Indictment, Case No. IT-02-54-T (28 July 2004); J. Gow, *The Serbian Project* (2002).

<sup>13</sup> 'The World against Serbia', *The Economist*, 5/30/92, Issue 7761, p. 49-50.

<sup>14</sup> UNSC Res. 757 (30 May 1992) (e.g. trade embargo, diplomatic sanctions); UNSC Res. 781 (9 October 1992) (ban of military flights over BiH); UNSC Res. 787 (16 November 1992) (shipments of basic products through the FRY).

<sup>15</sup> C. Rogel, *The Breakup of Yugoslavia and its Aftermath* (2004) 125-126.

<sup>16</sup> I.H. Daalder, *Getting to Dayton* (2000) 128-129.

<sup>17</sup> The General Framework Agreement for Peace in Bosnia and Herzegovina (14 December 1995) available at [http://www.ohr.int/dpa/default.asp?content\\_id=379](http://www.ohr.int/dpa/default.asp?content_id=379). With respect to the BiH, the agreement is far more complex and far reaching. See section 3.1 of DOMAC's report on BiH.

<sup>18</sup> The last reliable census took place in 1981 which found that Albanians made up 77 percent of the entire population with Serbs and Montenegrins making up only 15 percent. See Petrovic, *supra* note 2. No parallel data exists for the years 1991-2009: The last SFRY's official census held in 1991 was boycotted by the Albanian population. The next census is scheduled for 2011. See <http://www.kosovotimes.net/flash-news/642-republic-of-kosovo-sets-the-date-for-its-first-census.html>. For further details see T. Judah, *Kosovo: What Everyone Needs to Know* (2008) 1-2.

<sup>19</sup> Article 4 of the 1974 Constitution of the SFRY.

<sup>20</sup> See generally M. Pavlović, 'Kosovo Under Autonomy: 1974-1990' in C. W. Ingrao and T. A. Emmert (eds.), *Confronting the Yugoslav Controversies: A Scholar's Initiative* (2009).

many in Serbia who viewed it as a challenge to Serbia's sovereignty. In September 1990, following the Albanian declaration of independence, Milosevic' Serbia amended the constitution and revoked Kosovo's autonomy. The following years saw a constant deterioration in the status of the Kosovar Albanians, once themselves responsible for discrimination practices against non-Albanians in Kosovo.<sup>21</sup> The Albanian Education system was shut down, property transactions were limited and hundreds of thousands Albanians were fired from state institutions. The Parliament and Government were dissolved and the Serbian police harshly enforced law in Kosovo. Over the next seven years nearly 350,000 Albanians left Kosovo. Meanwhile, incentives were provided to Serbs who settled in the Province.<sup>22</sup>

From 1996 onwards the KLA began to attack Serb objectives.<sup>23</sup> A full-fledged armed conflict erupted in February 1998 with a major assault on Drenica Valley, a stronghold of the KLA, by FRY's forces.<sup>24</sup> The magnitude of the offensive and the level of violence that ensued prompted the ICTY Prosecutor in March 1998 to establish the Tribunal's jurisdiction over the events.<sup>25</sup> Serb forces were enhanced in May when the Serbian police (MUP) and the Yugoslav army (VJ) began collaborating in attacks along the Albanian border. The KLA, which at some point controlled over forty percent of Kosovo, now retreated and the Serb offensive ended in September of that year.<sup>26</sup> NATO-sponsored negotiations ultimately failed with Serbia refusing to sign an agreement allowing enhanced autonomy to Kosovo guaranteed by NATO presence. In response, an air strikes campaign was launched by NATO on March 24 1999 as the conflict entered its second phase.<sup>27</sup> The campaign gradually expanded, in scope and objectives, when Serbia re-launched an offensive in Kosovo,<sup>28</sup> uprooting over 800,000 Kosovo

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<sup>21</sup> L. Nikolic, 'Ethnic Prejudices and Discrimination: The Case of Kosovo' in F. Bieber and Z. Daskalovski (eds.), *Understanding the War in Kosovo* (2003) 53, 63.

<sup>22</sup> See generally, F. Trix, 'Kosovar Albanians between a Rock and a Hard Place' in Ramet and Pavlakovic, *supra* note 8, 309.

<sup>23</sup> Nations, *supra* note 5, 226.

<sup>24</sup> *Ibid* (note 23) p. 227.

<sup>25</sup> ICTY, Press Release: The Prosecutor's Statement Regarding the Tribunal's Jurisdiction over Kosovo (10 March 1998), available at <http://www.icty.org/sid/7683>.

<sup>26</sup> H. H. Perritt, *Kosovo Liberation Army: The Inside Story of an Insurgency* (2008) 70.

<sup>27</sup> R. Dannreuther, 'War in Kosovo: History, Development and Aftermath' in M. Buckley and S. N. Cummins (eds.), *Kosovo: Perceptions of War and Its Aftermath* (2001) 12, 21-23.

<sup>28</sup> A. H. Cordesman, *The Lessons and Non-Lessons of the Air and Missile Campaign in Kosovo* (2001) 26-7.

Albanians.<sup>29</sup> Finally, on June 10 Milosevic succumbed to international pressure and signed the agreement previously turned down by him in February.<sup>30</sup> The agreement was incorporated into SC resolution 1244 that brought a formal end to the conflict. The resolution also established the United Nations Mission in Kosovo (UNMIK) and turned Kosovo into a UN protectorate while avoiding determination on the final status of Kosovo.

## 2.2 THE MASS ATROCITIES

The atrocities committed throughout Croatia and BiH are detailed in the respective DOMAC country reports. Because the wars were essentially fought between the different ethnic communities, the demographic make-up of territories played a decisive role in that it constituted the driving force for the policy of 'ethnic cleansing' practices which characterized the wars. In both countries the crimes followed a similar pattern: the spread of terror amongst an ethnic community via acts of murder, imprisonment and torture, rape, destruction of property and other forms of persecution, in order to induce the community members to relocate. In many instances expulsion was facilitated by force.

The scale of the atrocities could partly be explained by the number of armed groups involved in the conflict. Crimes were committed not only by regular forces, such as the VRS, HVO and the ABH (in Bosnia), but also by additional security and police forces and numerous militias. From the inception of the war in Croatia, foreign armies intervened in the internal turmoil: in Croatia JNA forces assisted the SAO Army. In BiH, the VH assisted the VHO and the VJ assisted the VRS. To some extent all the abovementioned forces were complicit, in one form or another, in the policies of ethnic cleansing.

In total, the war in Croatia claimed the lives of approximately 22,000 people (15,000 Croats and 7,000 Serbs).<sup>31</sup> The war in BiH caused the deaths of approximately

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<sup>29</sup> UNHCR, 'The Kosovo Refugee Crisis: An Independent Evaluation Of UNHCR's Emergency Preparedness and Response' (2000) available at <http://www.unhcr.org/cgi-bin/texis/vtx/search?page=search&docid=3ba0bbeb4&query=kosovo>.

<sup>30</sup> See generally S. T. Hosmer, *The Conflict over Kosovo: Why Milosevic Decided to Settle When He Did* (2001).

<sup>31</sup> M. Bjelajac and O. Zunec, 'The War in Croatia, 1991-1995', in *Confronting the Yugoslav Controversies: A Scholars' Initiative* (2009).

100,000.<sup>32</sup> Between 20,000 and 40,000 women were raped or otherwise sexually assaulted in BiH alone; and over 2 million people displaced. The ethnic composition of entire regions has been affected. The share of non-Serbs in the Republika Srpska, had fallen by 81.74 per cent while at the same time it increased by 41.18 per cent in the Federation of BiH.<sup>33</sup> In Croatia the proportion of the Serb population in the country dropped from 12% in 1991 to 4.5% in 2001.<sup>34</sup>

Familiar patterns of abuse re-emerged in Kosovo. Serb police and military forces intentionally attacked civilians in their attempt to crush popular support for the KLA. They destroyed towns, expelled thousands of Albanians, looted houses and committed summary executions. The KLA, on its part, resorted to similar methods, expelling, abducting and executing Serb civilians.

Some of the worst cases of human rights violations occurred in 1999. Serb forces systematically and efficiently expelled 860,000 Albanians<sup>35</sup> and internally displaced several hundred of thousands more. Rapes and looting were commonplace as well as executions of Albanian men which had been previously separated from the women and children. The murdered victims were disposed of in various ways so as to cover up the crimes.<sup>36</sup> The KLA's abuses were more limited in scope but not in cruelty. In total, over 10,000 Kosovar Albanians are known or are presumed to have been killed. Over 2,000 are still missing. More than 2,000 Serbs, Roma and members of other minority groups are either dead or missing.<sup>37</sup> Over 40 percent of all residential houses were either damaged or destroyed. Half of Kosovo's water wells were contaminated by human or

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<sup>32</sup> According to an independent study published in 2008 by the Research and Documentation Centre in Sarajevo (RDC) the number of war-related casualties is subject to much debate and past estimates reached 329,000. See a review of different studies in E. Tabeau & J. Bijak, 'War-related Deaths in the 1992–1995 Armed Conflicts in Bosnia and Herzegovina: A Critique of Previous Estimates and Recent Results' 21 Eur. J. Population (2005) 187. The RDC study is considered well-established as it contains specific information on every person included in the analysis. It has however been considered as "minimum standard". See P. Ball et al., 'The Bosnian Book of Dead: Assessment of the Database' (2007) available at [http://www.hicn.org/research\\_design/rdn5.pdf](http://www.hicn.org/research_design/rdn5.pdf); Z. Obermeyer et al., 'Fifty years of violent war deaths from Vietnam to Bosnia: analysis of data from the world health Survey programme' 336 Brit. Med. J. (2008) available at <http://www.bmj.com/content/336/7659/1482.full.pdf>. The Obermeyer study's estimate is 167,000.

<sup>33</sup> The information was provided by the ICTY Prosecutor in the case of Plavsic, *Prosecutor v. Plavsic*, Case No. IT-00-39&40/1-S (Sentencing Judgment) (27 February 2003) para. 36, available at <http://www.icty.org/x/cases/plavsic/tjug/en/pla-tj030227e.pdf>.

<sup>34</sup> Information based on the 2001 Census, available at [http://www.dzs.hr/Eng/censuses/Census2001/Popis/E01\\_03\\_03/E01\\_03\\_03\\_RH.html](http://www.dzs.hr/Eng/censuses/Census2001/Popis/E01_03_03/E01_03_03_RH.html).

<sup>35</sup> UNHCR, *The Kosovo Refugee Crisis*, *supra* note 29, pp. 6, 117.

<sup>36</sup> HRW, 'Under Orders: War Crimes in Kosovo' (2001), available at <http://www.hrw.org/en/reports/2001/10/26/under-orders-war-crimes-kosovo>.

<sup>37</sup> More accurate information is currently unavailable. The Humanitarian Law Center, A Belgrade-based NGO, is currently compiling exact lists of dead and missing victims. See <http://www.hlc-rdc.org/Dokumentovanje/LJUDSKI-GUBICI-1991-1995-1998-2000/Kosovska-knjiga-pamcenja/index.1.en.html>.

animal remains, garbage and chemicals.<sup>38</sup> Finally, NATO's bombing campaign upped the tally of civilian victims by at least 500.

## 3. POST CONFLICT COUNTRY BACKGROUND

### 3.1 POLITICAL CONDITIONS

The political opinion in Serbia in the aftermath of the wars was outright hostile to the notion of war crimes prosecution. 1990s Serbia was ruled by Milosevic, which was elected as Serbia's president in 1990 and again in 1992, and later as FRY president in 1997 (elections in which he ran unopposed).<sup>39</sup> Milosevic's rule monopolized and mobilized the Serbian media, which was essentially used to discredit political opposition and to the advancement of the government's agenda.<sup>40</sup> Contents of programs and articles were often dictated to spread propaganda, enhance nationalism and ethnic intolerance<sup>41</sup> and create the perception of Serbia as the victim of biased international scrutiny.<sup>42</sup> For the vast majority of the population these contents were the only ones they were exposed to.<sup>43</sup> Following the wars in Croatia and BiH, the opposition was unable to escape the adoption of a similar nationalist agenda for fear of being branded unpatriotic. It had neither the resources nor the inclination to present a unified front and provide a competing political platform to that of the SSP and Milosevic.<sup>44</sup> The net result was the misinformation of Serbs about Serbia's real involvement in the wars. Serbs were also

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<sup>38</sup> For post-war damage assessment see the EU sponsored study by International Management Group (IMG) at <http://www.img-int.org/Central/Public08/Documents.aspx>.

<sup>39</sup> I. Jeffries, *The Former Yugoslavia at the Turn of the Century* (2002) 80-82. His party, the SSP, held a majority in both the Serbian parliament (in 1993 parliamentary elections took place following the dissolving of parliament by Milosevic who wanted to avoid a vote of no confidence. The SSP won 123 out of 250 seats) and the federal parliament (in 1996 Milosevic's SSP, together with two other coalition parties, won 64 out of 108 seats allocated to Serbia in the federal parliament in 1996).

<sup>40</sup> F. David, 'The Media in Dark Times: A View of the Media in Serbia' 5 *Helsinki Monitor* (1994) 41. Most independent media outlets were the subject of harassment, nationalization or closure. The largest television stations (especially the public *Belgrade TV*) and newspapers (*Politika* in particular) were monopolized by the government and purged from non-Serbs and independent journalists and editors. L. Sell, *Slobodan Milosevic and the Destruction of Yugoslavia* (2002) 183-185. Opposition parties only had access to alternative television and radio broadcasting as well as to newspapers with narrower, locally based, circulation. L. J. Bacevic, 'Access to the Media and the Multiparty System in Serbia' 57 *Int'l Communication Gazette* (1996) 167.

<sup>41</sup> A. Bozic-Roberson, 'Words before the War: Milosevic's Use of Mass Media and Rhetoric to Provoke Ethnopolitical Conflict in Former Yugoslavia' 38 *East. Eur. Q.* (2004) 395.

<sup>42</sup> M. Milosevic, 'The Media Wars: 1987-1997' in J. Udovicki and J. Ridgeway (eds.), *Burn this House: the Making and Unmaking of Yugoslavia* (2000) 109.

<sup>43</sup> *Ibid.*

<sup>44</sup> E. D. Gordy, *The Culture of Power in Serbia* (1999) 21-60; G. O. Hall, 'The Politics of Autocracy: Serbia under Slobodan Milosevic' 33 *East Eur. Q.* (1999) 233, 242.

unfamiliar with, or suspicious of, other, alternative, narratives beyond the nationalist one advanced by the regime.

Additional factors effectively prevented the possibility of war crimes prosecutions. Corruption permeated every aspect of life in Serbia: the executive, the judiciary, public administration, health-care and education systems etc.<sup>45</sup> In the 2000 Corruption Index published by “Transparency International” the FRY’s Serbia was one of the lowest scoring countries out of more than 90 countries surveyed.<sup>46</sup> This lawless environment provided criminal elements, closely tied to the government and public administration, with the opportunity to flourish.<sup>47</sup> In fact, as late as 2001 the Serbian interior minister admitted that organized crime syndicates in Serbia possessed more money and arms than the government.<sup>48</sup> By 1996 Serbia was in an economic upheaval. Inflation, wars and internationally imposed sanctions,<sup>49</sup> all devastated the economy: investments in infrastructure stopped, unemployment rates crossed the 25% mark and black market economy generated the equivalent of 40.8% of registered social product in 1995 and 34.5% in 1997.<sup>50</sup>

In September 2000 Milosevic was defeated in the federal presidential elections by Vojislav Kostunica, himself a conservative nationalist, hostile to the ICTY and international intervention.<sup>51</sup> In December of that year the SSP lost the Serbian parliamentary elections to an 18-party coalition, the “Democratic Opposition of Serbia” (DOS), which formed the new government headed by Zoran Djindjic. The transition period proved to be long and unstable: the new administration was still vulnerable to the military and the secret police as well as organized crime syndicates that formed part of those hierarchies<sup>52</sup> - the very same institutions implicated in crimes committed in the

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<sup>45</sup> Center for Liberal-Democratic Studies, 'Corruption in Serbia' (2001) available at [http://www.clds.rs/newsite/eng\\_publikacije\\_studije.html](http://www.clds.rs/newsite/eng_publikacije_studije.html).

<sup>46</sup> It was ranked no. 89<sup>th</sup> out of 90. The 2000 index is available at [http://www.transparency.org/policy\\_research/surveys\\_indices/cpi/previous\\_cpi/2000](http://www.transparency.org/policy_research/surveys_indices/cpi/previous_cpi/2000).

<sup>47</sup> R. F. Miller, 'The Difficult Fight against Corruption in Transitional Systems: the Case of Serbia', in *Transcultural Stud. Series in Interdisciplinary Research Vol. II-III (2006-2007)* 245.

<sup>48</sup> BBC News, 'Serbian Gangs Richer than Government' (20 June 2001) available at <http://news.bbc.co.uk/2/hi/europe/13981974.stm>.

<sup>49</sup> *Supra* note 14.

<sup>50</sup> M. Palairat, 'The Economic Consequences of Slobodan Milosevic' 53 *Euro-Asia Stud.* (2001) 903, 904.

<sup>51</sup> L. J. Cohen, 'Post Milosevic Serbia' 100 *Current Hist.* (2001) 99.

<sup>52</sup> R. B. Baker, 'Towards A New Transitional Justice Model: Assessing the Serbian Case' 11 *San Diego Int'l L. J.* (2009) 171, 194-199.

Yugoslav wars and Kosovo.<sup>53</sup> Indeed, Djindjic was assassinated on 12 March 2003 as a direct result of his efforts to bring about the prosecution of crime syndicate members not only on organized crime charges but also on war crimes charges.<sup>54</sup> A state of emergency was declared the very same day of the assassination and the passage of legislation of dubious constitutionality brought with it renewed political instability.<sup>55</sup>

The following years have continued to be politically volatile. The FRY was transformed into the Serbia and Montenegro confederate in 2003 only to be dissolved in June 2006. Kostunica was elected prime minister of Serbia in December 2003 and between 2004 and 2008 Serbia's political system oscillated between him and Boris Tadic, Serbia's president since July 2004. The conservative Kostunica represented an attachment to Milosevic's institutions and nationalistic dislike of criticism.<sup>56</sup> Tadic, on the other hand, has been following a more liberal line and has been more susceptible to Western influence, especially as a result of his pro-EU integration stance.<sup>57</sup> In the midst of such tension, two issues have come to dominate the Serbian agenda: EU accession and Kosovo's final status. The first has been a motivating factor for the advancement of war crimes prosecutions whereas the latter – an inhibiting factor. The issue of Kosovo, a soft spot in the Serbian national psyche, finally led to the downfall of Kostunica, who dissolved the fragile coalition he headed in 2008 following his disagreement with Tadic over Kosovo's unilateral declaration of independence.<sup>58</sup>

Currently, Serbia's government is pro-European, composed of Tadic's Democratic Party (DS) and the SSP, Milosevic's old party. The coalition was formed following the 2008 elections which resulted in only a slim majority for the DS,<sup>59</sup> with the ultra-nationalist Radical Party coming in a close second. Serbia officially applied for EU membership in December 2009.<sup>60</sup>

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<sup>53</sup> The support of the army and police of the new government certainly contributed to the peaceful political transformation. Pavlakovic, 'Serbia Transformed? Politic Dynamics in the Milosevic Era and After' in Ramet and Pavlakovic, *supra* note 8, 13, 29-30.

<sup>54</sup> S. Antonic, 'Serbia after Djindjic', 12 E. Eur. Const. Rev. (2003) 113, 115.

<sup>55</sup> Which suspended basic human rights and weakened the independence of the judiciary. See *infra* section 3.3.

<sup>56</sup> J. Natalja Clark, Vojislav, 'Kostunica – Some Reflections on his Time as Serbian Premier' 10 J. Southern Eur. & Balkans (2008) 31.

<sup>57</sup> D. Bilefsky, 'Rift Over Closer Ties to Europe Ignites Serbian Political Crisis' NY Times (6 February 2008) 4.

<sup>58</sup> D. Bilefsky, 'Serbia, Split Over Kosovo, Moves toward Early Elections' NY Times (9 March 2008) 12.

<sup>59</sup> D. Bilefsky, 'Serb coalition settles on prime minister', NY Times (26 May 2008).

<sup>60</sup> The Delegation of the EU to the Republic of Serbia, 'Milestones in EU – Serbia Relations', available at [http://www.europa.rs/en/srbijalEu/politicki\\_ekonomski\\_odnosi/proces\\_stabilizacije\\_pridruzivanja.html](http://www.europa.rs/en/srbijalEu/politicki_ekonomski_odnosi/proces_stabilizacije_pridruzivanja.html).

## 3.2. GENERAL DESCRIPTION OF THE LEGAL SYSTEM

### The Federation/Republic Court System

In the post-conflict period and up to 2003, Serbia was one of two constituent republics making up the FRY (the other republic being Montenegro).<sup>61</sup> Criminal jurisdiction was divided between the federal and republican court systems. The Federal Court acted as a court of the highest instance in matters relating to federal statutes, serving as an appellate court regarding rulings by courts of the republics in cases involving federal issues.<sup>62</sup> The federal system also encompassed military tribunals, applying federal legislation.<sup>63</sup> Military courts were divided into first instance courts<sup>64</sup> and the Supreme Military Court.<sup>65</sup> The jurisdiction of military courts extended not only to military personnel but also to civilians<sup>66</sup> with respect to certain offences relating to acts against the Yugoslav armed forces.<sup>67</sup>

The Serbian court system operated in parallel to the federal system. Criminal cases were handled by courts of general jurisdiction which encompassed municipal courts, district courts and the Serbian Supreme Court.<sup>68</sup> War crimes prosecution fell under the jurisdiction of the Serbian district court. Courts of first instance sat in panels consisting of two judges and three lay judges for criminal offenses punishable by fifteen years imprisonment or more severe punishment.<sup>69</sup> Appeal chambers were composed of a panel of five professionals.<sup>70</sup> A verdict was based on a majority vote.<sup>71</sup>

### Applicable Criminal Codes

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<sup>61</sup> Article 2 of the FRY Constitution (27 April 1992), available at <http://www.cecl.gr/RigasNetwork/databank/Constitutions/Yugoslavia.html>.

<sup>62</sup> Article 108(1) of the FRY Constitution.

<sup>63</sup> *Ibid.* Article 138.

<sup>64</sup> According to art. 8 of the Law on Military Courts there were three such courts in Belgrade, Nis and Podgorica. During the war, these courts suspended their work, while 24 new first instance courts were established in specific military units. *Prosecutor v. Milutinovic*, Case No. IT-05-87-T, Judgment of 26 February 2009 (Trial Chamber).

<sup>65</sup> *Ibid.* Arts. 7 and 19 of the Law on Military Courts. During the war two more chambers were established in Nis and Podgorica.

<sup>66</sup> Art. 10 of the Law on Military Courts.

<sup>67</sup> SFRY CC, Chapter XX (arts. 201-236). The code is available at [http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode\\_fry.htm#chap\\_16](http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm#chap_16).

<sup>68</sup> By 2000, there existed 138 municipal courts and 30 district courts. World Bank, "FRY: Legal and Judicial Diagnostic" (April 2002) 35, available at <http://siteresources.worldbank.org/INTLAWJUSTINST/Resources/FRYDiagnosticFinal.pdf>.

<sup>69</sup> FRY CPC, Art. 23(1).

<sup>70</sup> *Ibid.* Art. 23(2).

<sup>71</sup> *Ibid.* Art. 116.

The relevant legislation applicable to war crimes prosecutions arising from the wars in the 1990s were the 1992 Basic Criminal Code of the Republic of Serbia (1992 Serbian CC), which substituted the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (1976 SFRY CC), incorporating the latter's provisions in their entirety. The provisions of the 1992 Serbian CC most relevant for war crimes prosecutions were: Article 141 (Genocide), Article 142 (War crimes against the civilian population), Article 143 (War crime against the wounded and sick), Article 144 (War crimes against prisoners of war), Article 145 (Organizing a group and instigating the commission of genocide and war crimes), Article 146 (Unlawful killing or wounding of the enemy), Article 147 (Marauding), Article 148 (Making use of forbidden means of warfare), Article 149 (Violating the protection granted to bearers of flags of truce), Article 150 (Cruel treatment of the wounded, sick and prisoners of war), Article 151 (Destruction of cultural and historical monuments), Article 153 (Misuse of international emblems) and Article 152 (Instigating an aggressive war). These provisions fell under Chapter XVI of the code, which was entitled 'Criminal Acts against Humanity and International Law', even though there was no specific provision proscribing crimes against humanity. Command responsibility was also missing from the 1992 Serbian CC. This is significant as pursuant to the principle of legality, future war crimes prosecutions could not be based on that doctrine.<sup>72</sup>

Pursuant to Article 16 of the SFRY Constitution which stated that international treaties ratified by the Federation formed part of the federal legal matrix, the following international conventions were also applicable in the prosecution of crimes committed during the 1991-1995 war: the Four Geneva Conventions of 1949 and their 1977 Additional Protocols; the 1948 Convention on the Prevention and Punishment of the Crime of Genocide; and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.

### **Applicable Criminal Procedure Laws**

During the nineties the applicable criminal procedure law in Serbia was the FRY Criminal Procedure Code from 1977 (FRY CPC).<sup>73</sup> The main contours of criminal investigation

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<sup>72</sup> See discussion on the issue of command responsibility in the post WCP policy accompanying notes 381-384 below.

<sup>73</sup> SFRY Law on Criminal Procedure, 1977, available at [http://www.podaci.net/\\_z1/8122806/Z-kpostu02v7704-0113.html](http://www.podaci.net/_z1/8122806/Z-kpostu02v7704-0113.html) (Serbian).

and prosecution under the FRY CPC are as follows: Criminal proceedings began with a ‘preliminary’ investigation by the police; statements collected by the police were not admissible, however, in court proceedings.<sup>74</sup> The file compiled by the police was then transferred to the public prosecutor,<sup>75</sup> who would then initiate the second stage, the “judicial” investigation, by filing a request with the investigating judge.<sup>76</sup> The judicial investigation was designed as an impartial process wherein all relevant evidence, incriminating or exculpatory, should be gathered. Both the prosecution and the defense were involved and could make specific requests for investigation.<sup>77</sup> Upon completion of the investigation the investigating judge returned the file to the prosecutor,<sup>78</sup> who was the competent organ to file an indictment.<sup>79</sup> The prosecutor was allowed to amend or withdraw the indictment at any time during the trial.<sup>80</sup> The injured parties were entitled to take part in both the investigative and trial stage, including “the right to propose evidence, question the accused, witnesses and expert witnesses, to present comments and explanations in terms of their reports and to make other statements and put the other proposals”.<sup>81</sup>

The CPC was amended in 1999 by a decree on the application of the law on criminal procedure during the state of war (promulgated in connection with the war in Kosovo).<sup>82</sup> The most notable amendment, which applied to both civil and military courts, was the empowerment of prosecutors to conduct investigations without attaining the permission of the investigating judge to issue charges.

The FRY CPC guaranteed important rights of defendants in criminal proceedings: the defendant’s presumption of innocence;<sup>83</sup> the right to counsel;<sup>84</sup> the right to be informed about the time and place of the performance of investigative actions;<sup>85</sup> the right

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<sup>74</sup> See especially *Ibid.* Arts. 151-164.

<sup>75</sup> *Ibid.* Art. 151(6).

<sup>76</sup> *Ibid.* Art. 158.

<sup>77</sup> *Ibid.* Arts. 156-181.

<sup>78</sup> *Ibid.* Art. 174.

<sup>79</sup> *Ibid.* Art. 45.

<sup>80</sup> *Ibid.* Arts. 51 and 337.

<sup>81</sup> *Ibid.* Art. 59(2).

<sup>82</sup> Published in the Official Gazette on 4 April 1999.

<sup>83</sup> *Ibid.* Art. 3.

<sup>84</sup> *Ibid.* Art. 67. Part VI regulated the issue of counsel (art. 67-75). Notably, violation of this right may render ensuing evidence inadmissible. Art. 218 (10).

<sup>85</sup> *Ibid.* Art. 168(5).

to be notified about the criminal offence of which he or she is accused, interrogated, or suspected.<sup>86</sup> Trials in absentia were prohibited<sup>87</sup> except in exceptional cases.<sup>88</sup> The CPC also regulated the possibility to copy documents in the possession of the prosecutor, with the prosecutor's consent,<sup>89</sup> although it did not expressly guarantee the right to have access to all of the evidence. The use of "violence, threats or other similar means in order to obtain statements or admissions from the defendant"<sup>90</sup> was prohibited and a statement extracted contrary to this provision was not to serve as a basis for judgment.<sup>91</sup>

A judgment could only be based on evidence presented during the trial,<sup>92</sup> except in cases where the court believed that statements made by the accused outside the investigative procedure or without the presence of counsel were vital to the clarification of important facts. Remarkably, this option was only relevant with respect to offences carrying capital punishment or twenty-year imprisonment instead of lesser offences.<sup>93</sup> But in any case, a judgment had to be based on evidence other than the defendant's statement.<sup>94</sup>

### 3.3 CAPACITY OF THE LEGAL SYSTEM TO PROSECUTE MASS ATROCITY CASES

The Serbian judicial system, as part of the federal legal system, was operating under heavy constraints emanating from the authoritarian and corrupt political context and, to a large extent, mirrored it. As will be described in section 4 *infra*, it was unrealistic to expect from this system to be able to produce fair, balanced and professional war crimes proceedings during the war and its immediate aftermath.

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<sup>86</sup> Ibid. Art. 4(1), Art. 218(2) and Art. 156(3) respectively.

<sup>87</sup> Art. 29(2) of the FRY Constitution; Art. 24(2).

<sup>88</sup> Art. 300 FRY CPC.

<sup>89</sup> Ibid. Art. 131(2).

<sup>90</sup> Ibid. Art. 218(8).

<sup>91</sup> Ibid. Art. 218(10).

<sup>92</sup> Ibid. Art. 347(1).

<sup>93</sup> Ibid. Art. 84.

<sup>94</sup> Ibid. Arts. 223 and 323.

