



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

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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

This report analyzes the impact of the ICTY on national war crimes proceedings in Croatia in three areas: rates of prosecutions, normative changes to relevant criminal law and capacity development. Croatia has processed thousands of war crimes cases since the outbreak of war in 1991. Such prolific legal activity provides many potential tangent points of interaction and mutual influence between the two types of legal mechanisms, which makes Croatia a valuable case-study in the context of DOMAC's mandate: seeking the optimal utilization of international criminal tribunals to enhance the capacity of domestic legal systems to process war crimes so as to maximize the fight against impunity.

Despite the potential for substantial contribution to Croatia's capacity to try war crimes, the negative interaction between the ICTY and Croatia in the first years of the Tribunal's existence, which was a critical period in the formation of prosecutorial policies in Croatia, prevented better absorbing of ICTY law and expertise by the Croatian system. As a result the ICTY could not help prevent ethnic bias in war crimes proceedings in Croatia, nor has it inspired better standards of the proceedings. In some respect, it helped vindicate them.

While the principle reasons for the sub-standard character of war crimes proceedings in Croatia were the national narrative of victimhood, corruption and lack of capacity of the judiciary – all stemming from the undemocratic and pluralistic political rule – the ICTY did not address them in a constructive manner, but by way of avoidance, which enhanced Croatia's suspicion of its work and mandate, which, in turn, legitimized the country's prosecutorial policy.

Positive contributions to law, capacity and trial standards have been made since the democratic change in Croatia and the initiation of the Tribunal's completion strategy, which shifted the Tribunal's focus from itself towards Croatia and facilitated partnership between the two systems. This manifested in the transferring of cases and material to Croatia, better outreach and exchange of knowledge and experience.

This analysis demonstrates the vital role played by outreach of international tribunals: Appropriate outreach allows for professional interaction and exchange and prevents misinformation regarding the tribunals that might be used for public

manipulation. This is especially true in situations similar to that of Croatia when nationalist agenda, lack of judicial capacity and decentralized jurisdiction to process war crimes constitute the ground realities.

The incorporation of standards for war crimes proceedings in Croatia into the EU accession policy has proved an instrumental means to import much of the ICTY's expertise and knowledge to Croatia. Another conclusion of the report is therefore the importance of utilizing international tribunals as professional yardsticks by powerful foreign actors.

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# LIST OF ABBREVIATIONS

RSK.....	Serb Republic of Krajina
SFRY.....	Socialist Federal Republic of Yugoslavia
BiH.....	Bosnia and Herzegovina
HDZ.....	Croatian Democratic Union
SAO.....	Serbian Autonomous District
JNA.....	Yugoslav Army
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
SC.....	UN Security Council
1976 SSFRY CC.....	1976 Criminal Code of the Socialist Federal Republic of Yugoslavia
1993 Croatian CC.....	1993 Basic Criminal Code of the Republic of Croatia
1997 CPA.....	The 1997 Criminal Procedure Act
2009 CPA.....	The 2009 Criminal Procedure Act
ICC Law.....	Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law
UN HRC.....	United Nations Human Rights Committee

# 1. INTRODUCTION

This report examines the impact of the ICTY on domestic war crime proceedings conducted in Croatia since 1991. Croatia is the first out of three case-studies relating to the Balkans wars of the 1990s to be analyzed by the DOMAC Project - the remaining two being Serbia and Bosnia and Herzegovina.

The war in Croatia began in 1991 following its decision to disassociate from the Yugoslav Federation and declare independence. Croatia was not only fighting against Yugoslavia but also against the 'Serb Republic of Krajina' an autonomous entity established in north-east Croatia by separatist Croatian Serbs and supported by Yugoslavia. Over 20,000 people died as a consequence of the war, two-thirds of them Croats. In a fashion similar to the war in Bosnia and Herzegovina (1992-1995) and the war in Kosovo (1999), the war in Croatia was accompanied by mass atrocities against civilians and combatants alike with each faction conducting its own campaign of ethnic cleansing against the other.

The scale of the crimes committed throughout the Balkans prompted the Security Council to establish in 1993 the first international criminal tribunal since the post world war II Nuremberg tribunal: 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). The ICTY became operational in 1995, whereas Croatian domestic courts had begun war crime prosecutions in 1991. Both mechanisms of criminal responses have been engaged with one another, at some level, since then.

## 1.1 OBJECT OF THE REPORT

The object of the current report is to identify and analyze the impact of the ICTY, representing the international criminal law response to the atrocities which took place in Croatia, on the parallel domestic proceedings conducted by the Croatian justice system in response to the same set of events. Owing to the magnitude of events in the former Yugoslavia, this report confines itself to the review of war crimes proceedings against perpetrators of crimes committed as part of the war in Croatia (and not in BiH).

The Croatian case study is particularly valuable due to its complexity: First, Croatia has processed thousands of war crime cases for almost two decades. Such prolific legal activity provides many potential tangent points of interaction and mutual influence between the two types of legal mechanisms. The report aims to find whether this potential has been realized, i.e. whether the ICTY has had a notable impact on the parallel Croatian investigation policies and techniques, prosecutorial policies and applicable law, witness and victims support measures etc.

Second, Croatia is in the unique position of being both a victim and victimizer state. Indeed, the ICTY has gone after Serb officials and commanders responsible for crimes committed against Croats, but at the same time indicted Croatian Generals for crimes committed against the Serb population. As a consequence, Croatia's perception of the ICTY has been ambiguous and its relationship with the Tribunal difficult. One of the tasks of the report is to figure out how this unique relationship has affected the impact of the ICTY on domestic war crime prosecutions in Croatia.

Lastly, Croatia has undergone two transition periods in the span of two decades: from a constituent republic of the SFRY to an independent state under a one party rule during the 1990s and later to a liberal democracy seeking EU membership since 2000. The different political settings along with the entry of the EU to the scene as an influential actor have each created different dynamics with respect to the relationship between Croatia and the ICTY and are thus invaluable to the study and are part of the factors analyzed by the report.

## 1.2 STRUCTURE OF REPORT

The structure of the report is, for the most part, chronological. Part 2 briefly describes the Croatian war: its background, the identity of the parties and the atrocities that took place during the five years of the conflict. It highlights the ethno-national tensions between the Croat and Serb populations that were central to the opening of the war, to the nature of the crimes committed therein and to the nature of the subsequent legal responses. Part 3 outlines the conditions in post-war Croatia that were relevant to its willingness and capabilities to prosecute war crimes. It looks at the political atmosphere, the legal framework in place and the capacity of the justice system to take on the endeavor of trying war criminals. These conditions also serve as a reference point with which subsequent developments are compared.

Parts 4 and 5 then proceed to describe the national and international responses to the mass atrocities that were committed in Croatia. Part 4 is concerned with the domestic war crime prosecutions in Croatia. The national response, which suffered from ethnic bias, procedural deficiencies, lack of capacity and political intervention, is described according to the different stages of the proceedings, from the investigation stage to the trial and sentencing stages. Part 5 then focuses on the ICTY: its indictment and prosecution record with respect to the war in Croatia and the dissonance that was intentionally created between the Tribunal and the domestic proceedings. Part 6 goes on to describe the interaction between both systems.

Parts 7 and 8 conclude the reports. Part 7 analyzes the overall impact the ICTY has had in three areas of domestic war crime proceedings in Croatia: applicable law, rates of prosecution and capacity building. It is thus the core of the report in the sense that it utilizes the information brought about in previous sections in order to extract the conclusions that correspond to the object of the report: the actual impact of the ICTY on domestic war crime prosecutions in Croatia: its scope, nature and limitations. The examination is based on the starting points described in parts 3 and 4, the mechanisms of cooperation and the relationship between Croatia and the ICTY described in Parts 5 and 6 and the role played by the EU in pushing for the judicial reforms undertaken by Croatia since 2003. Finally, Part 8 concludes the analysis by highlighting the main conclusions and lessons from the Croatian case.

### 1.3 METHODOLOGY

The methodology employed in this report is informed by the general structure of the DOMAC project. Specifically, it is but one out of ten case-studies that make up DOMAC's Work Package 5 (WP5). As noted in the WP5 preliminary report "The case studies are expected to offer a chance to contextualize and concretize the research undertaken in other WPs" (particularly, WP2 and WP3)" 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> In other words, other work packages of the DOMAC Project are thematic in nature. Each analyzes a specific field of interaction in detail (such as normative impact, sentencing policies, capacity

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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>.

building etc.). WP5, on the other hand, is a country specific endeavor, focusing on identifying the conditions and factors in the context of a specific state that might explain the impact identified by other work packages. Consequently, these conditions and factors are the focus of the research conducted for this report since the actual specific impacts have already been outlined by other work packages.

Therefore, the report relies less on independent empirical data and more on data collected and analyzed by other work packages: WP2 and WP3. This data has been contextualized using many secondary sources which consist of reports by the intergovernmental and nongovernmental organizations (Amnesty International, Human Rights Watch, International Center for Transnational Justice, UNDP and the Norwegian Refugee Council to name but a few) as well as reports by Croatian ministries, legislation and case-law, newspaper articles and scholarly writings.

Complementing available public resources, are the subjective accounts conveyed in interviews conducted with persons familiar with war crime prosecutions in Croatia. DOMAC staff conducted two rounds of interviews. The first took place in April-May 2008 in Zagreb where interviews were conducted with officials from the following organizations:

- The EU Mission to Croatia
- The ICTY Liaison Office in Zagreb
- The OSCE Mission to Croatia
- Local NGOs monitoring war crime trials in Croatia
- University Law Professors

The second round of interviews took place in January 2009 in The Hague with ICTY staff from the Outreach Program, Prosecutors office, Chambers and Witness Unit. A third, and final, round of interviews took part in November and December 2009 and included interviews of Supreme Court judges, County Courts prosecutors and re-interviews with EU and OSCE officials as well as local NGOs.

## 2. CONFLICT BACKGROUND

### 2.1 THE CONFLICT

The war in Croatia took place between 1991 and 1995 and involved two fronts: against the Federal government of Yugoslavia, from which the newly declared Croatian Republic was attempting to secede; and against the 'Serb Republic of Krajina' (Republic of Srpska Krajina (RSK)) the political entity which was formed by Croatian Serbs who opposed the Croatian secession and was backed by the Federal government. The war in Croatia was but one facet of the greater Balkans war that erupted after the disintegration of Yugoslavia in the early 1990's and was intertwined with the wars in Slovenia, Bosnia Herzegovina and, to a lesser extent, the conflict in Kosovo.

Croatia was one out of six republics (Serbia, Montenegro, Slovenia, Croatia, Bosnia and Herzegovina (BiH) and Macedonia) that made up Tito's Socialist Federal Republic of Yugoslavia (SFRY) along with two autonomous regions (Kosovo and Vojvodina) located inside the Serbian Republic. The national, religious and ethnic divides between the mosaic of approximately twenty distinct communities which constituted the republics did not make for a harmonic assembly. Tensions were contained, rather than resolved, throughout Tito's rule from 1945 and up to 1980. The Federal Constitution, which was premised on the notion of unity, nonetheless allowed for substantial autonomy to the republics which included rights to self-determination and secession.<sup>2</sup> Notably, the Yugoslav collective Presidency consisted of eight members, one from each federal unit, with the position of chair annually rotating between them. This constitutional structure satisfied centuries old nationalistic tendencies, especially on the part of Croatia and Serbia, only to an extent, and their nationalistic aspirations were unleashed again following the death of Tito

Yugoslavia of the 1980s was plagued with challenges. The Yugoslav economic system, a unique exercise in communism, was in a dire state. With the death of Tito, the only successful unifier the region ever had, in 1980, the federal structure soon began to disintegrate back into the familiar chaos of national and ethnic contestations. By the end

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<sup>2</sup> The preamble of the 1974 Constitution of the SFRY reads in part: "The nations of Yugoslavia, proceeding from the right of every nation to self-determination, including the right to secession, on the basis of their will freely expressed in the common struggle of all nations and nationalities in the National Liberation War and Socialist Revolution." The right to secession, however, was not contained in any of the Constitution's articles. See D Kofman, 'Secession, law, and rights: The case of the former Yugoslavia', 1 Hum Rts Rev. (2000) 9,25fn27

of the 1980s, the federal structure was so weak it was unable to pass legislation and the Presidency was effectively controlled by a Serb-Montenegrin block. Federal elections scheduled for 1990 never took place as they were made redundant by republic-level elections held at the beginning of that year. These events coincided with the formal rise of nationalist parties that prioritized their respective republics over the Yugoslav idea.

In Croatia the ultra-nationalist party, the Croatian Democratic Union (HDZ) headed by Frandjo Tudjman, with its "thousand years dream" of national independence separatist agenda, took power (taking over 205 out of 356 seats in Parliament). Tudjman's ideology and his separatist aspirations stemmed from a long standing resentment towards Serbia, historically the most dominant entity in the region. The Serb community in Croatia, which tallied 12% of the total Croatian population, had therefore become alert. Serbs were systematically marginalized under Tudjman's regime: many were purged from positions in the state administration and police forces, and the use of Serbian Cyrillic alphabet was formally discouraged. The breaking point for the Serb community was its demotion in the new Croatian Constitution from the status of a constituent nation to a national minority. To the Serb community, the HDZ's platform was reminiscent of the Pavelic regime which ruled Croatia during WWII under the protection of Nazi Germany and was notorious for the atrocities it committed against Serbs, as well as, *inter alia*, Jews and Roma.

In response, the Serb community began to mobilize. In December 1990 the Serbian Autonomous District (SAO) was established under the leadership of Milan Babic. The SAO initial goal was to prevent Croatia's secession from the SFRY (within which they felt protected). Their cause was taken up by the Serbian President Milošević who supported and cultivated their plan to annex to Serbia the predominantly Serb territories in Croatia, mainly Krajina in the south and Eastern Slavonia in the west.

The war erupted in March 1991. The first stage of the war began as a string of clashes between armed Croat and SAO forces. The clashes developed into a full blown war in August with the Yugoslav Army (JNA) forces, previously deployed as peacekeepers, fighting alongside the SAO. Following Croatia's declaration of independence on 25 June 1991, hostilities escalated with Serb forces occupying territories in Slavonia, Baranja, Banija and Krajina on the eastern front and Knin on the Southern front. In October the JNA joined Croat Serb forces to initiate a full scale attack against the Croat military forces. By the end of the year about a third of Croatia's territory

was under SAO control. This first chapter of the conflict ended in December 1991 by a cease-fire agreement which saw the withdrawal of JNA forces from Croatia and the deployment of the UN Protection Force (UNPROFOR). That month the SAO was transformed into the RSK. The cease-fire corresponded to the recognition of Croatia by the international community, including the EC, in January 1992.

The second stage of the war began in 1992 and lasted up to 1995. Despite the cease-fire, the conflict continued, albeit on a smaller scale. By 1994 the RSK was losing Serbia's support and was finally overrun in 1995 by Croat forces in two large NATO assisted operations 'Flash' and 'Storm'. The war officially ended in December 1995 with the signing of the 'Dayton Accord', a comprehensive peace agreement that brought an end to the wars in BiH and Croatia.

## 2.2 THE MASS ATROCITIES

As evidenced by the foregoing description, the Croatian war was waged for the purpose of ethno-national domination over specific territories of the SFRY. This was mirrored in the manner with which the war was fought: as in the war in BiH and later in Kosovo, it was the ethnicity of the population which determined its 'status', rather than any humanitarian distinction between civilians and combatants. Once the ethnic composition of geographical areas became the precondition for military and political success, a community other than one's own was viewed as a security liability and therefore needed to be disposed of. The Croatian war, as part of the Yugoslav wars, thus became infamous for the policy of 'ethnic cleansing' employed by all factions involved.

While it is true that atrocities were committed also out of revenge or pure sadism, what primarily characterized them was the calculated policy underlying them. Ethnic cleansing was an assault on entire civilian populations and consisted of killings, torture, rape, persecution, enslavement, internment, deportation and damage to private and public property. Terrorizing entire communities proved an effective strategy prompting the 'voluntary' expulsion of undesirable elements from one's region. The scale of the atrocities was enormous: the ethnic composition of entire regions was sharply altered, scores of cities and villages were destroyed or substantially damaged, a significant part of the religious and cultural heritage property was completely destroyed and the number of refugees and internally displaced persons reached millions. By the end of 1995 Croatia was, to a large extent, devastated.

In Croatia, atrocities were committed throughout the first part of the war, mainly, but not exclusively, by Serb forces who strove, to clear the territories under their control from non-Serb population and establish a "Great Serb State". Infamous atrocities that occurred during that period included the evacuation of 200 Croats from the hospital in Vukovar and their subsequent execution at the nearby Ovčara farmhouse by local Serb defense forces; and the Lovas, Skabrnja, Bacin and the Vocin massacres. Overall, the number of Croats living within the RSK territories had fallen from 353,595 to 18,200 by the end of the war. Atrocities committed by Croat forces at the beginning of the war included the Medak Pocket operation which included the unlawful killing and wounding of 100 Serbs, and the plunder and destruction of villages south of the city of Gospic. Large scale atrocities were also committed by Croats mostly towards the end of the war, especially during Operation 'Storm' in 1995, which was accompanied by the killing of approximately 150 civilians, the forced displacement of over 150,000 persons, and the whole and partial destruction of over 100 villages. By 2001, the proportion of the Serb population in all of Croatia dropped from 12% to 4.5%.