To begin with, investigation of war crimes could not be entrusted to the police. Many in the police were implicated in the commission of war crimes, especially those committed in Kosovo, and therefore had no incentive to investigate such cases.<sup>95</sup> Furthermore, a main function of the Serbian police force during the nineties was to secure the political regime, rendering it highly politicized with many elements therein involved in corruption.<sup>96</sup> Even if a genuine will to prosecute war crimes existed, this was beyond the capacity of the police force. Crucial elements needed for the proper investigation of war crimes, such as the interviewing of victims and witnesses as well as the examination of crime scenes, were out of reach of Serbian investigators: regarding crimes which took place in Croatia and BiH, there was no legal framework put into place for cooperation between Croatia and Serbia until 1998,<sup>97</sup> and between BiH and Serbia until 2005.<sup>98</sup> As for crimes committed in Kosovo, the region has been under the administration of UNMIK since June 1999,<sup>99</sup> and Serbia had lost all authority to operate independently therein.

On top of the problematic situation of the police - the institution designed to investigate crimes - the Serbian judiciary, tasked with adjudicating crimes, was also ill suited to handle war crime cases. The character of the Serbian legal system during the nineties was described by the president of the Supreme Court, elected in 2000, in the following terms:

“for decades in this country the principle of utilitarianism dominated, instead of the principle of legality... [t]hat led to the worst possible consequence for the legal system of any country - the legal system collapsed, fell apart, and life went on in spite of it and outside of it... The masters of manipulation brought fear into the courtroom, ordering up not only trials but sentences... Few judges in the legal system managed to remain upright and to oppose such methods ...”<sup>100</sup>

<sup>95</sup> HRW, 'Justice at Risk: War Crimes Trials in Croatia, BiH and Serbia and Montenegro' (October 2004) 15, available at <http://www.hrw.org/reports/2004/icty1004/>.

<sup>96</sup> OSCE, 'Study on Policing in the FRY' (2001) available at [http://www.osce.org/documents/spmu/2001/07/17633\\_en.pdf](http://www.osce.org/documents/spmu/2001/07/17633_en.pdf).

<sup>97</sup> Agreement between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Aid in Civil and Criminal Matters (15 September 1998) (SFY Official Gazette – International Gazette 1/1998).

<sup>98</sup> Agreement between Serbia and Montenegro, and Bosnia and Herzegovina on Legal Aid in Civil and Criminal Matters (24 February 2005) (SM Official Gazette – International treaties 6/2005). As with the treaty with Croatia, *Ibid.*, the treaty does not provide for extradition. See Comment of the Serbian Justice Ministry available at <http://www.mpravde.gov.rs/en/articles/international-activities-eu-integration-and-projects/mutual-legal-assistance/bilateral-agreements.html>.

<sup>99</sup> SC res. 1244 (10 June 1999).

<sup>100</sup> Justice Karamarkovic in an address to the society of judges of Serbia translated and reproduced in E. D. Gordy, 'Postwar Guilt and Responsibility in Serbia: the Effort to Confront It and the Effort to Avoid it' *in* Ramet and Pavlakovic, *supra* note 8, 166, 171.

The main weaknesses of the Serbian and Federal legal systems stemmed from the calculated erosion of the status of judges by the government. The ever increasing intervention in legal proceedings by the government went hand in hand with undermining the authority and security of judges. Thus, judges' salaries were one of the lowest in Serbia's public sector, thereby making them susceptible to bribes.<sup>101</sup> Judges belonging to the Judges Association were persecuted and dismissed<sup>102</sup> as were judges who did not allow the authorities to dictate their decisions.<sup>103</sup> Public opinion polls throughout the late nineties expressing people's distrust of the judiciary reflected this reality.<sup>104</sup>

The professional legal standards held by judges deteriorated during the nineties. In only four years, between 1994 and 1998, approximately one third of judges in the FRY left their positions<sup>105</sup> to be replaced by government appointees chosen on the basis of their political loyalties, rather than their legal qualifications.<sup>106</sup> Notably, cases carrying special significance to Serbia's elite were allocated to certain 'suitable' judges in order to ensure a desired outcome.<sup>107</sup> Presidents of the supreme courts were authorized to assign specific cases to specific judges. The criteria employed to assign judges to cases were not regulated by law, nor were they transparent or under any kind of review.<sup>108</sup>

A 2001 assessment report conducted by UNDP described the extensive neglect in which the judicial system found itself: the judiciary was not only lacking experienced personnel but was also in want of access to legal materials, IT and communication equipment and reasonable physical working conditions, such as adequate chambers and

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<sup>101</sup> Transparency International Serbia, 'National Integrity System' (Belgrade, 2001) 53.

<sup>102</sup> Helsinki Committee for Human Rights in Serbia, 'Annual Report 2000' available at [http://helsinki.org.rs/reports\\_t10a02.html](http://helsinki.org.rs/reports_t10a02.html). These included a judge of the Serbian Constitutional Court, a judge of the Serbian Supreme Court and a Belgrade municipal court judge. Belgrade Center for Human Rights, "Human Rights in Yugoslavia 1999" (Belgrade, 2000) 210, available at <http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20yugoslavia%201999.pdf>.

<sup>103</sup> Ibid. Also see Institute for War and Peace Reporting, 'Milosevic Tightens Hold on Judiciary' (September 2000) available at <http://www.iwpr.net/ru/node/7590>.

<sup>104</sup> For relevant public opinion surveys conducted in Serbia see Corruption in Serbia, *supra* note 45, at 88-89.

<sup>105</sup> Belgrade Center for Human Rights, 'Human Rights in Yugoslavia 1998' (Belgrade, 1999) 236-237, available at <http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20yugoslavia%201998.pdf>. A notable case is of judge Obradovic, a municipal court judge, who resigned in 1999 stating as his reason the moral collapse of the courts in the country which caused criminal courts to lose their legitimacy. Quoted in "Human Rights in Yugoslavia 1999", *supra* note 102, 258.

<sup>106</sup> 'Report of Association of Judges of Serbia', Annex 2 of OSCE ODIHR, "The Situation of the Judiciary in Serbia After Milosevic" (17 October 2000) available at [http://www.osce.org/documents/odihr/2000/10/1804\\_en.pdf](http://www.osce.org/documents/odihr/2000/10/1804_en.pdf); IWPR, *Ibid.* "The official gazette of the Republic of Serbia, which publishes lists of selected candidates, revealed that most 'new' judges used to work on farms, community centers or in the special forces units of the Yugoslav Army".

<sup>107</sup> Report of Association of Judges of Serbia, *Ibid.*

<sup>108</sup> Human Rights in Yugoslavia 1998, *supra* note 105, 238.

courthouses.<sup>109</sup> Similar observations were made by the World Bank which attributed many of the failings of the judiciary to the lack of effective administrative, financial and technical support.<sup>110</sup>

With the police and judiciary completely subjugated to, and curtailed by, the government and with professional ethics lacking, prosecution of those responsible for crimes was unrealistic. This was the state of things not just during the Milosevic regime years but, as described in the following section, also after October 2000, as long as those who were connected to that regime, in political, military and judicial circles, remained in power.

## 4. THE NATIONAL RESPONSE TO THE MASS ATROCITIES

This section concentrates on the first period of the legal response of Serbia to the mass atrocities committed between 1991 and 1999 – the legal response that took place during the years of Milosevic' rule. This first period is significant since it created the context for the establishment of the ICTY and informed much of its design and attitude towards domestic prosecutions in the Balkans. The manner in which war crimes have been handled domestically by Serbia after October 2000 is described and analyzed in section 7 *infra*.

The first war crimes cases initiated by Serbia, as part of the FRY, concerned events which took place during Croatia's war of independence. At least twenty six investigation proceedings were launched in 1992, all against Croats and almost all in federal military courts.<sup>111</sup> At least three people were convicted of armed rebellion and war crimes against the civilian population and sentenced to death by the Belgrade military tribunal.<sup>112</sup> According to Amnesty International, Human Rights Watch (HRW) and the Helsinki Committee for Human Rights, the defendants were ill-treated and confessions

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<sup>109</sup> UNDP, 'Final Report – Expert Mission - An Assessment of Working Conditions of Judicial Staff in Serbian Courts' (October 2001) available at [http://handbook.undp.org.rs/annex/Step2/Working\\_Condits\\_of\\_Jud%20staff\\_2\\_.pdf](http://handbook.undp.org.rs/annex/Step2/Working_Condits_of_Jud%20staff_2_.pdf).

<sup>110</sup> Legal and Judicial Diagnostic Report, *supra* note 68.

<sup>111</sup> Report submitted by the FRY to the Commission of Experts Established pursuant SC Resolution 780 (1992), available at <http://www.ess.uwe.ac.uk/documents/repug1.htm>.

<sup>112</sup> Martin Sabljic, Zoran Sipos and Nikola Cibaric, cases IK 108/92 (14 July 1992) and IK 112/92 (26 June 1992).

were extracted from them by torture.<sup>113</sup> The sentences were never carried out as the three Croats, along with tens of other indictees, were repatriated to Croatia under an agreement concluded between the FRY and Croatia in July 1992.<sup>114</sup>

Only one other case relating to the Yugoslav war came before Serbia's courts during the Milosevic era. In 1994 Dusan and Vojin Vuckovic, members of the "Yellow Wasps" paramilitary group were indicted in the Sabac district court for crimes committed in the Bosnian municipality of Zvornik. Specifically, Dusan Vuckovic was prosecuted for the killing of sixteen Bosnian Muslims, the wounding of another twenty and for rape. Vojin Vuckovic, the commander of the "Yellow Wasps", was prosecuted for false impersonation and illegal possession of weapons and explosives. The circumstances enabling the proceedings against two Serbian nationals were unknown, yet the impression it gave was of a show trial, designed to demonstrate to the world Serbia's willingness and ability to try war criminals.<sup>115</sup> Vuckovic' lawyer expressed those sentiments: "the Serbian Government of President Slobodan Milosevic is using the case for a twin purpose: to distance itself from war crimes in Bosnia by showing that such crimes will be punished in Serbia, and to pre-empt international war crimes trials that could target the political leaders found to be responsible for what happened. Dangerous for 'Big Fish'."<sup>116</sup> Indeed, both the manner of the trial management as well as the final verdict appear to support this allegation. According to the Humanitarian Law Center (HLC), "the trial very quickly degenerated into a farce".<sup>117</sup> Observers from Human Rights Watch reported an inept prosecution and inappropriate sympathy to the defendants by the Judges and guards.<sup>118</sup> Furthermore, despite the fact that Dusan was found guilty of the charges against him, he was sentenced only to seven-year imprisonment where Vojin, who was found guilty of illegal possession of arms, received a suspended sentence of one year. Two years later, the Supreme Court of Serbia added three more

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<sup>113</sup> Amnesty International, 'UA 223/92' (EUR 48/019/92, 2 July 1992); HRW, 'War Crimes Trials in the Former Yugoslavia' (June 1 1995), available at <http://www.hrw.org/legacy/reports/1995/yugoslavia/>.

<sup>114</sup> Amnesty International, 'Further information on UA 223/92' (EUR 48/22/92, 7 September 1992) available at <http://www.amnesty.org/en/library/info/EUR48/022/1992/en>.

<sup>115</sup> V. Petrovic, 'Gaining the Trust through Facing the Past? – Prosecuting War Crimes Committed in the former Yugoslavia in National and International Legal Context' (Center for Advanced Study Sofia, 2008) 17.

<sup>116</sup> Quoted in R. Cohen, "Serbs Put a Serb on Trial for War Crimes", NY Times (June 12 1994).

<sup>117</sup> HLC, 'Transitional Justice Report - Serbia, Montenegro and Kosovo, 1999-2005' (Belgrade, 2006) 31, available at <http://www.hlc-rdc.org/uploads/editor/02%20-%20tranzicija%20-%20engleski.pdf>.

<sup>118</sup> War Crimes Trials in the Former Yugoslavia, *supra* note 113.

years of prison sentence to Dusan and sentenced Vojin to a four-month prison sentence.<sup>119</sup>

Another example attesting to Serbia's reluctance to be involved in war crimes prosecutions was the case of Milan Lukic. Between 1992 and 1993 several abductions of Bosnian Serbs occurred in Sandzak on the border of Serbia and Montenegro. Since these acts were committed in FRY territory a parliamentary committee was established to investigate them. The Committee, however, had no access to documentation nor did it interview any of the material witnesses.<sup>120</sup> In the meantime, the only suspect detained by Serbian authorities, Lukic, was released in 1993 after members of his militia, the "White Eagles" threatened to bomb a train station.<sup>121</sup> In 1994 he was apprehended again but was extradited to the RS, where he was released immediately.<sup>122</sup> No other war crimes proceedings, relating to the wars in Croatia and BiH, ensued in Serbia under the Milosevic regime.<sup>123</sup>

Serbia's response to the Kosovo's conflict was similar in nature, albeit more paranoid.<sup>124</sup> During the first phase of the war, prior to NATO's engagement in the conflict, an estimated two thousand Kosovar Albanians were arrested and approximately two-hundred were tried for terrorism and subversive activities.<sup>125</sup> Tens of such proceedings were monitored by the OSCE's Kosovo Verification Mission (KVM). In its 1999 report, the mission stated that trials against Albanians were usually not based on physical evidence but rather on confessions extracted by force; the defendants were deprived of many due

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<sup>119</sup> Transitional Justice Report, *supra* note 117, 31.

<sup>120</sup> J. Udovički and J. Ridgeway, *Burn this House: the Making and Unmaking of Yugoslavia* (2000) 295-296.

<sup>121</sup> 'Serbia and Montenegro', 18 Ann. Hum. Rts. Rep. Submitted to Congress by U.S. Dep't St. (1993) 1038, 1039.

<sup>122</sup> 'Serbia and Montenegro', 19 Ann. Hum. Rts. Rep. Submitted to Congress by U.S. Dep't St. (1994) 949, 950.

<sup>123</sup> One case was prosecuted in Montenegro. Nebojsa Ranisavljevic was arrested in 1996 and tried between 1998 and 2002 for abduction and murder in relations to the abductions involving Lukic, *supra* text accompanying notes **Error! Bookmark not defined.**-122. He was convicted by the court in Bijelo Pol of crimes against a civilian population for his role in the abduction and murder of nineteen Muslims and one Croat in 1993. Although Ranisavljevic was found guilty of shooting and wounding one of the prisoners, rather than of murder he was sentenced to fifteen-year incarceration. AI, 'War Crimes Verdict in Montenegro' (EUR 70/009/2002, 12 September 2002), available at <http://asiapacific.amnesty.org/library/Index/ENGEUR700092002?open&of=ENG-SRB>. Petrovic points out that the trial began at a time when the relationship between Milosevic and Montenegro were "beyond repair". Petrovic, *supra* note **Error! Bookmark not defined.**, 17.

<sup>124</sup> C. Gall, 'Seeing Enemies Everywhere, Serbia Begins a Legal Offensive' NY Times (29 November 1999).

<sup>125</sup> International Crisis Group, 'Kosovo Albanians in Serbian Prisons: Kosovo's Unfinished Business' (January 2000) 6, available at <http://www.crisisgroup.org/en/regions/europe/balkans/kosovo/085-kosovo-albanians-in-serbian-prisons-kosovos-unfinished-business.aspx>. The charges were made under article 125 (terrorism) and article 136 (Associating for the purpose of illegal activity) of the 1976 SFRY CC.

process rights; and judgments relied on inaccurate or vague interpretation of the law.<sup>126</sup> At the end of the NATO campaign, many Albanians were transferred from Kosovo, now under the authority of UNMIK, into Serbia and over six-hundred were put on trial.<sup>127</sup> A particularly notorious case was the “Djakovica Group” trial which ended in the conviction of one-hundred and forty-three Albanians from Kosovo of terrorism offences despite the presiding judge conceding “it was impossible to determine the individual guilt (of the defendants) and that “it was not necessary”.<sup>128</sup> Notably, Kosovar Albanians were not charged with war crimes. For example, in the case of Bekim and Luan Mazreku, the indictment of the two Albanian alleged they raped, tortured and killed Serb civilians – the two were charged with terrorism. Another notable complication was that because most evidence was located in Kosovo, and therefore unavailable for the district court in Nis, the case against the brothers was based almost entirely on the report based on after-the-fact recollection of the investigating judge (which was suspiciously more detailed than the report the same judge handed in at the end of the on-sight investigation) as well as their forced confessions.<sup>129</sup> Nevertheless they were convicted of the charges and sentenced to twenty years in prison.

The most bizarre trial took place in September 2000. Fourteen foreign leaders, including Bill Clinton, Tony Blair and Jacques Chirac, were convicted in *absentia* by the Belgrade district court of war crimes, war of aggression and the attempt to assassinate Milosevic.<sup>130</sup> Each received a twenty-year prison sentence.<sup>131</sup>

Serbia, it was quite clear, did not effectively investigate and prosecute crimes committed by its own forces. Indeed, according to observations made by KVM monitors who accompanied crime scene investigations into incidents of deaths of Albanians during the war, investigating judges did not adequately examine the crime scenes, especially in cases where it was known that the perpetrators were members of the

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<sup>126</sup> OSCE/ODIHR, 'Kosovo/Kosova as Seen, as Told – An Analysis of the Human Rights Findings of the OSCE Kosovo Verification Mission October 1998 – June 1999' (1999) Part III, Chapter 10, available at [http://www.osce.org/publications/odihr/1999/11/17755\\_506\\_en.pdf](http://www.osce.org/publications/odihr/1999/11/17755_506_en.pdf).

<sup>127</sup> Belgrade Center for Human Rights, 'Human Rights in Yugoslavia 2000' (Belgrade, 2001) 228, available at <http://english.bgcentar.org.rs/images/stories/Datoteka/human%20rights%20in%20yugoslavia%202000.pdf>.

<sup>128</sup> Humanitarian Law Center's press release cited in V. Peric Zimonjic, 'Serb court jails Albanians "held at random" ', *The Independent* (23 May 2000).

<sup>129</sup> HLC, 'Convicted without Evidence – Legal Analysis of the Mazreku Trial' (16 May 2001).

<sup>130</sup> V. Peric Zimonjic, 'Belgrade Begins Show Trial of NATO War Criminals', *The Independent* (19 September 2000).

<sup>131</sup> Chirac's court appointed counsel reportedly declared that if he was the judge he would not hesitate to shoot the “scum” for their evil doing. Cited in M. Starcevic & J. K. Kleffner, 'FRY', 3 *Yearbook of International Humanitarian Law* (2000) 490, 494.

Serbian police – and made do with the police version of either self-defense or Albanian terrorists' responsibility for incidents.<sup>132</sup>

The functioning of the military judicial system during the war in Kosovo was addressed by the ICTY in the Milutinovic case. The Court concluded that “The system was not...effective in investigating, prosecuting, and punishing those responsible for committing serious crimes against the civilian population.”<sup>133</sup> One of the reports exhibited to the Court, compiled by Serbia in 2003, stated that in the period from 1 June 1998 to 27 June 1999 criminal proceedings were instituted against 305 members of the VJ. The Court observed however, that out of the 20 investigations concerning serious offences, most were discontinued and the outcome of the rest of the investigations could not be verified.<sup>134</sup> Indeed, from the testimonies given in that case as well as in the Milosevic case,<sup>135</sup> it can be inferred that grave crimes were under-reported, that the situation during the war made it difficult to conduct investigations and prosecutions and that the military courts had little chance to follow through proceedings because they were disbanded after the war ended and most cases were transferred to civil courts where they were discontinued. The Court did, however, acknowledge that the failure of the military judicial system also stemmed from the obstruction of proceedings by members of the VJ who prevented the prosecution of individuals who committed crimes.<sup>136</sup>

Two cases concerning crimes committed against the Albanian civilian population in Kosovo did go to trial during 1999-2000, although none of them for war crimes charges. In July 2000 two Serbian policemen, Boban Petkovic and Djordje Simic were charged with the murder of three Albanians in Kosovo. The Pozarevac district court found them guilty and sentenced Petkovic to four years and nine months in prison and Simic to one year in prison.<sup>137</sup> In December 2000 Army Captain Dragisa Petrovic and two reservists, Nenad Stamenkovic and Tomica Jovic, were convicted by a military tribunal in Nis for the murder of two Albanian Civilians. Petrovic received a four-year and ten-month

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<sup>132</sup> KVM Report, *supra* note 126, Chapter 10, 6.

<sup>133</sup> *Prosecutor v. Milutinovic*, *supra* note 64, para 569.

<sup>134</sup> *Ibid.* para 544.

<sup>135</sup> Especially by Major-General Radomir Gojovic, the former Chief of the legal department of the VJ General Staff who compiled some of the reports presented to the Court.

<sup>136</sup> *Prosecutor v. Milutinovic*, *supra* note 64, para 569.

<sup>137</sup> Under Orders, *supra* note 36, 484. In a retrial ordered by the Serbian Supreme Court, in 2003 Petkovic was sentenced to five years and Simic was acquitted. ICTJ, 'Selected Developments in Transitional Justice' (2004) 5, available at <http://www.ictj.org/images/content/1/1/117.pdf>.

prison sentenced. Stamenkovic and Jovic received a four and a half-year sentence each.<sup>138</sup>

## 5. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES

### 5.1 THE ESTABLISHMENT OF THE ICTY

The International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY) was established by the UN Security Council (SC) in Resolution 808 of 22 February 1993. The Resolution referred to the interim report submitted to it only a few days prior by the Commission of Experts established pursuant to SC Resolution 780 which found evidence that grave breaches of the Geneva Conventions and other violations of humanitarian law were committed in the territory of the SFRY and recommended the establishment of a special international tribunal.<sup>139</sup>

According to Williams and Scharf, once the violations of humanitarian law were spelled out by the Commission, there began a momentum within the SC and outside it to demand international criminal prosecutions. The establishment of an international tribunal became all the more attractive in view of the above-described political situation in the Former Yugoslavia and shortcomings of the domestic response to the atrocities.<sup>140</sup>

The rhetoric accompanying the establishment of the ICTY by the SC alluded to the need for justice, deterrence, promotion of the international rule of law, reconciliation and maintenance of peace.<sup>141</sup> The implications of setting up an international criminal tribunal were not fully fathomed at the time of its establishment in 1993. This was due partly to other presumed motives dictating this move of the SC (such as the appeasement of public opinion and the need to adopt measures in lieu of military

<sup>138</sup> OSCE, 'War Crimes Before Domestic Courts' (Belgrade, October 2003) 9, available at [http://www.osce.org/documents/fry/2003/11/1156\\_en.pdf](http://www.osce.org/documents/fry/2003/11/1156_en.pdf).

<sup>139</sup> Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274 (26 January 1993).

<sup>140</sup> P R Williams and M P Scharf, *Peace with Justice* (2002) 96-98.

<sup>141</sup> See the comments made by SC Members upon the conclusion of Resolution 808 (22 February 1993) and Resolution 827 (25 May 1993) which effectively established the Tribunal. Reproduced in V. Morris and M. P. Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia Vol. II* (1995) especially Brazil, Venezuela, and France 161-2; 182; 163-4 respectively. Provisional Verbatim Record of the 3217<sup>th</sup> meeting, held at Headquarters, New York, On Tuesday, 25 May 1993: Security Council, 48<sup>th</sup> sess. (UN Doc. S/PV.3217).

intervention)<sup>142</sup> and partly because it is uncertain that the Tribunal was taken seriously by SC Members at that point in time.<sup>143</sup>

The Statute of the ICTY was adopted by the SC soon thereafter in resolution 827 of 25 May 1993. Article 1 of the Statute defined the competence of the Tribunal "to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991". The Tribunal's subject matter jurisdiction extended to war crimes (grave breaches of the Geneva Conventions of 1949<sup>144</sup> and violations of the laws and customs of war<sup>145</sup>), crimes against humanity<sup>146</sup> and genocide.<sup>147</sup>

### 5.3 PROSECUTIONS OF CRIMES CONCERNING SERBIA

Altogether, nine cases *strictly related* to Serbia and Serbian officials were adjudicated before the ICTY, involving twenty one people (out of which two cases involved seven defendants charged with crimes against ethnic Serbs). Only three final judgments have been handed down by the Tribunal thus far. Two cases are in the appeals stage and three others are still in the trial stage. Another three Serb nationals, not holding official positions in Serbia, were indicted by the Tribunal in connection with crimes committed in Srebrenica, Sarajevo, Dubrovnic and Karajina.

#### *Indictments of Serbs*

- The first Serb national indicted was Radovan Karadzic, former president of the RS and supreme commander of its forces. Indicted in 1995, he was arrested in Serbia and transferred to the Tribunal thirteen years later, in 2008.

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<sup>142</sup> Y. Beigbeder, *Judging War Criminals: The Politics of International Justice* (1999) 146; M. Reisman, 'Stopping Wars and Making Peace: Reflections on the Ideology and Practice of Conflict Termination in Contemporary World Politics' 6 *Tul. J. Int'l & Comp. L.* (1998) 5, 46-49; S. R. Ratner and J. S. Abrams, *Accountability for Human Rights Atrocities in International Law* (2<sup>nd</sup> ed. 2001) 191.

<sup>143</sup> D. P. Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' in R. S. Clark and M. Sann (eds.), *The Prosecution of International Crimes* (1996) 185, 187-198; Michael Scharf's remarks quoted in Schabas, *supra* note 157, 21.

<sup>144</sup> Article 2 of the ICTY Statute.

<sup>145</sup> *Id.* Article 3.

<sup>146</sup> *Id.* Article 5.

<sup>147</sup> *Id.* Article 4.

- Dorde Dukic, Assistant Commander for Logistics in the Main Staff of Bosnian Serb Army, was indicted in 1996 in connection with the siege of Sarajevo. He died the same year.
- Dragomir Milosevic (Corps Commander of the Sarajevo Romanija Corps), a Serb national, was initially indicted in 1998 for his role in the siege of Sarajevo. The full indictment was only made public in 2001. He surrendered to the Tribunal in 2004.
- The first indictments directly concerning Serbia were issued in 1999. Slobodan Milosevic was indicted in connection with crimes committed in Kosovo that year. The indictment was amended in 2001 to include crimes committed in Croatia and BiH as part of the Greater Serbia policy. Milosevic was transferred to The Hague in 2001. Proceedings were terminated upon his death in 2006.
- Milan Milutinovic (former president of Serbia), Nikola Sainovic (former FRY deputy prime minister), Dragojub Ojdanic ((former VJ chief of staff and FRY defense minister) and Vljako Stojiljovic (former minister of the interior) were all indicted in 1999 for their role in the campaign against Albanians in Kosovo in 1999. Milutinovic, Sainovic, and Ojdanic were arrested in 2001. Stojiljovic died in 2002 before being surrendered to the Tribunal.
- In 2000 the two Serbian JNA officers involved in the 1991 bombardment of Dubrovnik were indicted. Pavle Strugar (commander of the JNA Second Operational Group) and Miodrag Jokic (vice admiral in the Yugoslav navy) surrendered in 2001.
- In 2003, the leader of the Serbian Radical Party, Vojislav Seselj, was indicted for inciting crimes against non-Serb in both Croatia and BiH. He surrendered immediately. His case is in the trial stage.<sup>148</sup>
- The same year Nebojsa Pavkovic (former Commander of the Third Army of the VJ), Vladimir Lazarevic (former Chief of Staff of the Third Army of the VJ) and Sreten Lukic (former head of the staff for Kosovo in the Serbian ministry of the interior, assistant chief of the public security service and the

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<sup>148</sup> *Prosecutor v. Seselj*, Case No. IT-03-67.

chief of border administration of the border police in the ministry of the interior) were indicted in connection to crimes committed in Kosovo. They were all arrested in 2005. Vlastimir Djordjevic (former assistant minister of the interior) was also indicted the same year for the joint criminal enterprise to ethnically cleanse Kosovar Albanians in 1999.

- Jovica Stanisic (head of the Serbian security service) and Franko Simatovic (commander of the special operation unit of the security service), were indicted in 2003 for establishing and training units (including paramilitary groups) which committed war crimes in Croatia and BiH. They were arrested in Serbia in 2003 and transferred to the Tribunal. Their case is in the trial stage.<sup>149</sup>

#### *Indictments of non-Serbs*

- The first indictments of Kosovar Albanians were issued in 2003. The indictments alleged that Fatmir Limaj, Haradin Bala, Isak Musliu and Agim Murtezi were responsible for the murder and abuse of Serb and Albanian prisoners in the Llapushnik prison camp in Kosovo during 1998. The first three were arrested and transferred to The Hague in 2003. The indictment against Agim Murtezi was withdrawn.
- In 2005 additional indictments of Kosovar Albanians were issued against Ramush Haradinaj (a KLA Commander) - at the time the prime minister of Kosovo - Idriz Balaj (commander of the KLA "Black Eagles" unit) and Lahi Barhimaj (member of the KLA general staff) for crimes committed against Serbs, Albanians and Roma in the Dukagjin region of Kosovo in 1998. They were arrested in 2005.

#### *ICTY Judgments Concerning Atrocities Committed against Non-Serbs*

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<sup>149</sup> Prosecutor v. Stanisic and Simatovic, Case No. IT-03-69.

- The first ICTY judgment of a Serbian official was the sentencing judgment rendered in the case against Jokic in March 2004.<sup>150</sup> Jokic pleaded guilty to six counts of violations of the laws or customs of war for events related to the shelling of Dubrovnik on 6 December 1991. He was sentenced to seven years of imprisonment.
- In January 2005 the Tribunal found Strugar guilty of two counts of violations of the laws or customs of war (attacks on civilians and destruction or willful damage to institutions dedicated to religion, charity and education, the arts and sciences, historic monuments and works of art and science) resulting from his involvement in the attack on Dubrovnik. He received eight years imprisonment but was granted an early release effective February 2009.<sup>151</sup>
- In February 2009, the ICTY convicted Sainovic, Ojdanic, Pavkovic, Lazarevic and Lukic for their part in the ethnic cleansing of Kosovar Albanians during NATO's campaign.<sup>152</sup> Milutinovic was acquitted since as the Serbian president he had no control over the VJ which was a federal organ and he had little de facto control of the Serbian MUP. The trial chamber found that Sainovic, Lukic and Pavkovic participated in a joint criminal enterprise to forcibly deport Albanians from Kosovo and that the commission of murder and damage to mosques was foreseeable to them. They were convicted of four counts of crimes against humanity and one count of war crimes and sentenced each for twenty-two year imprisonment. The chamber found that Ojdanic and Lazarevic did not participate in the joint criminal enterprise but gave material support to the VJ and MUP forces in Kosovo nonetheless. They were convicted of two counts of crimes against humanity. Each was sentenced for fifteen year imprisonment. Both parties filed an appeal.

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<sup>150</sup> *Prosecutor v. Jokic*, Case No. IT-01-42/1, Sentencing Judgment of 18 March 2004 (Trial Chamber I).

<sup>151</sup> *Prosecutor v. Strugar*, Case no. IT-01-42, Judgment of 31 January 2005 (Trial Chamber II). Affirmed by the Appeals Chambers on 17 July 2008.

<sup>152</sup> *Prosecutor v. Sainovic*, Case no. IT-05-87, Judgment of 26 February 2009 (Trial Chamber II).

- In February 2011 Djordjevic was found guilty of not preventing the crimes in Kosovo and by concealing evidence. He was sentenced to 27 years in prison.<sup>153</sup>

#### *ICTY Judgments Concerning Atrocities Committed against Serbs*

- In November 2005, Trial Chamber II acquitted Limaj and Musliu of war crimes and crimes against humanity charges. The Chamber held that the extent of crimes committed by KLA members against non-Albanians between May and July 1998 did not reach the threshold required for the charge of crimes against humanity. Furthermore, it did not find evidence to support the claim that Limaj and Musliu possessed enough authority and control over the Llapushnik prison camps, where many Serb and Albanians civilian detainees were subject to torture and cruel treatment, nine of whom were later executed. Haradin Bala, a guard at the camp was found guilty of mistreating prisoners as well as participating in the execution of the nine prisoners. He was sentenced to thirteen-year imprisonment.<sup>154</sup> The judgment was upheld by the Appeals Chamber in 2007.<sup>155</sup>
- In April 2008 the Trial Chamber acquitted Haradinaj and Balaj of the charges of crimes against humanity and war crimes based on insufficient evidence. Barhimaj was found guilty of the mistreatment and torture of two Albanian civilians detained in the Jablanica compound and was sentenced to six-year imprisonment.<sup>156</sup> The Appeals Chamber instructed, in July 2010, that the three defendants be retried on some of the original charges.

## 6. COOPERATION BETWEEN THE ICTY AND SERBIAN DOMESTIC SYSTEM

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<sup>153</sup> Prosecutor v. Djordjevic, Case No. IT-05-87/1, Judgment of 23 February 2011 (T. Ch. II).

<sup>154</sup> Prosecutor v. Limaj et al., Case no. IT-03-66, Judgment of 30 November 2005 (Trial Chamber II).

<sup>155</sup> Prosecutor v. Limaj et al., Case no. IT-03-66, Judgment of 27 September 2007 (Appeals Chamber).

<sup>156</sup> Prosecutor v. Haradinaj et al., Case no. IT-03-84, Judgment of 3 April 2008 (Trial Chamber I).

## 6.1 INITIAL PERIOD

### Domestic Prosecutions in the Design of the ICTY

Attitudes towards domestic prosecutions of war crimes in the context of the ICTY are best assessed as part of the circumstances surrounding the creation of the Tribunal.<sup>157</sup> As pointed out by the Japanese representative to the SC in 1993, the haste with which the ICTY was established came at the expense of a well-thought methodology, *inter alia* concerning the 'measures to establish a bridge with domestic legal systems'.<sup>158</sup> Indeed, and this is the gist of the matter, 'the audience for the tribunal was primarily the international community'<sup>159</sup> designed to 'fulfill the *World's hope* for reaffirming accountability mechanisms as a way of signaling a commitment to the rule of law'.<sup>160</sup> In this setting, domestic prosecutions for war crimes did not figure high on the agenda of the ICTY drafters.

A most telling reflection of such attitude was the jurisdictional basis of the Tribunal. Article 9 of the ICTY Statute provides as follows:

1. The International Tribunal and national courts shall have *concurrent* jurisdiction to prosecute persons for serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991.
2. The International Tribunal shall have *primacy* over national courts. At any stage of the procedure, the International Tribunal may formally request national courts to defer to the competence of the International Tribunal in accordance with the present Statute and the Rules of Procedure and Evidence of the International Tribunal.

The Tribunal was thus endowed with primacy over national jurisdictions thereby signaling the preference of the Tribunal over domestic courts by the international community.<sup>161</sup>

Yet it was quite clear from the outset that the bulk of cases related to the mass atrocities in the former Yugoslavia would have to be handled eventually by national

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<sup>157</sup> For details on the events leading up to these resolutions see W. A. Schabas, *The UN International Criminal Tribunals* (2006) 13-24; M. P. Scharf, *Balkan Justice* (1997).

<sup>158</sup> Reproduced in Morris and Scharf, *supra* note 141, 194.

<sup>159</sup> V. Hussain, 'Sustaining Judicial Rescues: The Role of Outreach and Capacity-Building Efforts in War Crime Tribunals' 45 *Va. J. Int'l L.* (2004-2005) 547, 561.

<sup>160</sup> *Ibid.* 562.

<sup>161</sup> See generally B. S. Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' 23 *Yale J. Int'l L.* (1998) 383.

courts.<sup>162</sup> Therefore, despite the principle of primacy, the Tribunal's jurisdiction was 'concurrent' rather than exclusive.<sup>163</sup> Commenting on Article 9, the report of the Secretary-General stressed that

'64. In establishing an international tribunal for the prosecution of persons responsible for serious violations committed in the territory of the former Yugoslavia since 1991, it was *not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts* with respect to such acts. Indeed national courts should be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures'.<sup>164</sup>

Nevertheless, back in 1993, there was not much feasibility for adequate domestic prosecutions.<sup>165</sup> Furthermore, other considerations, such as avoiding jurisdictional conflicts between BiH, Croatia and the FRY, mandated that war crimes prosecutions be concentrated in one tribunal.<sup>166</sup> The choice made by the SC was to separate the Tribunal physically and normatively from the region itself.<sup>167</sup> First, the location of the ICTY was set in The Hague.<sup>168</sup> Second, the Statute was made up by international law, with almost no reference to the domestic law of the SFRY.<sup>169</sup> Specifically, Rule 12 of the Tribunal's

<sup>162</sup> M. C. Bassiouni and P. Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (NY, Transnational Publishers, 1996) 313.

<sup>163</sup> A. A. Schvey, 'Striving for Accountability in the Former Yugoslavia' in J E Stromseth (ed.) *Accountability for Atrocities: National and International Responses* (Ardsey, Transnational Publishers, 2003) 39, 46.

<sup>164</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) UN Doc. S/25704 (3 May 1993).

<sup>165</sup> Lack of impartiality or independence on the part of the national proceedings was one of the grounds provided in the ICTY Rules of Procedure and Evidence for a request by the ICTY's Prosecutor to defer a case to the Hague. Rule 9(ii) of the Tribunal's Rules of Procedure and Evidence. Also see Article 10(2)(b) of the Statute allowing the Tribunal to process a case that had been dealt with by national proceedings on the same grounds. The rationale for the Tribunal's primacy did not rest solely on concerns of lack of due process in proceedings taking place in the former Yugoslavia. Other national courts exercising jurisdiction over acts falling under the mandate of the ICTY were subject to the rule. V. Morris and M. P. Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia Vol. I* (1995) 125-130. This was in contrast to impressions of several SC members, such as the UK ['In our view, the primacy of the Tribunal...relates primarily to courts in the territory of former Yugoslavia: elsewhere it will only be in the kinds of exceptional circumstances outlined in Article 10...that primacy should be applicable.'] and Russia ['But this is not a duty (referral) automatically to refer the proceedings to the Tribunal on such a matter. A refusal to refer the case naturally has to be justified.'] Morris and Scharf, *supra* note 141, 190 and 207 respectively. In such cases referral to the Tribunal was requested on the ground that 'what is in issue is closely related to, or otherwise involves, significant factual or legal question which may have implications for investigations or Prosecutions before the Tribunal'. Rule 9(iii) of the Tribunal's Rules of Procedure and Evidence.

<sup>166</sup> Schabas, *supra* note 157, pp. 126-7; R. Wedgwood, 'National Courts and the Prosecution of War Crimes' in G. Kirk McDonald & O. Swaak-Goldman, *Substantive and Procedural Aspects of International Criminal Law: Commentary* (2000) 393, 401-8.

<sup>167</sup> I. Nizich, 'International Tribunals and their Ability to Provide Adequate Justice: Lessons from the Yugoslav Tribunal' 7 *ILSA J. Int'l & Comp. L.* (2000-2001) 353, 362-364.

<sup>168</sup> Article 31 of the ICTY Statute. Granted, in 1993 the war was still raging in Croatia and BiH.

<sup>169</sup> The only exception being Article 24 of the Statute which provides that 'In determining the terms of imprisonment, the Trial Chambers shall have recourse to the general practice regarding prison sentences in the courts of the former Yugoslavia'. The OTP has kept itself informed of relevant domestic legislation although in practice the Tribunal made little use of it. Interview with an OTP staff member (January 2009, The Hague). See generally H. van der Wilt, 'National Law: A Small but Neat Utensil in the Toolbox of International Criminal Tribunals', 10 *Int'l Crim L. rev.* (2010) 209.

Rules of Evidence and Procedure held that 'determinations of courts of any State are not binding on the Tribunal'. Thirdly, the Tribunal's mandate did not include assisting local authorities and enhancing their capacity to try war criminals.<sup>170</sup> Consequently, resources were not allocated towards this goal.

### ICTY Policies vis-a-vis Domestic Prosecutions

The secondary role accorded to domestic prosecutions in the design of the court was reflected in the attitude taken by the organs of the ICTY during the Tribunal's formative years. While the Tribunal was in the process of constructing and proving itself as a capable judicial institution, its priorities revolved entirely around its own jurisdiction. Achieving that was difficult: up until the end of 1995 the war effectively prevented the OTP from conducting adequate investigations as well as the apprehension of suspects.<sup>171</sup> Even at the end of the war the Tribunal struggled to get hold of many of the persons indicted and received only limited access to evidence from the relevant states. Consequently, the Tribunal's priority was to assume jurisdiction on any case worthy of its jurisdiction. Under these circumstances, concerns regarding the division of cases between the ICTY and national authorities did not factor into the mindset of the Tribunal's organs. When the accused in the first case appeared before the Tribunal, Dusko Tadic, arguing against the supremacy of the Tribunal vis-à-vis domestic jurisdictions, both the trial and appeals chambers maintained that denying supremacy to the ICTY meant the granting of impunity to war criminals:

"Indeed, when an international tribunal such as the present one is created, it must be endowed with primacy over national courts. Otherwise, human nature being what it is, there would be a perennial danger of... proceedings being 'designed to shield the accused', or cases not being diligently prosecuted..."<sup>172</sup>

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<sup>170</sup> D. Tolbert, 'The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings' 26 *Fletcher F. World Aff.* (2002) 7, 12-16.

<sup>171</sup> R. Kerr, *The International Criminal Tribunal for the Former Yugoslavia: an Exercise in Law, Politics, and Diplomacy* (2004) 185.

<sup>172</sup> *Prosecutor v. Tadic*, Case No. IT-1994-1, Decision On the Defense Motion for Interlocutory Appeal on Jurisdiction, para. 58 (Appeals Chamber) (2 October 1995).

This state of affairs was reflected in the non-discriminating policy of the first prosecutor, Richard J. Goldstone, termed the 'pyramidal approach', which sought to prosecute not only 'big fish' but also low-level offenders.<sup>173</sup>

A further consequence of this mindset was the lack in institutional connection with domestic jurisdictions and lack of outreach programs that would convey to the public in these jurisdictions the details of the Tribunal's work.<sup>174</sup> Indeed, most of the ICTY's activities were not communicated to the communities in the Balkans; thus, proceedings and decisions were not translated initially into the Serbo-Croat language, nor were the proceedings regularly broadcasted.<sup>175</sup>

### Reaction of Serbia to the ICTY

The first official reaction of the FRY to the idea of the establishment of the Tribunal was expressed in a letter to the UN Secretary-General of May 1993 which stated that it considered "the attempts to establish an ad-hoc tribunal discriminatory" and that it "has its doubts about the impartiality of the ad hoc tribunal".<sup>176</sup> The letter also stated that war crimes "should be prosecuted and punished under national laws" and that the national authorities in the former Yugoslavia were able and entitled to do so.<sup>177</sup>

During the 1990s the FRY was consistent in its refusal to cooperate with the Tribunal.<sup>178</sup> In 1996, ICTY president Cassese reported FRY's refusal to arrest and

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<sup>173</sup> Schabas, *supra* note 157, 604. The policy was confronted with resistance by the ICTY's judges who believed that the Tribunal should try military and political leaders. See A. Cassese, 'The ICTY: A Living and Vital Reality' 2 J. Int'l Crim. Justice (2004) 585, 586-7.

<sup>174</sup> K. Cibelli and T. Guberek, 'Justice Unknown, Justice Unsatisfied' (Tufts University, 2001) available at <http://www.hrdag.org/resources/publications/justicereport.pdf>.

<sup>175</sup> There were early ad-hoc outreach initiatives. In 1996 an American-based company sponsored the broadcasting of the Tadic trial for a short time; around the same time the Coalition for International Justice (CIJ), an NGO dedicated for the support of international tribunals, provided useful documents and information on the Tribunal on its website; grass root outreach activities were also provided by ABA-CEELI field offices. For a detailed description of the early stage see L. C. Vohrah and J. Cina 'The Outreach Program' in R. May et al (eds.) *Essays on ICTY Procedure and Evidence in Honor of Gabriel Kirk McDonald* (2001) 547.

<sup>176</sup> 'Letter Dated 19 May 1993 from the charge d'affaires a.i. of the Permanent Mission of Yugoslavia to the United Nations Addressed to the Secretary-General', UN doc. s/25801 (21 May 1993) 2.

<sup>177</sup> *Ibid.*

<sup>178</sup> With one exception: Drazen Erdemovic, a Bosnian national, was transferred to The Hague by Serbia in March 1996. At the time of his transfer he had not been indicted by the ICTY, but was officially sought out by the OTP as a witness in the investigation of the Srebrenica massacre. According to Richard Goldstone, the motive of Milosevic for agreeing to the transfer was to "garner financial assistance from the United States". Quoted in <http://www.ceu.hu/news/2009-11-03/transcript-ceremonial-address-of-justice-richard-j-goldstone-at-john-shattuck-inaugu>. According to Lamont, the FRY went to a great length to explain the legal basis for the extradition, i.e., his lack of Serbian citizenship and the temporary nature of the transfer. The need for such explanation attested to the internalization of non-compliance with the ICTY in the domestic culture of the FRY. C. K. Lamont, *International*

transfer indicted persons to the ICTY to the SC on three different occasions.<sup>179</sup> He also noted in the Tribunal's 1997 annual report the FRY's principled refusal to enact legislation which would enable it to cooperate with the Tribunal.<sup>180</sup> In 1998 alone, five additional reports of FRY's non-compliance were transmitted to the SC by president Kirk McDonald. They concerned two issues in particular. The first issue raised by the President revolved around the dispute between the FRY and the Tribunal regarding the "Vukovar three". The three JNA officers were indicted by the Tribunal in October 1995 in connection with the killing of 260 Croatian POWs in Vukovar hospital in 1991.<sup>181</sup> Despite the arrest warrant issued by Trial Chamber I in 1996, the FRY not only refused to surrender them but also promoted Mrksic and Slijivancanin. The communications between the Tribunal and Belgrade regarding the prosecution of the three merit attention: in November 1998 the president of the Belgrade military court informed the Tribunal of investigation proceedings initiated by the court concerning the events in Vukovar and asked for a copy of the ICTY's case-file and the evidence relating to the indictment.<sup>182</sup> In response, the Prosecutor asked the Court to order the deferral of the case to the ICTY on the grounds that the national proceedings "lacked impartiality and independence and were designed to shield the accused from international criminal responsibility".<sup>183</sup> This request was granted by the Trial Chamber, albeit on a different ground.<sup>184</sup> Expectedly, the FRY ignored the request despite harsh condemnation by the SC.<sup>185</sup>

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*Criminal Justice and the Politics of Compliance* (2010) 67. Erdemovic was later indicted by the Tribunal and pleaded guilty. *Prosecutor v. Erdemovic*, Case No. IT-96-22-A, Judgment (Appeals Chamber) (7 October 1997).

<sup>179</sup> See UN Doc. S/1996/319 (25 April 1996) (concerning the refusal to execute arrest warrants against the "Vukovar three" (Mrksic, Radic and Slijivancanin); UN Doc. S/1996/364 (22 May 1996) (concerning the failure to execute an arrest warrant against Mladic when attending a funeral in Belgrade); UN Doc. S/1996/556 (16 July 1996) (concerning the refusal to execute arrest warrants against Mladic and Karadjic).

<sup>180</sup> ICTY's Fourth Annual Report, UN. Doc. S/1997/729 (18 September 1997) 45.

<sup>181</sup> *Prosecutor v. Mrksic et al.*, Case No. IT-95-13a (Indictment) (26 October 1995).

<sup>182</sup> ICTY press release, "Judge Kirk McDonald Addresses the UNSC" (8 December 1998) available at <http://www.icty.org/sid/7610>.

<sup>183</sup> ICTY press release, "'Vukovar Hospital' Case: Trial Chamber I requests the Federal Republic of Yugoslavia to defer the proceedings instituted against Mile Mrksic, Veselin Slijivancanin and Miroslav Radic" (15 December 1998) available at <http://www.icty.org/x/cases/mrksic/press/en/pr374.pdf>.

<sup>184</sup> On the basis of Rule 9(iii) of the Rules of Procedure which establishes a basis for a referral when the national proceedings raise issues that are "closely related to, or otherwise involves, significant factual or legal questions which may have implications for investigations or prosecutions before the Tribunal".

<sup>185</sup> SC Res. 1207 (17 November 1998).

A second issue raised by the president was the FRY's refusal to allow the OTP's staff entry into Kosovo during the war in 1998.<sup>186</sup> By denying the investigators travel documents the FRY effectively prevented the Tribunal from investigating the escalating violence in the region in real time.<sup>187</sup> When Milosevic was indicted by the Tribunal in May that year, the FRY's formal reactions were dismissive, branding the Tribunal as a mere political tool by the Americans and the indictment as a ploy to justify NATO's attack against Serbia.<sup>188</sup>

A notable point to be made is that while during these early days of the Tribunal's operation "anti-Hague" sentiments were generated by the Milosevic regime, they were nevertheless based on wide popular support. Public opinion polls conducted at that time revealed public distrust of the Tribunal which was perceived as a quintessential anti-Serb institution.<sup>189</sup> Granted, negative perception of the ICTY was partially attributed to the political propaganda disseminated by state-owned media; yet they may have also been the product of the workings of the Tribunal itself. As one study concluded:

"The blankness of the façade which the ICTY presented to the region permitted the projection onto it of images which had little to do with the originating purposes of the institution, and which bore little relation to the manner in which it actually functioned, either as a court of law or as an element of the international political environment. Not surprisingly, under these conditions, nationalist politicians who had succeeded in occupying the larger part of the ideological space in the ex-Yugoslav states, found the opportunity to write their own narratives on this blank façade, as elaborations of their own 'proprietary myths' of recent history."<sup>190</sup>

## 6.2 COOPERATION OF SERBIA WITH THE ICTY POST MILOSEVIC

The ousting of Milosevic in October 2000 did not bring with it a substantial improvement in the interaction between Serbia and the Tribunal. The change of regime did not

<sup>186</sup> ICTY's Sixth Annual Report, UN. Doc. S/1999/846 (25 August 1999) 26.

<sup>187</sup> G. Kirk McDonald, 'Problems, Obstacles and Achievements of the ICTY', 2 J. Int'l Crim. Justice (2004) 558. Judge Kirk McDonald suggests that the lack of will by the SC to enforce the Tribunal decisions enabled the resurgence of crimes in Kosovo. *Ibid.* 65.

<sup>188</sup> M. Williams, 'Belgrade: Indictment Is NATO Trick', BBC News (27 May 1999); M. Warner, 'Milosevic Indicted', PBS (27 May 1999), available at [http://www.pbs.org/newshour/bb/europe/jan-june99/warcimes\\_5-27.html](http://www.pbs.org/newshour/bb/europe/jan-june99/warcimes_5-27.html).

<sup>189</sup> M. Biro, 'The ICTY in the Serbia Media' in J. B. Allcock (ed.), "The International Criminal Tribunal for the Former Yugoslavia" (scholar Initiative – Research Team 10) (2005) 139 fn 159, available at <http://www.cla.purdue.edu/si/Report-10g.pdf>. Also see the 2002 public survey conducted by International Institute for Democracy and Electoral Assistance, available at [http://www.idea.int/europe\\_cis/balkans/see\\_survey.cfm?renderforprint=1](http://www.idea.int/europe_cis/balkans/see_survey.cfm?renderforprint=1), which set the level of trust in the ICTY at 7.6%.

<sup>190</sup> *Ibid.* (introduction) 55.

revolutionize the national anti-Hague narrative that had formed by 2000. Nor was it accompanied by a meaningful reform of existing political and judicial institutions.<sup>191</sup> By all accounts, cooperation with the Tribunal in terms of transferring indictees and allowing access to evidence and witnesses was coercively induced rather than voluntarily offered and in any case was sporadic and insufficient.<sup>192</sup>

The unpopularity of the Tribunal made cooperation therewith a politically charged subject. Transfer of indictees especially was a destabilizing factor in the fragile democratic political framework in Serbia.<sup>193</sup> In the early 2000s the issue divided the FRY presidency, headed by Kostunica and the Serbian government, headed by Djindjic. The former was openly hostile to the ICTY, which he viewed as detrimental to the security of the republic. The latter advanced a more pragmatic view of the Tribunal which could be used as a means of ridding Serbia of powerful elements in the political and military institutions that constrained his plans for reform. In 2001 Milosevic's transfer to The Hague was made possible only by Djindjic's resolve. Djindjic was acting on a clear and direct threat by the US to withhold financial assistance from Serbia should it fail to arrest Milosevic.<sup>194</sup> With the eventual consent of Kostunica, Milosevic was arrested on domestic charges of corruption.<sup>195</sup> Subsequent efforts to transfer Milosevic, again – following US pressure, fell through since a law enabling transfer of suspects to the ICTY did not pass in the Federal parliament.<sup>196</sup> FRY's federal court thus prevented the federal government from handing Milosevic to the Tribunal. Djindjic, however, intervened and within a few hours the Serbian government transferred Milosevic to the Tribunal. This act provoked a political crisis with Kostunica branding the transfer illegal and a few Serbian cabinet members resigning in protest.<sup>197</sup> Interestingly, the transfer was not followed by mass

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<sup>191</sup> Lamont, *supra* note 178, pp 69-71. In fact, Milosevic was elected the president of the SPS in November 2000 and even met with Kostunica in January 2001. Cohen, *supra* note 51, p. 106-7.

<sup>192</sup> Lamont, *ibid*; Petrovic, *supra* note **Error! Bookmark not defined.**; D. F. Orentlicher, 'Shrinking the Space for Denial: The Impact of ICTY in Serbia' (2008), available at [http://www.soros.org/initiatives/justice/focus/international\\_justice/articles\\_publications/publications/serbia\\_20080520](http://www.soros.org/initiatives/justice/focus/international_justice/articles_publications/publications/serbia_20080520).

<sup>193</sup> M. Spoerri & A. Freyberg-Inan, 'From Prosecution to Persecution: Perceptions of the ICTY in Serbian Domestic Politics', 11 J. Int'l Relations & Development (2008) 350.

<sup>194</sup> Federal assistance was conditioned by US law upon the certification of the federal government that the FRY was cooperating with the ICTY. For details see Williams & Scharf, *supra* note 140, 232.

<sup>195</sup> S. Erlanger, "Serb Authorities Arrest Milosevic to End Standoff", NY Times (1 April 2001).

<sup>196</sup> Many legal obstacles prevented the extradition of Milosevic, the most problematic one being that under the constitutions of the FRY and Serbia a Serb national could not be extradited. K. D. Magliveras, "The Interplay between the Transfer of Slobodan Milosevic to the ICTY and Yugoslav Constitutional Law" 13 Eur. J. Int'l L. (2002).

<sup>197</sup> Williams & Scharf, *supra* note 140, 234.

demonstrations.<sup>198</sup> A public opinion survey conducted at the time pointed to the dissatisfaction of the public with the venue of the trial but not with the trial itself. The great majority of the public wanted Milosevic to stand trial in Belgrade.<sup>199</sup>

The relationship between Serbia and the Tribunal remained strained. In the 2002 report to the SC, the ICTY president concluded that cooperation was lacking especially at the federal level and that “many requests for assistance were still outstanding, in relation to access to evidence and documents and access to important witnesses”.<sup>200</sup> That being said, during this period a law on cooperation with the ICTY was enacted allowing transfer of indictees to the Tribunal and establishing a national council to coordinate requests from the Tribunal.<sup>201</sup> Eight more people were subsequently transferred to The Hague.<sup>202</sup> At the time, however, two of the main targets of the Tribunal, Karadzic and Mladic, resided uninterruptedly in Belgrade. Kostunica himself authorized the grant of full pension from the VJ to Mladic in 2002.<sup>203</sup>

Between 2002 and 2008, Serbia’s reluctance to cooperate with the ICTY defined their relationship with the exception of temporary surges in cooperation. One such surge occurred in early 2003: Kostunica’s post of president of the republic was abolished on 4 February 2003 following the dissolution of the FRY into Serbia and Montenegro. Two weeks beforehand, the exiting president of Serbia, Milan Milutinovic, surrendered to the Tribunal.<sup>204</sup> Twenty days later, radical opposition leader Vojislav Seselj surrendered as

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<sup>198</sup> Orentlicher, *supra* note 198, 39.

<sup>199</sup> Centre for Political and Public Opinion Research of the Institute for Social Sciences in Belgrade, cited in E. D. Gordy, 'Public Opinion on the ICTY and Reconciliation' in Allcock, *supra* note 189, p. 111, 112.

<sup>200</sup> Ninth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, UN Doc. UN Doc. A/57/379; S/2002/985 (4 September 2002) para 227.

<sup>201</sup> Law on Cooperation of the Federal Republic of Yugoslavia with the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia Since 1991 (11 April 2002) (SRJ Official Gazette Number 18, Year IX). The law was not without its shortcomings as it set no time limits to the acquiescence of a request and did not apply to individuals who had not been indicted before its entry into force. HRW, 'Cooperation Law Inadequate' (12 April 2002), available at <http://www.hrw.org/en/news/2002/04/11/yugoslavia-cooperation-law-inadequate>. The law was amended in 2003. The law is available in Serbian at [http://www.tuzilastvorz.org.rs/html\\_trz/PROPISI\\_ZAKONI/ZAKON\\_O\\_SARADNJI\\_SRBIIJE\\_I\\_CRNE\\_GORE\\_CIR.pdf](http://www.tuzilastvorz.org.rs/html_trz/PROPISI_ZAKONI/ZAKON_O_SARADNJI_SRBIIJE_I_CRNE_GORE_CIR.pdf).

<sup>202</sup> Dragoljub Ojdanic (Former VJ chief of Staff), Nikola Sainovic (former FRY deputy prime minister), Momcilo Gruban, Milan Martic and Mile Mrksic, all surrendered. Dusan Knezevic, Nenad and Predrag Banovic were arrested and transferred by Serb authorities.

<sup>203</sup> International Crisis Group, 'No Mladic, No Talks' (21 March 2007), available at <http://www.crisisgroup.org/en/regions/europe/balkans/serbia/no-mladic-no-talks.aspx>.

<sup>204</sup> ICTY Press Release, 'Milan Milutinovic Transferred to the International tribunal for the Former Yugoslavia' (20 January 2003), available at <http://www.icty.org/sid/8310>.

well.<sup>205</sup> In March 2003 Djindjic was assassinated by members of a crime syndicate connected to a special police unit, the “Red Berets”, in an attempt to prevent his policies against organized crime from materializing.<sup>206</sup> Public grief and outrage following the assassination was the catalyst for some far reaching measures taken by the Serb government against organized crime and members of security forces connected therewith.<sup>207</sup> More to the point, major steps were taken in connection with ICTY cooperation, most notably the establishment of a war crimes chamber in the Belgrade District Court and a special prosecutor's office for war crimes which would later become the main channel of cooperation with the ICTY;<sup>208</sup> the amendment of the cooperation law;<sup>209</sup> and the transfer of an additional five war crime suspects to the Tribunal.<sup>210</sup> According to some, these pro-ICTY measures prompted the emergence of Seselj's party, SRS, in the December 2003 elections as the largest party in the Serbian Parliament.<sup>211</sup> After the elections, Kostunica became the Serbian prime minister and cooperation once again stalled. Until 2008, cooperation was inconsistent and Serbia's willingness to heed to the Tribunal was with difficulty obtained by US and EU pressure.<sup>212</sup> EU accession, which was pursued more vigorously since the pro-EU Boris Tadic was elected in 2004,<sup>213</sup> was especially conducive to cooperation. In July 2004 the Special Council for Cooperation with the ICTY was established.<sup>214</sup> In the first half of 2005 three important indictees, high ranking army and police generals, were transferred to The Hague to stand trial for their part in the Kosovo campaign: Nebojsa Pavkovic and Vladimir Lazarevic surrendered themselves while Sreten Lukic was arrested and transferred to the ICTY.<sup>215</sup> These concessions on the part of Serbia notwithstanding, Kostunica made a

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<sup>205</sup> ICTY Press Release, 'Vojislav Seselj Transferred to the ICTY Detention Unit' (24 February 2003), available at <http://www.icty.org/sid/8297>.

<sup>206</sup> Twelve men were convicted by the organized crime chamber at the Belgrade district court on 23 May 2007. N. Wood, '12 Serbs Guilty in Killing of Prime Minister' NY Times (24 May 2007).

<sup>207</sup> As part of “Operation Sabre” over 13000 persons were arrested including the heads of the Special Operations Unit. The Counter-Intelligence Unit was dissolved. Miller, *supra* note 47, p. 249.

<sup>208</sup> See Section 7.1 *infra*.

<sup>209</sup> The law was amended so as to allow the transfer of all suspects requested by the Tribunal – not just those who had already been indicted. Lamont, *supra* note 178, p71 fn27.

<sup>210</sup> These included Jovica Stanisic (Head of the State Security Forces) and Franko Simatovic (Head of the Special Operations Unit).