In total, the war in Croatia claimed the lives of approximately 22,000 people (15,000 Croats and 7,000 Serbs).

## 3. POST CONFLICT COUNTRY BACKGROUND

### 3.1 POLITICAL CONDITIONS

The 1990 Constitution established the independent Croatia as a parliamentary democracy based on a tripartite division into the legislative, executive and judicial branches.<sup>3</sup> The legislative branch, the *Sabor*, is composed of the House of Representatives and the House of Counties.<sup>4</sup> The authority of the executive branch is divided between the President and the Prime Minister.<sup>5</sup>

Croatia's transition from a communist regime to a liberal democracy had been protracted. Up to the year 2000 the Croatian political arena was essentially run as a one

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<sup>3</sup> Article 4 to the Croatian Constitution.

<sup>4</sup> Id. Article 70.

<sup>5</sup> Id. Article 98.

party regime by the HDZ party and its authoritarian-like leader President Tudjman.<sup>6</sup> Tudjman's tenure was centralistic yet popular despite allegations of nepotism and corruption.<sup>7</sup>

The legal system under Tudjman was acutely vulnerable to political pressure which impeded its independence. The first OSCE Progress Reports from 1998 and 1999 emphasized the pressure the judiciary was under. Thus, the government refrained from implementing Constitutional Court's decisions with which it did not agree and publically threatened to dismiss judges or limit the jurisdiction and funding of the Court. In December 1998 the Parliament announced that “the Government is to prepare a well elaborated system of measures aimed at limiting the courts’ authority” and to “diminish the scope of the legal mechanism.”<sup>8</sup> One of the mechanisms used to that effect was the political appointment of members to the High Council of Justice, the body in charge of the appointment, discipline and dismissal of judges and prosecutors.<sup>9</sup> The OSCE reports also documented the enactment of laws designed to impact the result of specific legal proceedings and refusal to enforce judicial decisions, especially with respect to eviction of Croats from Serb properties.<sup>10</sup>

The nationalistic platform of the HDZ and Tudjman instilled the popular image of Croatia as a victim country fighting a defensive war against Serbs. Indeed, Serbs were the 'other' against which Croatia's national identity was pitted.<sup>11</sup> In the context of domestic prosecutions of war crimes there was thus no viable option to bring charges against any member of the Croatian leadership for actions undertaken during the war. Moreover, such an endeavor would have been tantamount to a betrayal of the heroic legacy of the 'Homeland War' – an inconceivable notion in 1990s Croatia. The translation of attempts to prosecute Croat perpetrators into assault on Croatia itself has endured

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<sup>6</sup> Z Kusovac, 'The Prospects for Change in Post-Tudjman Croatia', 9 E. Eur. Const. Rev. (2000) 57.

<sup>7</sup> SP Ramet, 'Liberalism, Morality, and the social Order: The Case of Croatia's Corrupt Populist Pluralism' 25 Ohio N.U. L. Rev. (1999) 349.

<sup>8</sup> Reproduced in OSEC, Report of the OSCE Mission to the Republic of Croatia on Croatia's Progress in Meeting International Commitments since January 1999 (18 May 1999) p. 16 fn 55.

<sup>9</sup> OSCE, Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting International Commitments since September 1998 (26 January 1999) p. 10.

<sup>10</sup> Ibid.

<sup>11</sup> A Bellamy, *The Formation of Croatian National Identity: A Centuries-Old Dream?* (Manchester University Press, 2003) 68-69.

and still constitutes an obstructive factor in domestic war crime prosecutions in present day Croatia.<sup>12</sup>

Tudjman's effectively instilled legacy still exudes substantial influence on the legitimacy of governments in the country and, by implication, on Croatia's attitude towards the issue of war crimes prosecutions. The Government which came into power in 2000, consisting of a center-left coalition of six parties (*šestorka*), as well as President Stjepan Mešić, struggled to overcome the view pushed forward by the right wing opposition according to which initiation of criminal proceedings against Croats was unpatriotic.<sup>13</sup> Yet, it was only from this point onwards that drastic changes in the policy towards domestic war crime prosecution were made possible.

Ironically, the most significant improvements in Croatia's record in the field of domestic prosecutions occurred with the return of the HDZ to power in late 2003. The major contributing factor to the Party's new policy was the opening of negotiations between Croatia and the EU. The Croatian government officially applied for membership in the EU in February 2003 and in June 2004 the EU granted Croatia the official status of candidate country. Negotiations were nonetheless conditioned upon Croatia's full cooperation with the ICTY and improvements in the standards of war crime prosecutions.<sup>14</sup> This point is discussed further in Parts 6 and 7 *infra*.

## 3.2 GENERAL DESCRIPTION OF THE LEGAL SYSTEM

### *The Court System*

Croatia is a civil law state. At the apex of its legal system is the Constitution of the Republic of Croatia of 22 December 1990. Part 4 (Judicial Power) and Part 5 (The Office of the Public Prosecution) of Chapter IV regulate the powers and hierarchy of the Croatian court system. The Law on Courts of 6 January 1994 (with subsequent amendments in 1996, 1997 and 2000) supplements the Constitution in the regulation of

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<sup>12</sup> V. Peskin & M. P. Boduszyński, 'International justice and domestic politics: post-Tudjman Croatia and the international criminal tribunal for the former Yugoslavia' 55 *Europe-Asia Stud.* (2003) 1117.

<sup>13</sup> For further details see O. Erözden, 'Croatia v the ICTY; A Difficult year of Cooperation' <http://web.ceu.hu/cps/bluebird/pap/erozden1.pdf>.

<sup>14</sup> Brussels European Council 17 and 18 June 2004-Presidency Conclusions (10679/2/04 REV 2) (19 July 2004) 7-8; Council Decision (2006/145/EC) on the principles, priorities and conditions contained in the Accession Partnership with Croatia from 20 February 2006 (OJ L 55, 25.2.2006, p. 30).

the organization and powers of the Croatian courts. Courts of general jurisdiction are organized hierarchically in three instances and are separated into regions.<sup>15</sup>

Municipal courts are courts of first instance authorized to hear criminal cases where the offence alleged is punishable by no more than ten years imprisonment.<sup>16</sup> County (also referred to as District) courts, on the other hand, are the courts of first instance for criminal offences punishable by imprisonment exceeding ten years.<sup>17</sup> Article 17 of the Law on Courts provides that the functions of County courts include conducting investigations; deciding appeals against decisions of an investigating judge; making decisions regarding an investigating judge's proposals;<sup>18</sup> conducting extradition proceedings;<sup>19</sup> and enforcing foreign judicial decisions.<sup>20</sup> Furthermore, County courts are the courts of second instance in appeals of decisions of Municipal courts.<sup>21</sup> At the time of the establishment of the ICTY, no specialized court existed to try war crime cases and all twenty one County courts served as a first instance jurisdiction for such cases.

At the top of the criminal justice hierarchy is the Supreme Court of the Republic of Croatia.<sup>22</sup> The Supreme Court is the second instance court in cases of appeal against first instance County court decisions.<sup>23</sup> It is the third instance court in cases of appeal against second instance County court decisions.<sup>24</sup> The Supreme Court also has the power to decide on extraordinary judicial remedies.<sup>25</sup>

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<sup>15</sup> See Article 13 of the Law on Courts.

<sup>16</sup> Article 16 (1) of the Law on Courts and Article 17 (1) of the 1997 Criminal Procedure Act (CPA) – which was in force at that time - available at [http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_\\_Criminal-Procedure-Act.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Criminal-Procedure-Act.pdf).

<sup>17</sup> Article 17 (1) of the Law on Courts and Article 19 (1) of the 1997 CPA. Article 20 (1) of the 1997 CPA provided that at first instance county courts comprise panels of one judge and two lay judges, or where the offence carries a punishment exceeding fifteen years imprisonment, two judges and three lay judges.

<sup>18</sup> Article 17 (2) of the Law on Courts.

<sup>19</sup> Article 17 (3) of the Law on Courts and Article 19 (5) of the 1997 CPA.

<sup>20</sup> Article 17 (8) of the Law on Courts and Article 19 (6) of the 1997 CPA.

<sup>21</sup> Article 19 (2) of the 1997 CPA. Under Article 20 (3) of the 1997 CPA, at a trial at second instance county courts comprise panels of two judges and three lay judges.

<sup>22</sup> Article 118 of the Croatian Constitution.

<sup>23</sup> Article 21 (1) of the 1997 CPA. Under Article 22 (2) of the 1997 CPA, at a trial at second instance the Supreme Court comprises panels of two judges and three lay judges.

<sup>24</sup> Article 21 (2) of the 1997 CPA. Article 22 (3) of the 1997 CPA provides that at third instance the Supreme Court comprises panels of five judges.

<sup>25</sup> Article 22 (3) of the Law on Courts and Article 21 (3) of the 1997 CPA. In Chapter Twenty-Five of the 1997 CPA, the following extraordinary judicial remedies were specified: reopening of criminal proceedings; extraordinary mitigation of punishment; request for the protection of legality; and request for extraordinary review of the final judgment. Extraordinary judicial remedies can be made only with regard to a judicial decision that is final.

Parallel to this structure of courts there exists the Constitutional Court which decides, *inter alia*, on the conformity of laws with the Constitution; on constitutional complaints against individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions allegedly violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution; and on jurisdictional disputes between the legislative, executive and judicial branches.<sup>26</sup>

### *The State's Attorney Office*

The Office of the Public Prosecutions or the State's Attorney Office<sup>27</sup> in Croatia is an 'autonomous and independent judicial body empowered and obliged to proceed against those who commit criminal and other punishable offences...'<sup>28</sup> It is organized in a hierarchical structure<sup>29</sup> with the municipal State's Attorney offices<sup>30</sup> at the bottom, the district State's Attorney offices<sup>31</sup> in the middle and the State's Attorney Office of the Republic of Croatia<sup>32</sup> at the top. Until 2008,<sup>33</sup> the State's Attorney offices initiated investigations of criminal offences by submitting to an investigative judge a request for investigation. The role of the investigative judge was then to compile the evidence necessary to make a determination as to whether a case should proceed to trial. The final decision on the sufficiency of the evidence gathered, and thus whether an indictment should be issued and a case should proceed to trial, was within the powers of the relevant State's Attorney office.

The State's Attorney office then gathered all the evidence required to best present the case at trial.<sup>34</sup> The role of the court was to decide the case. Only materials that were

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<sup>26</sup> Article 128 of the Constitution.

<sup>27</sup> In the Croatian Constitution reference is made to the 'Office of the Public Prosecutions', whilst the Act governing the Office refers to the 'State's Attorney Office'. However, the difference is only as a matter of translation, and in the Croatian language the same term is used in both the Constitution and the Act governing the Office ('Državno Odvjetništvo').

<sup>28</sup> Article 124 of the Croatian Constitution and Article 2 of the Act on the State's Attorney Office.

<sup>29</sup> Article 10 of the Act on the State's Attorney Office.

<sup>30</sup> These offices cover the territory of one or a number of municipal courts, Article 11 (1) of the Act on the State's Attorney Office.

<sup>31</sup> These offices cover the territory of a county court, Article 11 (2) of the Act on the State's Attorney Office.

<sup>32</sup> This office covers the entire territory of Croatia, Article 11 (3) of the Act on the State's Attorney Office.

<sup>33</sup> The role of the investigating judge was substantially altered by the 2009 CPA. *Infra* Section 7.3.

<sup>34</sup> See Article 15 of the Act on the State's Attorney Office.

presented and orally explained during the course of a trial could form the basis of the court's decision. Upon examining such evidence the court reached a conclusion as to whether or not a particular fact has been proved.

### *The Police*

The Croatian police constitutes a section in the Croatian Ministry of the Interior. The police force is organized, under the Law on Police of 2000,<sup>35</sup> by districts: operational police is operated by local police stations throughout twenty districts. Each district is headed by its own administration. These administrations are supervised by four departments in the police directorate.<sup>36</sup> Alongside the four departments there exist other specialized departments: the criminal police directorate, border police directorate, forensic center, command of special police and the operational-communication center.

War crimes have been investigated by local police stations and by the department for war crimes and terrorism. The latter was established in 1991, initially under the criminal police directorate, and in 1992 as an independent department, in order to centralize information on war crimes.<sup>37</sup>

### *Applicable Criminal Codes*

Already in the early 1990's there was a normative framework in place for the prosecution of war crimes. In war crime prosecutions arising from the war in the 1990s, competent County courts applied the 1993 Basic Criminal Code of the Republic of Croatia (1993 Croatian CC), which was a reproduction of the 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (1976 SFRY CC).<sup>38</sup> The courts also applied international treaty law.

The relevant provisions of the 1993 Croatian CC in war crimes prosecutions are: Article 119 (Genocide), Article 120 (War crime against the civil population), Article 121 (War crime against the wounded and sick), Article 122 (War crime against prisoners of

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<sup>35</sup> Law on Police, 2002, available at <http://www.pak.hr/Default.aspx?art=1322&sec=120>.

<sup>36</sup> The division of the districts between the departments is available at <http://www.mup.hr/1265.aspx>.

<sup>37</sup> S Kutnjak Ivkovic, 'The Croatian Experience' in DK Das & O Marenin (eds.) *Challenges of Policing Democracies: a World Perspective* (2000) 45, 53, 64.

<sup>38</sup> 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). The 1976 SFRY CC is applied to crimes committed before the date on which the 1993 Croatian CC came into force.

war), Article 123 (Organizing a group and instigating the commission of genocide and war crimes), Article 124 (Unlawful killing or wounding of the enemy), Article 125 (Marauding), Article 126 (Making use of forbidden means of warfare), Article 127 (Violating the protection granted to bearers of flags of truce), Article 128 (Cruel treatment of the wounded, sick and prisoners of war), Article 129 (Unjustified delay of the repatriation of prisoners of war), Article 130 (Destruction of cultural and historical monuments) and Article 131 (Instigating an aggressive war).<sup>39</sup> These provisions have the same content as the corresponding provisions of the 1976 SFRY CC. Generally speaking, the abovementioned provisions do not make a distinction between international conflicts and non-international conflicts.<sup>40</sup> It is interesting to note that these 1993 provisions come under Chapter XV of the Code, which is entitled 'Criminal Acts against Humanity and International Law',<sup>41</sup> even though there is no provision for crimes against humanity. Command responsibility is also missing from the 1993 Croatian CC. Article 28 is also pertinent in that it criminalizes acts committed by omission if the offender abstains from performing an act which he/she was obligated to perform. It was thus one of the potential bases for imputing responsibility to military commanders for crimes committed by subordinates following omissions to prevent (but not to punish) the crimes.<sup>42</sup>

As a result of Article 140 of the Croatian Constitution,<sup>43</sup> which incorporates international treaties into domestic law, the following international conventions have also been applied in the prosecution of crimes committed during the 1991-1995 war: the Four Geneva Conventions of 1949<sup>44</sup> and their 1977 Additional Protocols;<sup>45</sup> the 1948

<sup>39</sup> However, it must be noted that Article 131 has never been used.

<sup>40</sup> Specifically, Articles 120, 121, 124, 126, 127, 130 apply to "[W]hoever, in violation of the rules of international law at the time of war or armed conflict".

<sup>41</sup> Original language: 'Krivična Djela Protiv Čovječnosti i Međunarodnoga Prava'.

<sup>42</sup> This legal construction was not used though before the case of Ademi and Norac. See *infra* text accompanying notes 235-240.

<sup>43</sup> Article 140 of the Croatian Constitution provides:

'International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects. Their provisions may be changed or repealed only under conditions and in the way specified in them or in accordance with the general rules of international law.'

The Constitution of the Republic of Croatia available at [http://www.usud.hr/default.aspx?Show=ustav\\_republike\\_hrvatske&Lang=en](http://www.usud.hr/default.aspx?Show=ustav_republike_hrvatske&Lang=en). Article 140 was preceded by Article 134 of the 1990 Constitution containing an identical provision.