<sup>211</sup> E. Simpson, 'Stop the Hague: Internal v. External Factors Suppressing the Advancement of the Rule of Law in Serbia' 36 Geo. J. Int'l L. (2004-5) 1255, 1264-4; Spoerri & Freyberg-Inan, *supra* note 193, p 361.

<sup>212</sup> Orentlicher, *supra* note 198, pp. 45-50.

<sup>213</sup> Spoerri & Freyberg-Inan, *supra* note 193, p 362.

<sup>214</sup> Tellingly, both the foreign affair and defense ministers refused to head the council. 'Serbia and Montenegro Establishes New Council for Cooperation with ICTY' (13 July 2004) <http://oneworldsee.org/node/3316>.

point of not *transferring* indictees to the Tribunal, but instead opted for a policy of inducing them to surrender voluntary and making a public spectacle of their patriotic sacrifice which was generously rewarded by compensations given to their families.<sup>216</sup> While this policy helped lower the political cost of these transfers, it sent an antagonistic message to the public that the ICTY was not Serbia's friend.

Since 2008, following the parliamentary elections that saw Mirko Cvetkovic appointment to prime minister, the relationship between Serbia and the ICTY has improved. In an important move, Karadzic was arrested in July 2008 and transferred to The Hague.<sup>217</sup> Since then Serbia stepped up its efforts to apprehend Mladic,<sup>218</sup> an issue that had become central to Serbia's attempt at EU accession.<sup>219</sup> In December 2008, ICTY Prosecutor reported to the SC that cooperation with Serbia has "significantly improved" and that Serbia, via the Council for Cooperation with the ICTY, has provided "timely responses to the majority of requests to for assistance" in terms of access to witnesses and documents.<sup>220</sup> In November 2009, the ICTY President reported to the SC that Serbia has been responding "adequately and expeditiously" to OTP's requests such as securing appearance of witnesses at The Hague; safeguarding witness safety; executing search and seizure operations which provided important evidence; and providing access to archives and documents.<sup>221</sup> The same assessment was included in the latest report of the ICTY President, with the exception of criticism on the tactics employed by Serbia at

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<sup>215</sup> The three were later convicted. See text accompanying notes 153 and 152 above.

<sup>216</sup> Transitional Justice Report, *supra* note 117, 9. Kostunica managed to pass a law to that effect but its application was halted by the Serbia constitutional court. O. Bekou, 'Rule 11 bis: An Examination of the Process of Referrals to National courts in ICTY Jurisprudence' 33 *Fordham Int'l L.J.* (2009-2010) 723, 757 fn181.

<sup>217</sup> UN Center Press Release, "Radovan Karadzic transferred to UN war crimes tribunal in The Hague" (30 July 2008), available at <http://www.un.org/apps/news/story.asp?NewsID=27525&Cr=Radovan&Cr1=>.

<sup>218</sup> In a recent interview, the Serbian war crimes prosecutor, Vladimir Vukcevic, admitted that as early as 2006 Mladic was very close to being apprehended. 'Serb prosecutor fears leaks thwarting Mladic arrest', AFP (14 October 2010). Serbian police conducted several raids on Mladic family's homes confiscating important evidence. M. Simons, "Data on Balkan Wars Found in Home of Suspect", *NY Times* (July 10, 2010), available at [http://www.nytimes.com/2010/07/11/world/europe/11mladic.html?\\_r=1&ref=ratko\\_mladic](http://www.nytimes.com/2010/07/11/world/europe/11mladic.html?_r=1&ref=ratko_mladic). In June 2010 his wife was arrested on possession of illegal weapons charges. His family's petition to declare him dead was rejected by a Serbia court in September 2010. As a consequence of the failure to secure his transfer to the ICTY the Head of the Council for Cooperation has stepped down as the head of the special task force which was established in 2006 to secure the apprehension of remaining fugitives. AFP, 'Serbian official hunting genocide suspect Mladic resigns' (29 December 2009), available at <http://www.france24.com/en/node/4958486>.

<sup>219</sup> S. Castle, 'EU Approves Step towards Serbian Membership', *NY Times* (14 June 2010), available at <http://www.nytimes.com/2010/06/15/world/europe/15iht-union.html>.

<sup>220</sup> ICTY Press Release, 'Address of Serge Brammertz, Prosecutor of the International Criminal Tribunal for the former Yugoslavia to the United Nations Security Council' (12 December 2008), available at <http://www.icty.org/sid/10029>.

<sup>221</sup> 'Letter dated 12 November 2009 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council', UN. Doc. S/2009/589 (13 November 2009) paras 30-33.

that time in pursuing Mladic and Goran Hadzic.<sup>222</sup> In May 2011 Mladic was finally captured and transferred to The Hague. Hadzic was transferred in July 2011.<sup>223</sup>

In assessing Serbia's improved cooperation with the ICTY, two factors should be considered. First, recent cooperation has not been accompanied by respective improvements in public opinion in Serbia with respect to the ICTY. The latest comprehensive survey, conducted in November 2009, clearly demonstrates that attitudes and perceptions of the Tribunal are still as negative as those expressed in previous surveys conducted in the first half of the 2000s.<sup>224</sup> 72% of the population (and 78% of the Serbian public) hold a negative opinion of the Tribunal. Of the said group, 82% base their opinion on the belief that the Tribunal is unfair and biased, an anti-Serb institution that convicts only Serbs.

Second, the political significance of the abovementioned perceptions of the ICTY amongst the Serbian public has been reduced considerably in the past few years. Cooperation with the Tribunal does not, therefore, carry the same political price tag previously attached to it.<sup>225</sup> Currently, 40% of the Serbian population considers such cooperation a necessary part of the EU accession process and/or a step needed in order to avoid sanctions.

## 6.3 COOPERATION OF THE ICTY WITH SERBIA

### The Completion Strategy

As already noted, cooperation between the ICTY and Serbia during the first years of the former's operation was one-sided, with the ICTY being the sole recipient of assistance. Minor changes in the policy of the ICTY vis-a-vis domestic prosecutions began to take

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<sup>222</sup> Letter dated 31 May 2010 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council, UN. Doc. S/2010/270 (1 June 2010) Paras 40-50. As of October 2010, 43 fugitives have been surrendered by Serbia to The Hague. UN GA Press Release, 'Top Officials from UN War Crimes Tribunal for Former Yugoslavia, Rwanda, Appeal to Assembly for Resources, Help with Staffing Woes' (8 October 2010), available at <http://www.un.org/News/Press/docs/2010/ga11008.doc.htm>.

<sup>223</sup> See *infra* note 294.

<sup>224</sup> The surveys were conducted by the Belgrade Center for Human Rights in cooperation with the OSCE Mission to Serbia. The can be found at [http://www.english.bgcentar.org.rs/index.php?option=com\\_content&view=article&id=406:attitudes-towards-the-international-criminal-tribunal-for-the-former-yugoslavia-icty-&catid=103](http://www.english.bgcentar.org.rs/index.php?option=com_content&view=article&id=406:attitudes-towards-the-international-criminal-tribunal-for-the-former-yugoslavia-icty-&catid=103).

<sup>225</sup> Interview with Ivan Jovanovic (October 2010).

place in 1997 due to the growing case-load of the ICTY.<sup>226</sup> In November 1997 the Tribunal amended its Rules of Evidence and Procedures (RPE) by adding Rule 11 *bis* on 'Suspension of Indictment in case of Proceedings before National Courts'. The Rule allowed the Prosecutor to suspend proceedings against an accused if the authorities of a state in which the accused was arrested were prepared to prosecute him/her and the said jurisdiction was deemed appropriate.<sup>227</sup> By 1998, Goldstone's successor, Louise Arbour, redesigned the OTP's investigation strategy to pursue only high-level perpetrators.<sup>228</sup> Hence, the OTP's policy was steered towards individuals who either bear the highest levels of responsibility or those who have 'distinguished themselves in committing numerous crimes in the most overt, systematic or widespread manner'.<sup>229</sup> This meant that for the first time a clear division of labor between the ICTY and national authorities was established - cases not meeting the Prosecutor's criteria were left to national jurisdictions. Later that year, Rule 11 *bis* was amended to extend the power of suspension of proceedings to the trial chambers assigned to the case.<sup>230</sup> It is noteworthy that no actual deferrals were contemplated before 2002 despite a recommendation by a group of experts, assigned by the UN Secretary-General to evaluate the effective operation of the ad-hoc tribunals, to make use of Rule 11 *bis*.<sup>231</sup>

In 1999 the Tribunal's Outreach Program was initiated by ICTY President Gabrielle Kirk McDonald. Since then ICTY materials began to be regularly translated into Serbo-Croat, a website in the Serbo-Croat language was launched and live broadcasting of the proceedings on the internet commenced. Since 2000, ICTY offices have been opened in Belgrade, Pristina, Sarajevo and Zagreb charged with communicating with the media, the legal community, governmental and non-governmental organizations, victims'

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<sup>226</sup> In 1997, for example, Justice Arbour publicly endorsed prosecutions taking place in Germany against two lower-level offenders, Djajic and Jorgic, stating that the 'true position is that the International Tribunal and national courts have concurrent jurisdiction, and that such cases can be properly prosecuted in either forum.' Justice Arbour's Statement regarding War Crimes related Trials Currently Underway in Germany, available at <http://www.un.org/icty/pressreal/p171-e.htm>.

<sup>227</sup> At any stage before a verdict was handed down the Prosecutor was entitled to rescind the order and ask for the referral back to The Hague.

<sup>228</sup> L. Arbour, 'The Crucial Years' 2 J. Int'l Crim. Justice (2004) 396, 398.

<sup>229</sup> C. Del Ponte, 'Prosecuting the individuals Bearing the Highest level of Responsibility' 2 J. Int'l Crim. Justice (2004) 516, 517.

<sup>230</sup> *Ibid.*

<sup>231</sup> 'Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia and the International Criminal Tribunal for Rwanda' UN Doc. A/54/634 (22 November 1999) 37-8.

associations and diplomatic representatives.<sup>232</sup> Yet, interaction between ICTY judges and their local counterparts was not possible. Apart from the political conditions which made such interaction difficult, the mutual mistrust between the judiciaries and the prevailing opinion amongst ICTY judges that this was not part of the mandate of the Tribunal contributed to the professional disconnect between the two systems.<sup>233</sup>

In the early 2000s the notion of terminating the mandate of the Tribunal began to surface. The demise of the Tribunal was deemed a palatable option only if the domestic alternative were to become effective.<sup>234</sup> The international community's attention was thus finally drawn to proceedings at the domestic level. By 2000, the SC and donor states began to signal their desire to have the ad-hoc tribunals, both time and resource consuming, move to complete their work.<sup>235</sup> In response, ICTY President Claude Jorda announced to the SC in June that year that the Tribunal could complete its work by 2007.<sup>236</sup> Subsequent reports by the ICTY President and Prosecutor clarified the conditions *sine qua non* for the success of this endeavour. The first was the enhanced cooperation of states in terms of access to evidence and apprehension of the remaining fugitives. Such cooperation ensured a speedier pace with respect to remaining cases. The second was the transfer of cases involving low and middle level offenders to adjudication before national jurisdictions. The purpose behind the plan was the alleviation of the case-load that had been congesting the Tribunal.

Yet it took some time for the idea to materialize into a bona fide plan. The state of the judicial systems in the former Yugoslavia presented the greatest obstacle for the completion strategy. In a report addressed to the SC in 2000, ICTY judges conveyed their view that in the short term transferring cases to 'the States from the Balkans' was untenable 'due both to the political climate and the issue of the safety of the witnesses, victims, accused and judges'.<sup>237</sup> In resolution 1329 (December 2000) the SC authorized the appointment of *ad litem* judges as well as the appointment of two additional judges to

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<sup>232</sup> ICTY Website <http://www.un.org/icty/bhs/frames/outreach.htm>.

<sup>233</sup> Interview with an ICTY Judge (January 2009, The Hague).

<sup>234</sup> K. Zoglin, 'The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or junk justice?' 27 Hum. Rts. Q. (2005) 41.

<sup>235</sup> D. Raab, 'Evaluating the ICTY and its Completion Strategy' 3 J. Int'l Crim. Justice (2005) 82, 84; L. Bingham, 'Strategy or Process? Closing the International Criminal Tribunals for the Former Yugoslavia and Rwanda' 24 Berkley J. Int'l L. (2006) 699, 700-702.

<sup>236</sup> President Jorda's speech to the UN Security Council (20 June 2000) available at <http://www.icty.org/sid/>.

<sup>237</sup> 'Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia' UN Doc. A/55/382-S/2000/865 (14 September 2000), available at <http://www.undemocracy.com/S-2000-865.pdf>.

the Appeals Chamber in order to enhance the capacity of the Tribunal. Notably, the SC noted the existence of Rule 11*bis* but made no further reference to it. As late as May 2004 ICTY President, Theodor Meron, was of the opinion that the Tribunal 'cannot be sure that international human rights and fair trial standards are fully satisfied' in the state courts of the states of the former Yugoslavia.<sup>238</sup>

The initiative eventually received official endorsement from the SC in August 2003. Resolution 1503 set forth the principal elements of the 'completion strategy' to be followed:

- *Expected schedule*: Completion of all investigations by 2004, completion of all first instance trials by 2008 and completing of all work by 2010.<sup>239</sup>
- *Cooperation with the Tribunal*: the SC called on 'all States, especially Serbia and Montenegro, Croatia, and Bosnia and Herzegovina', and on the Republika Srpska within Bosnia and Herzegovina, to intensify cooperation with and render all necessary assistance to the ICTY, with emphasis on transferring Radovan Karadzic and Ratko Mladic to the ICTY.<sup>240</sup>
- *Transfer of cases to domestic courts*: the SC called on 'the international community to assist national jurisdictions, as part of the completion strategy, in improving their capacity to prosecute cases transferred from the ICTY and the ICTR and encouraged the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach.'<sup>241</sup>

Despite assessments by the ICTY President and the Prosecutor that the schedule outlined by the SC for the completion strategy might not be tenable,<sup>242</sup> the SC nevertheless insisted on the timetable set in Resolution 1503, linking the success of the completion strategy with capacity building of national jurisdictions. In Resolution 1534 the SC stressed the need for the OTP to review the case load of the ICTY 'in particular with

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<sup>238</sup> Annex I to the first biannual report of the ICTY to the SC, 'Assessments and report of Judge Theodor Meron, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004)' UN Doc. S/2004/420 (21 May 2004) 8.

<sup>239</sup> SC Res. 1503/03 (28 August 2003) operative para. 7.

<sup>240</sup> *Ibid.* para. 2.

<sup>241</sup> *Ibid.* para 1.

<sup>242</sup> Also see report drawn by the UN Internal Oversight Services in January 2004 which assessed that the schedule outlined by the SC may not be achievable. 'Review of the Office of the Prosecutor at the International Criminal Tribunals for Rwanda and for the former Yugoslavia' (7 January 2004) UN Doc. A/58/677, para. 10.

a view to determining which cases should be proceeded with and which should be transferred to competent national jurisdictions'.<sup>243</sup> Furthermore, the SC ordered the Tribunal to 'ensure that any such indictments concentrate on the most senior leaders suspected of being most responsible for crimes.'<sup>244</sup> The resolution added: 'the *strengthening of competent national judicial systems is crucially important* to the rule of law in general and to the implementation of the ICTY and ICTR Completion Strategies in particular.'<sup>245</sup>

### Transfer of Cases to National Authorities under Rule 11bis

The process of transferring cases from the ICTY to national courts was facilitated by two major changes in the operation of the ICTY. The first concerned limiting the wide discretion afforded to the Prosecutor under the Article 16(2) of the ICTY Statute with respect to initiating investigations and indictments. Rule 28(A) of the RPE was amended to allow the ICTY bureau<sup>246</sup> to supervise whether an indictment has met the criterion articulated in Resolution 1534 i.e. that it involves 'the most senior leaders suspected of being most responsible for crimes within the jurisdiction of the Tribunal'.<sup>247</sup>

The second change involved repeated amendments of Rule 11bis<sup>248</sup> to allow the transfer of cases to national jurisdictions.<sup>249</sup> In deciding upon the most appropriate venue

<sup>243</sup> SC Res. 1534/04 (26 March 2004) operative para. 4.

<sup>244</sup> Ibid. para. 5.

<sup>245</sup> Ibid. para 9 (emphasis added).

<sup>246</sup> The President, Vice-President and the Presiding Judges of the Three Trial Chambers – Rule 23 RPE.

<sup>247</sup> On the question of Prosecutorial discretion and independence in this context see D. Mundis, 'The Judicial Effect of the "Completion Strategy" on the Ad Hoc International Criminal Tribunals' 99 AJIL (2005) 142, 147-149.

<sup>248</sup> For a review of the different amendment to the Rule see M. Bohlander, 'Referring an indictment from the ICTY and ICTR to another court: Rule 11bis and the consequences for the law of extradition' 55 Int'l & Comp. L. Q. (2006) 219, 220.

<sup>249</sup> See generally S. Somers, 'Rule 11bis of the International Criminal Tribunal of the Former Yugoslavia: Referral of Indictments to National Courts' 30 B. C. Int'l & Comp. L. Rev. (2007) 175. Rule 11bis now reads in part:

'(A) After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges...("Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State:

(i) in whose territory the crime was committed; or (ii) in which the accused was arrested; or (iii) having jurisdiction and being willing and adequately prepared to accept such a case...'

The order of the three above-mentioned types of venue is of no hierarchical relevance according to the Appeals Chamber. It held: 'where there are concurrent jurisdictions under Rule 11bis(A)(i)-(iii) of the Rules, discretion is vested in the Referral Bench to choose without establishing any hierarchy among these three options and without requiring the Referral Bench to be bound by any party's submission that one of the alternative jurisdictions is allegedly the most appropriate. A decision of the Referral Bench on the question as to which State a case should be referred... must be based on the facts and circumstances of each individual case in light of each of the prerequisites set out in Rule 11bis(A) of the Rules'. *Prosecutor v. Jankovic*, Decision on Rule 11bis referral, Case No. IT-96-23/2-AR11bis.2 (A.C.)

for transfer of a case, the Referral Bench has held that such determination is based on 'considerations of the best possible conduct of the trial, including the proximity to the victims, safety for witnesses, the availability of evidence and the prospects of a fair and expeditious trial for the accused.'<sup>250</sup> Almost all referrals to date have been to states on whose territories the alleged crimes occurred as these jurisdictions usually possess a 'significantly greater nexus' to the cases.<sup>251</sup>

Pursuant to Rule 11*bis* (B) the Referral Bench may order such referral after being satisfied that:

- The accused will receive a fair trial and that the death penalty will not be imposed or carried out –

In setting out the standard of the 'fair trial' criterion, the Tribunal has limited itself to ensuring that the legislation in place in a certain state guarantees the highest human rights standard, namely Article 14 of the ICCPR, Article 21 of the ICTY Statute and Article 6 of the ECHR.<sup>252</sup> The Tribunal has refused to speculate on the actual manner in which these guarantees would be applied in practice,<sup>253</sup> prompting concerns that the conditions set out in Rule 11*bis* (B) do not in fact guarantee fair trial.<sup>254</sup>

- The position and alleged responsibility of the defendant does not fall within the criterion of Resolution 1534 (Rule 11*bis* (C)) –

This criterion is intended to ensure the instructions prescribed by resolution 1534, i.e. that only those persons that occupied the most senior position and bear the most responsibility for the crimes are to be tried before the Tribunal. In the process of vetting out high-level accused the jurisprudence

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(15 November 2005) para. 33. Also see *Prosecutor v. Todovic*, Decision on Savo Todovic's Appeals against Decision on Referral under Rule 11*bis*, Case No. IT-97-25/1-AR11bis.1 (A.C.) (4 September 2006) para. 42.

<sup>250</sup> *Prosecutor v. Ljubičić*, Decision to Refer the Case to BiH Pursuant to Rule 11*bis*, Case No. IT-00-41-PT (R.B.) (12 April 2006) para. 28.

<sup>251</sup> *Prosecutor v. Jankovic*, *supra* note 249, para. 37.

<sup>252</sup> L. Gradoni, "'You will receive a Fair Trial Elsewhere": The Ad Hoc International Criminal Tribunals Acting as Human Rights Jurisdiction' 54 *Netherlands Int'l L. Rev.* (2007) 1, 24. For the list of guarantees see *Prosecutor v. Stankovic*, Decision on Referral of Case under Rule 11*bis*, Case No. IT-96-23/2-PT (R.B.) (17 May 2005) para. 55.

<sup>253</sup> *Prosecutor v. Todovic*, *supra* note 249, para. 56.

<sup>254</sup> J. Dieckmann and C. Kerll, 'UN Ad Hoc Tribunals under Time-Pressure: Completion strategy and Referral Practice of the ICTY and ICTR from the Perspective of the Defense' 8 *Int'l Crim. L. Rev.* (2008) 87, 97, 102; S. Williams, 'ICTY Referrals to National Jurisdictions: A Fair Trial or A Fair Price?' 17 *Crim. L. Forum* (2006) 177, 216-218.

of the Tribunal clarified that a) the position of the accused and the gravity of his alleged offences are dispositive; b) and that the term 'most senior leaders' pertain also to paramilitary leaders;<sup>255</sup> c) the term is not limited to the architects of an overall policy.<sup>256</sup> Generally, a presumption in favor of referrals has characterized the decisions of the Referral Bench.<sup>257</sup>

The provision also stipulates that upon such order of referral 'the Prosecutor shall provide to the authorities of the State concerned all of the information relating to the case which the Prosecutor considers appropriate and, in particular, the material supporting the indictment'.

Only one case was referred to Serbia. Vladimir Kovacevic (AKA Rambo) was indicted for his role in the attack on the Croatian city of Dubrovnik in 1991.<sup>258</sup> Although he was transferred to The Hague by Serbia in 2003 he was declared unfit to stand trial and released back to Serbia where he was hospitalized in a psychiatric facility.<sup>259</sup> Following the 2006 Trial Chamber decision not to dismiss the indictment against Kovacevic, the prosecutor requested the case be referred to Serbia. In its decision later that year the Referral Bench granted the prosecutor's request. Serbia was the appropriate state to try Kovacevic, according to the Bench, on the ground that the transfer of the accused to another facility might be detrimental to his mental health.<sup>260</sup> While the Bench declared it was satisfied that the Serbian legal system satisfied the 'fair trial' requirement, the fact that the Kovacevic case was the only one referred to Serbia was not a source of pride considering the opposite conclusion reached by the Bench one year prior: in the Mrksic case (the Vukovar Three case),<sup>261</sup> Serbia's bid for referral was rejected (as was Croatia's parallel request), by the Referral Bench on the grounds of fair trial concerns.<sup>262</sup> Serbia

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<sup>255</sup> *Prosecutor v. Lukic*, Decision on Milan Lukic's Appeal regarding Referral, Case No. IT-98-32/1-AR11BIS.1 (11 July 2007) para. 20-21.

<sup>256</sup> *Prosecutor v. Jankovic*, *supra* note 249, para 20.

<sup>257</sup> Williams, *supra* note 254, 201-202. The *Lukic* case was the only appeal against the Prosecutor's decision to refer that was accepted by the Appeals Chamber.

<sup>258</sup> *Prosecutor v. Kovacevic*, Case No. IT-01-42/2, Second Amended Indictment (17 October 2003). For a list of cases referred under Rule 11 *bis* see <http://www.icty.org/sid/8934>.

<sup>259</sup> ICTY Press Release, 'Vladimir Kovacevic Declared Unfit to Stand Trial' (12 April 2006), available at <http://www.icty.org/sid/8763>.

<sup>260</sup> *Prosecutor v. Kovacevic*, Case No. IT-01-42/2, Decision on Referral of Case Pursuant to Rule 11 *bis* (17 November 2006) para. 24.

<sup>261</sup> Text accompanying *supra* notes 181-185.

<sup>262</sup> *Prosecutor v Mrksic et al.*, Case No. IT-95-13/1, Decision on the Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11 *bis* (30 June 2005).

was also denied referral of the Mejakic case in April 2006.<sup>263</sup> The case against Kovacevic is still pending before the Belgrade WCC.<sup>264</sup>

### The Transfer of Category II Cases and other Materials to Serbia

Pursuant to the completion strategy, no new indictments were to be issued by the ICTY. Therefore investigations regarding new cases have halted and several case files could not mature into indictments. These cases have been transferred to local authorities with a view that they would pick up where the OTP left off. They involve lower level perpetrators connected to the higher level leadership cases tried at the Tribunal. The transfer of the cases and materials was concluded at the end of 2009 with seventeen case-files pertaining to forty-three persons being handed over to Croatia, BiH and Serbia.<sup>265</sup> Between three and five cases were transferred to Serbia.<sup>266</sup> One such file related to crimes committed in Zvornik municipality. Proceedings in Serbia, however, expanded the scope of the case and the crimes committed in Zvornik have been divided into three more specific cases.<sup>267</sup>

The transfer of the remaining ICTY case files and investigation materials and evidence is the responsibility of the 'Transition Team' of the OTP, which was established pursuant to the Completion Strategy in 2004. Besides following up on the progress of the cases transferred under the *11 bis* procedure, the team's central task is to respond to requests from national prosecutor offices and courts to obtain evidence and other investigative materials. Members of the team interviewed by DOMAC indicated that such procedures are carried out on a daily basis and have been extremely successful in that an efficient and respectful working relationship has been formed between the OTP and national prosecutors. Indeed, evidence obtained by the ICTY is used in most local trials in Serbia and requests from the local prosecutor's office to the team occur on a weekly

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<sup>263</sup> Albeit on grounds that BiH possessed a stronger nexus to the case. *Prosecutor v. Mejakic*, Case No. IT-02-65, Decision on Joint Defense Appeal against Decision on Referral under Rule 11 *bis* (7 April 2006).

<sup>264</sup> Bekou, *supra* note 216, 772 fn241.

<sup>265</sup> 'Seventeenth annual report of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991', UN Doc. A/65/205, S/2010/413 (30 July 2010) para 80.

<sup>266</sup> Because the OTP cases were incomplete in terms of investigations, the prosecutor's office does not consider all of them as "cases". Interview with Ivan Jovanovic (October 2010).

<sup>267</sup> Belgrade Center for Human Rights, "'Human Rights in Yugoslavia 2009' (Belgrade, 2010) 378, available at <http://www.english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20serbia%202009.pdf>.

basis.<sup>268</sup> This is not surprising as most cases prosecuted in the Belgrade court are linked to some extent to ICTY cases and investigations. The Ovcarica case, for example, concerned the same events in Vukovar that formed the ICTY case against Mrksic and Slijivancanin.<sup>269</sup> The Braca Bitici and Podujevo cases were connected to the ICTY case against Vlastimir Djordjevic;<sup>270</sup> the Scorpions cases in Belgrade are linked to the ICTY cases against Stanisic and Simatovic<sup>271</sup> and indeed refer to ICTY documents;<sup>272</sup> The Suva Reka and Stara Gradiska cases are linked to ICTY cases against Sainovic et al and against Brdjanin<sup>273</sup> respectively; and the Lekaj case to the Haradinaj case.<sup>274</sup> The judgment in the Lekaj case specifically referred to a map of the operational zone of Lekaj's unit and a photo of him, both provided by the ICTY.

The OTP also allows local authorities to conduct their own search of the unrestricted materials through providing national prosecution offices with electronic access keys to some databases, pursuant to an agreement signed between the OTP and Serbia.<sup>275</sup> The OTP further set up computer posts in The Hague where delegations from local jurisdictions can browse additional databases.

### Transfer of Expertise

Since the beginning of the implementation of the completion strategy, the ICTY's outreach program extended the scope of its activities designed to introduce legal professionals from the region to the work of the ICTY.<sup>276</sup> ICTY staff attended conferences, round tables and meetings with members of the legal community, the media, ministries, university and high school students, NGOs etc. Examples of interactions with members of the Serbian system included ICTY visits of Supreme Court judges, the war crime prosecutor, and the head of witness protection unit who all met

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<sup>268</sup> Interview with Ivan Jovanovic (October 2010).

<sup>269</sup> Above notes 179-**Error! Bookmark not defined.**

<sup>270</sup> Above note 153. The Serbian War Crime Prosecutor maintains that it was his office that connected Djordjevic to the crimes in Braca Bitici.

<sup>271</sup> Above note 149.

<sup>272</sup> Humanitarian Law Center, 'War Crimes Trials in Serbia' (December 2007) 7, available at <http://www.hlc-rdc.org/uploads/editor/War%20Crimes%20Trials%20in%20Serbia%20Report.pdf>.

<sup>273</sup> Prosecutor v. Bradjanin, Case No. IT-99-36-T.

<sup>274</sup> *Supra* note 156.

<sup>275</sup> 'Memorandum of Understanding on Access to Documents through the Electronic Disclosure Suite between the Office of the Prosecutor of the ICTY and the Office of the War Crimes Prosecutor of the Republic of Serbia' (2006).

<sup>276</sup> For details on the different activities see <http://www.icty.org/sid/8938>.

with ICTY President, Prosecutor and Registrar to get an insight into the work with witnesses and evidence. In 2008 the Tribunal began developing a program on its legacy which put special emphasis on enhancing the capacity of the domestic systems in the region. Consequently, the Tribunal intensified the interaction between itself and the local judiciaries, studied their needs and responded to them directly. Efforts at transferring knowledge and expertise shifted from a more academic paradigm to direct interactions between ICTY staff and its counterparts in the region. A detailed list of activities is produced in Annex II of this report. The following are only key developments stemming from the shift in paradigm:

- In 2008 the intern project was established whereby interns from the Region spent six months in the ICTY followed by an internship at their home institutions; visit of representatives from Belgrade state court to learn about witness protection; and a visit of security staff of the district court for training. In 2009 several one-on-one meetings were organized. The ones pertaining to Serbia included a visit of judges to the ICTY for training in witnesses and victims support services; a visit of Serbian investigators from the WCIS which were introduced to the ICTY staff responsible for issuing requests from Serbia to the Tribunal and introducing them to technical and analytical tools and management of investigations; a visit of judges, police and witness and victims coordinator for training; and the holding of a roundtable hosting representatives from the National Council of Cooperation with the ICTY, war crimes prosecutor's office, judicial training center and the Belgrade district court with ICTY Outreach representatives to discuss, among other, judicial collaboration.
- Together with the OSCE, specifically OHDIR, and the UNICRI, a nine month long study was undertaken in 2009 to assess the needs of the local systems. Judges, prosecutors, governmental officials, academics and NGO members were consulted regarding their greatest challenges in continuing the work of the ICTY in terms of war crimes prosecutions, education and outreach.<sup>277</sup> In accordance with the memorandum of understanding

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<sup>277</sup> OCSE OHDIR& UNICRI, 'Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer' (September 2009), available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/report\\_supporting\\_transition\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/report_supporting_transition_en.pdf)

concluded between the Tribunal and its partners, the study was to constitute the basis for further action in the region.<sup>278</sup> As a result of the study, in May 2010 OHDIR and UNICRI established the “War Crimes Justice Program”. During the eighteen months of the project additional staff has been hired to assist local institutions in the management of war crimes cases; development of training materials on IHL and research/analytical tools; additional working visits; and translation of ICTY transcripts into Bosnian and Serbo-Croat languages.<sup>279</sup> As of February 2011, 20 staff members support staff have joined the WCC and the Higher Court as part of the project.<sup>280</sup>

- In 2009 the Tribunal published a specified manual which covers all the elements of war crimes prosecution, from the investigation, indictment, arrest, pre-trial, and trial stages, all the way to the judgment and sentence stages. It also addresses the issues of witness and victims services and legal aid.<sup>281</sup>
- Since June 2009 The OTP has been hosting the “Visiting National Prosecutors Program”, involving three prosecutors from BiH, Croatia and Serbia who have been working at the OTP alongside OTP staff. The prosecutors have a dual mandate: they serve as liaison officers between their respective national offices and the ICTY and work on domestic cases during which they become familiarized with the databases, management and analytical tools of the Tribunal and the procedures concerning access to confidential evidence.<sup>282</sup>

Notably, the transfer of expertise to the local jurisdictions has not been budgeted and only a small part of these activities have been funded by the Tribunal. Capacity building events thus largely rely on availability of donors. Furthermore, as the Tribunal

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<sup>278</sup> Interview with Judge Pocar, (January 2009, The Hague).

<sup>279</sup> Project outline is available at <http://www.osce.org/odihr/43617.html>.

<sup>280</sup> ICTY Press Release, 'ICTY Conducts Training Session for Serbian Legal Professionals', available at <http://www.icty.org/sid/10543>.

<sup>281</sup> ICTY–UNICRI, *ICTY Manual on Developed Practices* (2009) available at [http://www.icty.org/x/file/About/Reports%20and%20Publications/manual\\_developed\\_practices/icty\\_manual\\_on\\_developed\\_practices.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/manual_developed_practices/icty_manual_on_developed_practices.pdf).

<sup>282</sup> ICTY, 'Assessing the Legacy of the ICTY – Background Paper' (February 2010), available at <http://www.icty.org/sid/10292>.

has been downsized in the past few years, available staff members are few in number. According to interviews conducted by DOMAC, remaining staff members of the ICTY have been strained for time and resources in order to participate in the abovementioned initiatives and programs.

## 7. THE IMPACT OF THE ICTY ON DOMESTIC PROSECUTIONS IN SERBIA

War crimes proceedings in 2010 Serbia are conducted on a different, better, level than fifteen years ago. All aspects of the proceedings have improved since Serbia's initial response to the wars described in section 4 *supra*. A more hospitable political atmosphere to war crimes prosecutions exists, allowing more leeway to indict and prosecute Serbian suspects. Fair and professional prosecutions have also been enabled by the establishment of specialized organs within the judicial system and changes in legislation. As was the case with Croatia, these changes were not instigated or brought about directly by the ICTY, but rather by regime changes and external coercion. The impact of the ICTY lies elsewhere, in constituting a professional model that prosecutions in Serbia, once they became viable, have had to emulate. This section describes the developments that have taken place in the institutional and normative frameworks in Serbia and analyses their connection with the Tribunal in relation to the points of interaction described in the preceding section.

Like its neighbor Croatia, a very influential factor on Serbia's policy on war crimes prosecutions has been the prospects of EU accession. The impact of the EU on Serbia is clearly ascertained in the context of Serbia's cooperation with the ICTY. Under the 'Stabilization and Association Process' (SAP) established in 1999 to regulate the integration of the five Balkan states into the EU,<sup>283</sup> cooperation with the ICTY was set as a condition for the opening of negotiations on a Stabilization and Association Agreement (SAA).<sup>284</sup> Serbia has generally demonstrated its susceptibility to this aspect of EU

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<sup>283</sup> Operational Conclusions (COM (1999) 235 final) (26 May 1999), Bull. EU 5-1999, available at [http://aei.pitt.edu/3571/01/000722\\_1.pdf](http://aei.pitt.edu/3571/01/000722_1.pdf).

<sup>284</sup> Thereby cementing what had already been declared in the Conclusions on the Principle of Conditionality Governing the Development of the European Union's Relations with Certain Countries of South-Eastern Europe', Bull. EU 4-1997 (29 April 1997).

conditionality.<sup>285</sup> Former ICTY prosecutor, Carla de la Ponte, estimated that EU conditionality brought about the transfer of over 14 indictees by Serbia to the ICTY.<sup>286</sup> The transfer of Karadzic in 2008 by the newly elected pro-EU government was further attributed to EU pressure, especially on the part of the Netherlands.<sup>287</sup> This process has not been without its difficulties.<sup>288</sup> Negotiations between Serbia and the EU on the SAA which opened in October 2005 were suspended in 2006 as a result of Serbia's failure to apprehend six indictees, including Mladic.<sup>289</sup> They were not resumed until June 2007 following a declaration on the part of the Serbian government it was committed to cooperate fully with the Tribunal.<sup>290</sup> The SAA between Serbia and the EU was finally signed in April 2008<sup>291</sup> and in December 2009 Serbia applied for EU membership. Ratification progress of the SAA only began in June 2010 following the confirmation by the ICTY Prosecutor that Serbia was indeed complying with its obligations to the Tribunal.<sup>292</sup> In October 2010 the EC Council requested the Commission's opinion on Serbia's membership application.<sup>293</sup> In October 2011, following the capture and transfer of Mladic and Hadzic, the European Commission recommended Serbia to become a

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<sup>285</sup> Interview with OPT Senior advisor (January 2009, The Hague). See C. Pippan, 'The Rocky Road to Europe: The EU's Stabilization and Association Process for the Western Balkans and the Principle of Conditionality' 9 Eur. Foreign Aff. Rev. (2004) 219, 241. The EU Commission stated in the 2005 Enlargement Strategy Paper, that the then Serbia and Montenegro Union "achieved significant progress in co-operation with the ICTY in the run-up to the Commission Report on the preparedness to start SAA negotiations, in particular delivering a significant number of indictees to The Hague Tribunal." Commission of the EC, '2005 Enlargement Strategy Paper' (COM(2005) 561 final) (9 November 2005) available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=505DC0561](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=505DC0561).

<sup>286</sup> C. Del-Ponte, *Madame Prosecutor: Confrontations with Humanity's Worst Criminals and the Culture of Impunity* (2009) 455-459.

<sup>287</sup> Lamont, *supra* note 178, p. 85. The same is true with respect to the arrest of Mladic in May 2011 and Goran Hadzic in July 2011.

<sup>288</sup> M. Dobbels, 'Serbia and the ICTY: How Effective is EU Conditionality?' EU Diplomatic Papers 6/2009 (2009) 12-13, available at [www.coleurope.eu/file/content/.../ird/.../pdf/.../EDP\\_6\\_2009\\_Dobbels.pdf](http://www.coleurope.eu/file/content/.../ird/.../pdf/.../EDP_6_2009_Dobbels.pdf).

<sup>289</sup> Although progress was made with respect to access to documents and witnesses. Commission of the EC, 'Serbia 2006 Progress Report' (SEC(2006) 1389 (8 November 2006) 15-16, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/Nov/sr\\_sec\\_1389\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/Nov/sr_sec_1389_en.pdf).

<sup>290</sup> Commission of the EC, 'Serbia 2007 Progress Report' (SEC(2007) 1435 (6 November 2007) 16, available at [http://ec.europa.eu/enlargement/pdf/key\\_progress\\_report%20\(8%20November%202006\)%2010.pdf](http://ec.europa.eu/enlargement/pdf/key_progress_report%20(8%20November%202006)%2010.pdf), available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/nov/sr\\_sec\\_1389\\_en.pdf\\_documents/2007/nov/serbia\\_progress\\_reports\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/sr_sec_1389_en.pdf_documents/2007/nov/serbia_progress_reports_en.pdf).

<sup>291</sup> Stabilization and Association Agreement between the European Communities and Their Member States of the one part, and the Republic of Serbia, of the other, available at [http://ec.europa.eu/enlargement/pdf/serbia/key\\_document/saa\\_en.pdf](http://ec.europa.eu/enlargement/pdf/serbia/key_document/saa_en.pdf).

<sup>292</sup> EU Council, 'Council Conclusions on the Western Balkans', (10765/3/10REV 3, Annex III) (14 June 2010), available at <http://register.consilium.europa.eu/pdf/en/10/st10/st10765-re03.en10.pdf>.

<sup>293</sup> EU Council, 'Application by the Republic of Serbia for membership of the European Union - Council conclusions' (15305/2/10REV 2) (25 October 2010), available at <http://register.consilium.europa.eu/pdf/en/10/st15/st15305-re02.en10.pdf>.

candidate country for European Union membership.<sup>294</sup> Amid criticisms levelled against the EU that ICTY conditionality has not been consistently and strictly maintained towards Serbia,<sup>295</sup> it nevertheless still plays a central role in Serbia's attempts at accession.

Compared with the issue of ICTY cooperation, domestic prosecutions of war crimes have received far less attention in EU policy. Nevertheless, the issue has been addressed by the Council since 2004 when it set the development of the capacity to try war crimes and the strengthening of the war crimes prosecutor's office as priorities.<sup>296</sup> Annual progress reports on Serbia since 2005 followed domestic prosecution of war crimes in Serbia primarily in the context of review of Serbia's judicial system.<sup>297</sup>

## 7.1 INVESTIGATION/PROSECUTION RATES

This section seeks to determine what, if any, impact the work of the Tribunal has had on the rates of domestic war crimes investigations and prosecutions in Serbia. The examination is divided into two parts: the first looks at the influence on the very existence of domestic proceedings, i.e., has the ICTY had any impact on the generation of the process within Serbia of war crimes investigations and prosecutions. The second looks at the possible influence on the choice of proceedings, in other words, whether the ICTY has had an effect on the selection of cases within the context of the domestic war crimes proceedings. The conclusion of this analysis is as follows: with respect to the first part

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<sup>294</sup> It's report stated that "Cooperation with the International Criminal Tribunal for the former Yugoslavia has greatly improved since 2008 to a now fully satisfactory level, as best illustrated by the arrests and transfers to the Hague tribunal of Radovan Karadzic in 2008, Ratko Mladic and Goran Hadzic in 2011", Commission of the EC, 'Commission Opinion on Serbia's Application for Membership of the European Union' (12 October 2011) 8, available at [http://www.europa.rs/en/srbijalEu/kljucni\\_dokumenti/CommisionsOppinionofSerbia%27sMembershipApplication.html](http://www.europa.rs/en/srbijalEu/kljucni_dokumenti/CommisionsOppinionofSerbia%27sMembershipApplication.html)

<sup>295</sup> F. Hartmann, 'The ICTY and EU Conditionality' in J. Batt and J. Obradovic-Wochnik (eds.) *War Crimes, Conditionality and EU Integration in the Western Balkans* (2009) 67, available at <http://www.iss.europa.eu/uploads/media/cp116.pdf>; Dobbels, *supra* note 288.

<sup>296</sup> EU Council, 'Council Decision on the Principles, Priorities and Conditions Contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999' (9 June 2004), available at <http://register.consilium.europa.eu/pdf/en/04/st09/st09354.en04.pdf>. It should also be noted that upon its application to the Council of Europe Serbia (then the FRY) committed itself to revise, in co-operation with Council of Europe experts, the legislation and regulations concerning, *inter alia*, war crimes and to "ensure prosecution before the courts of crimes which are not prosecuted by the ICTY". See Parliamentary Assembly of the Council of Europe, *Opinion No. 239 (2002), The Federal Republic of Yugoslavia's application for membership of the Council of Europe*, adopted 24 September 2002, available at <http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta02/EOPI239.htm>.

<sup>297</sup> E.g. EU Commission, 'Serbia and Montenegro – 2005 Progress Report' (9 November 2005) 15, available at [http://ec.europa.eu/enlargement/archives/pdf/key\\_documents/2005/package/sec\\_1428\\_final\\_progress\\_report\\_cs\\_en.pdf](http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1428_final_progress_report_cs_en.pdf); EU Commission, 'Serbia 2006 progress report' (8 November 2006) 10, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2006/nov/sr\\_sec\\_1389\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/sr_sec_1389_en.pdf); EU Commission, 'Serbia 2007 Progress Report' (6 November 2007) 10, available at [http://ec.europa.eu/enlargement/pdf/key\\_documents/2007/nov/serbia\\_progress\\_reports\\_en.pdf](http://ec.europa.eu/enlargement/pdf/key_documents/2007/nov/serbia_progress_reports_en.pdf); EU Commission, 'Serbia 2008 Progress Report' (5 November 2008) 12, available at [http://ec.europa.eu/enlargement/pdf/press\\_corner/key-documents/reports\\_nov\\_2008/serbia\\_progress\\_report\\_en.pdf](http://ec.europa.eu/enlargement/pdf/press_corner/key-documents/reports_nov_2008/serbia_progress_report_en.pdf).

there is little doubt that it was the ICTY's existence and operation that led to the holding of war crimes trials in Serbia. Domestic war crimes proceedings were initiated either as a response to the distrusted ICTY or as a result of external players, primarily the EU, which were inspired by the ICTY's work to exert pressure on Serbia to develop similar domestic processes. In this sense, domestic war crimes proceedings can be viewed as a reaction to ICTY proceedings. As to the second part, direct impact of the Tribunal on the selection of domestic war crimes cases can be established. Such selection has been based on either concrete investigations transferred by the OTP to its Serbian counterpart or on the revelations stemming from ICTY judgments which inspired further action on the part of the Serbian prosecutor.

As outlined in chapter 4 *supra*, the domestic response to the mass atrocities of the Yugoslav and Kosovo wars under Milosevic has been negligible. Aside from one show trial aimed at appeasing the international community,<sup>298</sup> and a host of dubious trials against Albanians for terrorism, no real attempt has been made to adjudicate war crimes perpetrators. The reasons for this avoidance were described in detail in section 3 *supra* and are, in a nutshell, the complicity of the political and military echelons in the crimes, the firm sensation of victimhood across Serbia, the pervading corruption in all public sectors and the lack of independence and capacity of the judicial branch. Adequate war crimes proceedings in these circumstances were simply impossible in Serbia.

Against this backdrop, the establishment of the ICTY and the first indictments of Serbs, including Karadzic in 1995 and Milosevic in 1999,<sup>299</sup> initially had a freezing effect on prospects of domestic proceedings by enhancing public perceptions of victimhood and prompting defensive responses from the Serbian and the media. As described in sections 6.1 and 6.2 *supra*, Serbians resented the ICTY from the outset which, in turn, transformed the Tribunal into an effective tool in the hands of nationalist political parties.

Even with the establishment of the DOS coalition government in 2000, left to its own devices, Serbia (the government as well as the general population) would most probably not have opted to conduct war crimes proceedings. In fact, the ICTY had a great deal to do with the prevailing resentment to such proceedings against Serbia. As described in chapter 6 *supra*, Serbs generally believed they were victims of a selective

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<sup>298</sup> The case of Dusan and Vojin Vuckovic, *supra* text accompanying notes **Error! Bookmark not defined.**-119.

<sup>299</sup> See section 5.2 *supra*.

policy of prosecutions on the part of the international community and political leaders of almost all the political spectrum shared and continued to embrace the same sentiments. Furthermore, as outlined in chapter 5 *supra*, between 1999 and 2003, most of the Serbian highest political and military echelon was indicted by the ICTY, especially with respect to the conflict in Kosovo. The fact that indictments were not issued against Albanian leaders until 2003 when four indictments were handed down did not help matters much. In that context, as pointed out by Mark Ellis, the Executive Director of the International Bar Association (IBA), on the basis of extensive interviews conducted by him at the time, there was no will among Serbs to conduct domestic war crimes proceedings.<sup>300</sup>

On the other hand, with time, the fact that the Tribunal remained one of the least trusted institutions in Serbia has come to support domestic war crimes proceedings. To a certain extent, the negative sentiments towards the ICTY made the idea of domestic proceedings not a bad idea at the time after all. Kostunica, who made no secret of his distaste of the Tribunal, came around to the idea of holding domestic war crimes trials as a means of keeping the Tribunal at bay.<sup>301</sup>

And thus, with the establishment of the DOS coalition government there began a slow process of domestic war crimes prosecutions. But the fact that such proceedings were mostly a 'knee jerk' reaction to the Tribunal, coupled with the fragility of the new regime and with little international attention directed at domestic war crimes prosecutions, resulted in the lack of a coherent prosecutorial policy. The consequences of this were a) very few war crimes proceedings took place, and b) proceedings would not involve high ranking officials. To highlight this last point, according to Radio B92 the then Serbia's new head of police, Sreten Lukic, announced in May 2001 that 66 police officers were to be investigated for crimes against Albanians during the NATO campaign.<sup>302</sup> The very same Sreten Lukic was later found guilty by the Tribunal of

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<sup>300</sup> M. S. Ellis, 'Coming to Terms with its Past: Serbia's New Court for the Prosecution of War Crimes' 22 Berkeley J. Int'l L. (2004) 165, 168.

<sup>301</sup> 'Kostunica reiterated the necessity of the international community's acceptance of trials in Serbia and the country's cooperation with the ICTY on that basis.' USIP, 'Serbia AT A Crossroad Again' (2004), available at <http://www.usip.org/publications/serbia-crossroads-again-can-country-firmly-embark-reform-path-president-boris-tadic>; Also see Orentlicher, *supra* note 198, 66-7; Justice at Risk, *supra* note 95,5; HRW, 'Selling Justice Short' (2009) 96-7, available at [http://www.hrw.org/en/node/84262/section/10#\\_ftn397](http://www.hrw.org/en/node/84262/section/10#_ftn397).

<sup>302</sup> Under Orders, *supra* note 36, 485.

participating in a joint criminal enterprise to deport Albanians from Kosovo during the Campaign.<sup>303</sup>

Thus, in the period between the change in government in 2000 and the creation of a specialized war crimes court in late 2003 only few war crimes proceedings took place. Besides the retrial of Petkovic and Simic, which ended in 2003,<sup>304</sup> only three other trials took place: the Nikolic case, the Sjeverin case and the Podujevo case:

The first war crimes case prosecuted following the fall of Milosevic was against Ivan Nikolic, a VJ soldier, who was charged with the murder of two Albanians in Kosovo in 1999. He was sentenced in 2002 to eight years in prison by the Prokuplje district court.<sup>305</sup> The light sentence partly stemmed from the prosecutions' insistence that his courageous conduct during the war be taken into account.<sup>306</sup>

The second war crimes case adjudicated in Serbia, the Sjeverin case, exemplified the immense difficulties of the domestic war crimes proceedings and the challenges which the ICTY presented. The Belgrade district court found four men, including Milan Lukic,<sup>307</sup> guilty of the abduction and murder of 16 Muslims from Sjeverin in Serbia and Montenegro.<sup>308</sup> The trial against Lukic in 2003, which was conducted *in absentia*, took place despite the fact that Lukic was indicted by the Tribunal in October 1998.<sup>309</sup> The verdict was quashed by the Supreme Court in 2004 on what has been described by several NGOs as unconvincing grounds.<sup>310</sup> In the opinion of the victims and their families the decision stemmed from 'an anti-Hague lobby' which ruled Serbia since Djindjic's assassination.<sup>311</sup> In the retrial of the Sjeverin case in 2005, the trial chamber took notice of the ICTY indictment but declared that the primacy principle did not prevent its

<sup>303</sup> *Supra* text accompanying note 152.

<sup>304</sup> *Supra* text accompanying note 137.

<sup>305</sup> OSCE 2003 Report, *supra* note 138, 8.

<sup>306</sup> Transitional Justice Report, *supra* note 117, 31 fn 82.

<sup>307</sup> AI, 'Sjeverin War Crimes Verdict in Belgrade' (AI Index: EUR 70/023/2003) (1 October 2003), available at <http://www.amnesty.org/en/library/asset/EUR70/023/2003/en/d41e4c9b-d686-11dd-ab95-a13b602c0642/eur700232003en.html>.

<sup>308</sup> As he was hiding at the time in the RS. See text accompanying notes **Error! Bookmark not defined.**-123.

<sup>309</sup> The indictment was unsealed in 2000.

<sup>310</sup> According to Amnesty International the Supreme Court posited that the trial judgment did not ascertain the precise role played by each of the accused in the murders. AI, 'Serbia and Montenegro: A Wasted Year. The Continued Failure to Fulfil Key Human Rights Commitment to the Council of Europe' (AI Index: EUR 70/005/2005) (March 2005), available at <http://www.amnesty.org/en/library/info/EUR70/005/2005>. According to the HLC, the decision was based on political considerations of the judges who were all Milosevic appointees. D. Konjikusic, 'Retrial Under Way in Sjeverin Case', Southeast European Times in Belgrade (22/03/05), available at [http://www.setimes.com/cocoon/setimes/xhtml/en\\_GB/features/setimes/features/2005/03/22/feature-02](http://www.setimes.com/cocoon/setimes/xhtml/en_GB/features/setimes/features/2005/03/22/feature-02).

<sup>311</sup> Konjikusic, *Ibid*.

jurisdiction to try Lukic on war crimes charges under Article 142 of the 1976 SFRY CC.<sup>312</sup> Notably, Serbia unsuccessfully continued its efforts to apprehend and try Lukic. In 2005 Serbia requested his extradition from Argentina – where he was arrested – which was denied in favor of his transfer to the Tribunal instead. Serbia then asked the case be referred to it under Rule 11*bis*.<sup>313</sup> Its request was declined since the Tribunal did not deem the domestic proceedings against Lukic in Serbia to represent a stronger link to the case than that of BiH, which also asked for referral. Eventually Lukic was tried by the Tribunal and sentenced to 30 years imprisonment in July 2009.<sup>314</sup>

Another trial that took place in 2003 was the Podujevo case (also known as Podujevo I case) involving two defendants, Sasa Cvjetan and Dejan Demirovic, former members of the Serbian MUP reserve Scorpions unit. They were accused of killing Albanian civilians in Podujevo, Kosovo in 1999. The trial was relocated to Belgrade district court at the request of the prosecutor to enable the undisturbed interrogation of witnesses of Albanian ethnicity.<sup>315</sup> In 2004 Cvjetan was convicted and sentenced to 20 years imprisonment.<sup>316</sup> Demirovic, who fled to Canada, was tried *in absentia*. He was later extradited to Serbia but proceedings against him were dropped. The judgment was annulled by the Supreme Court in 2005 on the grounds of violations of Cvjetan's human rights in the pre-trial stage as well as insufficient evidence establishing his guilt,<sup>317</sup> a decision criticized by a HLC lawyer who represented the victims.<sup>318</sup> The retrial, which was upheld by the Supreme Court in December 2005, once again convicted Cvjetan. At the time, the HLC protested the fact that although the cases produced evidence sufficient for the institutions of proceedings against Cvjetan's superiors – this was not pursued by the prosecutor.<sup>319</sup> Indeed, in the 2011 ICTY verdict in the case of Vlastimir Djordjevic, former Assistant Minister of the Ministry of Internal Affairs of Serbia, the fact that the accused did not pursue a proper investigation of the crime and that Demirovic was deployed back

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<sup>312</sup> The translated judgment is available at <http://www.scribd.com/doc/42071374/Milan-Lukic-et-al-judgement-Belgrade-court-2003>.

<sup>313</sup> *Prosecutor v. Lukic*, Case No. IT-98-32/1-PT, 'Decision on Referral of Case Pursuant to Rule 11*bis*' (5 April 2007).

<sup>314</sup> *Prosecutor v. Lukic*, Case No. IT-98-32/1-PT, Judgment of 20 July 2009 (Trial Chamber III).

<sup>315</sup> OSCE 2003 Report, *supra* note 138, 10.

<sup>316</sup> Transitional Justice Report, *supra* note 117, 32.

<sup>317</sup> 'A Wasted Year', *supra* note 310, 7-8.

<sup>318</sup> D. Todorovic, 'War Crime Cases before the Serbian National Court', available at [www.helsinki.org.rs/doc/dragoljub%20todorovic.doc](http://www.helsinki.org.rs/doc/dragoljub%20todorovic.doc).

<sup>319</sup> Transitional Justice Report, *supra* note 117, 32.

to Podujevo despite Djordjevic's knowledge of the facts, supported the charges of his efforts to conceal evidence of the campaign against Albanians in 1999.<sup>320</sup>

A major development in war crimes proceedings in Serbia took place in 2003, with the adoption of The Law on Organization and Competence of Government Authorities in War Crimes Proceedings. The jurisdiction of all district courts to try war crimes was transferred to a new chamber in the Belgrade District Court – the War Crime Chamber (WCC) which was entrusted by the WC law with exclusive jurisdiction to try war crimes in Serbia. The WC law not only established the WCC, but also the War Crimes Prosecutor's Office (WCPO) and the War Crimes Investigation Service (WCIS).<sup>321</sup> From that point on all war crimes investigations, prosecutions and adjudications were conducted by these special organs. The said organs are discussed further in sections 7.2 and 7.3 *infra* but in the context of this section, concerning the rates of investigations and prosecutions, it should be pointed out that the decision to invest exclusive jurisdiction in one court signaled an expectation about a relatively limited number of proceedings which would be conducted in Serbia (in contrast to the multitude of proceedings undertaken in Croatia where the specialized war crimes chambers were not endowed with exclusive jurisdiction).<sup>322</sup> Indeed, the WCC was composed of only six judges, two investigative judges<sup>323</sup> and seven law clerks;<sup>324</sup> the WCPO employed seven deputy prosecutors and two analysts;<sup>325</sup> and the WCIS employed only 12 police officers.<sup>326</sup> Indeed, eight year since the establishment of the WCC, only twelve final judgments and thirteen first instance judgments were handed down (eight trials are on-going) – all against 110 individuals.<sup>327</sup>

This, however, was not necessarily the idea behind the designation of the WCC. IBA's Mark Ellis, who worked closely with the OSCE on the new law, reported that the

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<sup>320</sup> *Prosecutor v. Djordjevic*, *supra* note 153, paras. 1962-1966.

<sup>321</sup> Articles 9 and 10; Articles 4-7; and Article 8 respectively of the Law on Organization and Competence of Government Authorities in War Crimes Proceedings of 1 July 2003, English translation available at <http://www.osce.org/serbia/66115> (hereinafter WC Law).

<sup>322</sup> See DOMAC report on the impact of the ICTY on domestic war crimes prosecutions in Croatia.

<sup>323</sup> By 2004 there were 4 investigating judges. DOMAC interview with Judge Vizic (Belgrade, May 2008).

<sup>324</sup> ICTJ, 'Against the Current – War Crimes Prosecutions In Serbia' (2007) 15, available at <http://www.ictj.org/en/news/press/release/1499.html>.

<sup>325</sup> *Ibid.* 6.

<sup>326</sup> That number rose to 22 police officers by 2007, *ibid.* 12.

<sup>327</sup> The information is regularly updated on the War Crimes Prosecutors Office website, at [http://www.tuzilastvorz.org.rs/html\\_trz/PREDMETI\\_ENG.HTM](http://www.tuzilastvorz.org.rs/html_trz/PREDMETI_ENG.HTM).

original draft which was prepared by the Serbian government, designated three district courts for that purpose (Belgrade, Nis and Novi Sad) and the jurisdiction in each particular case would be decided by the Supreme Court. It was the objections put forward by the OSCE and the group of international experts which assisted the government in the drafting process (which were in favor of consolidating the considerable resources required for war crimes proceedings into one organ and preventing a potential politicization of the allocation of cases by the Supreme Court) that tipped the scale in favor of one specialized court.<sup>328</sup> And it should be pointed out that relative to limited resources of the WCC and the war crimes prosecutor, mentioned above, the rates of war crimes prosecutions are rather impressive: one trial was adjudicated before the WCC in 2004, four in 2005, two in 2006, one in 2007, nine in 2008, four in 2009 and eleven in 2010.<sup>329</sup>

It doesn't seem that the ICTY had an immediate impact on the decision to establish the WCC. It has been suggested that the prospect of receiving cases from the ICTY under the *11bis* procedure gave further support to the idea of a specialized war crimes system.<sup>330</sup> Serbia was of course conscious of such a possibility in 2003-2004 as can be seen by the rush amendment to the WC law in 2004 (which allowed the use of ICTY evidence before the WCC)<sup>331</sup> just after the ICTY prosecutor sought referral of the Rambo case to Serbia in October 2004.<sup>332</sup> But such prospects did not exist in 2002, when the drafting of the law began which points to the fact that the ICTY was not the primary motivation for the creation of the war crimes system.

The specific mechanism for processing war crimes notwithstanding, the ICTY did have an impact on the acceptance, on the part of the Serbian government, that war crimes trials were to be held. Around that time, the completion strategy prompted the EU to give notice to domestic war crimes proceedings. This was the immediate cause for the continued war crimes proceedings and here lies the *central* avenue of ICTY impact on Serbia: the Tribunal turned war crimes prosecutions into a political reality which, as

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<sup>328</sup> Ellis, *supra* note 300, 185. This is also confirmed by the OSCE's Ivan Jovanovic and Mr. Bojan Lapcevic, deputy prosecutor, the Serbian War Crime Prosecutor's Office (May 2008).

<sup>329</sup> See Appendix 1 for a table of war crimes trials in Serbia since 2004.

<sup>330</sup> 'Serbian Justice on Trial', *The Economist* (19 May 2005), available at [http://www.economist.com/node/3992436?story\\_id=3992436](http://www.economist.com/node/3992436?story_id=3992436).

<sup>331</sup> Introducing Article 14(a) to the WC Law.