<sup>44</sup> Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of the Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 75 U.N.T.S. 85; Geneva Convention Relative to the

Convention on the Prevention and Punishment of the Crime of Genocide;<sup>46</sup> and the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity.<sup>47</sup>

The relevant law on criminal procedure has been the 1997 Criminal Procedure Act (1997 CPA) which came into force on 1<sup>st</sup> January 1998. Criminal proceedings are split into three stages: the preparatory or pre-investigatory stage,<sup>48</sup> the investigative stage and the trial stage.<sup>49</sup> The police is considered to be a subservient institution carrying out the will of the State's Attorney Office and the investigative judge. They are required to submit all cases, information and evidence to the State's Attorney Office, who in turn decided if there was sufficient evidence to initiate an investigation. The investigation itself has been carried out by an investigative judge of the court that has jurisdiction thereof.<sup>50</sup> Upon concluding the investigation, the investigating judge is to deliver the case files to the State's Attorney who, within fifteen days, has to file a motion to supplement the investigation, issue an indictment or declare that he was desisting from prosecution.<sup>51</sup>

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

The Croatian legal system had, at least during the immediate post conflict period, attained a reputation for being ineffective and corrupt. Intervention from the executive branch had a devastating effect on its ability to operate adequately.<sup>52</sup> Since

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Treatment of Prisoners of War, Aug. 12, 1949, 75 U.N.T.S. 135; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 75 U.N.T.S. 287.

<sup>45</sup> Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts (Protocol I), July 8, 1977, 1125 U.N.T.S. 3; Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), July 8, 1977, 1125 U.N.T.S. 609.

<sup>46</sup> The Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 11, 1948, 78 U.N.T.S. 227.

<sup>47</sup> Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Dec. 16, 1968, 754 UNTS 73.

<sup>48</sup> Chapter Seventeen of the 1997 CPA.

<sup>49</sup> Chapter Eighteen of the 1997 CPA.

<sup>50</sup> Article 199 of the 1997 CPA.

<sup>51</sup> Article 216 of the 1997 CPA.

<sup>52</sup> The intentional weakening of the Constitutional Court resulted in a constitutional crisis in the relationship between itself and the Supreme Court with the latter refusing to acknowledge the superiority of the former and apply its decisions. OSCE, Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since May 1999 (28 September 1999) p 14, available at [http://www.osce.org/documents/mc/1999/09/1051\\_en.pdf](http://www.osce.org/documents/mc/1999/09/1051_en.pdf).

appointments to the judiciary were mostly dictated by political considerations rather than professional criteria (which did not exist) the professional level of prosecutors and judges was a source of concern. Once appointed, they had no recourse for professional training programs.

On top of that, there has been a chronic shortage of judges due to the government's failure to fill many vacant positions. All of the abovementioned factors lead to a combined backlog of approximately one million court cases<sup>53</sup> and prolonged proceedings.<sup>54</sup> Additional problems existed: Rules giving priority to urgent cases were unpublished;<sup>55</sup> individuals were not given notice regarding initiation of cases in which they had interest and cases would consequently commence *in absentia*;<sup>56</sup> administrative procedures were not transparent<sup>57</sup> nor was there full judicial review over administrative decisions.<sup>58</sup> Most importantly, there was a consistent failure to enforce court decisions, including a ruling of the Constitutional Court instructing administrative bodies to provide reasoned decisions.<sup>59</sup> A survey conducted in cooperation with the World Bank as late as 2006 found that 70% of firms still considered the courts corrupt, and, on a related note, only 35% regarded the courts as fair and impartial.<sup>60</sup>

Criminal proceedings suffered from similar deficiencies. Challenges began at the investigation stages: prior to 1990, the vast majority of the police force consisted of Croat Serbs. Following the purges conducted by the HDZ and the subsequent outbreak of war, thousands of positions were in need of being filled, including around eighty percent of detective posts. Since the police force played a combat role during the war, thousands of policemen were drafted in a very short period of time without undergoing a proper vetting and training process. The police force was thus very young, inexperienced, and bound

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<sup>53</sup> Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since May 1998 (8 September 1998) p. 14, available at [http://www.osce.org/documents/mc/1998/09/1048\\_en.pdf](http://www.osce.org/documents/mc/1998/09/1048_en.pdf) ; OSCE May 1999 Report, *supra* note 8, 17.

<sup>54</sup> A fact not overlooked by the European Court of Human Rights. See *Camasso v. Croatia*, ECHR (Application no. 15733/02) (13 January 2005); *Debelic v. Croatia*, ECHR (Application no. 2448/03) (26 May 2005).

<sup>55</sup> OSCE September 1998 Report, *ibid.* p. 8.

<sup>56</sup> OSCE January 1999 Report, *supra* note 9, 11.

<sup>57</sup> OSCE May 1999 Report, *supra* note 8, 17.

<sup>58</sup> OSCE January 1999 Report, *supra* note 9, 11.

<sup>59</sup> OSCE September 1998 Report, *supra* note 53, 14 fn 32.

<sup>60</sup> World Bank, 'Judicial Reform Project; Document (PID) Concept Page (Report No. AB3046)' June 13, 2007, p. 2, available at [http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/06/13/000104615\\_20070613162112/Rendere d/PDF/PID1Concept0Stage1April11312007.pdf](http://www-wds.worldbank.org/external/default/WDSContentServer/WDSP/IB/2007/06/13/000104615_20070613162112/Rendere d/PDF/PID1Concept0Stage1April11312007.pdf).

together by comradely experience.<sup>61</sup> Furthermore, 65 police stations and 60% of police equipment were destroyed during the war. In sum, the Croatian police force was in poor shape at the end of the war.<sup>62</sup>

With respect to pre-trial proceedings, a 2006 EU sponsored review conducted in cooperation with the Croatian Ministry of Justice, which related also to the post conflict period, highlighted further areas in need of reform, such as cumbersome and repetitive investigation proceedings, weak involvement of investigating judges in criminal investigations and marked differences between the districts in level of cooperation between the police and prosecutors, as well as in the application of investigation procedures.<sup>63</sup>

The Croatian justice system also suffered from lack of a human rights culture. According to a 1998 U.S. State Department report, irregularities and poor guarantees for human rights were prevalent from the investigation stage (suspects were detained for the most part of the investigation period and release on bail was uncommon; detainees were often denied the right to an attorney at all stages of the investigation) to the trial stage (prolonged proceedings; prolonged detention).<sup>64</sup>

Lack of funding further impeded criminal proceedings. Monitoring organizations have drawn attention to deficiencies in the setup of courts in Croatia, such as the shortage in human resources, lack of technical and IT capacities in County courts and inadequate infrastructure (such as repeated power outages, limited space that did not allow a physical separation between the defendants on one side and victims and witnesses).<sup>65</sup>

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<sup>61</sup> S Kutnjaklvkovic & CB Klockars, "Police Integrity in Croatia" in C B Klockars et al. (eds.) *The Contours of Police Integrity* (2004) 56.

<sup>62</sup> SK Ivkovic & MR Haberfeld, 'Transformation from Militia to Police in Croatia and Poland' 23 *Policing Int'l J. Police Strat. & Mgmt* (2000) 194, 207.

<sup>63</sup> CARDS 2003 Twinning Light Project HR03-IB-JH-04-TL, *Reform of Pre-Trial Criminal Proceedings in Croatia* (2006), available at [http://bim.lbg.ac.at/files/sites/bim/Final\\_Project\\_Document\\_en.pdf](http://bim.lbg.ac.at/files/sites/bim/Final_Project_Document_en.pdf).

<sup>64</sup> See <http://www.hri.org/docs/USSD-Rights/1998/Croatia.html>.

<sup>65</sup> Center for Peace, Nonviolence and Human Rights Osijek, 'Monitoring of War Crimes Trials 2005 Annual Report' (2005) 17-18, available at <http://www.documenta.hr/eng/documents/annrep2005.pdf>.

## 4. THE NATIONAL RESPONSE TO THE MASS ATROCITIES

As early as 1991 Croatia began utilizing its judicial system to address atrocities committed during the war. As of 2010 it is still thus engaged. According to information provided by Croatia in August 2009 to the UN Human rights Committee:

- A total of 1,829 persons were accused
- There are on-going proceedings against 1,176 persons (527 in the investigation stage and 649 in the stage of an on-going or completed main hearing)
- Proceedings were completed by final judgements of conviction in relation to 630 persons. 465 of them, approximately 70%, were convicted *in absentia*.
- In relation to 550 persons, further criminal proceedings were discontinued or they were acquitted.
- Proceedings were discontinued before indictment against 1,472 persons<sup>66</sup>

Throughout these nineteen years Croatia has come a long way in terms of the quality of war crimes proceedings and it is this slow but steady evolution of the Croatian policy towards war crimes proceedings that this report attempts to analyze in connection with ICTY war crimes proceedings. This section concentrates mainly on the initial response of Croatia, between 1991 and 2004. The subsequent period is described in more detail in Section 7 *infra*.

The basic problem with Croatia's response, especially until 2004, was that the large numbers of war crimes proceedings resembled more an act of national vendetta than an even-handed exercise of criminal justice. The most obvious characteristic of the said proceeding was the ethnic bias against Serbs which underlined them. Thus, the overwhelming majority of indictees were of Serb descent who were accused of crimes committed against Croats; at the same time, most crimes against Serbs had not been investigated, let alone prosecuted. Furthermore, most proceedings did not meet

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<sup>66</sup> Republic of Croatia, "Replies to the List of Issues (CCPR/C/HRV/Q/2) to be Taken up in Connection with the Consideration of the Second Periodic Report of Croatia (CCPR/C/HRV/2)" (4 August 2009) UN Doc. CCPR/C/HRV/Q/2/Add.1 (28 August 2009).

acceptable standards of procedural fairness and due process: many trials were conducted *in absentia*, and many more were plagued by irregularities from the investigation stage all the way up to the court proceedings. As will be explained in Section 5.1., the substandard quality of national trials informed, to a large extent, the ICTY's subsequent prejudice against domestic prosecutions in the region.

The OSCE, EU, local NGOs such as Documenta, the Norwegian Refugee Council and the Centre for Peace, Non Violence, and Human Rights depicted in their reports and subsequent interviews conducted by DOMAC several shortcomings of war crimes proceedings in Croatia. The main ones are as follows:

*The investigation stage:* Investigations in Croatia were influenced by two key factors. First, ethnic hostility coupled with political pressure prevented the instigation or caused significant delays with respect to investigations against Croat perpetrators of crimes against Serbs. A notable example is the failure to launch an investigation into the killing of hundreds of civilians in Sisak and its vicinity during 1991-1992. Croatian police have also been implicated not only in refusals to conduct investigations<sup>67</sup> but also in the intimidation of witnesses.<sup>68</sup> Some investigations began seven or eight years after the crime was committed, resulting in loss of witnesses as well as physical evidence. At the same time, many investigations against Serbs were opened on the basis of unfounded allegations that were not put into question. Second, lack of capacity played a crucial role in the quality of investigations. The system was overwhelmed by the wide scope of atrocities requiring investigation and was lacking in resources and expertise. The department for war crimes and terrorism was very active in 1991 in interviewing and arresting thousands of people, often in violation of basic standards of liberty.<sup>69</sup> It is unclear how effective, however, this exercise had been since there are no records available which detail how many were interviewed and arrested in connection to war crimes. Nor is it clear how many of these cases matured into indictments and trials. Notably, it is unknown whether the department in fact centralized information provided by local police stations. As already mentioned, the Croatian police force was young and

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<sup>67</sup> HRW, 'Justice at Risk: War crime Trials in Croatia, BiH and Serbia and Montenegro' (October 2004) 16, available at <http://www.hrw.org/reports/2004/icty1004/>.

<sup>68</sup> OSCE, 'Background Report: Domestic War Crime Trials 2004' (26 April 2005) 23-25 available at [http://www.osce.org/documents/mc/2005/04/14056\\_en.pdf](http://www.osce.org/documents/mc/2005/04/14056_en.pdf); OSCE, 'Background Report: Domestic War Crimes Proceedings 2006' (3 August 2007) 39 available at [http://www.osce.org/documents/mc/2007/10/27566\\_en.pdf](http://www.osce.org/documents/mc/2007/10/27566_en.pdf).

<sup>69</sup> Ivkovic, "The Croatian Experience", *supra* note 37, at 53.

lacked experienced detectives, equipment and proper regulations. To a large extent this accounted for shortcomings such as disappearance of evidence, failure by investigators to preserve crime scenes and secure the conduct of autopsies.<sup>70</sup> On top of these difficulties, post war investigations were further frustrated by the lack of witnesses and perpetrators, who were located outside Croatia. This was the basis for mass *in absentia* proceedings.

*The Indictment stage:* The poor quality of many investigations did not, as a rule, prevent indictments. Consequently, many indictments filed suffered from imprecision and shortage of evidence.<sup>71</sup> In this context, one should mention the large number of group indictments which did not elaborate each of the defendants' role in the alleged crime and was based only on the location of the defendants at the time of the crime or on their membership in a certain group or unit.<sup>72</sup> Bias is a notable pattern in the indictment stage. Serbs account for 227 out of 281 indictees between 2002 and 2008. Prior to 2001 no war crime charges were brought against persons belonging to the Croat forces. The latter were instead prosecuted for 'regular' crimes committed during the war period and in the war zone against Serbs (3970 reported, 1492 charged).<sup>73</sup> Serbs, on the other hand, were indicted for relatively minor offences.<sup>74</sup>

*The Trial Stage:* One of the most controversial policies in war crime proceedings has been the scope of trials conducted *in absentia*. These have been prevalent mostly due to the inability to apprehend many Croat-Serbs that fled Croatia during and after the war. The latest report from the Croatian Chief State Attorney submitted to the OSCE in January 2009 reports that 117 verdicts, encompassing 465 indictees (almost a third of all indictees) were dispensed in trials conducted *in absentia*.<sup>75</sup> According to the 2008 review of the State Attorney's Office itself, with respect to at least 62 of those convicted a re-trial was merited and with respect to 53 additional persons further investigation should be

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<sup>70</sup> Ibid, 20-22.

<sup>71</sup> HHO, Documenta, Center for Peace, Nonviolence and HR Osijek, Discussion Paper (26 March 2008).

<sup>72</sup> Human Rights Watch, Broken Promises (September 2003) p. 49, available at <http://www.hrw.org/en/node/12271/section/8>; Justice at Risk, *supra* note 67.

<sup>73</sup> Cited in Osijek Center, 'Monitoring of War Crimes Trials 2005', *supra* note 65, 16.

<sup>74</sup> Ibid. 13. Examples include, according to HRW, theft of flour (pillage) or knocking out a tooth (inhumane act). Broken Promises, *supra* note 72, 52.

<sup>75</sup> The OSCE report and documents submitted by the State Attorney are on file with DOMAC. The most prolific courts are in Zadar (87 in 21 verdicts); Sisak (77 in 25 verdicts); Osijek (67 in 16 verdicts); Sibenik (52 in 10 verdicts); Split (50 in 6 verdicts); Gospic (46 in 8 verdicts); and Vukovar (40 in 6 verdicts).

conducted with a view of requesting a re-trial. Notably, only 2 of these verdicts did not concern Serbs.<sup>76</sup> Indeed, the weakness of many of these proceedings results from a poor evidentiary basis. Contributing factors, besides the absence of the accused, were the superficial investigations that were either influenced by prevailing ethnic hostilities during the war and in the years that followed thereafter, or caused by the limited capacity to conduct comprehensive investigations.

NGOs monitoring war crime trials have also reported on the comparative disadvantages encountered by Serb defendants. These include uneven practices in issuing detention orders, the provision of greater latitude in cross examinations of witnesses testifying against Croat defendants and cases where threats emanating from the courtroom audience were allowed.<sup>77</sup> Other shortcomings included a shortage of experienced defense counsels,<sup>78</sup> inconsistency in decisions relating to the threshold of proof needed for war crime trials, procedural errors and errors in finding and weighing facts and in applying the facts to the law,<sup>79</sup> and insufficient support and protection of witnesses, many of which have come under threat (especially in trials against Croat defendants).<sup>80</sup> Another noteworthy aspect of trials against Croat defendants is the pressure put on judges and prosecutors. OSCE reported on an incident where the court took no action when defense lawyers instructed defense witnesses in open court how to testify about activities of the accused. Furthermore, during a recess in trial proceedings, a house in Osijek constituting one of the crime scenes, was demolished, potentially hampering any reconstruction of the crimes by the trial court.<sup>81</sup> In this context, the trial against Branimir Glavas, a Parliament Member, for the torture and murder of Serb civilians in 1991 in Osijek, should be mentioned. Glavas's Parliamentary immunity was waived by Parliament in 2006; yet, he was re-elected during his trial. In January 2008, the Supreme Court held that his re-election restored his immunity and the Croatian

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<sup>76</sup> Cited in OSCE, 'Croatia's progress in meeting international commitments since July 2000' (13 November 2000) 4 available at [http://www.osce.org/documents/mc/2000/11/1053\\_en.pdf](http://www.osce.org/documents/mc/2000/11/1053_en.pdf).

<sup>77</sup> Osijek Center, 'Monitoring of War Crimes Trials 2005', *supra* note 65, 28-30; OCSE, 'Background Report: Domestic War Crime Trials 2005' (13 September 2006) 15-20, available at [http://www.osce.org/documents/mc/2006/09/20668\\_en.pdf](http://www.osce.org/documents/mc/2006/09/20668_en.pdf).

<sup>78</sup> OSCE, September 2006 Report, *supra* note, 24-26.

<sup>79</sup> *Ibid.* 21-24.

<sup>80</sup> ICTJ, Croatia: Selected Developments in Transnational Justice' (December 2006) pp 21-25, available at <http://www.ictj.org/static/Europe/TJdevelopments.eng.pdf> ('Selected Developments').

<sup>81</sup> For further details see OCSE, 'News in Brief', (9 January – 22 January 2008) available at [http://www.osce.org/documents/mc/2008/02/29700\\_en.pdf](http://www.osce.org/documents/mc/2008/02/29700_en.pdf).

Parliament had to consider a request for immunity waiver once again. It finally waived his immunity from standing trial but not from being detained – in contrast to the opinion of the Supreme Court that his detention was necessary – prompting a statement by the Court's President that the constitutional separation of powers in Croatia mandated deference to the court on the matter of detention.<sup>82</sup>

There have also been fundamental flaws in some of the district courts' judgments. In a 2004 report, the OSCE detailed judgments based on insufficiently established facts, errors in weighing facts and problems applying certain legal principles, including international humanitarian law, to the established facts.<sup>83</sup> According to Prof. Josipovic, a notable Croatian legal expert (and the current President of the country), some of these cases, such as the Karan, Lora and Savic cases, have become notorious even among the Croatian public.<sup>84</sup>

Lastly, there has also been a clear difference between the conviction rates of Serbs and Croats. According to OSCE reports between 2002 and 2005 83%, 94%, 75% and 85% (respectively) of Serbs charged were convicted while 18%, 71% (of only 4 defendants), 20% and 25% of Croats charged were convicted.<sup>85</sup> A more comprehensive picture is provided by the DOMAC WP3 report on the Balkans.

### *Implementation of Amnesty Legislation*

The first amnesty law enacted in September 1992 decreed that war-related crimes would enjoy amnesty from indictment, arrest and prosecution.<sup>86</sup> Article 2 of the 1992 law excluded from the scope of its amnesty provisions prosecutions that are "mandatory under the provisions of international law". The vague language of the law resulted in the

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<sup>82</sup> For further details see OCSE, 'News in Brief', (9 January – 22 January 2008) available at [http://www.osce.org/documents/mc/2008/02/29700\\_en.pdf](http://www.osce.org/documents/mc/2008/02/29700_en.pdf).

<sup>83</sup> OSCE, 'Domestic War Crime Trials 2004', *supra* note 68, 31-36 available at [http://www.osce.org/documents/mc/2005/04/14056\\_en.pdf](http://www.osce.org/documents/mc/2005/04/14056_en.pdf).

<sup>84</sup> I Josipovic, 'Responsibility for War Crimes before National courts in Croatia' 88 Int'l Rev. Red-Cross (2006) 145, 154 fn24.

<sup>85</sup> OSCE, August 2007 Report, *supra* note 68, 53.

<sup>86</sup> Law on Amnesty from Criminal Prosecution and Proceedings for Criminal Offences Committed in Armed Conflict and in War against the Republic of Croatia. Article 1 reads "Criminal proceedings shall be terminated against the perpetrators of criminal acts committed during the armed conflicts, that is, the war against the Republic of Croatia or related to these armed conflicts, that is, the war, committed in the period from 17 August 1990 until the day this law has entered into force. No criminal prosecution shall be instituted and no criminal procedure shall be initiated for the commission of those criminal acts. Criminal prosecution already undertaken shall be terminated *ex officio* by the court's ruling. If a person, to whom the amnesty as per Paragraph I of this Article applies, has been deprived of his freedom, he shall be released by the court's ruling."

passage of two additional amnesty laws accommodating demands from the UN Security Council (SC) to provide broader and clearer rules so as to better facilitate the return of Serb refugees:<sup>87</sup> the second amnesty law of May 1996<sup>88</sup> and the third amnesty law of October 1996, which is still in force today.<sup>89</sup> The purpose of all three laws was to absolve rebel Serbs of criminal acts committed against Croatia during the war, thereby enabling national reconciliation. The third law especially was credited for being clearer and wider in scope than the 1992 law.<sup>90</sup> Article 3 thereto specified as exceptions to the amnesty law articles of the 1993 Croatian CC relating to genocide and war crimes;<sup>91</sup> acts of terrorism under international law; and crimes unrelated to the war.

Since war crimes were expressly excluded from scope of the amnesty laws, the qualification of acts as either "common crimes" or "war crimes" became pertinent and required a clear and consistent judicial policy by courts that were applying such amnesties. The manner in which amnesties were dispensed during the 1990s by courts in Croatia did little to advance the distinction. As late as 2000, the OSCE Mission in Zagreb recommended that there "remains a need for the authorities to clearly and publicly distinguish between criminal acts subject to amnesty and war crimes."<sup>92</sup> According to Human Rights Watch, amnesty decisions did not offer adequate information regarding the identity of the person amnestied or the acts subject to amnesty. Many Serbs were thus not aware of these decisions or their precise scope.<sup>93</sup> The lack of clear definitions and the confusion surrounding grant of amnesties also brought about instances of re-classification of acts for which individuals had been amnestied as war

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<sup>87</sup> Statement by the President of the SC, UN Doc. S/PRST/1996/30 (3 July 1996).

<sup>88</sup> Amnesty Act Applicable to the Perpetrators of Criminal Acts Committed in the Temporarily Occupied Areas of Vukovar-Sirmium and Osijek-Baranja – The law applied only to Croatian Serbs who fought in the region of the former Sector East, and not to persons who served with the "RSK" in the former Sectors North and South. See Further Report on the Situation of Human Rights in Croatia Pursuant to SC Res 1019 (1995), UN Doc. S/1996/691 (23 August 1996) p. 8.

<sup>89</sup> General Amnesty Law (October 1996) available at [http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_\\_General-Amnesty-Act\\_1996.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__General-Amnesty-Act_1996.pdf).

<sup>90</sup> UN High Commissioner for Refugees, 'Overview of Amnesty Laws in the Former Yugoslavia' (21 January 1997) available at: <http://www.unhcr.org/refworld/docid/3ae6b325c.html>.

<sup>91</sup> *Supra* text accompanying notes 39-41.

<sup>92</sup> OSCE, 'Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since July 2000' (13 November 2000) p. 5, available at [http://www.osce.org/documents/mc/2000/11/1053\\_en.pdf](http://www.osce.org/documents/mc/2000/11/1053_en.pdf).

<sup>93</sup> HRW, 'Croatia: Second Class Citizens: The Serbs of Croatia (March 1999) pp. 55-58, available at <http://www.hrw.org/sites/default/files/reports/crosrb99.pdf>.

crimes and the prosecution of Serbs for crimes eligible for amnesty.<sup>94</sup> Furthermore, the criminal records of amnestied individuals were not expunged. As a consequence, amnestied individuals were not able to pursue professions which disallowed criminal records, such as public office positions, the legal profession and the police.<sup>95</sup> Serbs were not the only ones granted amnesty. Croat members of the armed forces were also eligible for amnesty. OSCE reported on several instances where amnesties were granted to Croats for acts constituting war crimes.<sup>96</sup> Pursuant to a 2008 decision by the Constitutional Court, acts which were subject to amnesty cannot be requalified as war crimes and prosecuted.<sup>97</sup>

There are no definite data on the number of amnesties granted. The latest estimate published by the OSCE in 2002 states that more 21,255 amnesties were dispensed.<sup>98</sup>

## 5. THE INTERNATIONAL RESPONSE TO THE MASS ATROCITIES

### 5.1 THE ESTABLISHMENT OF THE ICTY

#### *General*

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 before by the Commission of Experts established pursuant to SC Resolution 780 which found evidence that grave breaches of the Geneva

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<sup>94</sup> US Department of State, 'U.S. Department of State Country Report on Human Rights Practices 1996 – Croatia', (30 January 1997), available at: <http://www.unhcr.org/refworld/docid/3ae6aa818.html>; <sup>94</sup>US Department of State, 'U.S. Department of State Country Report on Human Rights Practices 1996 – Croatia', (23 February 2000), available at <http://www.state.gov/g/drl/rls/hrrpt/1999/323.htm>.

<sup>95</sup> Norwegian Refugee Council, 'Slow progress reported in the implementation of the Amnesty Law' (2002) (On file with DOMAC).

<sup>96</sup> K-44/92 Amnesty decision issued by the Military Court in Zagreb(2 November 1992); also K-42/92 Amnesty decision issued by the Military Court in Zagreb(10 November 1992).

<sup>97</sup> U-III-543/1999, 26 November 2008. The Constitutional thus overturned a contrary decision from 2007 of the Supreme Court.

<sup>98</sup> OSCE, 'Background Report: Domestic War Crime Trials 2002' p. 2, available at [http://www.osce.org/documents/mc/2004/03/2185\\_en.pdf](http://www.osce.org/documents/mc/2004/03/2185_en.pdf).

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>99</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 and shortcomings of the domestic response to the atrocities.<sup>100</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 the peace.<sup>101</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 a necessary substitution for military intervention)<sup>102</sup> and partly because it is uncertain that the Tribunal was taken seriously by SC Members.<sup>103</sup>

The Statute of the ICTY was adopted by the SC 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>104</sup> and

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<sup>99</sup> Interim Report of the Commission of Experts Established Pursuant to Security Council Resolution 780 (1992), UN Doc. S/25274 (26 January 1993).

<sup>100</sup> P R Williams and M P Scharf, *Peace with Justice* (Oxford, Rowman & Littlefield, 2002) 96-98.

<sup>101</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 MP Scharf, *An Insider's Guide to the International Tribunal for the Former Yugoslavia Vol. II* (NY, Transnational Publishers Inc. Irvington-on-Hudson, 1995) especially Brazil, Venezuela, France 161-2; 182; 163-4 respectively. PROVISIONAL VERBATIM RECORD OF THE 3217TH MEETING, HELD AT HEADQUARTERS, NEW YORK, ON TUESDAY, 25 MAY 1993: SECURITY COUNCIL, 48<sup>th</sup> sess. (UN Doc. S/PV.3217).

<sup>102</sup> Y Beigbeder, *Judging War Criminals: The Politics of International Justice* (NY, St. Martin's Press, 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; SR Ratner and JS Abrams, *Accountability for Human Rights Atrocities in International Law* (Oxford, OUP, 2<sup>nd</sup> ed. 2001) 191.

<sup>103</sup> DP Forsythe, 'Politics and the International Tribunal for the Former Yugoslavia' in RS Clark & M Sann (eds.), *The Prosecution of International Crimes* (London, Transaction Publishers, 1996) 185, 187-198; Michael Scharf's remarks quoted in Schabas, *supra* note 108, 21.

<sup>104</sup> Article 2 of the ICTY Statute.

violations of the laws and customs of war<sup>105</sup>), crimes against humanity<sup>106</sup> and genocide.<sup>107</sup>

### *Domestic Prosecutions in the Design of the Court*

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>108</sup> As pointed out by the Japanese representative to the SC, 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>109</sup> Indeed, and this is the gist of the matter, 'the audience for the tribunal was primarily the international community'<sup>110</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>111</sup> In this setting, domestic prosecutions for war crimes did not figure high on the agenda of the ICTY drafters.

The 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>112</sup>

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<sup>105</sup> Id. Article 3.

<sup>106</sup> Id. Article 5.

<sup>107</sup> Id. Article 4.

<sup>108</sup> For details on the events leading up to these resolutions see W A Schabas, *The UN International Criminal Tribunals* (Cambridge, Cambridge University Press, 2006) 13-24; M P Scharf, *Balkan Justice* (Durham, Carolina Academic Press, 1997).

<sup>109</sup> Reproduced in Morris and Scharf, *supra* note 101, 194.

<sup>110</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>111</sup> *Ibid.* 562.

<sup>112</sup> See generally BS Brown, 'Primacy or Complementarity: Reconciling the Jurisdiction of National Courts and International Criminal Tribunals' 23 Yale J. Int'l L. (1998) 383.

Yet it was quite clear from the outset that the bulk of cases relating to the mass atrocities in the former Yugoslavia were to be handled by national courts.<sup>113</sup> Therefore, despite the principle of primacy, the Tribunal's jurisdiction was not intended to be exclusive in nature.<sup>114</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>115</sup>

Nevertheless, back in 1993, there was not much feasibility for adequate domestic prosecutions. As pointed out in the proposal of the Conference on Security and Cooperation in Europe (CSCE) on the establishment of an international tribunal:

'As far as national courts are concerned the Rapporteurs saw no real possibility of an effective prosecution of war crimes and crimes against humanity at the national level... "First, the Croatian courts are still in transformation process... Second, it is unlikely that the courts in Croatia would be considered as impartial and independent by many of the persons concerned. Third... it can be assumed that persons from e.g. Serbia would hesitate to appear as witnesses against suspected Croatian war criminals... Fourth, the bringing of justice... presumably encompasses persons of high level... it is less appropriate that the administration of justice be entrusted to any of the parties to the conflict"... These reasons... apply *a fortiori* to BiH'<sup>116</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.<sup>117</sup>

<sup>113</sup> MC Bassiouni and P Manikas, *The Law of the International Tribunal for the Former Yugoslavia* (NY, Transnational Publishers, 1996) 313.

<sup>114</sup> AA Schvey, 'Striving for Accountability in the Former Yugoslavia' in JE Stromseth (ed.) *Accountability for Atrocities: National and International Responses* (Ardsey, Transnational Publishers, 2003) 39, 46.

<sup>115</sup> Report of the Secretary-General pursuant to paragraph 2 of Security Council Resolution 808 (1993) UN Doc. S/25704 (3 May 1993).

<sup>116</sup> 'Proposal for an International War Crimes Tribunal for the former Yugoslavia (under the Moscow Human Dimension Mechanism to BiH and Croatia)' (9 February 1993) reproduced in Morris and Scharf, *supra* note 101, 211, 237.

<sup>117</sup> 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* (NY, Transnational Publishers Inc. Irvington-on-Hudson, 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 101, 190, 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.

Indeed, ICTY's officials point out the impracticality during the mid to late 1990s of cooperation with national authorities, including Croatia: First, the post war atmosphere was so charged that the perception of objectivity of the Tribunal achieved through distancing it from the region was viewed as imperative. Second, it was in the interest of local authorities to leave the task of war crime prosecutions in the hands of the Tribunal so as to avoid instability and the costs associated with cooperation with the ICTY. Third, cooperation with local jurisdictions was not feasible in the first few years. The exchange of information could have compromised the security of victims and witnesses, as well as the integrity of investigations and evidence. In Croatia especially the open hostility towards the Tribunal that began manifesting itself towards 1995 on the part of the government effectively blocked this avenue.

Faced with such realities on the ground, the choice made by the SC was to separate the Tribunal physically and normatively from the region itself.<sup>118</sup> First, the location of the ICTY was set in The Hague.<sup>119</sup> Second, the Statute was made up by international law, with almost no reference to the domestic law of the SFRY.<sup>120</sup> Specifically, Rule 12 of the Tribunal's Rules of Evidence and Procedure provided that 'determinations of courts of any State are not binding on the Tribunal'. Thirdly, the Tribunal's mandate did not include reference to the need for assisting local authorities and enhancing their capacity to try war criminals.<sup>121</sup> Hence, resources were not allocated towards this goal.

## 5.2 PROSECUTIONS OF CRIMES RELATING TO THE WAR IN CROATIA

In total, out of 166 individuals indicted by the Tribunal only 20 were charged by the ICTY with respect to atrocities committed during the war in Croatia.

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<sup>118</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>119</sup> Article 31 of the ICTY Statute. Granted, in 1993 the war was still raging in Croatia and BiH.

<sup>120</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'.

<sup>121</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.

### *Indictments of non-Croats*

The first indictments were issued by the Tribunal already in 1995. They concerned:

- Milan Martić, at one time the President of the RSK, apprehended in 2002;
- Slavko Dokmanović, the former president of the Vukovar municipality, who together with three JNA officers (Mile Mrksić, Miroslav Radić and Veselin Slijivancanin - the so-called "Vukovar Three") was indicted for the 1991 Vukovar hospital massacre. Dokmanović was arrested in 1997 but committed suicide a year later. The other three were apprehended in 2002 and 2003;
- In 1997, the infamous Serbian paramilitary leader and war lord Željko Raznatić (Arkan), was indicted; Arkan was never captured and died in 2000.<sup>122</sup>
- In 2000 and 2001 the ICTY indicted three JNA officers involved in the 1991 bombardment of Dubrovnik. Pavle Strugar and Miodrag Jokić who surrendered in 2001; Vladimir Kovacević was captured one year later.
- Notably, former Serbian President, Slobodan Milošević was indicted and arrested in 2001 *inter alia* for atrocities committed in Croatia against non-Serbs during the war. He died in 2006 before the completion of the trial against him.