<sup>332</sup> See *supra* text accompanying notes 258-260.

discussed above in the context of the completion strategy,<sup>333</sup> was transferred onto the shoulders of the domestic jurisdictions of the republics of the former SFRY. This reality filtered into the international sphere where Serbia was now operating in. And this meant that in order to establish closeness with the West, namely the EU<sup>334</sup> and the US,<sup>335</sup> Serbia had no other option than to import war crimes proceedings domestically. Thus, the very existence of the ICTY and the work it had done were at the heart of the necessity to take on war crimes trials. Indeed, all those interviewed by DOMAC, specifically Serbian judges, prosecutors and NGO representatives, stated that without the ICTY, at least as a concept, there would not have been domestic prosecutions of war crimes in Serbia.<sup>336</sup>

Once the mechanism for war crimes prosecution was set in place, the ICTY has had much influence, at least initially, on the selection of the cases tried before the WCC. Several cases were brought upon directly by ICTY proceedings:

- The Ovchara trials, concerning the murder of injured Croatian soldiers and civilians taken from the Vukovar hospital,<sup>337</sup> was an incomplete case transferred by the OTP to the Serbian war crimes prosecutor.<sup>338</sup> Indeed, two of those indicted in the Ovchara case, Mirosljub Vujovic and Stanko Vujanovic, had been mentioned in the ICTY 'Vukovar Three' indictment of August 2002.<sup>339</sup> Serbia's eagerness to adjudicate the Vukovar case domestically<sup>340</sup> might have been one reason this case was the first one prosecuted before the WCC although Del Ponte eventually decided not to refer it to Serbia.<sup>341</sup>

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<sup>333</sup> *Supra* section 6.3.

<sup>334</sup> *Supra* text accompanying notes 296-297.

<sup>335</sup> Ellis, *supra* note 300, 169.

<sup>336</sup> This was also the conclusion of Orentlicher, *supra* note 192, at 67: "perhaps the Tribunal most important contribution was that of beginning the process of legal reckoning at a time when local trials were not possible in Serbia".

<sup>337</sup> See text accompanying *supra* notes 181-185.

<sup>338</sup> 'Selected Developments', *supra* note 137, 6. During her visit to Belgrade in May 2003 Del Ponte brought with her 8 boxes of documents pertaining the Vukovar massacre. 23 suspects were detained soon thereafter. 'Serbs Detain 23 over Massacre' BBC News (26 May 2003), available at <http://news.bbc.co.uk/2/hi/europe/2938358.stm>.

<sup>339</sup> *Prosecutor v. Mrksic*, Case No. IT-95-13/1, 'Second Amended Indictment' (28 August 2002).

<sup>340</sup> Prosecutor Vukcevic hinted this eagerness stemmed from a desire to shield former generals indicted by the ICTY. T. Carter, "Playing by the Rule of Law" 91 A.B.A. J. (2005) 51, 54.

<sup>341</sup> The ICTY allowed the Prosecutor to withdraw its request for referral to either Serbia or Croatia in July 2005. *Prosecutor v. Mrksic*, Case No. IT-95-13/1, 'Decision on the Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11 bis', (1 July 2005).

- The Zvornik I and II trials against former members of the Yellow Wasps militia began as a category II case (complete with witness statements and documents obtained by ICTY investigators) transferred by the OTP to the WCPO in June 2004.<sup>342</sup>
- The Scorpions I and II trials were prompted by a video shown during the Milosevic trial depicting six Bosnian men being executed by members of the Scorpions militia. The tape, obtained by Natasa Kandic from the HLC, was given to the Serbian prosecutor on 23 May 2005.<sup>343</sup> She also gave a copy to the OTP which showed it a week later, on June 1, during the Milosevic trial.<sup>344</sup> Within a day, after both Tadic and Kostunica conveyed outrage publically, four out of the five men shown in the tape were arrested<sup>345</sup> and indicted on 7 October 2005.
- Following the acquittal of Limaj by the ICTY, the Serbian prosecutor initiated an investigation of Limaj and 27 other KLA members for crimes committed against Serb and Albanians civilians in Kosovo. The Prosecutor also consulted the OTP on the matter pursuant to a procedure for investigations of individuals acquitted by the Hague Tribunal.<sup>346</sup> Eventually, no indictment was pursued by the prosecutor who opted to transfer the case to EULEX after a fruitful cooperative dialogue.<sup>347</sup> An arrest warrant against Limaj, currently a PM in the Kosovo parliament, was issued by EULEX in March 2011.<sup>348</sup>

In addition to cases directly affected by ICTY proceedings, many of the cases brought before the WCC concerned events which were the subject of ICTY judgments or concerned people indirectly implicated in ICTY proceedings. In March 2009 an

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<sup>342</sup> Prosecutor v. Branko Popovic et al, Indictment (12 August 2005) available at [http://www.tuzilastvorz.org.rs/html\\_trz/OPTUZNICE/O\\_2005\\_08\\_12\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2005_08_12_ENG.pdf).

<sup>343</sup> T. Judah and D. Sunter, 'How Video that Put Serbia in Dock was Brought to Light', *The Guardian* (5 June 2005), available at <http://www.guardian.co.uk/world/2005/jun/05/balkans.warcrimes>.

<sup>344</sup> ICTY transcripts of Milosevic trial (1 June 2005).

<sup>345</sup> 'Serbia shocked by video showing Srebrenica shootings', *The Guardian* (3 June 2005), available at <http://www.guardian.co.uk/world/2005/jun/03/warcrimes.balkans>.

<sup>346</sup> United States Department of State, '2009 Country Reports on Human Rights Practices – Serbia', (2010), available at <http://www.unhcr.org/refworld/docid/4b9e52c1c.html>.

<sup>347</sup> 'Ex-KLA Questioned, Released' B-92 (17 March 2011), available at [http://www.b92.net/eng/news/crimes-article.php?yyyy=2011&mm=03&dd=17&nav\\_id=73283](http://www.b92.net/eng/news/crimes-article.php?yyyy=2011&mm=03&dd=17&nav_id=73283).

<sup>348</sup> 'Ex-KLA Commander Renounces Immunity', B-92 (18 March 2011), available at [http://www.b92.net/eng/news/crimes-article.php?yyyy=2011&mm=03&dd=18&nav\\_id=73303](http://www.b92.net/eng/news/crimes-article.php?yyyy=2011&mm=03&dd=18&nav_id=73303).

investigation of Radoslav Mitrovic and 4 others, all former members of the Serbian MUP stationed in Kosovo in 1998 and 1999, was initiated by the WCPO following a complaint submitted by the HLC. The complaint was based on statements of witnesses, one of whom was a protected witness that had previously testified before the ICTY in the Milutinovic case.<sup>349</sup> At the time, Mitrovic was standing trial before the WCC for the killing of civilians in Suva Reka, a crime in which he had been implicated by the ICTY in the Milutinovic judgment three weeks earlier.<sup>350</sup> A month later Mitrovic was acquitted by the WCC, but the investigation against him continued by the war crimes prosecutor who was also appealing the acquittal.<sup>351</sup> Other examples: the accused in the Lovas case, Ljuban Devetak, had been mentioned in ICTY proceedings in the Milosevic, Mrksic and Dokmanovic cases. Nenad Malic, the accused in the Stari Majdan case, was implicated for that crime in the ICTY case against Stanisic and Zupljanin.

In general, 32 trials have been, or currently are, adjudicated before the WCC. However, only 13 have made it to the Appeal stage and out of that four were quashed in appeal (Ovcara I, Bytyqi Brothers, Sinan Morina and the Tuzla Convoy) and in three a retrial was ordered with respect to one accused (Scorpions I, Suva Reka, Podujevo II). The retrials congested the already busy schedules of the WCPO and the WCC. Until 2010 the Supreme Court was the appellate court for WCC cases. The practice of the Supreme Court to quash fully or partially WCC judgments attracted criticism from NGOs which suspected that political, rather than legal, considerations constituted the motive behind it. Specifically, it was contended that because many of the judges on the Supreme Court were Milosevic appointees, hostile to the idea of war crimes trials, they were deliberately obstructing the functioning of the WCC.<sup>352</sup> Others did not share that opinion. According to Ivan Jovanovic from the OSCE as well as Judge Vizic, the reasons for the practice were unfamiliarity with international criminal law as well as judicial conservatism.<sup>353</sup> It is interesting to note that the practice of ordering retrials has not changed since the beginning of 2010, when the judicial structure in Serbia changed

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<sup>349</sup> *Prosecutor v. Milutinovic*, *supra* note 64. Also see *supra* text accompanying note 152.

<sup>350</sup> *Ibid.* paras. 484, 498-9.

<sup>351</sup> The investigation has been complicated by allegations on the part of Natasa Kandic of corruption and irregularities in the office of the war crimes prosecutor. 'Irregularities and Abuse of Power in War Crimes Proceedings in the Republic of Serbia', available at <http://www.hlc-rdc.org/Saopstenja/2002.en.html>. Also see discussion in section 7.3 *infra*.

<sup>352</sup> Interviews with representatives from the HLC and BCHR (Belgrade, May 2008).

<sup>353</sup> Interviews conducted in Belgrade (May 2008).

profoundly.<sup>354</sup> The WCC was branded as the War Crimes Panel (WCP) of the Belgrade High Court and appeals of its judgments are now decided by a special department in Serbia's new Appellate Court. Since the beginning of 2010, nine appeals were decided by the Appellate Court. Two cases were quashed (Bytyqi Brothers and Tuzla Convoy) and two were partly quashed (Suva Reka and Podujevo II). Since the judges of the Appellate Court are new appointees with knowledge of international criminal law,<sup>355</sup> it is questionable whether either of the abovementioned arguments is still valid.

One point should also be made. Indictments still do not target high-level perpetrators, especially concerning crimes that took place in Kosovo. Besides of objective difficulties (lack of access to evidence for example) the office may have self-censored itself out of concern of the political implications of investigations against high-level perpetrators.<sup>356</sup>

## 7.2 NORMATIVE IMPACT

This section concerns the normative impact of ICTY jurisprudence on domestic war crimes proceedings in Serbia. The normative impact examined in this section is not limited to the influence of substantive precedents of the ICTY on Serbian law. It also encompasses other alterations and innovations of domestic law that were inspired by the ICTY.

Overall, the ICTY has not had a profound impact on Serbian domestic war crimes law, save laws that were specifically tailored to accommodate cooperation with the ICTY which do not have general applicability. The underlying reason is that, for the most part, there was simply no reason to incorporate ICTY law into Serbian law. First, with respect to national trials of war crimes that occurred during the 1990s, the relevant substantive legislation which has been applied was the 1976 SFRY CC and the 1992 Serbian CC, described in section 3.2. *supra*. Second, there was never such a demand from the ICTY itself. The requirements of the 11*bis* procedure with respect to the domestic law<sup>357</sup> have been interpreted very narrowly by the Referral Bench. As long as the domestic law contained provisions which were relevant enough to try referred cases, and as long that

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<sup>354</sup> For the Appellate Court's record to date see Annex I.

<sup>355</sup> Interview with OSCE Ivan Jovanovic (October 2010).

<sup>356</sup> Communication with OSCE's Ivan Jovanovic (October 2010).

<sup>357</sup> See discussion accompanying *supra* notes 246-262.

the Bench was satisfied that the law would be applied fairly, no amendments to the criminal legislation were needed.<sup>358</sup>

Thus, Serbian case-law on war crimes has made little use of ICTY jurisprudence in interpreting the 1976 SFRY CC and the 1992 Serbian CC. As demonstrated later on in this section, Appellate Court judges have recently begun to cite ICTY case-law in their decisions. To date, this has been done only to the extent ICTY cases support existing interpretations of laws rather than to introduce new ones. Be that as it may, this budding practice might be explained by the judges' interaction with ICTY judges, which they found extremely useful.<sup>359</sup> Such interactions were rare at the time the WCC was established,<sup>360</sup> but became more frequent over time.<sup>361</sup> Whether more frequent peer to peer meetings during the early stages of the WCC would have resulted in greater influence is an open question.

Nor has there been much impact on war crimes provisions in the 2006 CC, which maintained previous legal structures, while incorporating thereto some of the provisions of the ICC Statute. According to Appellate Court Judge Dr. Miodrag Majic, part of the reason why the practice of the ICTY has had no significant impact on domestic legislation and its interpretation lies in the difference between the systematics and definitions of these crimes in the ICTY and ICC Statutes and those of the domestic law.<sup>362</sup> Furthermore, In line with the judicial conservatism which has characterized domestic war crimes law, the CC does not incorporate the doctrine of joint criminal enterprise and only partially incorporates command responsibility as formulated by the ICTY.

With respect to criminal procedure law, some provisions in the WC law reflect lessons from the ICTY experience. As of yet, they have not been incorporated into the CPC which has been designed to address the general overhaul of the Serbian judicial system, distinct from war crimes proceedings.

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<sup>358</sup> See the referral decision in the Kovacevic case, *supra* note 260, paras 31-47.

<sup>359</sup> "I am confident that more frequent contacts with judges from ICTY also had an impact on changes in this direction". Communication with Appellate Court Judge Dr. Miodrag Majic, (March 2011). One judge interviewed conveyed how helpful discussions with ICTY judges were in terms of both substantive law and the structuring of decisions. Interview with a WCC judge (November 2009, Belgrade).

<sup>360</sup> Interview with Judge Pocar and ICTY Outreach staff (January 2009, The Hague).

<sup>361</sup> See Annex II.

<sup>362</sup> Communication with Appellate Court Judge Dr. Miodrag Majic, (March 2011).

## Laws Directly Related to the ICTY

- The 2002 (as amended in 2003) Law on Cooperation of the FRY with the ICTY:<sup>363</sup> The law declared that 'Serbia and Montenegro shall respect and implement the court decisions of the International criminal tribunals and provide legal assistance to its investigative and judicial authorities'.<sup>364</sup> It also allows for the establishment of an ICTY field office in Serbia and Montenegro; for the right of the ICTY to conduct investigations in Serbia and Montenegro (including collection of testimonies, physical evidence and documents); for a procedure of transferring domestic war crimes cases to the ICTY; and most importantly, for a procedure of surrendering indictees to the Tribunal.<sup>365</sup> Lastly, Article 7 established a Council for cooperation with the Tribunal.
- The 2004 amendment to the WC Law which allows the use of ICTY evidence in domestic war crimes proceedings.<sup>366</sup>
- The 2004 Law on the Rights of the Accused Held in Detention Pending Trial at the International Criminal Tribunal and of their Family Members providing financial assistance to Serb ICTY indictees and their families.<sup>367</sup> The law was short-lived as the Constitutional Court of Serbia declared any individual act or action based on this law null and void.<sup>368</sup>
- The 2006 Law of Serbia and Montenegro on freezing of assets of ICTY fugitives was never implemented as the freezing of assets was ordered by the WCC on the basis of Article 234 of the CPC.<sup>369</sup>

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<sup>363</sup> *Supra* notes 196-201.

<sup>364</sup> *Ibid.* Article 1(2).

<sup>365</sup> *Ibid.* Articles 8; 9; 12-17; 18-31 respectively.

<sup>366</sup> *Supra* notes 331. For further discussion see *infra* notes 470-472.

<sup>367</sup> Congressional Research Service, 'Serbia and Montenegro: Current Situation and U.S. Policy' (18 January 2005), 14, available at <http://www.policyarchive.org/handle/10207/bitstreams/969.pdf>.

<sup>368</sup> On the ground it discriminated against all other defendants. Financial aid was still provided to indictees (who surrendered to the ICTY) and their families on the basis of a 2003 governmental decision. Communication with Ivan Jovanovic (March 2011).

<sup>369</sup> Serbian Government, 'Action Plan for Fulfillment of Priorities under the European Commission 2010 Progress Report, with the Aim of Accelerating the Achievement of Candidate Country Status (December 2010) 13-4, available at [http://www.seio.gov.rs/upload/documents/Vesti/!FINAL\\_MASTER\\_AP\\_ProgressReport2010\\_EN.pdf](http://www.seio.gov.rs/upload/documents/Vesti/!FINAL_MASTER_AP_ProgressReport2010_EN.pdf).

## Impact of the ICTY on Domestic Jurisprudence

Generally speaking, the WCC (and later the WCP) have made scarce use of ICTY jurisprudence. The review of judgments of the WCC and the new Appellate Court Department shows that most references to the ICTY relate to evidence, rather than law. This is not surprising considering the civil law nature of the Serbian judicial system which is not based on the notion of legal precedents. Consequently, because ICTY case-law is usually not specifically mentioned in decisions it is difficult to identify a direct influence of the ICTY thereon. For example, in the Suva Reka case, Article 142 of the 1976 FRY CC (war crimes against the civilian population) was interpreted by both the trial chamber and the Appellate Court to include acts committed on account of personal motives as long as a sufficient nexus to the armed conflict could be established (i.e. awareness of the context of armed conflict and the fact that the act was committed under the guise of the conflict).<sup>370</sup> The reasoning correlates to that of the ICTY in the Kunarac Appeal's decision concerning the required nexus of the act to the armed conflict.<sup>371</sup> However, there is no way to ascertain whether the decision in Suva Reka was predicated on the Kunarac decision.

There are only few examples of cases that specifically cited ICTY's jurisprudence in support of legal determinations:

- The issue of POW status was at the heart of the Ovcarica cases where the defendants were charged with acts against POWs under Article 144 of the 1992 CC for the execution of more than 200 Croatian soldiers in Vukovar in 1991. Before the Appellate Court two arguments were raised by the defendants challenging the classification of the victims' POW status. The first argument denied the existence of the status in non-international armed conflicts such as was the situation between Croatia to the SFRY in November 1991. The Appellate Court rejected the argument on the ground that the Croatian soldiers (the victims) were entitled to the POW status by virtue of the JNA's agreement to apply the Third Geneva Convention to VH

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<sup>370</sup> *Prosecutor v. Mitrovic*, Judgment of 30 June 2010 (Serbia Appellate Court) section 2.2.2. The decision summary (in Serbian) is available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivichno-odeljenje/ratni-zlocini/kz1-po2-4-2010.html>.

<sup>371</sup> *Prosecutor v. Kunarac*, Case No. IT-96-23, Appeals Judgment of 12 June 2002, paras 58-9.

forces.<sup>372</sup> This construction as to the applicability of the Third Geneva Convention was identical to that used by the ICTY in the Mrksic case (AKA the 'Vukovar Three' case) which dealt with the same events in Vukovar.<sup>373</sup>

Despite the fact that the Appellate Court did not cite the Mrksic case it did rely expressly on the Blaskic case in rejecting the second argument raised by the defendants: that the specification of the crime in the indictment as a violation of Article 144 of the 1992 CC (crimes against prisoners of war) was incorrect/inaccurate owing to the presence of civilians among the victims and the fact that at least 50 soldiers were wounded (offenses that fell under Articles 142 and 143 of the 1992 CC).<sup>374</sup> The Appellate Court rejected the argument stating that the presence of civilians in the group did not exclude the crimes against them from the ambit of Article 144 1992 CC. While this is in line with Mrksic trial judgment,<sup>375</sup> the Court chose to cite the paragraphs from the Blaskic Appeals judgment stating that the wounded state of the victims did not render them civilians but that rather they retained their POW status.<sup>376</sup> This citation was only loosely relevant to the determination it came to support (that because most of the group consisted of POWs, Article 144 subsumes other crimes under Articles 142 and 143).

- In the Lekaj case, the WCC held that the armed conflict in Kosovo continued until the final withdrawal of the VJ from Kosovo on 20 June 1999, stating that "[T]his viewpoint is taken by the Prosecution of the Hague Tribunal in its indictments for events on Kosovo".<sup>377</sup> It went on to state that "hence it is completely irrelevant that during the event in question there was no fighting on one smaller area...,12.06.1999, since there was fighting between the KLA and the FRY army...in other parts of Kosovo." The latter

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<sup>372</sup> *Prosecutor v. Vujovic*, Judgment of 23 June 2010 (Serbia Appellate Court) paras 74-6. The decision summary (in Serbian) is available at <http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-1-2010.html>.

<sup>373</sup> *Prosecutor v. Mrksic et al.*, Case No. IT-95-13, Appeals Judgment of 5 May 2009, para. 69.

<sup>374</sup> These grounds of appeal were advanced in order to demonstrate the WCC erred in the specification of the crime which is, as an error in law, a ground for a re-trial.

<sup>375</sup> Since what is determinative was the subjective belief of the defendants that the victims were entitled to POW status. *Prosecutor v. Mrksic et al.*, Case No. IT-95-13, 27 September 2007, paras. 207, 480.

<sup>376</sup> *Prosecutor v. Vujovic*, *supra* note 372, paras. 80-83. The paragraphs quoted by the Appellate Court were paragraphs 113-4 of *Prosecutor v. Blaskic*, Case No. IT-95-14, Appeals Judgment of 29 July 2004.

<sup>377</sup> *Prosecutor v. Lekaj*, Judgment of September 2006 (Belgrade District Court) (on file with DOMAC).

statement corresponds to the jurisprudence of the ICTY.<sup>378</sup> While the decision does not cite a specific ICTY decision, it seems that it nevertheless signals that it was aware of the ICTY's position on the issue. The WCC judges have so far refrained from constructing a distinction between international and non-international conflict because, for the most part, it has little legal relevance under the CC, and also because of fear of provoking political resistance.<sup>379</sup>

- In the appeals decision in the Ovcara case, the Appellate Court cited paragraph 32 of the Kupreskic Appeals decision concerning the standard of review over assessments of witnesses by a trial chamber.<sup>380</sup> The standard set by the ICTY was that "it is primarily for the Trial Chamber to determine whether a witness is credible and to decide which witness' testimony to prefer, without necessarily articulating every step of the reasoning in reaching a decision on these points."<sup>381</sup> In the Ovcara Appeal the court adopted the same standard deferring, in principle, to the WCC's determination of a witness's reliability.

The issue of command responsibility is an interesting test case in the context of ICTY influence. The war crimes prosecutor had been under pressure from inside as well as outside Serbia to indict superiors based on the doctrine.<sup>382</sup> However, as mentioned in section 3.2 *supra*, command responsibility as a form of criminal responsibility did not exist as such in the 1976 SFRY CC (and the 1992 Serbia CC) and the prosecutor has been of the view that the application of the doctrine was a breach of the *nullum crimen sine lege* principle enshrined in Article 5 of the Code.<sup>383</sup> It is interesting to note that even in Serbia's submissions before the ICTY in 11 *bis* procedures, it refrained from convincing

<sup>378</sup> See *Prosecutor v. Tadic*, Case No. IT-94-1, 'Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction' of 2 October 2005, para 70.

<sup>379</sup> Interview with OSCE's Ivan Jovanovic (May 2008, Belgrade).

<sup>380</sup> *Prosecutor v. Vujovic*, *supra* note 372, para. 68.

<sup>381</sup> *Prosecutor v. Kupreskic*, Case No. IT-95-16, 'Appeals Judgment' of 23 October 2001, para. 32.

<sup>382</sup> E.g. 'No Justice is Possible without Processing of Command Responsibility' available at <http://oneworldsee.org/No-justice-is-possible-without-processing-of-command-responsibility>; HRW, 'Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro' (2004) 24-25, available at <http://www.hrw.org/en/reports/2004/10/13/justice-risk-0>.

<sup>383</sup> See Vukcevic' paper (in Serbian) available at [http://www.tuzilastvorz.org.rs/html\\_trz/STRUCNI\\_RADOVISRI\\_VV\\_CIR.pdf](http://www.tuzilastvorz.org.rs/html_trz/STRUCNI_RADOVISRI_VV_CIR.pdf). Of specific concern in this context is the mental element at the basis of the doctrine, either the 'had reason to know' standard (adopted in ICTY jurisprudence) or the 'should have known standard' (found in Article 28 of the ICC Statute). See DOMAC report by Antonietta Trapani, 'Assessing War Crimes Trials in the Territories of the Former Yugoslavia: Normative Impact of the ICTY'.

the bench that command responsibility constituted part of its applicable law, as Croatia did,<sup>384</sup> despite competing against the latter for referrals in all three cases.<sup>385</sup>

Although criminal responsibility of superiors for the actions of their subordinates, in the form akin to Article 7(3) of the ICTY Statute, was not enshrined in the 1976 FRY CC and the 1992 CC, some aspects of the doctrine were potentially covered by Article 30 of the 1976 SFRY CC which provides for criminal responsibility in cases of omission contrary to the defendant's obligation to act. Proponents of the utilization of Article 30 suggested the invocation of this article in connection with the abovementioned articles of chapter XVI of the code (war crimes offences) as a manner of importing the doctrine into the Serbian criminal system.<sup>386</sup> Article 30, however, is inapplicable to cases where the superior had no actual knowledge of the subordinate's crimes. The prevailing view in Serbia was therefore that since Article 30 does not contain the objective mental element (when the superior should have known) its application is suitable only in cases where knowledge of crimes by defendants is proven.<sup>387</sup>

In 2008 the war crimes prosecutor in the Zvornik II indictment charged Branko Popovic (former commander of Zvornik Territorial Defense (TO)) with, *inter alia*, failure to prevent abuse of prisoners by TO members despite having been aware of the crimes. In the November 2010 judgment the WCP convicted Popovic on the charge, thereby accepting the form of responsibility when the perpetrator had knowledge of the crimes and failed to prevent them. The WCP might have taken a cue from the decision by the Appellate Court in June 2010 in the Suva Reka case. In the latter decision, the Appellate Court rejected the prosecution's argument that it had been established that one of the defendants issued the order to the perpetrators of the massacre of Albanians civilians. According to the decision, under Article 142 of the 1976 FRY CC, it needs to be proven that the order was clear and unequivocal. The decision, for some reason, stated in that context that this demand was not necessary in cases of command responsibility "when a person in command can be held responsible for failure to prevent or punish the crime of

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<sup>384</sup> See DOMAC report on the ICTY impact on war crimes prosecutions in Croatia, Chapter 7.

<sup>385</sup> See text accompanying notes 258-264 *supra*.

<sup>386</sup> Against the Current, *supra* note 324, 9; HLC, 'Command Responsibility: The Contemporary Law', available at <http://www.hlc-rdc.org/uploads/editor/Command%20Responsibility.pdf>.

<sup>387</sup> R. B. Baker, 'Customary International Law in the 21<sup>st</sup> Century: Old Challenges and New Debates', 21 Eur. J. Int'l L. (2010) 173, 202-3. Baker describes how the use of this construction in 2003 by the Pristina court in Kosovo (in the Llapi case) injected confusion into the legal system and was eventually quashed by the Kosovo Supreme Court in 2005.

his/her subordinates.<sup>388</sup> Since the indictment did not address the issue of command responsibility it is not clear why the Appellate Court expressly, and for the first time in any war crimes judgment, elaborated on the issue. It could be explained by pronouncements of some of the Court's judges in conferences and meetings to the effect that the doctrine is in principle applicable. The appeal in Zvornik II is currently ongoing and it is interesting to see what would be the express position of the Appellate Court's on the matter.

Lastly, one doctrine identified with the ICTY, the doctrine of joint criminal enterprise (JCE), has not been incorporated into Serbian law, at least not its third modality regarding crimes committed outside the common plan ('incidental criminal liability based on foresight and voluntary assumption of guilt')<sup>389</sup>. So far, the war crimes prosecutor has only charged defendants with co-perpetration,<sup>390</sup> a mode which was rejected by the ICTY in favor of JCE.<sup>391</sup> Neither the prosecutor nor the WCC (and later the WCP) held in any case that a perpetrator which shares a common plan with others is equally liable for unplanned crimes which were nevertheless foreseeable as a result of the common plan. This is especially evident in the Lekaj judgment (regarding the responsibility of the defendant for crimes committed by members of his KLA unit in which he did not physically participate) and the judgment in the Scorpions case (regarding the person who stood guard during the execution of six Muslim men and boys).<sup>392</sup>

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<sup>388</sup> *Prosecutor v. Mitrovic*, *supra* note 370, section 2.4.1.

<sup>389</sup> A. Cassese, 'The Proper Limits of Individual Responsibility under the Doctrine of Joint Criminal Enterprise', 5 J. Int'l Crim. Just. (2007) 109, 113.

<sup>390</sup> Under Serbian law, co-perpetration is similar to two other modes of JCE in that it requires common goal, consent over the common goal, joint participation, knowledge of acting with others. What separates the two modalities is the lack of requirement in the JCE of 'substantial contribution' (as held in the Appeals judgment in *Prosecutor v. Kvočka*, Case No. IT-98-30, Appeals Judgment of 28 February 2005, para 97. Cassese, however, maintains that such a requirement has been required in the practice of the ICTY. *Ibid.* at 127-8. With respect to the mental element, according to Ivan Jovanovic and Bogdan Ivanisevic, "'Svesni nehat" (inadvertent recklessness in common law and ICTY terminology which is the threshold for the abovementioned JCE modality)...would not suffice for co-perpetration for war crimes since direct intent or indirect intent...are required for war crimes under domestic law.' Communication with Jovanovic and Ivanisevic (July 2009).

<sup>391</sup> *Prosecutor v. Stakic*, Case No. IT-97-24, Appeals judgment of 22 March 2006, paras 62-3.

<sup>392</sup> BCHR, 'Human Rights in Serbia 2008' (2009) 251, available at <http://english.bgcentar.org.rs/images/stories/Datoteka/human%20rights%20in%20serbia%202007.pdf>.

## Impact of the ICTY on Criminal Legislation

- **The Serbian Criminal Code**

Chapter thirty four of the current Criminal Code of 2006 (CC)<sup>393</sup> contains some provisions on war crimes that were not present in previous codes. These provisions were introduced as an implementation of the Rome Statute of the International Court to which Serbia became a party in 2001.<sup>394</sup> A good example is Article 371 which incorporates crimes against humanity into the code.<sup>395</sup> Article 371 does not contain the element of organizational policy which is laid out in Article 7(2) of the ICC Statute and is thus more in line with ICTY jurisprudence.<sup>396</sup>

Article 384 of the CC refers to the responsibility of commanders for acts of their subordinates. The construction of command responsibility departs from the jurisprudence of the ICTY as well as Article 28 of the ICC Statute in three ways. First, it is prescribed as a criminal offence, not as a form of criminal liability. Second, commanders and superiors are responsible for crimes of their subordinates only if they knew about the said crimes. Failure to prevent the crime as a result of negligence is a separate form of this offense punishable by 6 months to 5 years.<sup>397</sup> Lastly, the failure to punish

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<sup>393</sup> The code is available at [http://www.mpravde.gov.rs/images/34\\_\\_law\\_on\\_state\\_administration.pdf](http://www.mpravde.gov.rs/images/34__law_on_state_administration.pdf).