Four Serbs were indicted in 2003:

- Jovica Stanišić, Head of the State Security Service of the Ministry of Internal Affairs of the Republic of Serbia, and Franko Simatović also from the Serbian Security Service. They were indicted for participating in a joint criminal enterprise involving the forcible and permanent removal of the majority of non-Serbs, from large areas of Croatia and BiH. They were granted provisional release in June 2006

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<sup>122</sup> Although Arkan and his group the 'Arkan's Tigers' participated in the fighting in Eastern Slavonia during 1991-1992 on the side of the RSK, Arkan was indicted for acts that took place in BiH during 1995. The substance of the indictment, it should be noted, was not made public until 2001. See *Prosecutor v. Raznatić*, Case No. IT-97-27, (Decision to Vacate an Order for Non-Disclosure) (19 January 2001).

- Vojislav Seselj, the leader of the Serb Radical Party, indicted for promoting the idea of "Greater Serbia" by inflammatory speech and provision of the financial, material, logistical and political support necessary for the forcible removal of non-Serbs in Croatia and BiH. The trial is on-going
- Milan Babic, former president of the SAO and RSK. He gave himself up that year but committed suicide in 2006.
- Goran Hadzic, Former President of the RSK was indicted in 2004 and is still at large.
- Lastly, Momcilo Perisic was indicted in 2005 in connection with the shelling of Zagreb.

### *Indictments of Croats*

The first indictments against members of the Croatian forces were issued in 2001:

- Ante Gotovina, a Croatian General, was indicted for his involvement in 'Operation Storm'.<sup>123</sup>
- Rahim Ademi was indicted with regards to the Medak Pocket operation.<sup>124</sup> In 2004 Mirko Norac was surrendered to the ICTY to stand trial in connection with the Medak Pocket operation. The case against Norac and Ademi was eventually transferred to Croatia under Rule 11 *bis*.<sup>125</sup>
- Two more people were indicted in connection with Operation Storm in 2004: Ivan Cermak and Mladen Markac, Commander of the Special Police of the Ministry of the Interior of the Republic of Croatia.<sup>126</sup>
- In 2002 Croatia's former Chief of Staff, Janko Bobetko, was indicted by the Tribunal for his responsibility for the Medak Pocket operation.<sup>127</sup> He died in 2003 before being transferred to the Tribunal.<sup>128</sup>

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<sup>123</sup> *Prosecutor v. Ante Gotovina*, Case no. IT-01-45-I.

<sup>124</sup> *Prosecutor v. Rahim Ademi*, Case no. IT-01-46-I.

<sup>125</sup> See notes accompanying notes 171-172, 235.

<sup>126</sup> *Prosecutor v. Cermak and Markac*, Case No. IT-03-73.

<sup>127</sup> *Prosecutor v. Bobetko*, Case. No. IT-02-62.

<sup>128</sup> See notes accompanying notes 200-202.

*ICTY Judgments Concerning Atrocities Committed against Croats*

The first ICTY judgment with respect to Croatia was the sentencing judgment rendered in the case against Jokic in March 2004.<sup>129</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. The second sentencing judgment was rendered in June 2004 in the case of Babic who also pled guilty to one count of persecution as a crime against humanity in connection with his involvement in the forcible removal of non-Serb from RSK's territory.<sup>130</sup> He was sentenced to thirteen years imprisonment.

Three other related judgments were subsequently handed down. 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. The next two judgments were issued in 2007. In one of the most important judgments regarding the war in Croatia, Martić was convicted on 16 counts of the indictment including persecutions, murder, torture, deportation, attacks on civilians, wanton destruction of civilian areas and other crimes against humanity and violations of laws and customs of war. The Tribunal found that Martić intended to forcibly displace the Croat and other non-Serb population from the territories of SAO Krajina and the RSK, as part of a joint criminal enterprise between the SAO Krajina and RSK leadership and Milošević to thereby establish a unified Serb state. The case regarding the Vukovar hospital massacre was decided in September 2007. Martić was sentenced to twenty years imprisonment while co-defendants Slijivčanin received only five years imprisonment and Radić was found not guilty.<sup>131</sup> The judgment is currently under appeal.

Lastly, the cases against Seselj and Stanisic and Simatovic are still in the trial phase.

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<sup>129</sup> *Prosecutor v. Jokic*, Case No. IT-01-42/1, Sentencing Judgment of 18 March 2004 (Trial Chamber I).

<sup>130</sup> *Prosecutor v. Babic*, Case No. IT-03-72-S, Sentencing Judgment of 29 June 2004 (Trial Chamber I).

<sup>131</sup> *Prosecutor v Mrksic et al.*, Case No. IT-95-13/1, Judgment of 27 September 2007 (Trial Chamber II).

*ICTY Judgments Concerning Atrocities Committed against Non-Croats*

The only case on the ICTY docket pertaining to crimes against Serbs is the Gotovina case. The trial commenced in March 2008.

## 6. INTERACTION BETWEEN THE ICTY AND CROATIAN DOMESTIC SYSTEM

### 6.1 GENERAL: THE PROSECUTORIAL POLICY OF THE OTP

#### *Initial Period*

As mentioned in Section 5.1. *supra* there was little inclination on the part of the Tribunal to assist with domestic war crime prosecutions. Up until the end of 1995 the war effectively prevented adequate investigations as well as the apprehension of suspects.<sup>132</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 worthwhile case. Under these circumstances, concerns regarding the division of cases between the ICTY and national authorities did not factor into the mindset of the OTP. This state of affairs was reflected in the policy of the first Prosecutor, Richard J. Goldstone, termed the 'pyramidal approach', which sought to prosecute low-level offenders and work its way up towards 'bigger fish'.<sup>133</sup> What was obvious was that 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.

One notable element of this mindset was the lack in institutional connection with domestic jurisdictions and lack of outreach program that would convey to the public in these jurisdictions the details of the Tribunal's work.<sup>134</sup> Indeed, most of the ICTY's activities were not communicated to the communities in the Balkans; thus, proceedings

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<sup>132</sup> R Kerr, *The International Criminal Tribunal for the Former Yugoslavia: an exercise in law, politics, and diplomacy* (Oxford, OUP, 2004) 185.

<sup>133</sup> Schabas, *supra* note 108, 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>134</sup> K Cibelli & T Guberek, 'Justice Unknown, Justice Unsatisfied' (Tufts University, 2001) available at <http://www.hrdag.org/resources/publications/justicereport.pdf>.

and decisions were not translated initially into the Serbo-Croat language, nor were the proceedings regularly broadcasted.<sup>135</sup>

A real change in the policy regarding domestic prosecutions was not visible before 2003, yet a minor shift can be detected as of 1997 along with the growing case-load of the ICTY. 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.'<sup>136</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 for 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. 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>137</sup>

By 1998, Goldstone's successor, Louise Arbour, redesigned the OTP's investigation strategy to pursue high-level perpetrators.<sup>138</sup> 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>139</sup> This meant that for the first time a clear division of labor between the ICTY and national authorities was established with cases not falling under the Prosecutor's criteria left to be prosecuted by national jurisdictions. Later that year Rule 11*bis* was amended to extend the power of suspension of proceedings to the trial

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<sup>135</sup> There were early ad-hoc outreach initiatives. In 1996 an American-based company sponsored the broadcasting of the Tadić 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 LC 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* (The Hague, Kluwer Law International, 2001) 547.

<sup>136</sup> 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>137</sup> For previous versions of the Rule see <http://www.un.org/icty/legaldoc-e/index.htm>; M Bohlander, 'Referring an indictment from the ICTY and ICTR to another court: Rule 11*bis* and the consequences for the law of extradition' 55 *Int'l & Comp. L. Q.* (2006) 219, 220.

<sup>138</sup> L Arbour, 'The Crucial Years' 2 *J. Int'l Crim. Justice* (2004) 396, 398.

<sup>139</sup> C Del Ponte, 'Prosecuting the individuals Bearing the Highest level of Responsibility' 2 *J. Int'l Crim. Justice* (2004) 516, 517.

chambers assigned to the case.<sup>140</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>141</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' associations, international organizations and diplomatic representatives.<sup>142</sup>

### *Shift in Attitude: the Completion Strategy*

A drastic change in attitude occurred in the early 2000s when 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>143</sup> The international community's attention was thus finally drawn to proceedings at the domestic level. This delayed change is regrettable, since the shifting of the burden of prosecutions to the national level could and perhaps should have been foreseen from the outset, as both the ICTY and ICTR were designed as temporary institutions.<sup>144</sup> In fact, the OSCE/CSCE addressed the issue as early as 1993.<sup>145</sup> But as it happened – the work of domestic courts was not given serious attention – at least until the completion strategy of the Tribunal began to dominate the agenda.

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<sup>140</sup> Ibid.

<sup>141</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.

<sup>142</sup> ICTY Website <http://www.un.org/icty/bhs/frames/outreach.htm>.

<sup>143</sup> K Zoglin, 'The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or junk justice?' 27 Hum. Rts. Q. (2005) 41.

<sup>144</sup> D Raab, 'Evaluating the ICTY and its Completion Strategy' 3 J. Int'l Crim. Justice (2005) 82, 84.

<sup>145</sup> OSCE Report, *supra* note 116, 266.

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>146</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>147</sup> Subsequent reports by the ICTY President and Prosecutor clarified the conditions *sine qua non* for the success of this endeavor. 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 the 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 some of the case-load that has been congesting the Tribunal.

Yet it took some time for the idea to materialize into a bona fide plan. The dire 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 the 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>148</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 the Appeals Chamber in order to enhance the capacity of the Tribunal. Significantly, the SC noted the existence of Rule 11*bis* but made no further reference to it. In 2002, the ICTY President expressed concerns over the ability of BiH, the only state considered with respect to referrals, to accept cases from the tribunal due to the state of its judicial system.<sup>149</sup> As late as May 2004 ICTY President, Theodor Meron, was of the opinion that the Tribunal 'cannot be sure that international human

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<sup>146</sup> Raab, *supra* note 144, 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>147</sup> President Jorda's speech to the UN Security Council (20 June 2000) available at <http://www.un.org/icty/pressreal/p512-e.htm>.

<sup>148</sup> 'Report on the Operation of the International Criminal Tribunal for the Former Yugoslavia' UN Doc. A/55/382-S/2000/865 (12 May 2000) available at <http://www.un.org/icty/pressreal/RAP000620e.htm>.

<sup>149</sup> 'Report on the Judicial Status of the International Criminal Tribunal for the former Yugoslavia and the Prospect of Referring Certain Cases to National Courts' UN. Doc S/2002/678 (17 June 2002).

rights and fair trial standards are fully satisfied' in the state courts of the states of the former Yugoslavia.<sup>150</sup>

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

- *Expected schedule*: Completion of investigations by 2004, completion of all first instance trials by 2008 and completing all work by 2010.<sup>151</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, particularly to bring Radovan Karadzic and Ratko Mladic, as well as Ante Gotovina and all other indictees to the ICTY'.<sup>152</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 encourages the ICTY and ICTR Presidents, Prosecutors, and Registrars to develop and improve their outreach'.<sup>153</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>154</sup> the SC nevertheless insisted on the timetable set in Resolution 1503, linking any chance of seeing the completion strategy through to 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 a view to determining which cases should be proceeded with and

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<sup>150</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>151</sup> SC Res. 1503/03 (28 August 2003) operative para. 7.

<sup>152</sup> Ibid. para. 2.

<sup>153</sup> Ibid. para 1.

<sup>154</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.

which should be transferred to competent national jurisdictions'.<sup>155</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>156</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>157</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>158</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>159</sup>

The second change involved repeated amendments of Rule 11bis<sup>160</sup> to allow the transfer of cases to national jurisdictions.<sup>161</sup> 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...'

According to the Appeals Chamber, the order in which the three above-mentioned types of venue were listed is of no hierarchical relevance:

Where there are concurrent jurisdictions under Rule 11bis(A)(i)-(iii) of the Rules,

<sup>155</sup> SC Res. 1534/04 (26 March 2004) operative para. 4.

<sup>156</sup> *Ibid.* para. 5.

<sup>157</sup> *Ibid.* para 9 (emphasis added).

<sup>158</sup> The President, Vice-President and the Presiding Judges of the Three Trial Chambers – Rule 23 RPE.

<sup>159</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>160</sup> For a review of the different amendment to the Rule see Bohlander, *supra* note 137.

<sup>161</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.

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.<sup>162</sup>

In deciding upon the most appropriate venue for transfer of a case, the Referral Bench has held that such a 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>163</sup> Notably, all ICTY 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>164</sup>

Pursuant to Rule 11bis (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>165</sup>. The Tribunal has refused to speculate on the actual manner with which these guarantees would be applied in practice,<sup>166</sup> prompting concerns that the conditions set out in Rule 11bis (B) do not in fact guarantee fair trial.<sup>167</sup>

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

<sup>162</sup> *Prosecutor v. Jankovic*, Decision on Rule 11bis referral, Case No. IT-96-23/2-AR11bis.2 (A.C.) (15 November 2005) para. 33. Also see *Prosecutor v. Todovic*, Decision on Savo Todovic's Appeals against Decision on Referral under Rule 11bis, Case No. IT-97-25/1-AR11bis.1(A.C.) (4 September 2006) para. 42.

<sup>163</sup> *Prosecutor v. Ljubičić*, Decision to Refer the Case to BiH Pursuant to Rule 11bis, Case No. IT-00-41-PT (R.B.) (12 April 2006) para. 28.

<sup>164</sup> *Prosecutor v. Jankovic*, *supra* note 162, para. 37.

<sup>165</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 11bis, Case No. IT-96-23/2-PT (R.B.) (17 May 2005) para. 55.

<sup>166</sup> *Prosecutor v. Todovic*, *supra* note 162, para. 56.

<sup>167</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.

This criterion is intended to ensure the instructions of 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 from low-level accused the jurisprudence 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>168</sup> c) the term is not limited to the architects of an overall policy.<sup>169</sup> Generally, a presumption in favor of referrals has characterized the decisions of the referral Bench.<sup>170</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'.

Once a case has been transferred, the OTP monitors the national proceedings with the help of the OSCE and report to the referral bench every three months.

## 6.1 ASSISTANCE BY THE ICTY TO CROATIA

### *Transfer of Cases to Croatia under Rule 11bis*

Only one case was transferred to Croatia under the *11bis* procedure. It involved defendants Ademi and Norac accused of the killings of Serb civilians in 1991 in the Medak Pocket located south of Gospic. The case was prosecuted in the Zagreb County Court which in its decision from May 2008, found Norac guilty of two charges based on command responsibility and acquitted Ademi of similar charges.<sup>171</sup> It should be noted that the case was a challenge to the Croatian authorities in the sense that their role was confined to subcontracting a prosecution based on an ICTY indictment and supported by ICTY evidence but translated into provisions of Croatian national law. This might not be a textbook example of ICTY's assistance to Croatia, as it was Croatia that lobbied hard to

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<sup>168</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>169</sup> *Prosecutor v. Jankovic*, *supra* note 162, para 20.

<sup>170</sup> Williams, *supra* note 167, 201-202. The *Lukic* case was the only appeal against the Prosecutor's decision to refer that was accepted by the Appeals Chamber.

<sup>171</sup> OCSE, 'Background Report: Ademi-Norac trial concluded' (12 June 2008) on file with DOMAC.

receive the case. Croatia acted as *Amicus Curiae* in the referral proceedings of the Norac and Ademi case before the Tribunal and submitted extensive information regarding the applicable legislation to the Tribunal in an effort to allow the transfer of the case.<sup>172</sup>

In another case coveted by Croatia, that of the "Vukovar Three", the ICTY Prosecutor decided to withhold the request for transfer. In accepting the Prosecutor's decision the Referral Bench stated: 'The factual allegations in this case include the execution of at least 264 persons taken from Vukovar Hospital. By their nature these allegations provide a ready foundation for this extreme intensity of feeling, an intensity which brings into sharp focus the question *whether, even today, a trial held in either country would be generally accepted as reflecting the fair administration of justice*'.<sup>173</sup>

#### *The Transfer of Category II Cases and other Materials to Croatia*

The most significant assistance given by the ICTY to Croatia has been in the context of transfer of Category II cases to the State's Attorney's Office. 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, termed 'Category II 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. According to the latest report of the ICTY Prosecutor two such case files have been transferred to Croatia.<sup>174</sup> The transfer of the materials is complemented by consultation provided by OTP staff members that have prosecuted related cases before the Tribunal. Notably, the Tribunal does not monitor or supervise these cases after their transfer.

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

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<sup>172</sup> *Prosecutor v Ademi and Norac*, Decision for Referral to the Authorities of the Republic of Croatia Pursuant to Rule 11*bis*, Case No. IT-04-78-PT (R.B.) (14 September 2005).

<sup>173</sup> *Prosecutor v Mrksic*, *supra* note 131, Decision on the Prosecutor's Motion to Withdraw Motion and Request for Referral of Indictment under Rule 11*bis*. (emphasis added).

<sup>174</sup> Annex II to the Biannual report of the ICTY to the SC, 'Report of Serge Brammertz, Prosecutor 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/2008/326 (14 May 2008) 17.

cases transferred under the *11bis* 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 there has become an efficient and respectful working relationship between the OTP and national prosecutors. Members of the OTP have had several meetings with their Croatian counterparts at the initiative of the Croatian State Attorney in order to identify cases and materials that require cooperation. This is a channel whereby many materials find their way back to the national authorities. The only exceptions to the team's ability to freely transfer materials are categories of evidence that concern either witness protection or evidence provided to the OTP by a state. In such cases they cannot be provided to the requesting authorities without prior clearance. 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. The OTP further set up computer posts in The Hague where delegations from local jurisdictions can browse additional databases.

### *Transfer of Expertise*

The ICTY staff members from the OTP, Chambers and Registry have been engaged in the transfer of expertise to local authorities since 2000. The experience accumulated within the Tribunal not only with respect to case-law and management of evidence but also with respect to witness protection and case management is valuable. Unfortunately, transfer of expertise to the local jurisdictions has remained un-institutionalized and underfunded. Thus, only a small part of these activities have been funded by the Tribunal and capacity building events largely rely on the initiative of donors. According to interviews conducted by DOMAC with ICTY staff members their participation in these events is subject to their good will and schedule allowances.

With respect to assistance in training of judges, prosecutors and defense counsels, the most notable contribution of the Tribunal was a six-meeting training seminar for Croatian judges and prosecutors held in October 2004 for approximately 70 Croatian judges and prosecutors. The topics discussed included the definitions of crimes under international and local laws, forms of criminal responsibility and association, targeting, investigation and charging decisions and methods of proof in war crimes trials.

The aim of the entire seminar was to compare the rules found in the Croatian legal system with the rules that apply at the ICTY, so as to better identify all the relevant issues for conducting war crimes trials in Croatia. The seminar was organized by the Croatian Ministry of Justice.<sup>175</sup>

Other activities included the participation of ICTY representatives in several seminars and conferences;<sup>176</sup> and working visits to the Tribunal of judges, attorneys, and Judicial Academy representatives from Croatia in 2005. The Croatian delegates attended court sessions and listened to presentations on transfer of evidence/cooperation between the OTP and the Croatian judiciary, application of substantive and procedural laws at the ICTY; collection and use of evidence – methods and techniques; judges perspective – evaluation of evidence; working with witnesses; and access to ICTY documents. This was organized by ABA CEELI and the Judicial Academy in Croatia. The ICTY has also been advising NGOs monitoring Croatian court proceedings. Thus, representatives of the Tribunal attended round tables in 2006, 2007 and 2008 where Croatian NGOs discussed shortcomings in Croatian war crime prosecutions with representatives of the Croatian judiciary, law experts and the international community

An important scheme of cooperation that needs be mentioned is the ICTY's Liaison Officer's participation in fourteen special plenary meetings which have taken place between the Minister of Justice, Chief State Attorney, and representatives of the Supreme Court and the Ministry of Interior and the Head of Delegation of the EC to Croatia. The purpose of these meetings was to consult on issues relating to war crime prosecutions such as review of *in absentia* verdicts, witness protection, threshold for prosecution of war crimes and inter-state cooperation.<sup>177</sup> These meetings, which have proven to be quite productive, were the "brainchild" of the OSCE, which constructed the forum in 2006, invited the EU and ICTY as partners, convinced the Croatian authority to participate and provided the bulk of the information and "legwork". What should be emphasized is that this successful format is an *ad hoc* exercise, unique to Croatia, credited to the efficient OSCE office in Zagreb. It is not a product of a more comprehensive scheme on the part of either the EU or the ICTY, attesting to the lack of

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<sup>175</sup> Information provided by the ICTY Outreach Program (January 2009).

<sup>176</sup> By 2008 several such seminars were organized. See Annex I to this report.

<sup>177</sup> OSCE, *The Courier* No. 139 (October 2008) p. 2, available at [http://www.osce.org/publications/mc/2008/10/35049\\_1207\\_en.pdf](http://www.osce.org/publications/mc/2008/10/35049_1207_en.pdf).

institutionalized and holistic approach to the issue of cooperation between the Tribunal and national jurisdictions.

Lastly, two other projects have been undertaken in order to transfer ICTY knowledge and expertise (although neither are specific to Croatia). First, beginning April 2009 national prosecutors from the former Yugoslavia began working at the ICTY alongside the Transition Team as part of capacity building project funded by the EU. The purpose of the project is to train national prosecutors and young legal professionals by OTP staff for a period of six months. Young professionals join the Tribunal's pool of interns and work mainly on ICTY cases. National prosecutors, on the other hand, work on their own national cases while taking advantage of the Tribunal's resources such as evidentiary materials and the experience of OTP staff familiar with related cases.

The second project has been the 2009 publication of the "ICTY Manual on Developed Practices". The manual has been prepared by the Tribunal in collaboration with the UN Interregional Crime and Justice Research Institute (UNICRI) as part of the legacy project of the Tribunal. The manual is not aimed specifically at domestic systems and addresses a larger audience which includes international tribunals as well. The manual 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>178</sup>

## 6.1 ASSISTANCE BY CROATIA TO THE ICTY

### *Early Domestic Reaction to the ICTY*

The ICTY was established with the encouragement and blessing of Croatia. In 1993, when the RSK held the upper hand in the war, Croatia envisioned the Tribunal as a means to bring an end to the war.<sup>179</sup> When the Tribunal became operational in 1995 Croatia was in an all different situation: no longer the hapless victim following its victory over the RSK, it was now implicated in the ethnic cleansing of Croatian Serbs during

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<sup>178</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>179</sup> Interviews conducted with Vesna Terselic ('Documenta') April 2008; Prof. Ksenija Turkovic (University of Zagreb) on May 2008.

operations 'Flash' and 'Storm' as well as in some of the gruesome events in BiH.<sup>180</sup> The first cases before the ICTY were far from what the Croatian public expected: following the first case against Tadic,<sup>181</sup> a Bosnian Serb who was viewed as almost insignificant, came a string of prosecutions against Bosnian Croats including a case against Tihomir Blaskic,<sup>182</sup> the HVO Chief of Staff. Croatia's response became almost immediately defensive. Not only did Tudjman reject a subpoena issued by the Blaskic trial judge requesting certain documents<sup>183</sup> but he challenged the Tribunal's jurisdiction over operations 'Flash' and 'Storm' and refused to cooperate with the ICTY's investigation relating to them. Another source of frustration was the delays in the surrender to the Tribunal of Mladen Naletilic for crimes he allegedly committed in Bosnia.<sup>184</sup> Croatia's stance prompted Presidents of the Tribunal to file several complaints with the UN Security Council.<sup>185</sup>

#### *Hostility towards the ICTY and its Implications on Obtaining of Suspects and Evidence*

Despite Tudjman's disdain of the ICTY, Croatia did enact legislation enabling it to cooperate with the ICTY following the end of the war. In 1996 the 'Constitutional Law on the Co-operation of the Republic of Croatia with the International Criminal Tribunal' was enacted,<sup>186</sup> a piece of implementing legislation which was a necessary legal tool for the fulfillment of Croatia's obligations towards the ICTY.<sup>187</sup> The constitutionality of the law was challenged by Naletilic who claimed that his surrender to The Hague violated his rights as well as Croatia's sovereignty under the Croatian Constitution. His motion was

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<sup>180</sup> Erözden, *supra* note 13, 1117.

<sup>181</sup> *Prosecutor v. Tadic*, Case No. IT-94-1.

<sup>182</sup> *Prosecutor v. Blaskic*, Case No. IT-95-14-A.

<sup>183</sup> For details see JK Cogan, 'The Problem of Obtaining Evidence for International Criminal Court' 22 Hum. Rts. Q. (2000) 404. See also the decision of the ICTY Appeals Court decision on the Appellant's Motion for the Production of materials, Suspension of Extension of the Briefing Schedule, and Additional filing from 26 September 2000, <http://www.un.org/icty/blaskic/appeal/decision-e/00926PN313780.htm>.

<sup>184</sup> *Prosecutor v. Naletilic and Martinovic*, Case No. IT-98-34.

<sup>185</sup> EG 'Letter Dated 2 November 1999 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 to the President of the Security Council', UN Doc. S/1999/1117.

<sup>186</sup> Reproduced and Translated in I Josipovic (ed.), *Responsibility for War Crimes: Croatian Perspective* (Zagreb, University of Zagreb, 2005) 301.

<sup>187</sup> Commentary in I Josipovic, *The Hague Implementing Criminal Law* (Zagreb, Hrvatski Pravni Centar and Informator, 2000) 263-334.

denied by the Croatian Constitutional Court which upheld the Law's constitutionality.<sup>188</sup> Additional legislative acts passed in 1996 were two general amnesty acts.<sup>189</sup> The object of the laws was limited to fostering the return of refugees to Croatia. The law specifically excluded from its ambit crimes that fell under the jurisdiction of the ICTY such as genocide and war crimes.<sup>190</sup>

The coalition which took over the political reins in Croatia in 2000 initially demonstrated a strong commitment to cooperate with the ICTY. In February the Government concluded a status agreement establishing an ICTY Liaison Office in Zagreb and the following month finally surrendered Naletilic to The Hague.<sup>191</sup> In April 2000 it went as far as adopting a declaration acknowledging the Tribunal's jurisdiction over operations 'Flash' and 'Storm'.<sup>192</sup>

Yet, as far as proceedings against Croats at the ICTY went, full cooperation proved to be practically impossible. The mere suspicion of an ICTY indictment against Croats involved in the 'Homeland War' was enough to fuel public resentment towards the Tribunal and the government that was assisting it. In August 2000 rumors regarding the impending indictment by the ICTY of Head of the General Staff of Croatian Army, Lt. Gen. Petar Stipetic, sparked public outrage. The rumors hyped up by the media almost cost the coalition its unity as coalition members began to exchange accusations and express their dissatisfaction with the ICTY's anti-Croat stance.<sup>193</sup> About the same time further protests erupted upon the commencement of an ICTY investigation in the town of Gospic.<sup>194</sup> The investigation and exhumation, authorized by the government, were related to allegations of the killings of Serb civilians by Croat Defense forces in 1991. In February 2001 a County court in the city of Rijeka issued an arrest warrant for Mirko Norac, a retired army general, for his involvement in the Gospic massacre. Once again

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<sup>188</sup> Constitutional Court of Croatia, decision # U-III-854/1999 (21 October 1999), available at <http://sljeme.usud.hr/usud/prakswen.nsf/Ustav/C1256A25004A262AC12568110032F80D?OpenDocument>.

<sup>189</sup> Which replaced the 1992 law on amnesty. See *supra* text accompanying nn 86-98.

<sup>190</sup> Discussion in WW Burke-White, 'Protecting the Minority: A place for Impunity?' 2000 JEMIE (2000) 1,22-25; Also see UNSC Res. 6222 (22 May 1996).

<sup>191</sup> ICTY Weekly Press Briefing (16 February 2000) available at <http://www.un.org/icty/briefing/PB160200.htm>. For translation see Josipovic, *supra* note 187, 619.

<sup>192</sup> Report of the OSCE Mission to the Republic of Croatia on Croatia's progress in meeting international commitments since September 1999 (3 July 2000) p. 8 available at [http://www.osce.org/documents/mc/2000/07/1052\\_en.pdf](http://www.osce.org/documents/mc/2000/07/1052_en.pdf).

<sup>193</sup> For a detailed account see Erözden, *supra* note 13, 13-15.

<sup>194</sup> At the end of the month Milan Levar, a witness in the case for the ICTY was murdered by a car bomb. OTP News Release (30 August 2000) available at <http://www.un.org/icty/pressreal/p523-e.htm>.

rumors regarding an indictment by the ICTY spread and resulted in mass protests. Norac himself went into hiding. It wasn't until it had been made clear that Norac would be prosecuted in Croatia that protests died down and Norac surrendered.<sup>195</sup> He was tried and convicted by the Rijeka County Court for his involvement in the 1991 Gospic massacres. While serving a 12 years sentence he was re-indicted by the ICTY in connection with the Medak Pocket Operation<sup>196</sup> and transferred for his initial appearance in 2004. The case was subsequently transferred back to Croatia under Rule 11 *bis*.<sup>197</sup>

To understand the mindset of the Croatian public it is essential to note that ICTY indictments of Croat individuals for crimes that took place during the 'Homeland War' began to be issued (June 2001) before any trial concerning crimes against Croats had even commenced. This fact, coupled with the indictments of Generals Ademi and Gotovina, two celebrated Croatian heroes,<sup>198</sup> were used by right-wing opposition parties, including the HDZ, as evidence of the anti-Croatian bias of the ICTY. The Government's response was telling. Initially, Prime Minister Racan supported the extradition of the two indictees to The Hague. Growing pressure from within the coalition, however, shifted his public position prompting him to express his objection to the indictment in a letter to the ICTY's Prosecutor wherein he stated that the relevant indictments were tantamount to the criminalization of the entire Croatian campaign.<sup>199</sup> The delay in the apprehension and surrender of the generals allowed Gotovina to escape. Ademi, on the contrary, surrendered himself the very same month.

A year later, in September 2002, another indictment relating to the attack on the Medak Pocket was issued by the ICTY against former Croatian Chief of Staff Janko Bobetko.<sup>200</sup> Following the issuing of an arrest warrant by the Tribunal, Croatia was asked to transfer Bobetko to The Hague. This time the Government took an active stand against the indictment and publicly announced it had no intention to surrender the general. While acknowledging its commitment to cooperate with the ICTY it chose to challenge the arrest warrant before the Appeals Chamber stating that the indictment was

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<sup>195</sup> Peskin and Boduszyński, *supra* note 121126-1128.

<sup>196</sup> *Supra* note 124.

<sup>197</sup> *Supra* notes 172. For more details on the case see *infra* note 235 and accompanying text.

<sup>198</sup> *Supra* note 124.

<sup>199</sup> On Racan response see ICG, 'Croatia: Facing Up to War Crimes' (Zagreb/Brussels, 16 October 2001) available at [http://www.crisisgroup.org/library/documents/report\\_archive/A400468\\_16102001.pdf](http://www.crisisgroup.org/library/documents/report_archive/A400468_16102001.pdf).

<sup>200</sup> *Supra* note 127.

not factually and historically correct. Later that month the Parliament voted unanimously in favor of opposing the indictments.<sup>201</sup> The governmental response highlighted the volatility that existed regarding the issue of ICTY prosecution of Croats and their impact on domestic politics. With the strengthening of the right wing in Croatia at that time and in view of polls indicating 84% of the public opposed the surrender of Bobetko, the Government felt it did not have the mandate to comply with the request of the ICTY.<sup>202</sup> The saga ended in 2003 upon the death of the 84 year old Bobetko from diabetes.

In late 2003 the HDZ, now headed by Ivo Sanader, was elected back into government. As the ruling party during the war, the new government was less susceptible to the accusations that levelled at Racan's government. Yet, as a party that aligned itself with Tudjman's legacy the HDZ government was just as ambivalent as its predecessor. In February 2004 Generals Ivan Cermak and Mladen Markac surrendered to the ICTY upon their indictments for their part in the crimes committed against Croat Serbs during operation 'Storm'.<sup>203</sup> In December 2005 Gotovina was apprehended in Tenerife and extradited by Spain to the ICTY. The Government handled both cases in a similar fashion. It took the position that it respected its obligations to assist the ICTY with required documentations and other evidence but at the same time pledged to assist the defense of the Croatian defendants.<sup>204</sup> The public reaction to Gotovina's arrest illustrates the degree of public support enjoyed by the accused Croat Generals. Demonstrations broke out almost immediately with the biggest one taking place in Split where the crowd numbered 50,000 people.<sup>205</sup> According to polls 53% of the public believed Gotovina's arrest was harmful to the country and 64% believed he was innocent.<sup>206</sup> In April 2011 Gotovina, along with co-defendant Mladen Markac were found guilty of crimes against humanity committed during Operation Storm as members of a joint criminal enterprise. They were sentenced to 24 and 8 years imprisonment respectively. The verdict was badly received in Croatia, with the Croatian President, Ivo Josipovic, a supporter of the ICTY, expressing his shock at the decision and adding he did not believe in the legal

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<sup>201</sup> OSCE, 'Background Report: The ICTY and General Janko Bobetko' (10 October 2002) available at [http://www.osce.org/documents/mc/2002/10/1978\\_en.pdf](http://www.osce.org/documents/mc/2002/10/1978_en.pdf).

<sup>202</sup> Peskin and Boduszyński, *supra* note 12, 1132-1133.

<sup>203</sup> *Supra* note 126.

<sup>204</sup> ICTJ, 'Selected Developments', *supra* note 80, 9-10.

<sup>205</sup> OSCE, 'Reaction in Croatia to the arrest of Ante Gotovina' (13 December 2005) 3-4 available at [http://www.osce.org/documents/mc/2005/12/17488\\_en.pdf](http://www.osce.org/documents/mc/2005/12/17488_en.pdf).