<sup>394</sup> <http://www.icc-cpi.int/Menus/ASP/states+parties/Eastern+European+States/Serbia.htm>.

<sup>395</sup> Article 371 reads:

Whoever in violation of the rules of international law, as part of a wider and systematic attack against civilian population orders: murder; inflicts on the group conditions of life calculated to bring about its complete or partial extermination, enslavement, deportation, torture, rape; forcing to prostitution; forcing pregnancy or sterilization aimed at changing the ethnic balance of the population; persecution on political, racial, national, ethical, sexual or other grounds, detention or abduction of persons without disclosing information on such acts in order to deny such person legal protection; oppression of a racial group or establishing domination or one group over another; or other similar inhumane acts that intentionally cause serious suffering or serious endangering of health, or whoever commits any of the above-mentioned offences, shall be punished by imprisonment of minimum five years or imprisonment of thirty to forty years.

<sup>396</sup> Prosecutor v. Kunarac, Case No. IT-96-23, Appeals Judgment of 12 June 2002, para. 98.

<sup>397</sup> Article 384 reads

(1) A military commander or person who in practice is discharging such function, knowing that forces under his command or control are preparing or have commenced committing offences specified in Article 370 through 374, Article 376. Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obliged to take to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.

(2) Any other superior who knowing that forces under his command or control are preparing or have commenced committing of offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken or was obliged to take to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.

subordinates is specified elsewhere in the CC under Chapter Thirty titled 'Criminal offences against the Judiciary'. Specifically, it is included in Article 332(3) which deals with failure to report preparation of a criminal offence.<sup>398</sup>

Interestingly, the CC, while incorporating most of the provisions of Article 8 of the ICC Statute, retained the structure and classification of war crimes offences of the SFRY CC.<sup>399</sup> Thus, only three articles in the CC are titled "War Crime" (Articles 372 to 374), although there are other acts, such as those in Articles 376 and 378, which are also essentially war crimes. In the opinion of Dr. Miodrag Majic, this classification departs from the classifications of ICTY and ICC Statutes and might lead to unnecessary difficulties such as unjustly exclusion of those acts from the provisions of indefinite statute of limitations (Article 108). Also, like the SFRY CC, the definitions of war crimes make no specific distinction between international and non-international armed conflicts. More concrete suggestions for revision of the provisions have thus far not been accepted, although in the future they might be inevitable owing to an increasing number of war crimes judgments that apply and interpret them.<sup>400</sup>

- **The WC Law<sup>401</sup>**

Article 14 of the WC law introduced video link as a new means to question witnesses, victims and experts. The adoption of Article 14 was a direct lesson from the ICTY procedures that allowed video link to facilitate witnesses and victims that were unwilling or unable to be present at trial.<sup>402</sup>

Changes in the criminal procedure applicable to war crimes proceedings were introduced to the WC law in 2009. Specifically, Article 13(b) lifted, with respect to war crimes proceedings, the general prohibition in the CPC

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(3) If the offence specified in paragraphs 1 and 2 of this Article is committed from negligence, the offender shall be punished by imprisonment of six months to five years.

<sup>398</sup> Article 332(3) reads:

An official or responsible person who knowingly fails to report a criminal offence of his subordinate who committed the offence in discharge of his official, military or work duty, if such an offence is punishable by imprisonment of thirty to forty years, shall be punished by imprisonment of six months to five years.

<sup>399</sup> Except Articles 379 (appropriation of objects from bodies) and 382 (unjustified delay of repatriation of POWs), the war crimes offences correspond to the classification found in the SFRY CC.

<sup>400</sup> Communication of Appellate Court Judge Dr. Miodrag Majic (March 2011).

<sup>401</sup> *Supra* note 321.

<sup>402</sup> Ellis, *supra* note 300, 187.

on plea agreements with defendants charged with offenses which are punishable by over twelve years.<sup>403</sup>

Article 13(a) allows an exception to the general limitation imposed by the CPC that cooperating witnesses would be members of a group established for the purpose of illegal acts. The requirement was suited for organized crime cases but ill-suited for war crimes cases because it precluded witnesses from official branches such as army or police.<sup>404</sup>

Finally, Article 14(b) regulates the relationship between detention of domestic war crimes defendants and detention in ICTY proceedings.<sup>405</sup>

- **The Serbian Criminal Procedure Code**

A new Criminal Procedure Code (CPC) has been in the making for several years. The planned 2006 CPC never entered into force and was formally quashed by Parliament through an amending law in 2009.<sup>406</sup> The amending law does include a provision which is, *inter alia*, pertinent to war crimes prosecutions. Article 103 provides that before returning a case for re-trial the court of second instance shall hold a hearing in order to examine if shortcomings in the first instance trial can be rectified. The Appellate Court has already resorted to such hearings such as in the Tuzla Column case. The provision was designed to help shorten the length of criminal proceedings and alleviate some of the case backlog. Its added value, as far

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<sup>403</sup> Article 13(b) reads.

When the proceedings are conducted for a crime referred to in Article 2 of the present Law, the plea bargain agreement may be concluded without restrictions stipulated in Article 282a, paragraph 1 of the Criminal Procedure Code.

<sup>404</sup> Interview with OSCE's Ivan Jovanovic who is a member of the working group on the amendment to the War Crimes Law (November 2008). Paragraph 1 of Article 13(a) reads:

The War Crimes Prosecutor may propose to the court to question, in the capacity of cooperating witness, a member of an armed unit, government body or a political organization subject to criminal proceedings for a criminal offence referred to in Article 2 of the present Law, provided that he fully confessed to the commission of a criminal offence, and if the importance of his testimony for the detection or obtaining evidence of the participation of other perpetrators of such criminal offence or detection or obtaining evidence of other crimes referred to in Article 2 of the present Law outweighs the consequences of the criminal offence he committed.

<sup>405</sup> Article 14(b) reads

The time spent in detention on remand during the proceeding before the International Criminal Tribunal for the Former Yugoslavia shall not be granted as credit against the period of detention ordered in the proceedings before the domestic court in accordance with the provisions of the Criminal Procedure Code.

The time spent in detention in the proceedings before the International Criminal Tribunal for the Former Yugoslavia shall be a credit granted towards serving a sentence imposed by the domestic court.

<sup>406</sup> See 'Law on Amendments and Additions to the Criminal Procedure Code' (2009). The law is available on the website of the Serbian Justice Ministry <http://www.mpravde.gov.rs/en/articles/legislation-activities/>.

as war crimes prosecutions were concerned, was to tackle the practice of the botched Supreme Court to send WCC cases for retrial which undermined trust in the WCC.<sup>407</sup>

Articles 109(a), (b), (v), (g) and (đ) of the CPC (introduced by the amending law) concerning witness protection have been inspired by the rules of the ICTY.<sup>408</sup> These provisions are further supplemented by the law on the protection program for participants in criminal proceedings which is applicable to war crimes and organized proceedings.<sup>409</sup>

The new CPC, which entered into force vis-à-vis war crimes and organized crime prosecutions in November 2011, introduces a new investigation model, more akin to adversarial systems. In that sense it mirrors one aspect of ICTY procedure, which is integration between continental and adversarial systems. Criminal investigations are to be conducted under the authority of prosecutors instead of investigating judges. According to Prof. Goran Ilic, a member of the working group of the CPC, 'the dominant role of the public prosecutor will also be reflected in the fact that the police will be under his/her direct supervision in performing their activities related to the pre-trial proceedings, evidence collection, and particularly "police custody".'<sup>410</sup> The new investigation model is well suited for the WCPO which, as outlined in the following section, has encountered many difficulties with the performance of the police in war crimes investigations.<sup>411</sup>

### 7.3 CAPACITY DEVELOPMENT

This section analyzes the impact the ICTY has had on the capacity of the Serbian judicial system to successfully process war crimes proceedings. The concept of capacity development in the context of DOMAC research has been defined as the 'efforts and activities of outside partners, and in particular international criminal tribunals, which can

<sup>407</sup> BCHR, 'Human Rights in Serbia 2007' (2008) 236, available at <http://english.bgcentar.org.rs/images/stories/Datoteke/human%20rights%20in%20serbia%202007.pdf>.

<sup>408</sup> J. C. Gardetto, 'The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans' (June 2010) 22, available at [http://assembly.coe.int/CommitteeDocs/2010/20100622\\_ProtectionWitnesses\\_E.pdf](http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf). Mr. Gardetto is the special rapporteur on the subject, Council of Europe.

<sup>409</sup> Available at <http://www.mpravde.gov.rs/en/articles/legislation-activities/>.

<sup>410</sup> Interview with Goran Ilic, Dnevnik (1 October 2010), available at <http://serbiamdtf.org/NewsJSR.aspx>.

<sup>411</sup> Human Rights in Serbia 2007, *supra* note 407, 235.

potentially support, facilitate or catalyze the capacity of domestic judicial systems to prosecute individuals for international crimes'.<sup>412</sup> In line with this definition, capacity development pertains not only to 'transfer of knowledge and skills', which includes training, meetings, monitoring and other informal means, but also to 'administrative and material conditions in which these new capacities should be used', which include provision of supplies and infrastructure and institutional design.<sup>413</sup>

Notably, the examination of capacity development below is focused on the contribution to the management of war crimes proceedings and not on the larger context of judicial reform which is brought on by other factors such as a regime change or the contribution of other external players such as the EU in the case of Serbia.

Admittedly, the development of Serbia's capacity to try war crimes trials over the past ten years has had a lot to do with the toppling of Milosevic in 2000 and the extensive judicial reform that has been taking place since. As already mentioned in section 7.1 *supra* these are the processes that have facilitated the initiation of war crimes proceedings in Serbia.

Indeed, Serbia's judicial system has been subject to reform since the regime change in 2000. As noted in Section 3.3 *supra* the judicial system was severely impaired by, among other things, politicization, corruption, unqualified staff and inadequate infrastructure. As early as 2001, the Serbian government developed a strategy for judicial reform, designed to address issues of case backlog, lack in administrative efficiency, unsuitable personnel and outdated legislation.<sup>414</sup> Despite these efforts the EC Commission's feasibility report on the preparedness of Serbia to negotiate SAA established that the 'independence as well as the efficiency of the judiciary remains weak'.<sup>415</sup> Judicial reform became a key short-term priority in the SAA negotiations with Serbia.<sup>416</sup> Since then two subsequent reform strategies were developed (in 2006 and

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<sup>412</sup> See DOMAC report by A. Chehtman and R. McKenzie, 'Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice' (September 2009) 11.

<sup>413</sup> *Ibid.* 12-13.

<sup>414</sup> For the excerpts of the strategy and the decision on the establishment of the Judicial Reform Council see OSCE, 'Report on Judicial Reform in Serbia' (2003) 46-48 (on file with DOMAC).

<sup>415</sup> Communication from the Commission on the Preparedness of Serbia and Montenegro to Negotiate a Stabilization and Association Agreement with the European Union' (COM(2005) 476 final) (12 April 2005), available at <http://eur-lex.europa.eu/COMByRange.do?year=2005&min=476&max=500>.

<sup>416</sup> 'Council Decision on the principles, priorities and conditions contained in the European Partnership with Serbia and Montenegro including Kosovo as defined by the United Nations Security Council Resolution 1244 of 10 June 1999 and repealing Decision 2004/520/EC' (2006/56/EC) (30 January 2006), available at [http://eur-lex.europa.eu/smartapi/cgi/sga\\_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=306D0056](http://eur-lex.europa.eu/smartapi/cgi/sga_doc?smartapi!celexplus!prod!CELEXnumdoc&lg=en&numdoc=306D0056).

2009).<sup>417</sup> The reforms address judicial efficiency, transparency and independence and encompass changes to the structure of courts; appointment, service and training of professional staff of courts and prosecution offices; and relations between the police, courts and ministries.

In the course of the last ten years, Serbia has had many foreign partners assisting and facilitating the many facets of the reform: the EU,<sup>418</sup> OSCE,<sup>419</sup> USAID and the American Bar Association,<sup>420</sup> UNDP,<sup>421</sup> Switzerland,<sup>422</sup> and many other countries taking part in the Multi Donor Trust Fund for Justice Sector Support in Serbia.<sup>423</sup> Many of these collaborative projects included support to war crimes proceedings, either directly or indirectly, as part of the general reform of the judiciary. Indirect contribution pertained to projects that did not target war crimes proceedings but nevertheless had an impact thereon. Examples of such indirect contributions are the work on new criminal procedure codes discussed in the previous subsection (subsection 7.2) and the restructuring of the organization of courts: in 2010 a new court structure was established in Serbia as part of the national judicial reform strategy.<sup>424</sup> The new structure of general jurisdiction courts is as follows: basic courts took over municipal courts and higher courts took over some of the district courts' jurisdiction. The Supreme Court was replaced by four appellate courts and a new Court of Cassation. This overhaul of the court system was explained by the government as a necessary means to change the old system which was "imbalanced by an overly complex and costly network of facilities that does not reflect the actual workload or current needs of the Republic's judiciary".<sup>425</sup> As part of the new structure the current war crimes system has changed and is now composed of a special panel in the

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<sup>417</sup> Serbian Ministry of Justice, 'National Judicial Reform Strategy' (April 2006), available at [http://serbiamdtf.org/Resources/National%20Judicial%20Reform%20Strategy%20\(April%202006\).pd](http://serbiamdtf.org/Resources/National%20Judicial%20Reform%20Strategy%20(April%202006).pd); Serbian Ministry of Justice, '2009 Work Plan' (November 2008), available at <http://www.mpravde.gov.rs/images/2009%20Work%20Plan.pdf>.

<sup>418</sup> E.g. Implementation of the National Judicial Reform Strategy in the Republic of Serbia Project [http://www.coe.org.rs/eng/tdoc\\_sr/coe\\_office\\_in\\_belgrade/projects\\_sr/?conid=61](http://www.coe.org.rs/eng/tdoc_sr/coe_office_in_belgrade/projects_sr/?conid=61).

<sup>419</sup> <http://www.osce.org/serbia/43342>.

<sup>420</sup> Final report available at [http://pdf.usaid.gov/pdf\\_docs/PDACO079.pdf](http://pdf.usaid.gov/pdf_docs/PDACO079.pdf).

<sup>421</sup> E.g. 'UNDP Country Program Action Plan for the Republic of Serbia 2011-2015', available at [http://www.undp.org.rs/download/UNDP%20CPAP%202011-2015%20\(ENGLISH\)%20-%20signed.pdf](http://www.undp.org.rs/download/UNDP%20CPAP%202011-2015%20(ENGLISH)%20-%20signed.pdf).

<sup>422</sup> Support for Justice Sector Reform and Modernization in the Republic of Serbia Project, [http://www.swiss-cooperation.admin.ch/serbia/en/Home/Domains\\_Programs\\_and\\_Small\\_Projects/Rule\\_of\\_Law\\_and\\_Democracy/Support\\_for\\_Justice\\_Sector\\_Reform\\_and\\_Modernization\\_in\\_the\\_Republic\\_of\\_Serbia](http://www.swiss-cooperation.admin.ch/serbia/en/Home/Domains_Programs_and_Small_Projects/Rule_of_Law_and_Democracy/Support_for_Justice_Sector_Reform_and_Modernization_in_the_Republic_of_Serbia).

<sup>423</sup> For details see <http://serbiamdtf.org/default.aspx>.

<sup>424</sup> with the entry into force of the law on organization of courts, law on seats and territorial jurisdictions of courts and public prosecutor's offices, the law on public prosecution and the law on judges.

<sup>425</sup> 'National Judicial Reform Strategy', *supra* note 417, 19.

Belgrade High Court (which formally took over the WCC although with no notable actual changes to staff and rules) and a Special Department in the Belgrade Appellate Court.<sup>426</sup>

As already indicated,<sup>427</sup> the ICTY was not designed to assist the national jurisdictions with capacity, nor was funding for such related activities attached to the completion strategy. The Outreach Program, tasked with organizing capacity related activities, has thus been dependant on garnering external contributions or on collaboration with existing projects. With no independent funding and based on personal initiatives of many in the different sections of the Tribunal, the ICTY has had considerable success in enhancing the capacity of Serbian institutions to try war crimes cases. Its greatest success resulted from identifying the needs of the professional domestic institutions and the formation of good professional relationship with them. Once local needs were identified, knowledge and experience were better transmitted to the proper Serbian bodies. Similarly, the building of trust with the WCPO facilitated the transfer of crucial materials to be processed and used in local trials. All in all, the ICTY has had great effect on the current capacity of Serbian institutions in processing war crimes trials.

### **ICTY Impact on the Institutional Design of War Crimes Proceedings**

The current system for war crimes trials was established by the WC law in 2003.<sup>428</sup> Under the law, war crimes proceedings were brought under the exclusive jurisdiction of the WCC and the WCPO. Alongside these bodies the law created the WCIS and a detention center. So structured, the system was to function as a self-sustaining organism, somewhat insulated from the plagues of the judiciary.

The ICTY was not formally involved in the decision to establish the Serbian war crimes system,<sup>429</sup> which was the initiative of the Djindjic' government as early as 2002.<sup>430</sup> However, prominent ICTY staff members, including President Cassese and Prosecutor Goldstone, participated in the experts group that assisted the Government (at the

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<sup>426</sup> Article 39 of the Courts law; Articles 10 and 10(a) of the WC law.

<sup>427</sup> *Supra* section 6.1.

<sup>428</sup> *Supra* note 321.

<sup>429</sup> See Prosecutor Vukcevic' statement in Orentlicher, *supra* note 198, 63.

<sup>430</sup> Ellis, *supra* note 300, 166. Also see text accompanying *supra* notes 330-332.

instigation of IBA and the OSCE) in the drafting of the law.<sup>431</sup> Some of the group's recommendations found their way into the WC law.

- With respect of the jurisdiction to try war crimes cases – as mentioned in section 7.1, it was the suggestion of the group to reserve jurisdiction on war crimes trials to only one court so as to better utilize the limited resources of the Serbian judiciary.<sup>432</sup>
- With respect to the selection process of the prosecutor, paragraph 1 of Article 5 of the WC law incorporates the group's suggestion as to the required professional qualifications of the person elected for the position.<sup>433</sup>
- With respect to the WCIS, paragraphs 3 and 4 of Article 8 of the WC law incorporate the group's concerns as to the lack of authority of the Prosecutor *vis-a-vis* the unit, which operates under the Ministry of Internal Affairs. Paragraph 3 and 4 ensure that the Prosecutor be consulted in appointing and dismissing the head of the unit and in regulating its operations.<sup>434</sup>
- With respect to War Crimes Victims and Witnesses Support Unit (WCVWSU), Article 11 of the WC law established the Assistance and Support Unit. The provision was not present in the government's draft law and was added as a result of the group's recommendations.<sup>435</sup> The

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<sup>431</sup> Other participants included Sylvia de Bertodano (defense council before the ICTY), Jonathan Cedarbaum (Deputy Chef de Cabinet, ICTY Office of the President), David Tolbert (senior legal advisor and Chef de Cabinet); and Elizabeth Santalla Vargas (associate legal officer in the ICTY Registry). See IBA, 'Analysis of the Republic of Serbia's Proposed Law on the Prosecution of War Crime (2003) (on file with DOMAC).

<sup>432</sup> See text accompanying *supra* note 328.

<sup>433</sup> 'Analysis of the Republic of Serbia's Proposed Law, *supra* note 431, 9. Also see Ellis, *supra* note 300, 179-80. Article 5, paragraph 1 reads:

In nominating candidates for the War Crimes Prosecutor or electing Deputy War Crimes Prosecutors, preference shall be given to the candidates with the required professional knowledge and experience in the field of criminal law, international humanitarian law and human rights.

<sup>434</sup> Ellis, *supra* note 300, 183. Article 8, paragraphs 3 and 4 read:

The minister responsible for internal affairs shall appoint and dismiss the head of the unit after obtaining the opinion of the War Crimes Prosecutor.

The operations of the Unit shall be regulated by an act issued by the minister responsible for internal affairs after obtaining the opinion of the War Crimes Prosecutor.

<sup>435</sup> Ellis, *supra* note 300, 183-4. Article 11 reads:

The Higher Court in Belgrade shall form a unit for injured party and witness assistance (hereinafter: Assistance and Support Unit), which shall perform administrative and technical tasks, tasks relating to the assistance and support to injured parties and witnesses, as well as tasks of providing conditions for the application of procedural provisions of the present Law.

WCVWSU was only established in 2006,<sup>436</sup> presumably inspired by an ICTY conference on the issue of victims and witnesses.<sup>437</sup>

The participation of several ICTY personnel in the consultation process on the WC law in 2003 was not suggested by the ICTY, although the completion strategy was well under way,<sup>438</sup> nor was it requested by Serbia. Rather, it was an independent initiative by the OSCE. As former ICTY President Pocar explains it, there was no official process in place for direct peer-to-peer interaction between Serbia and the Tribunal – the disconnect between the two was mostly a consequence of mutual mistrust.<sup>439</sup> And so, although the burden to try perpetrators for war crimes was shifting away from the Tribunal towards the states, when it came to the establishment of the Serbian war crimes system – there was no direct participation on the part of the ICTY. This disconnect was remarkable in light of the political circumstances created by the completion strategy. Still, the strategy notwithstanding, the mindset of ICTY judges, prosecutors and administrators was not geared towards assisting Serbia, especially when the latter was not properly cooperating with the Tribunal.<sup>440</sup> The same applied to Serbia. The fact that one (albeit not the most prominent) reason for the enactment of the WC law was the hope of the Serbian government to receive cases from the ICTY,<sup>441</sup> or at the very least keep some cases at the national level,<sup>442</sup> was not sufficient to prompt Serbia to involve the ICTY in creating the system that would process the very same cases. The WCC was only later used by Serbia to convince the Tribunal to refer cases to it.<sup>443</sup>

The ICTY had direct impact on one post-2003 change to the design of the Serbian war crimes system. The prosecutor's authority was expanded in 2007 to include the

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The work of the Assistance and Support Unit shall be regulated by an act issued by the Chief Justice of the Higher Court in Belgrade, with the approval of the minister responsible for the judiciary.

<sup>436</sup> Against the Current, *supra* note 324, 21.

<sup>437</sup> Statement of Belgrade District Court Spokesperson, Ms. Ramic, in Orentlicher, *supra* note 198, 72.

<sup>438</sup> See text accompanying *supra* notes 234-245.

<sup>439</sup> Interview with Judge Pocar (The Hague, January 2009).

<sup>440</sup> See text accompanying *supra* notes 200-216.

<sup>441</sup> See text accompanying *supra* note 330.

<sup>442</sup> See text accompanying *supra* note 301.

<sup>443</sup> See text accompanying *supra* notes 330-332; 'Statement by Ms. Miroslava Beham, Permanent Representative of Serbia in Response to the Chief Prosecutor of the ICTY, Ms. Carla del Ponte, at the 63<sup>rd</sup> Meeting of the OSCE Permanent Council' (8 September 2006) ("The essentials precondition for the success of the [completion] strategy is the existence and ability of the domestic jurisdictions to try the referred cases and meet international standards in the proceedings. The War Crime Panel within the Belgrade District Court, its judges and the war crimes Prosecutor have proved that they are professionally and technically capable of prosecuting war crimes"); Also see *Prosecutor v. Mejakic*, Case No. IT-02-65, ICTY Transcripts (3 March 2005).

offence of assisting war crimes fugitives.<sup>444</sup> This amendment was part of a more cooperative attitude demonstrated by the new Serbian government at the time and was greeted positively by the OTP who viewed it as 'encouraging signs of the Serbian authorities' commitment to cooperation in the arrest of the remaining fugitives'.<sup>445</sup> Another aspect added to the work of the WCPO around that time is the action team tasked with locating the remaining ICTY fugitives, which prosecutor Vukcevic heads.<sup>446</sup>

## ICTY Impact on the Workings of War Crimes Proceedings

### *Transfer of knowledge*

As already described in Section 6.3 *supra*, the transfer of knowledge accumulated by the ICTY to the local jurisdictions began around 2003 with the initiation on the completion strategy. During this early period, ICTY Outreach that was tasked with the organization of the process had only minimal understanding of domestic needs and joint activities focused on educating domestic jurisdictions rather than mapping out the local landscape of challenges. Outreach officers did not target specific groups of Serbian local professionals, or concerned specific difficulties encountered by them. Examples of early activities included several IHL and command responsibility seminars to judges, prosecutors and investigators and short visits to the Tribunal to obtain a general impression. The Outreach Unit used those events to form communications with Serbian professionals and identify more concrete needs. As a result, from 2005 on mostly, ICTY activities gradually began to put more emphasis on creating personal relationships with their domestic counterparts. The character of activities also changed to incorporate more concrete field specific training based on exchange of information.<sup>447</sup>

Since the inception of the war crimes system in 2003, the work of both the WCPO and the WCP has been praised as highly professional.<sup>448</sup> Judges of the Appellate

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<sup>444</sup> Article 2(3) of the WC law.

<sup>445</sup> 'Assessment and Report of Judge Fausto Pocar, President of the International Tribunal for the Former Yugoslavia, Provided to the Security Council Pursuant to Paragraph 6 of Council Resolution 1534 (2004)' (Un. Doc. S/2007/663) (12 November 2007) para. 25.

<sup>446</sup> Interview with Deputy Prosecutor Veselin Mrdak (May 2008, Belgrade).

<sup>447</sup> The success of this method of capacity development was further highlighted in the study of OSCE OHDIR and UNICRI of 2009. See text accompanying *supra* notes 277-278. For the ICTY capacity development activities in Serbia see a list in Annex II.

<sup>448</sup> EC Commission, 'Serbia 2009 Progress Report' (SEC(2009) 1339) (14 October 2009) 20. According to HLC's Natasa Kandic, the war crimes trials in Serbia are the best in the region. Interview with Natasa Kandic (May 2008,

Court and the WCP, as well as prosecutors in the service of the WCPO, all possess experience and knowledge of criminal and humanitarian law.<sup>449</sup> Some degree of the said knowledge is owed to the judges' interaction with their ICTY counterparts. Annual meetings have been conducted since 2003. Topics discussed in these meetings included substantive issues but also issues pertaining to trial management, plea bargaining and sentencing practice, appeals standards, protective measures for witnesses and use of ICTY databases and evidence. As already noted in section 7.2 *supra*, interactions with ICTY judges have been greatly appreciated by Serbian judges.<sup>450</sup> While most of their knowledge come from their everyday work and training provided by the national judicial academy (which has also collaborated with the ICTY in the design of training),<sup>451</sup> interviews conducted by DOMAC with Serbian judges suggest that the greatest value has been the creation of a sense of solidarity in the vocation of the domestic and international judiciaries, which on the part of the Serbian judiciary translated into acknowledgment of ICTY case law in war crimes judgments and similarities in the structure of Judgments. This was especially relevant for Appellate Court judges. In the year since the creation of the Appellate Court, at least two out of its nine decisions have cited ICTY case-law. It has further attempted to refrain from sending back cases for retrial, opting to resolve deficiencies by conducting hearings. This, in turn, has contributed to the shortening of the duration of war crimes proceedings (sometimes to one and a half years instead of four).<sup>452</sup> Personal interactions and training on ICTY databases have also proved helpful to prosecutors, although their experience with OTP transition team on a routine basis has been even more successful.<sup>453</sup>

The ICTY has also been helpful in another aspect of capacity development in Serbia, which is the provision of additional trained personnel. The issue of trained personnel has been one of the biggest challenges faced by both the WCPO and the

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Belgrade). Lately, however, Kandić accused a deputy prosecutor of receiving money to assist the defendant Mitrović in the Suva Reka case. See [http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2011/S\\_2011\\_03\\_10\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2011/S_2011_03_10_ENG.pdf).

<sup>449</sup> Under Articles 10 and 10(a), judges must have no less than eight years of professional experience in the field of criminal law. Preference is given in the election process to judges with knowledge and experience in IHL and human rights. Under Article 5 of the WC law preference shall be given to the prosecutors with the professional knowledge and experience in the field of criminal law, IHL and human rights.

<sup>450</sup> Interview with a WCC judge (November 2009, Belgrade) Also see UN. Doc. S/2010/270, *supra* note 222, 25.

<sup>451</sup> UNDP, 'The Judicial Training Center in Serbia: A Case Study' (2009) 17, available at (<http://europeandcis.undp.org/governance/show/09207ABC-F203-1EE9-BE7109AA1ED41142>).

<sup>452</sup> Communication with OSCE's Ivan Jovanovic (October 2010). Also see table of cases in Annex I.

<sup>453</sup> See discussion accompanying *infra* notes 467-478.

courts, which are chronically understaffed. This, although there are now additional 12 staff members in the WCPO (outreach and legal staff and an analyst). Under the War Crimes Justice Project, managed by the OSCE with the ICTY, interns trained by the OTP for six months were later assigned to the courts and WCPO for additional six months.<sup>454</sup> The interns work on ICTY cases and develop expertise in accessing and managing ICTY evidence.<sup>455</sup>

The contribution of the ICTY to other bodies affiliated with war crimes proceedings has been instrumental in cultivating expertise although it could not overcome problems related to their limited capacity. The bodies at issue are the WCIS, the Witness Protection Unit and the WCVWSU. WCIS, which operates under the ministry of the interior, has presented a central challenge to the WCPO. The unit is charged with assisting the WCPO with investigations of war crimes and the search for war crimes fugitives. It is highly qualified as a result of ICTY training since 2003. Members have been educated on IHL, liaised with ICTY investigators and analysts and have been trained on Zy Lab software, the Analyst Notebook, the Case Map and the organization of case files. The training was also complemented by the OSCE program.<sup>456</sup> However, persisting problems with the performance of the unit have prevented maximizing its contribution to the prosecutor's office. First, there are issues of capacity. The unit is small and understaffed (currently consists of approximately 25 staff members). Second, it is not considered a popular assignment among members of the police.<sup>457</sup> Furthermore, it does not receive adequate cooperation from its colleagues in other police units.<sup>458</sup> While improved cooperation between the unit and the WCPO has been evident since 2006,<sup>459</sup> the relationship has gone sour of late. The unit is not proactive and the WCPO is not informed as to the information the unit actually possesses.<sup>460</sup> This should be improved with the entry into force of the new CPC that transfers investigations to the prosecutor's

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<sup>454</sup> See *supra* note 279.