<sup>206</sup> *Ibid.*

notion of joint criminal enterprise.<sup>207</sup> The Croatian Prime Minister announced the government will take 'all possible measures in line with the law so that the decision of the Hague tribunal's trial chamber is annulled by the appeals judges. Our standpoint on Operation Storm is very clear: that was a legitimate military operation aimed at liberating Croatian'.<sup>208</sup>

## 7. THE IMPACT OF THE ICTY ON DOMESTIC PROSECUTIONS IN CROATIA – ANALYSIS

The preceding chapters have examined the national and international responses to the atrocities committed during the war in Croatia, and the manner in which they interacted. During the 1990s, and to a lesser extent during the early 2000s, the prevailing political narrative of victimhood coupled with an inefficient and underfunded justice system made it difficult to conduct fair and balanced war crimes trials in Croatia. The ICTY, on its part, was not designed to work in cooperation with domestic jurisdictions and lacked institutional sensibility to local perspectives thereof. Interaction between the two systems during the first ten years was characterized by hostility (mostly on the part of Croatia) mixed with apathy (mostly on the part of the ICTY) and suspicion. The situation began to change with the change of regime in Croatia in 2000 and the completion strategy in 2003, and the interaction between the respective legal professionals intensified. This complex relationship accounts for the mix of influences that is detected: some productive, some not.

The impact of the Tribunal on domestic prosecutions in Croatia is difficult to assess. The causal link between developments which have occurred in the field of war crime prosecutions in Croatia and the ICTY is difficult to establish primarily because of two intervening factors. The first is the political transformation following Tudjman's death in 1999 from an authoritarian-like regime to a liberal democracy. The termination of the link between the ruling HDZ party and key positions in Croatian leadership and the introduction of institutional reforms and tolerance to pluralism have played an important

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<sup>207</sup> 'Croatian President shocked by The Hague's guilty verdict for Gotovina, Markac' available at [http://www.croatiantimes.com/news/General\\_News/2011-04-15/18626/ato\\_banner\\_3.swf](http://www.croatiantimes.com/news/General_News/2011-04-15/18626/ato_banner_3.swf).

<sup>208</sup> E Zebic & B Mihajlovic, 'Gotovina Conviction Riles Croats, Mollifies Serb', available at <http://iwpr.net/report-news/gotovina-conviction-riles-croats-mollifies-serbs>.

part on the capacity of the justice system as well as on the openness towards a different narrative pertaining to the war.

The second factor is the influence the EU has exerted over the Croatian judicial system. The Croatian government officially applied for EU membership in February 2003 and in June 2004 was granted the official status of candidate country. Negotiations were nonetheless conditioned upon Croatia's full cooperation with the ICTY and improvements in the standards of war crime prosecutions. Croatia's obligations to "Substantially improve the prosecution of war crimes trials, in particular by ensuring an end to the ethnic bias against Serbs...", to cooperate with the ICTY and to improve its judicial system were set out as short-term political priorities.<sup>209</sup> Furthermore, under Chapter 23 of the negotiating framework between Croatia and the EU, Croatia is expected to adapt its laws to the EU *acquis* (body of law) on the judiciary and fundamental rights.<sup>210</sup> The relevant parts of the chapter concern the independence, impartiality, competence and efficiency of the judiciary as well as the right to fair trial and minority rights.<sup>211</sup> As part of the screening process with respect to Chapter 23, Croatia has provided the EU with comprehensive information on these issues and received detailed guidelines as to standards it is expected to achieve in the field. Thus, Croatia has submitted its entire legal system to the scrutiny of the EU. In its annual reports on Croatia's progress the EU has been monitoring Croatia's judiciary from both an institutional and substantive perspectives including: the appointment procedure of judges and prosecutors, their training, salaries, level of efficiency and professionalism; the structure of courts, their physical and technological infrastructure; the length of proceedings, the administration of trials, the application of due process and minority rights, the budgets allocated to defense counsels and procedures regarding witnesses. The matter of domestic prosecutions for war crimes has occupied a special section in the progress reports.<sup>212</sup> The reports refer to issues of capacity of courts to try war crimes, the standards of trials, identity of defendants and the appeals processes. Croatia, in turn, has been attempting

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<sup>209</sup> Brussels European Council 17 and 18 June 2004-Presidency Conclusions (10679/2/04 REV 2) (19 July 2004) 7-8 ; Council Decision (2006/145/EC) on the principles, priorities and conditions contained in the Accession Partnership with Croatia from 20 February 2006 (OJ L 55, 25.2.2006) 30.

<sup>210</sup> Negotiating Framework (Luxemburg, 3 October 2005) available at [http://www.delhrv.ec.europa.eu/images/article/File/HR\\_negotiating\\_framedoc\\_en.pdf](http://www.delhrv.ec.europa.eu/images/article/File/HR_negotiating_framedoc_en.pdf).

<sup>211</sup> Screening Report–Chapter 23-Judiciary and Human Rights (27 June 2007) available at [http://ec.europa.eu/enlargement/pdf/croatia/screening\\_reports/screening\\_report\\_23\\_hr\\_internet\\_en.pdf](http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_23_hr_internet_en.pdf).

<sup>212</sup> Annual progress reports are available at <http://www.delhrv.ec.europa.eu/?lang=en&content=65>.

to improve its war crimes prosecutions record as part of its efforts to reform the judicial system. The high degree of EU influence over Croatia's policy towards the prosecution of war crimes should not be underestimated. Croatia's defiant refusal to sign a bilateral agreement with the US exempting American nationals from extradition to the ICC is an important indicator of such impact. Despite consistent pressure on the part of the US, which threatened to withhold monetary aid and obstruct Croatia's attempts at NATO accession,<sup>213</sup> Croatia ultimately sided with the EU policy against such agreements.<sup>214</sup>

A possible, third, intervening factor is the ratification of the Rome Statute by Croatia.<sup>215</sup> Some of the reforms in the judicial structure and legislation ensued as part of the law incorporating the Statute into Croatian law.

In light of the foregoing, the report is cautious in its examination of the direct effect the ICTY has had on the following facets of domestic war crime prosecution in Croatia and takes into account the above-mentioned factors.

## 7.1 NORMATIVE IMPACT

A limited degree of direct influence over Croatian law concerning war crime prosecutions is detected. At least with respect to the doctrine of command responsibility a clear impact of the Tribunal's jurisprudence is evident.

As noted, crimes that took place between 1991 and 1995 are governed by the 1976 SFRY CC and the 1993 Croatian CC.<sup>216</sup> Since 1993 there has been an overhaul in the Croatian criminal corpus. The current criminal code of Croatia was enacted in 1997 and came into force on 1<sup>st</sup> January 1998 (1997 Croatian CC). The principles of legality and leniency in Croatian criminal law, however, render the 1997 Croatian CC inapplicable to crimes committed during the 1991-1995 war.<sup>217</sup> Nevertheless, in order to

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<sup>213</sup> HRW, 'US Pressure on Croatia and Slovenia Undermines Justice' (9 June 2003) available at <http://www.hrw.org/en/news/2003/06/09/us-pressure-croatia-and-slovenia-undermines-justice>.

<sup>214</sup> Screening Report – Chapter 31 - Foreign, Security and Defense Policy (27 June 2007) p.7, available at [http://ec.europa.eu/enlargement/pdf/croatia/screening\\_reports/screening\\_report\\_31\\_hr\\_internet\\_en.pdf](http://ec.europa.eu/enlargement/pdf/croatia/screening_reports/screening_report_31_hr_internet_en.pdf). An observation from Croatia's Foreign Minister is worth mentioning: "One can hardly expect us to extradite our people [to the ICTY] and at the same time refuse to extradite citizens of the U.S. or any other country" quoted in HRW, 'Bilateral Immunity Agreements' (20 June 2003) p. 16, available at <http://www.iccnw.org/documents/HRWBIATableJune03.pdf>.

<sup>215</sup> Croatia ratified the Rome Statute on 21 May 2001. See <http://www.icc-cpi.int/Menus/ASP/states+parties/Eastern+European+States/Croatia.htm>.

<sup>216</sup> *Supra* note 38.

<sup>217</sup> Article 2 (Principle of Legality) of the 1997 Croatian CC provides:

'(1) Criminal offences and criminal sanctions may be prescribed only by statute.

assess the impact that international prosecutions of those crimes has had on the criminal legislation in Croatia,<sup>218</sup> the relevant provisions of the code will be mentioned. Chapter Thirteen of the 1997 Croatian CC contains the 'Criminal Offences against Values Protected by International Law'.<sup>219</sup> Like the 1976 SFRY CC and the 1993 Croatian CC, crimes against humanity and the customary doctrine of command responsibility were not included in the code.

Some far reaching developments have taken place with respect to war crime prosecutions:

- An amendment in 2004 to the 1997 Croatian CC contained a crimes against humanity provision, drafted very similarly to the definition found in Article 7 of the ICC Statute,<sup>220</sup> and introduced the doctrine of command responsibility to the jurisdiction of Croatian courts.<sup>221</sup> The amendment was first struck down by the Constitutional Court in November 2003 as it attracted only 58 votes out of 151 in Parliament in breach of the Constitution's provision requiring the majority of votes with respect to laws affecting human rights and fundamental freedoms.<sup>222</sup> Still, the above-mentioned provisions were re-introduced in July 2004.<sup>223</sup>
- The Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against the International Law

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(2) No one shall be punished, and no criminal sanction shall be applied, for conduct which did not constitute a criminal offence under a statute or international law at the time it was committed and for which the type and range of punishment by which the perpetrator can be punished has not been prescribed by statute.'

The principle of legality is also found in Article 31 of the Croatian Constitution. Article 3 (Mandatory Application of More Lenient Law) of the 1997 Croatian CC provides:

'(1) The law in force at the time the criminal offense is committed shall be applied against the perpetrator.

(2) If, after the criminal offense is committed, the law changes one or more times, the law that is more lenient to the perpetrator shall be applied.'

<sup>218</sup> This will be done in a report within WP2 of the DOMAC project.

<sup>219</sup> Provisions relevant to the prosecution of war crimes are: Article 156 (Genocide), Article 158 (War Crimes Against the Civilian Population), Article 159 (War Crimes Against the Wounded and Sick), Article 160 (War Crime Against Prisoners of War), Article 161 (Unlawful Killing and Wounding the Enemy), Article 162 (Unlawful Taking of the Belongings of those Killed or Wounded on the Battlefield), Article 163 (Forbidden Means of Combat), Article 164 (Injury of an Intermediary), Article 165 (Brutal Treatment of the Wounded, Sick and Prisoners of War), Article 166 (Unjustified Delay of the Repatriation of Prisoners of War) and Article 167 (Destruction of Cultural Objects or of Facilities Containing Cultural Objects). Article 157 criminalizes 'War of Aggression'.

<sup>220</sup> Jusipovic, 'Responsibility for War Crimes', *supra* note 84, 157.

<sup>221</sup> See Article 157a (Crimes against Humanity) and Article 167a (Command Responsibility).

<sup>222</sup> OCSE, 'News in Brief' (9 December 2003) 2 available at [http://www.osce.org/documents/mc/2003/12/1633\\_en.pdf](http://www.osce.org/documents/mc/2003/12/1633_en.pdf).

<sup>223</sup> OCSE, 'News in Brief' (2 August 2004) available at [http://www.osce.org/documents/mc/2004/08/3388\\_en.pdf](http://www.osce.org/documents/mc/2004/08/3388_en.pdf).

on War and Humanitarian Law (ICC Law)<sup>224</sup> was enacted in 2003 to implement the Rome Statute of the ICC within Croatia. The law created specialized 'war crimes' chambers in the four biggest County courts: Osijek, Rijeka, Split and Zagreb.<sup>225</sup> These specialized chambers do not have exclusive jurisdiction for war crimes prosecutions in Croatia. Rather, under Article 12 (1) of the ICC Law, they have jurisdiction alongside other County courts. However, Article 12 (3) of the ICC Law allows for the transfer of war crimes cases from County courts with territorial jurisdiction to the four specialized chambers, 'when it is in accordance with the circumstances of the criminal act and the needs of conduct of the proceeding.' The law further supplements criminal law procedures with respect to war crime prosecutions.<sup>226</sup> Article 13 (1) of the ICC Law provides that if one of the four specialized chambers has jurisdiction or is granted jurisdiction, investigations may be carried out by special investigative judges. Alternatively, it is possible that the investigation will be carried out by a regular judge, but that the case would subsequently proceed before one of the four specialized chambers, and vice versa. Article 13 (2) provides that regardless of which court holds the proceedings, there must always be three professional judges on the panel. This deviates from the general court rules, discussed above. The position of State Prosecutor for War Crimes was created in Article 14 of the ICC Law. This provision also grants the specialized prosecutor powers to undertake all necessary actions in relation to war crimes investigations and prosecutions. These powers, like those of the war crimes chambers themselves, exist alongside those of regular state prosecutors who also have the power to conduct war crimes prosecutions. One further provision of the ICC Law must be highlighted. Article 15 (1) of the ICC Law created a special police unit to

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<sup>224</sup> Available at <http://www.nottingham.ac.uk/law/hrlc/international-criminal-justice-unit/implementation-database.php>.

<sup>225</sup> Article 12 (1) of the ICC Law. There is no international involvement in the Croatian specialized chambers; Human Rights Watch, 'Justice at Risk', October 2004, p. 7.

<sup>226</sup> Article 1 of the ICC Law states:

'This Law shall regulate...the specifics of prosecution for criminal acts foreseen under Article 5 of the [ICC] Statute, criminal acts against values protected by the international law as per Articles 156 – 168, 187, 187a and 187b of the Penal Code...and other criminal acts from the jurisdiction of international criminal courts as well as the prosecution for criminal acts against the international justice system'.

investigate war crimes cases. This unit comprises police officers that are experienced in 'the detection of the most serious criminal acts'. Again the powers of the unit are complementary to those of regular police.

These developments do not bear directly on proceedings concerning war crimes which took place prior to their enactment, i.e. to crimes committed during the war. Therefore it is impossible to speculate on any indirect impact the ICTY may have had on their enactment and content.<sup>227</sup>

Another serious problem of assessing normative impact of ICTY on Croatian law applicable to the time of the war is the reluctance of the courts to rely on the jurisprudence of the ICTY in their judgments,<sup>228</sup> although they are required to refer in their judgments to the relevant provisions of international law which constitute war crimes.<sup>229</sup> Consequently, even if Croatian jurisprudence resembles that of the ICTY in some aspects, a causal link is difficult to establish. According to one Supreme Court judge interviewed by DOMAC, the jurisprudence of Croatian courts relating to war crimes is not a consequence of any direct influence.<sup>230</sup> Indeed, key decisions by the Supreme Court, which have influenced the jurisprudence of the trial courts, were issued as early as 1994, before the first of the Tribunal's decisions were handed down. Thus, the Supreme Court's interpretation of "complicity" in war crimes, as including not just those persons who "ordered" or "committed" the crimes but also every person who on the basis of mutual agreement had an important contribution, of any kind, to the implementation of the crimes, even implicitly,<sup>231</sup> has been adhered to since 1994.<sup>232</sup>

Direct influence of the jurisprudence of the ICTY can be detected in relation to the doctrine of command responsibility. As noted above, the legislation applicable to the time of the war, 1993 Croatian CC, did not include provisions akin to Article 7(3) of the ICTY

<sup>227</sup> Although according to the EU 2005 Progress Report, the 2004 amendment was part of the preparation of Croatia to the transfer of cases from the ICTY in accordance with Rule 11 *bis*. EC, 'Croatia 2005 Progress Report' (9 November 2005) p. 25, available at <http://www.delhrv.ec.europa.eu/uploads/dokumenti/3a87bfc3ab7e5d6740a3a4b1aef3e26a.pdf>.

<sup>228</sup> OSCE, April 2005 Report, *supra* note 83, 34.

<sup>229</sup> 'Considering that war crimes against the civilian population can be committed only by violating the rules of international law, the court is obliged to exactly indicate, in a verdict pronouncing the accused guilty for that criminal offence, which rules of international law the accused had violated.' The Constitutional Court of the Republic of Croatia in its decision U-III-368/98 reproduced in Josipovic, 'Responsibility for War Crimes', *supra* note 84, 157-8. Also, Supreme Court of the Republic of Croatia in cases Kz-213/01 and Kz-588/02.

<sup>230</sup> Interview conducted in November 2009, Belgrade.

<sup>231</sup> IKZ -381/94 (7 September 1994).