<sup>455</sup> Interview with a member of the OTP Transition Team (January 2009, The Hague). The Youth Initiative for Human Rights and the Swiss embassy in Belgrade established in 2007 a similar program which sponsored Serbian interns at the ICTY.

<sup>456</sup> OSCE, 'Annual Report of the Secretary General on Police-Related Activities in 2009' (2010) 50, available at [www.osce.org/spmu/71045](http://www.osce.org/spmu/71045). In 2010, OSCE training was terminated pursuant to an unexplained request from the police.

<sup>457</sup> HRW, 'Unfinished Business: Serbia's War Crimes Chamber' (2007) 27, available at <http://www.hrw.org/legacy/background/eca/serbia0607/>.

<sup>458</sup> Human Rights in Serbia 2007', *supra* note 407, 235.

<sup>459</sup> Against the Current, *supra* note 324, 12.

<sup>460</sup> Communication with OSCE's Ivan Jovanovic (October 2010).

authority.<sup>461</sup> The same goes for the witness protection unit which also operates under the ministry of the interior. Serbia has gained valuable experience in witness protection through its cooperation with the ICTY, which relied on Serbian police to secure the safety of witnesses, and has done so efficiently.<sup>462</sup> However, it is understaffed and does not have the resources to provide all the measures provided by law for the protection of witnesses and with respect to which its members were trained by the ICTY.<sup>463</sup> Furthermore, several complaints have been made throughout the years concerning the behavior of unit members towards witnesses in cases against Serbian police members.<sup>464</sup> Lastly, WCVWSU consists of only two staff members that are neither social workers nor psychologists.<sup>465</sup> Therefore, the experience from the ICTY Victims and Witnesses Section was mostly limited to methods of personal communication and administrative efficiency in coordinating victims and witnesses' presence upon their visit to Belgrade and the WCP.<sup>466</sup> While this has been beneficial, it does not make up for the lack of a more comprehensive care for witnesses before and after trial.

#### *Transfer of cases and evidence*

Since its establishment in 2004, the OTP's Transition Team has been working tirelessly to transfer cases and evidence to national jurisdictions, whether as part of the 11*bis* procedure, or in relation to complete investigations that have not matured into indictments (category II cases) and as a form of assistance to ongoing national investigations. As indicated above,<sup>467</sup> only one 11*bis* case (Kovacevic) and two category II cases (Zvornik and Ovcaras cases) were transferred to Serbia. Most of the communication between the Transition Team and the WCPO involves exchange of

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<sup>461</sup> See discussion accompanying *supra* notes 410-411.

<sup>462</sup> Interview with an Advisor to the ICTY Prosecutor (January 2009, The Hague).

<sup>463</sup> Gardetto, *supra* note 408, 23.

<sup>464</sup> *Ibid.* Recently, it has been alleged by the HLC that unit members have turned to threats against witnesses they were themselves protecting in connection with investigations into the responsibility of members of the 37<sup>th</sup> battalion for crimes committed in Kosovo. Irregularities and Abuse of Power, *supra* note 351.

<sup>465</sup> AI, 'Burying the past: Impunity for Enforced Disappearances and Abductions in Kosovo' (June 2009) 41, available at <http://www.amnesty.org/en/library/info/EUR70/007/2009/en>. Also see Unfinished Business: Serbia's War Crimes Chamber, *supra* note 457, 7-8. The HLC, which have been caring for victims in terms of counseling and legal representation as well as facilitating their testimonies. Interview with HLC's Natasa Kandic (May 2008, Belgrade). Also see HLC, 'Victim/Witness Counseling and Legal Representation: a Model of Support - Project implementation report' (November 2007) available at <http://www.hlc-rdc.org/Analyze/644.en.html>. The HLC has also collaborated with the ICTY in organizing several seminars to Serbian members of the judiciary in 2003. For details see Annex II.

<sup>466</sup> Interview with ICTY Liaison Officer Victims and Witnesses Section (January 2009, The Hague).

<sup>467</sup> See *supra* section 6.3.

evidence and information related to other cases. At least until recently, there were more such requests on the part of the Team than on the part of the WCPO.<sup>468</sup>

The WCPO has recourse to ICTY materials in three ways. They can either access the materials through the ICTY electronic databases, request the materials directly from the OTP via a written request,<sup>469</sup> or, since last year, through the office's prosecutor who works at the Tribunal on national cases and serves as a liaison officer to the WCPO (as part of the War Crimes Justice Project).<sup>470</sup> The OTP conducted special training sessions on how to access and use ICTY databases and how to apply for further ICTY materials for the benefit of staff from the WCPO and the visiting prosecutors and interns.<sup>471</sup> Types of evidence used by the WCPO include witness statements, expert military analysis, topographic documents, military documents, video recordings, personal documents etc. Evidence produced by the ICTY is admissible in the domestic investigations and in trials based on Article 14(a) of the WC law.<sup>472</sup> According to a recent decision by the Appellate Court, Article 14(a) is applicable to all evidence, including witness statements collected by ICTY investigators even if the witnesses reside in Serbia.<sup>473</sup>

The relationship between the two offices is excellent and has been so regardless of any political circumstances, as part of a professional respect that has built over time,<sup>474</sup> as well as the vested interest the OPT has to see the cases through.<sup>475</sup> Besides evidence, which has been the subject of most requests to the OTP, the Serbian office has also received advice concerning cases.<sup>476</sup> The need for assistance from the ICTY is clear. As indicated in section 7.1 *supra* many events and individuals that are subject of Serbian cases are also the subject of ICTY cases. Requests for evidence are thus cost effective, especially to the impoverished WCPO, and time saving. Most importantly, The OTP possesses evidence that is inaccessible to the WCPO because of the difficulty to obtain evidence from BiH, Croatia and especially Kosovo, especially when it comes to

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<sup>468</sup> Interview with Deputy Prosecutor Veselin Mrdak (May 2008, Belgrade).

<sup>469</sup> Interview with ICTY Transition Team staff (January 2009, The Hague).

<sup>470</sup> See text accompanying *supra* note 282.

<sup>471</sup> Visiting prosecutors also receive training on prosecution search methodologies and procedures by as ICTY experts (ICTY criminal analysts amongst others) as well as advice on ICTY related cases. See UN. Doc. S/2010/270, *supra* note 222, 39.

<sup>472</sup> See text accompanying *supra* note 331-366.

<sup>473</sup> *Prosecutor v. Mitrovic*, *supra* note 370.

<sup>474</sup> Interview with an Advisor to the ICTY Prosecutor (January 2009, The Hague).

<sup>475</sup> Interview with Aleksandar Kontic, member of the OTP Transition Team (January 2009, The Hague).

<sup>476</sup> *Ibid.*

testimony of witnesses. A good case in point is the Suva Reka case where it was the ICTY staff that helped with contacting Albanian witnesses.<sup>477</sup> The need is further compounded by the problems related to war crimes investigations by the WCIS described above. The use of ICTY materials in war crimes cases in Serbia is a routine matter and almost all cases involve directly or indirectly such materials.<sup>478</sup> This type of assistance has been crucial to the WCPO's work thus far, and according to most persons interviewed by DOMAC, including persons from the WCPO, judges and NGOs members, has been the most important contribution of the ICTY to Serbia's war crimes proceedings.

## 8. CONCLUSION

Serbia has been the most defiant republic in the Balkans towards the ICTY since the establishment of the latter in 1993. Serbia's leadership in the 1990s, itself indicted for some of the war-time atrocities in Croatia, BiH and Kosovo, naturally perceived the Tribunal as a personal assault, and was successful in triggering antagonism towards the ICTY within the general population. The fall of the Milosevic regime in 2000 made little difference in the general perception of the ICTY as an anti Serb institution.

Despite recent developments that saw Serbia acknowledging responsibility for atrocities, it is doubtful that the Serbian public shares this assumption of guilt and reckoning. Consequently, domestic war crimes proceedings undertaken by Serbia are almost peripheral in the country's political and social discourse. Many factors have contributed to the formation of this reluctance, the ICTY being but one thereof.

But regardless of the modest space occupied by these proceedings in Serbs' attention, the existence of war crimes prosecutions in Serbia is, to a large degree, attributed to the ICTY. The reality to which Serbia woke up after the toppling of Milosevic included the ICTY and its legacy: that atrocities committed during the 1990s conflicts are vigilantly prosecuted. This realization became a part of the international sphere Serbia was eager to join. Conducting domestic war crimes proceedings was one prerequisite set by powerful players within that sphere, mostly the EU and the US. This is not to say

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<sup>477</sup> Unfinished Business: Serbia's War Crimes Chamber, *supra* note 457, 23.

<sup>478</sup> Communication with OSCE's Ivan Jovanovic (October 2010).

that other voices in Serbia were not advancing the notion of war crimes prosecutions. But the central motivation for domestic proceedings was more a result of external coercion than internal persuasion on the part of Serbia. And the ICTY was the inspiration behind that coercion. Without the ICTY and its work there would have been no war crimes prosecutions in Serbia, at least not in the first decades following the atrocities.

But the ICTY's influence is a double edged sword. While responsible for the initiation of regular war crimes proceedings it also constitutes one of the reasons they are resented and had to be induced by coercion. And the fact that coercion propelled domestic proceedings has resulted in limited rates of prosecution, limited capacity of the local system to hold them and the limited influence on the normative framework applicable to war crimes.

Indeed, the domestic mechanism in charge of war crimes proceedings is limited in resources and support. No more than ten trials are conducted per year. The law is ill-equipped to support the prosecutions of commanders and superiors. The accused standing trial do not belong to the highest echelons.

The character of the ICTY's impact on Serbia as a double edged sword is evident in the three areas examined by DOMAC. Following are the primary conclusions of the Serbian case study.

- **Impact on Rates of Prosecutions of War Crimes**

As just indicated, domestic prosecutions were inspired by the ICTY. Furthermore, many of the domestic cases were either transferred to Serbia, in one form or another, or were effectuated by discoveries of ICTY proceedings. At the same time proceedings, especially against Serb defendants are still unpopular, partly due to the perception that Serbs have been persecuted by the international community embodied by the ICTY.

- **Impact on Capacity to Process War Crimes**

The abovementioned resentment and denial regarding Serbs' responsibility for war crimes further informed the meager resources provided to the war crimes system in Serbia. All bodies involved, from the investigation unit, prosecutor's office, victims and witness support and protection units to the courts are understaffed and underequipped. That being said, the existing

capacities have been enhanced by the transfer of expertise and experience by the ICTY to the national organs as well as the transfer of evidence.

- **Impact on Applicable Law to War Crimes**

The case-law developed by the ICTY and its Statute have had little substantive influence on Serbia law. This is especially evident in the newest criminal legislation that incorporates only some of the developments in international criminal law and in any case, was effected more by the ICC Statute than ICTY jurisprudence. The most controversial aspects of such case law, command responsibility and joint criminal enterprise, were mostly precluded from this legislation.

While these conclusions seem to indicate a sub-optimal influence of the ICTY, the Tribunal's influence is nevertheless impressive considering the problematic and complex starting point described in chapters 3, 4 and 6 of this report. Indeed, it is this starting point that demonstrates the need of an international justice mechanism and its potential to contribute to local systems. The relationship that has developed between the staff of the Serbian war crimes system and their counterparts at the ICTY has been extremely productive and mutually beneficial. In that, it demonstrates the potential inherent in the cultivation of a good connection between the international and national justice systems, a potential which was not detected by the ICTY in time.

### APPENDIX I – TABLE OF WAR CRIMES CASES BEFORE THE BELGRADE WAR CRIMES COURT

<b>Name</b>	<b>Initiated</b>	<b>1<sup>st</sup> Judgment</b>	<b>Appeal</b>	<b>Retrial</b>
Ovcara I (Miroљub Vujović et al) Indictment against former members of the Vukovar TO Serb paramilitaries for the killing of approx. 200 wounded Croatian soldiers and civilians taken from the Vukovar hospital in Nov. 1991	March 9 2004	December 2005 14 Convicted 2 acquitted	December 2006 Overturned Also see (Vukovar) Stanko Vujanović below	3 September 2007 (Saša Radak and Milorad Pejić added)  Judgment 12 March 2009 13 defendants convicted 5 acquitted  Confirmed on Appeal 23 June 2010
Ovcara II (Bulić) Indictment against a former member of the Vukovar TO for torture and wounding of Croatian soldiers and civilians taken from the Vukovar hospital in Nov. 1991	Trial separated on 27 January 2005 due to illness	30 January 2006	1 March 2007 Upheld conviction but reduced sentence Against 1	–
Lekaj Indictment against a former KLA member for the imprisonment, torture and murder of Roma civilians in Dakovica in June 1999	12 October 2005	September 2006	April 5, 2007 Conviction upheld	–
Zvornik I (Dragan Slavković et al) Indictment against 4 former members of yellow wasps militia for the torturing and killing of Muslim prisoners in Zvornik in Jun.-Jul. 1992	November 28, 2005	12 June 2008	September 2009 reduced the sentences of two upheld acquittal of 1	–
Scorpions I (Slobodan Medić) Indictment against 5 former members of the Scorpions militia for the murder of 6 Muslim civilians near Trnovo in July 1995	December 20, 2005	On April 11, 2007	September 2008 Upheld 3 convictions Reduced sentence of 1 and ordered re-trial of alexandar medic (Scorpions II)	See scorpions II below
Suva Reka (Radoslav Mitrovic et al)	October 2, 2006	23 April 2009	30 June 2010 Upheld 3 acquittals, 3 convictions	See Suva Reka II below

Indictment against 6 members of Serbian MUP for the killing of 49 civilians in Suva Reka in March 1999			and Ordered re-trial of Radojko Repanovic	
Bytyqi Brothers (Milos Stojanović and Sreten Popović) Indictment against 2 members of Serbian police as accessories to the murder of 3 brothers in Kosovo in July 1999	November 13, 2006	22 September 2009 2 acquitted	November 1 2010 Ordered retrial	
Sinan Morina Indictment against a former KLA member for the killing, torture and wounding of civilians and burning/destroying property in the Kosovar village of Opteruša in Jul. 1998	October 17, 2007	December 20, 2007 acquitted	Ordered re-trial	
The Tuzla Convoy Case (Ilija Jurišić) Indictment against a former senior officer of the BiH Ministry of Internal Affairs for ordering the attack on a withdrawing JNA column in Tuzla in May 1992 thereby killing 92 of them	22 February 2008	28 September 2009	11 October 2010 Cancelled conviction of 1 and ordered re-trial	
Slunj Case (Zdravko Pašić) Indictment against a former member of RSK police for killing a civilian doctor in Slunj in Dec. 1991	1 February 2008	8 July 2008	11 February 2009 Upheld conviction of 1 while increasing 2 years for sentence	-
Lovas Case (Ljuban Devetak et al) Indictment against 4 former JNA members, 6 former paramilitaries and 4 former TO members for launching an attack on a Croatian undefended village, and the killing, torture and imprisoning of civilians in Lovas in October 1991	17 April 2008			
Banski Kovacevac (Pan Bulat and Rade Vranešević) Indictment against 2 former members of RSK members for the killing of 6 Croatian civilians in Banski Kovacevak in March 1992	2 September 2008	15 March 2010 Convicted 2		
Podujevo II (Dragan Medić et al) Indictment against 4 former members of the Scorpion	8 September 2008	18 June 2009	25 may 2010 Upheld conviction of 3 Ordered re-trial of 1 (Dukic)	See Podujevo III below

militia for the murder of 14 Albanian civilians and the wounding of 5 more in Podujevo, Kosovo in March 1999				
Boro Trbojević Indictment against a former Serb paramilitary unit member for the taking of hostages and the murder of 5 civilians in Velika Peratovica and Topolovica in Aug.-Oct. 1991	26 September 2008	27 May 2009	Upheld 1 conviction on December 2009	–
Scorpion II (Aleksandar Medić) Indictment against a former members of the Scorpions militia for accessory to murder of 6 Muslim civilians near Trnovo in July 1995	15 October 2008	January 28 2009 convicted	Upheld On November 23 2009	–
Zvornik II (Branko Grujić and Branko Popović) Indictment against the former head of Zvornik municipality and former Zvornik TO commander for the deportation of 1,800 Muslims from Kozluk and the detention, torture and killing if prisoners in Zvornik 1992	20 November 2008 Trial separated on 26 May 2008	22 November 2010 Convicted 2		
Ovcara III (Damir Sireta) (extradited from Norway) Indictment against a former member of the Vukovar TO Serb paramilitary for the killing of approx. 200 wounded Croatian soldiers and civilians taken from the Vukovar hospital in Nov. 1991	23 December 2008	23 June 2009 Convicted	24 June 2010 judgment reduced	–
Stara Gradiška (Milan Španović) Indictment against a former RSK TO member for the torture and wounding of Croatian civilians held at the Stara Gradiška Prison camp during Oct. 1991 and Jan. 1992	17 September 2009	25 June 2010 Convicted	24 January 2011 Upheld	–
Stari Majdan (Nenad Malić) Indictment against a former member of the RSK army for the murder of 2 Muslim civilians and the attempted murder of another in Stari Majdan in Dec. 1992	18 September 2009	7 December 2009 Convicted	26 March 2010 Upheld	–

Gnjilane group (Agus Memisi et al) Indictment of 9 former KLA members for the murder of at least 80 civilians and the imprisonment, rape and torture of at least 153 others in Gnjilane in Dec. 1999	23 September 2009	21 January 2011 convicted 9		
Medak case (Milorad Lazic et al) Indictment against 4 former TO paramilitary in the RSK unit for the torture of a Croatian policeman in a Medak police in Sep. 1991	23 November 2009	15 June 2010 3 convicted 1 acquitted	19 Jan 2011 Ordered retrial of 1 Upheld re other 3	
Prijedor (Duško Kesar) Indictment against a former member of a RSK MUP reserve unit for the murder of 3 Muslim civilians in Prijedor in March 2004	18 February 2010	4 October 2010 Convicted		
Tenja (Darko Radivoj) Indictment of a former Serb paramilitary for the murder of a captive HV member in Tenja in Nov. 1991	6 May 2010	17 November 2010 Convicted 1		
Vukovar (Stanko Vujanovic) Indictment of a former Vukovar TO member for the killing of four civilians and injuring another in Sep. 1991	20 May 2010	1 November 2010 Convicted		
Podujevo 2 (Dukic) Indictment against a former members of the Scorpion militia for the murder of 14 Albanian civilians and the wounding of 5 more in Podujevo, Kosovo in March 1999	7 July 2010	September 2010 Convicted		
Zvornik III (Saša Cvjetan and Goran Savić) Indictment against 2 paramilitaries for the imprisonment and torture of Muslim civilians and the killing of another in Zvornik during May-Jul. 1992	13 September 2010 Against 3			
Zvornik V (Sima Bogdanovic et al) Indictment against 5 former paramilitaries for the murder of 23 Roma civilians and the kidnapping and	14 September 2010 Against 5			

rape of three women in July 1992 in Zvornik				
Lički Osik (Čeda Budisavljević et al) Indictment against 4 former members of paramilitary unit in RSK for the killing of a family in Široka Kula in Oct. 1991	4 October 2010	14 March 2011 4 Convicted		
Rastovac (Veljko Maric) Indictment against a former Croatian soldier for the murder of a civilian in Rastovac in Oct. 1991	6 October 2010 Against 1			
Beli Manastir (Zoran Vukšić) Indictment against 4 former SAO police members for the imprisonment, injury torture and murder of civilians in Beli Manastir in 1991	1 November 2010 Against 4			
Suva Reka II (Radojko Repanovic) Indictment against a commander in the Serbian MUP for ordering the killing of 49 civilians in Suva Reka in March 1999	10 November 2010	15 December 2010 Convicted		
Čuška (Toplica Miladinovićet al) Indictment against 2 former Serbian police members and 7 former members of the Jackals militia for the murder, terrorizing and expulsion of Albanian civilians in the village of Cuska between March and June 1999	20 December 2010 Against 9			

## ANNEX II – CAPACITY DEVELOPMENT ACTIVITIES ORGANIZED BY THE ICTY TO MEMBERS OF THE SERBIAN WAR CRIMES SYSTEM

Activities	Organizing Funding Institutions	Date
Some 20 judges, mainly from appellate courts in the region, participated in the meeting with Judge Fausto Pocar and Judge Carmel Agius from the ICTY. The judges discussed several topics including the protection of witnesses and victims, the definition of “civilians” in war crimes cases and the role of appellate judges in reviewing cases	War Crimes Project	17/1/11
Training session for legal professionals from the WCPO and the Higher and Appellate Court on locating ICTY information and materials relevant to their work, use of databases such as the website, the ICTY Court Records Database and the Appeals Chambers Case Law Research Tool, making requests to the ICTY for legal assistance and for variation of protective measures under the Tribunal’s Rules of Procedure and Evidence	WCJP	23/11/10
Five judges from the Appellate Court in Belgrade, five judges from the High Court in Belgrade and two prosecutors from the WCPO in Belgrade followed presentations on a wide range of issues, including ICTY databases, protective measures for witnesses, plea bargaining and sentencing practice, legal standards, case management and appeals. Participants also held peer-to-peer discussions with their ICTY counterparts and greatly enhanced their knowledge about judicial work at the Tribunal	OSCE	1-3/9/10
Visit to the ICTY by four senior police investigators from the service designed to help the police and investigators make contacts at the ICTY and to familiarize them with the staff, technical and analytical tools and management of investigation, as well as detention facilities and procedures. The guests talked to staff in charge of issuing requests to the Serbian police and judiciary. The group keenly followed the practical demonstrations of the Zy Lab software, the Analyst Notebook, the Case Map and the organization of case files	OSCE	9-1/10/09
Participants: two judges, four police analysts/investigators and a witness and victims coordinator. The first day provided a general introduction to the ICTY and introduced functions and responsibilities of each of the ICTY’s organs. The next two days judges, police analysts and the witness protection officer followed their own individual programs, with Outreach taking the lead in organizing the judges’ program, OTP Investigations Unit provided training for the police analysts, and the Victims and Witness Section worked with the Serbian witness protection officer	OSCE	7-9/7/09
13 representatives of the National Council for Cooperation with the ICTY, Office of the War Crimes Prosecutor, Ministry of Foreign Affairs of the Republic of Serbia, District Court of Belgrade, and the Judicial Training Centre participated in a roundtable on outreach.	UNDP	12/2/09
Three-day skills based training for the Belgrade District Court’s security staff by the ICTY Staff Welfare Officer and an ICTY Security Sergeant.	OSCE	4-6/6/08
Upgrading of witness support and protection skills was the aim of this visit of professionals from the Belgrade State Court, In addition to an in-depth program with the ICTY Victims and	OSCE	6-11/7/08

Witness Section, visitors also met with key representatives of the Registry, OTP and Defense		
The Outreach Belgrade representative together with the Head of Media, Outreach and Web Unit from The Hague explored ways of closer cooperation with the Belgrade War Crimes Court (WCC). President Sinisa Vazic agreed to conduct internal consultations to identify the issues in which the ICTY support is necessary. The issue of access to the Tribunal's Judicial Database was also highlighted	ICTY Outreach	11/4/08
Visit of Chairman and five members of the Witness Protection Commission to see the ICTY practices in witness protection and discuss challenges of their work with the ICTY professionals. The leading role in this study trip was taken by the ICTY Victims and Witnesses Section, but also meetings with the OTP and Chambers officials were held	OSCE	5-6/12/07
The three sessions organized by Outreach for eight future ICTY interns in The Hague. The interns were to serve three to six month internships at the Tribunal, followed by a three month internship at the WCC or the War Crimes Prosecutor's Office. In each training sessions, held in the preceding weeks, the interns learnt about different aspects of the ICTY work, international humanitarian law and enhanced their English writing skills. The first intern arrived at the Tribunal on 2 July	Youth Initiative for Human Rights and the Swiss Embassy in Belgrade	8/6/07
Briefings Serbian judicial officials about the Tribunal's investigations, trial and appeals in the Celebici case	ICTY Outreach and the HLC	24/2/07
Three day visit of Supreme Court of Serbia officials: Adviser for International Cooperation and Spokesperson. Program included introducing the Tribunal judicial achievements and best practices, and strongly concentrating on the specificity of a judicial institution's work with the media and outreach	UNDP	20-23/3/06
Participants: War Crimes Prosecutor Vladimir Vukcevic; President of the War Crimes Chamber of the Belgrade District Court Sinisa Vazic accompanied by judges and prosecutors from the Chamber; a Supreme Court Judge, and the Head of the Witness Protection Unit. During a three-day program, the guests shared their experiences in working on war crimes cases, met with the ICTY principals - President, Prosecutor and Registrar - gained an insight into the Tribunal's work with witnesses and evidence and held a roundtable discussion with some ICTY judges	US embassy in Belgrade	1-3/3/06
The ICTY Outreach Program hosted spokesperson for (WCC). This three-day visit included meetings with the ICTY's Communications Service, the Victims and Witness Unit, a tour of Courtroom 1 and meeting with the Spokesperson for the OTP	OSCE and Belgrade District Court	4-6/10/05
The two day program for two IT Section staff members of the (WCC) included attending court sessions and presentations on the following topics: the delay broadcast system, access to ICTY documents, the Judicial Database (JDB), exchange of documents between the WCC and the ICTY, security issues, Conference and Language Services Section (CLSS)	OSCE and Belgrade District Court	29-30/9/05
Nine Judges of the Serbian Supreme Court held meetings with Tribunal representatives where they discussed the war crimes cases that they had had before them and Serbian legislation relating to war crimes trials. Tribunal representatives discussed international humanitarian law and jurisprudence developed by the ICTY	UNDP	9-13/5/05
Two IT section representatives attended court sessions and the following presentations and activities: tour of the lobby area and technical facilities available to journalists, access to the ICTY documents, the JDB, exchange of data, security issues, meeting	OSCE and Belgrade District Court	15-17/3/05

with representatives of the ITSS, CMSS and the Internet Unit		
Week-long training program for Serbian war crimes investigators. The lectures focused on the Tribunal's establishment, mandate, work and relationship with domestic war crimes courts. The Tribunal was also represented by other speakers from the Office of the Prosecutor (OTP): the Deputy Chief of Investigations, a military analyst, a legal advisor, and an investigator.	OSCE	25-29/10/04
12 officials of the WCC participated in a host of discussions on practical issues relating to building the capacity of Serbia's war crimes court to try cases up to international standards and was aimed at building the channels of communication between the SWCC and the ICTY. The visit concluded with a roundtable with Tribunal judges.	UNDP	10-14/5/04
Conference with Serbian judges, prosecutors and investigators on the concept of command responsibility to Serbian judges, prosecutors and investigators. The conference involved lectures from respected law professors in the region and Tribunal experts	OSCE	27-8/3/04
Officials from the Serbian Ministry of Justice, Ministry of the Interior, Presidents of the War Crimes and Organized Crime panels, the War Crimes Prosecutor, and the Deputy Prosecutor for Organized Crime visited the ICTY for discussions on implementing a more effective witness protection program. The ICTY Staff from the Victims and Witness Section took the lead to share their experiences and gave presentations on various aspects of witness protection	OSCE	8-10/12/03
45 judges visited to the Tribunal where they received a general briefing on the ICTY and attended a trial	Judicial Center	11/11/03
IHL Seminar with judges, prosecutors, defense attorneys and investigators. The Outreach representative attended this training seminar, together with senior ICTY representatives: an investigator and a Trial Attorney from the Office of the Prosecutor and the President's Deputy Chef de Cabinet, who presented lectures on points of international law and led smaller group sessions. Outreach distributed Tribunal-related printed materials, including ICTY indictments, judgments and plea agreements.	HLC, IBA, and the Swedish International Development Cooperation Agency	23-25/10/03
This project consisted of three two-day sessions designed to help the capacity-building of the Serbian and Montenegrin judiciary to apply international humanitarian law and to enable them to conduct domestic trials for war crimes, genocide and crimes against humanity. Participants: eight judges, eight prosecutors, eight attorneys and nine police investigators from Serbia and Montenegro (including Kosovo). ICTY practitioners were among the lecturers	HLC, the Swedish International Development Cooperation Agency and the Canadian International Development Agency	8/5– 25/10/03
Conference on command responsibility with more than 40 members of the judiciary. The participants discussed the current and future status in their national law. The ICTY provided the bulk of lecturers	HLC and Ministry of Foreign Affairs of Denmark	23-24/5/03
Four ICTY officials participated as trainers in (IHL). Separate groups (judges, prosecutors, defense and investigators) worked on the issues of relevance to their fields. The seminar filled an evident gap in education on IHL, and promoted communication between the Tribunal and the local judiciary. Materials were distributed to all participants, including ICTY basic legal documents, indictments and judgments	IBA and HLC	8-10/5/2003



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- *Capacity Development in International Criminal Justice: A Mapping Exercise of Existing Practice*, by Alejandro Chehtman and Ruth Mackenzie, *DOMAC/2*, September 2009. Annex Capacity Development.
- *Reparation Workshop I: The Interactions between Mass Claims Processes and Cases in Domestic Courts*, by Edda Kristjansdottir, Report.
- *Prosecutions and Sentencing in the Western Balkans*, by Yael Ronen, with the assistance of Sharon Avital and Oren Tamir, *DOMAC/4*, February 2010.
- *The Impact of the European Convention of Human Rights in the Context of War Crimes Trials in Bosnia and Herzegovina*, by Silvia Borelli, *DOMAC/5*, November 2009.
- *Developing Local Capacity for War Crimes Trials: Insights from BiH, Sierra Leone, and Colombia*, by Alejandro Chehtman, *DOMAC/9*, June 2011.
- *Developing Bosnia and Herzegovina's Capacity to Process War Crimes Cases: Critical Notes on a 'Success Story'*, by Alejandro Chehtman, *Journal of International Criminal Justice*, Volume 9, number 3, pp. 547-570.
- *Two Sides of the Same Coin? Judging Milošević and Serbia before the ICTY and ICJ*, by Yuval Shany, in Timothy Waters, ed., *The Milošević Trial: An Autopsy* (Oxford University Press, forthcoming 2011).
- *Assessing the Impact of the International Ad-hoc Tribunals on the Domestic Courts of the Former Yugoslavia*, by Antonietta Trapani, *DOMAC/11*, September 2011.
- *The Impact of the International Criminal Tribunal for Yugoslavia on War Crime Investigations and Prosecutions in Croatia*, by Keren Michaeli, *DOMAC/10*, December 2011.

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