<sup>232</sup> See case K-15/95 (Split County Court) (26 May 1997), Kz 399/1997-6 and case Kz-791/02-6 (6 May 2003).

which imputes to military commanders crimes committed by their subordinates by reason of their omission to prevent or punish said crimes. In 2002 the Supreme Court acknowledged that a basis for command responsibility existed under Croatian law based on 'general domestic theories of criminal liability for failure to act in conjunction with Articles 86 and 87 of Protocol I'.<sup>233</sup> This decision, however, did not extend to cases where the commander did not know but 'ought to have known' of the behavior or to the commander's responsibility to punish subordinates for crimes.<sup>234</sup> The issue of command responsibility was recently dealt with by the Zagreb County Court in the only case transferred to Croatia under Rule 11*bis* concerning Ademi and Norac. The court, in its decision from May 2008, found Norac guilty of two charges based on command responsibility after finding that he was aware of the crimes committed by his subordinates. It thereby rejected Norac's contention that principle of command responsibility did not exist in the applicable criminal law. More noteworthy is the submission of Ademi which invoked the *Celebici* judgment of the ICTY in favor of the position according to which *de jure* authority was not sufficient to trigger command responsibility. The court accepted this argument and acquitted Ademi of charges based on command responsibility partly on the ground that he had no *operational* command authority over the troops in the Gospic District.<sup>235</sup>

The invocation of the *Celebici* case in a Croatian court is unique and deserves attention. As noted above, ICTY case-law is not usually cited in domestic proceedings and Croatian Courts tend to rely on their own jurisprudence. This tendency has crystallized in the 1990s when attitudes towards the Tribunal were mostly negative<sup>236</sup> and ICTY jurisprudence was unavailable to the legal profession in the Serbo-Croatian language.<sup>237</sup> The Ademi-Norac case, on the other hand, was transferred by the Tribunal with the blessing of the Government and public; it was prosecuted in cooperation and advice of the OTP; and was adjudicated before a war-crime specialized panel in the District Court of Zagreb. Put in this context, the connection between the ICTY and the Croatian justice System might support the conclusion that the invocation and

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<sup>233</sup> RH v. Milan Strunjas, Case No. I-Kz 588/02-9 (17 October 2002) cited in OSCE, 'Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring' (22 June 2004) 3-4, available at [http://www.osce.org/documents/mc/2004/06/3165\\_en.pdf](http://www.osce.org/documents/mc/2004/06/3165_en.pdf).

<sup>234</sup> Josipovic, 'Responsibility for War Crimes', *supra* note 84, 165-166,

<sup>235</sup> OCSE, 'Background Report: Ademi-Norac trial concluded' (12 June 2008) on file with DOMAC.

<sup>236</sup> See Section 6.2.*supra* and Section 7.2. *infra*.

<sup>237</sup> *Supra* notes 135 and 142.

construction of the doctrine of command responsibility under Croatian law was directly influenced by the ICTY. Indeed, in its presentation before the ICTY referral bench in the case of Ademi and Norac, the Croatian representative advanced this proposition. Specifically, he stated that the new position of the State Attorney of the Republic of Croatia with respect to command responsibility was informed by the series of seminars prepared by the ICTY for Croatian judiciary,<sup>238</sup> and that the official position of the State's Prosecutor is that Article 28(2) of the 1993 Croatia CC<sup>239</sup> should provide the legal basis for the doctrine under Croatian law with respect to war-time events.<sup>240</sup>

Yet, one should still be cognizant of the fact that the invocation of the doctrine was mandated by the structure of the indictment that originated from the ICTY and to which the Croatian prosecution was bound. While this serves as a means for infusing the legal doctrine into the Croatian case-law, it is yet to be seen whether the doctrine would be used in other national prosecutions. Furthermore, as argued in the DOMAC WP2 report, the extent of the ICTY's influence is limited to acceptance of the mode of responsibility. It stops short of adopting the ICTY's specific construction of the doctrine of command responsibility. The way that the Zagreb court conceived the mode of responsibility in acquitting Norac was based on the finding that he was not a part of a relevant chain of command. Such construction of command responsibility is far narrower than seen in ICTY case law. The decision was upheld by the Supreme Court in March 2010.<sup>241</sup>

Following the Ademi/Norac case, several proceedings based on command responsibility have been opened by County courts in Croatia. In April 2009, the County Court in Osijek, found Cedo Jovic,<sup>242</sup> commander of the RSK Army 35th Slavonian Brigade Military Police unit, guilty of mistreatment of the members of a forced labour squad comprised of non-Serbs, by failing to take measures within his authority in order to

<sup>238</sup> *Supra* note 175.

<sup>239</sup> *Supra* note 42.

<sup>240</sup> According to Mr. Horvatic: "A position was reached through discussion at the seminars and of opinion of the judges of Supreme Court and the general prosecutor and other prosecutors does an institution of command responsibility concerned can nevertheless be substituted for the most part by the application of Article 28 of the criminal code from 1993, which regulates the perpetration of a criminal offence by omission. Following this, it is the opinion of the public prosecution service that the provision mentioned of Article 28 of this criminal court with the application of the Geneva Conventions and additional Protocols could for the most part substitute the institution of command responsibility in the manner contained in Article 7(3) of The Hague Tribunal Statute." *Prosecutor v Ademi and Norac*, Decision for Referral, *supra* note 172, transcripts of 17 February 2005, available at <http://www.icty.org/x/cases/ademi/trans/en/050217MH.htm>.

<sup>241</sup> The Supreme Court upheld both the conviction of Norac and the acquittal of Ademi. It did reduce Norac's sentence from seven to six years imprisonment.

<sup>242</sup> The indictment was issued in November 2008.

punish the perpetrators and thus prevent them from further unlawful acting.<sup>243</sup> At least two other investigations of charges based on the doctrine were launched in 2009 in Osijek, (both against Serbs): in April 2009 an investigation began against a JNA commander - Enes Taso - for not prevent the killing of eleven members of the Croatian army captured in Vukovar. Another investigation opened in October 2009 is of Aleksandar Vasiljevic, an ex-commander of the JNA's Counterintelligence Agency (KOS), for war crimes committed in four Serbian camps. Vasiljevic is accused of knowing in what conditions inmates lived and to what treatment they were exposed, but failed to do anything to improve the situation, prevent the physical and mental abuse or punish the perpetrators. Notably, both Vasiljevic and Taso live outside of Croatia. In March 2009 the County Court in Požega, found Damir Kufner and Davor Šimić guilty of torturing and killing Serb civilians in 1991 in the area of village of Marino Selo. The two, commanders of the Military Police Squad attached to the Croatian National Guard, were convicted for failing to prevent the crimes.<sup>244</sup>

There appear to be a connection between the Ademi/Norac judgment and the decisions to pursue the abovementioned cases. According to a prosecutor from Osijek, the Ademi/Norac case legitimized the use of the command responsibility doctrine by the Prosecutor's office and paved the way for similar proceedings to take place.<sup>245</sup>

## 7.2. INVESTIGATION/PROSECUTIONS RATES

Prosecution rates provide only one facet of the domestic response to mass atrocity situations. The case of Croatia demonstrates that high rates of war crimes proceedings, which might be considered as a positive indicator of transitional justice, are in fact the result of compromised due process standards applied by the justice system in domestic criminal proceedings. As stated in Section 4 *supra*, war crimes investigations and prosecutions in Croatia have been by the thousands. What has been problematic with respect to those figures is the high number of prosecutions that appear to be motivated by eagerness to vindicate the Croat narrative rather than an objective pursuit of justice. Consequently, a disproportionate part of the proceedings was brought against Serbs, too

<sup>243</sup> The case was sent back to retrial on appeal. Jovic was once again convicted on 18 February 2010. See [http://www.centar-za-mir.hr/index.php?page=article\\_sudjenja&trialId=74&article\\_id=48&lang=en](http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=74&article_id=48&lang=en).

<sup>244</sup> Details by the monitoring team are available at [http://www.centar-za-mir.hr/index.php?page=article\\_sudjenja&trialId=66&article\\_id=48&lang=en](http://www.centar-za-mir.hr/index.php?page=article_sudjenja&trialId=66&article_id=48&lang=en).

<sup>245</sup> Interview conducted in November 2009, Belgrade.

few of them refer to Croats, and many of them have been made possible to - and rely on – unsatisfactory evidence, the absence of the accused and problematic application of the law and international standards of due process.

It appears to us that the ICTY has had limited impact on rates of war crime prosecutions in Croatia and that this impact seems to be, if anything, more negative than positive. The large number of war crimes cases and their focus on crimes committed against Croats has been, partly, a reaction to the ICTY's perceived failure to take on the same task. Positive reforms of the Croatian prosecutorial policy of war crimes, whereby fewer but better established cases are prosecuted, have been the direct result of the intervention of the EU in the area of domestic war crime prosecutions in Croatia.

The claim – that the heightened rate of prosecutions against Serbs and the reluctance to prosecute perpetrators of war crimes against Serbs are one of the implications of the Croatian distrust of and disappointment in the Tribunal - is based on the impressions of most persons interviewed by DOMAC in Croatia; as well as the correlation found between changes in public perceptions of the Tribunal and corresponding trends in war crimes proceedings.<sup>246</sup>

Until 2004, no judgment by the ICTY was issued against a Serb for crimes committed during the war in Croatia. A frustrated Croatian public watched, meanwhile, as the OTP was pursuing indictments against Croats for acts taken as part of the 'Homeland War'. This was interpreted negatively by Croats, who felt the Tribunal was not only slow in attaining justice for Croatian victims, but vigorous in hunting down those Croats who fought to defend those victims from the Serbs.<sup>247</sup> It is thus no surprise to find that in 2001, when Gotovina and Ademi were indicted by the Tribunal to the displeasure of Croatia, public hostility towards the ICTY was at an all-time high.<sup>248</sup>

Prosecutorial trends in Croatia during this period manifested the abovementioned public sentiments: the notion that crimes were committed by Croats during the celebrated war was both outrageous and insulting to many in Croatia. Consequently,

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<sup>246</sup> OSCE, 'Report of the Head of the OSCE Office in Zagreb Ambassador Jorge Fuentes to the OSCE Permanent Council' (6 March 2008) 8 observing that the disappointment over the 'Vukovar Three' verdict, *supra* note 131, 'created pressure to return to in absentia prosecutions of Serbs and fuelled opposition to prosecution of members of the Croatian armed forces.'

<sup>247</sup> Interviews conducted by DOMAC in Zagreb (April 2008).

<sup>248</sup> *Supra* notes 198-199.

Croats were rarely prosecuted for war crimes against non-Croats. Indeed, according to data supplied by the Croatian Prosecutor's Office, until 2001, only 7 members of Croatian units were indicted, while additional five members were indicted by 2004. Compared with the overall number of proceedings which took place between 1991 and 2004 (3232 persons investigated; 1400 indicted; 602 persons sentenced (almost 80% in absentia) this data is alarming.<sup>249</sup>

It wasn't until July 2002 that the Chief State Prosecutor acknowledged that a significant number of proceedings were in fact unsubstantiated and issued instructions to local prosecutors to review pending war crime cases to determine the sufficiency of the evidence prior to continuing with prosecution.<sup>250</sup> The review was completed in October 2004, with charges dismissed against only 370 persons while 1,900 cases were found to be substantiated.<sup>251</sup>

It should be emphasized, that the sentiments of the Croatian public were not properly addressed by the ICTY which, by most accounts, failed to identify in time the need for an outreach scheme that would educate the public on the activity of the Tribunal and confront its anti-Croat image.<sup>252</sup>

A tangible change in prosecutorial policies in Croatia does seem to correspond with an improvement in public opinion regarding the ICTY in 2004. That year the ICTY convicted Jokic and Strugar of war crimes committed during the notorious shelling of the city of Dubrovnik. Babic, the former President of the SAO, was found guilty of war crimes for his responsibility for the ethnic cleansing campaign against Croats within the territory controlled by the SAO. Furthermore, in 2005, the case of Ademi and Norac was referred back to Croatia by the Tribunal. According to Vesna Terselic from the 'Documenta' NGO, a survey conducted by the organization in 2006 found that approximately 60% of those

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<sup>249</sup> The information was reproduced in Documenta et al. 'Monitoring of War Crimes Trials Report for 2009 – Opinion Summary (March 2010) 2fn5, available at <http://www.documenta.hr/documenta/>.

<sup>250</sup> Those instructions stated: ... [i]t is a fact that at the time of the Homeland War and also afterwards, county state prosecutors' offices were submitting investigation requests indiscriminately in a number of cases, and based on insufficiently verified criminal charges, they were issuing dubious indictments for war crimes against a significant number of people on the basis of investigations conducted in an inferior manner, while those indictments did not concretize the illegal activity on the part of the particular defendants containing elements of war crimes." 11 July 2002 reproduced in OSCE, Background Report: Domestic War Crime Trials 2002, p.2fn 4 available at [http://www.osce.org/documents/mc/2004/03/2185\\_en.pdf](http://www.osce.org/documents/mc/2004/03/2185_en.pdf).

<sup>251</sup> OSCE, 'Domestic War Crime Trials 2004', *supra* note 68, 8.

<sup>252</sup> Interview with Vesna Terselić ('Documenta') (April 2008); interview with an ICTY official; Prof. Ksenija Turković (University of Zagreb) (May 2008) Zagreb. Even the UNSC called on the Tribunal to 'develop and improve' its outreach program. UNSC Res. 1503 (28 August 2003).

interviewed expressed positive opinions with respect to the ICTY and the potential prosecution of Croats.<sup>253</sup> During the same period changes in prosecution rates are detected. Compared with approximately 800 first instance judgements that were issued between 1991 to 2001 (an average of some 80 first instance judgements per year), Croatian courts rendered in 2004 42 first instance judgements. Between 2005 to 2007, domestic courts rendered only 38 first instance judgements. More, significantly, since 2004 there has been a marked decrease in the percentage of indictments against Serbs and *in absentia* trials in general. In 2006 Individual conviction rates stood at 50% with respect to both Serbs and Croats and the number of Serbs convicted *in absentia* has dropped to 37.5% of all indicted Serbs.<sup>254</sup> There has also been an increased scrutiny by the Croatian Supreme Court over County court judgments on war crimes cases restricting the use of *in absentia* trials, repealing first instance verdicts suffering from procedural deficiencies and granting requests for change of venue of trials to the Zagreb County Court acting as a specialized war crimes chamber.<sup>255</sup>

Yet, the correlation between prosecution rates and shifts in public opinion towards the ICTY is inconclusive because 2004 also marked the year when the EU began closely monitoring the rates of war crimes prosecutions in Croatia. EU intervention in the area of domestic war crime prosecution only began materializing following the establishment of the completion strategy whereas prior thereto EU attention was focused on the ICTY as the focal point of war crime prosecutions.<sup>256</sup>

The issue of war crime prosecutions was on the agenda of the EU with respect to its strategy towards the Balkans since 1995. In 1996, when the EU adopted its Regional Approach to the countries of South-Eastern Europe, it stressed its willingness to 'keep up pressure on all parties concerned to cooperate fully and unconditionally with the Tribunal.'<sup>257</sup> Specific conditions for initiating negotiations on association agreements with the relevant countries, decided upon in 1997, included adequate cooperation with the

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<sup>253</sup> Interview conducted by DOMAC (April 2008).

<sup>254</sup> OSCE, August 2007 Report, *supra* note 68, 53.

<sup>255</sup> OSCE, 'Background Report: Developments in war crimes proceedings January – May 2007' (5 June 2007) 3-5 available at [http://www.osce.org/documents/mc/2007/07/25754\\_en.pdf](http://www.osce.org/documents/mc/2007/07/25754_en.pdf).

<sup>256</sup> I Rangelov, 'EU Accession and Transitional Justice in the Former Yugoslavia', 2 Croatian Yearbook on Eur. L. & Pol. (2006) 365.

<sup>257</sup> Bull. EU 1/2-1996 (26 February 1996),

ICTY.<sup>258</sup> The same condition was formally integrated into the 'Stabilization and Association Process' (SAP) established in 1999 governing the process of full integration of the five Balkan states into the EU.<sup>259</sup> Concerns over domestic prosecutions of war crimes did not figure in the Commission's SAP reports until 2004, when the third annual report stated, in connection with the state of national judiciaries, that 'Further progress should be made in building the capacity to prosecute war crimes.'<sup>260</sup> While the issue of full cooperation with the ICTY remained a priority, the third report marked the turning point in EU policy towards domestic prosecutions. Since that point onwards, the EU has been investing in improving and facilitating domestic criminal proceedings. In fact, the topic of war crimes prosecutions in Croatia is discussed under the first political criteria for Croatia's accession to the EU – democracy and the rule of law – and takes into consideration varying aspects of the domestic proceedings connected with war crimes. The year 2004 thus was an important benchmark since the following year was the first year in which Croatia was scheduled to submit a progress report to the EU – a report that would have had to include Croatia's efforts to improve its record as far as war crimes proceedings went.

The impact of the EU on the policy of prosecutions should not be underestimated. As discussed in section 7.3 below with respect to far reaching reforms of the Croatian judiciary, Croatia is obligated to better war crimes figures under negotiation Chapter 23, which according to officials from the OTP constitutes its primary motivation for reduction of the figures of unsubstantiated war crime cases and investigations.<sup>261</sup>

Croatia's record with respect to rates of war crimes proceedings has continually improved since 2004. Thus, out of 426 persons indicted between 2004 and 2008, 41 were former members of Croatian forces.<sup>262</sup> However, two factors still distinguish Croats defendants from Serb defendants: Croats are prosecuted only with respect to severe war crimes whereas Serbs are prosecuted with respect to milder forms of war crimes.

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<sup>258</sup> 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).

<sup>259</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>260</sup> Commission of the EC, 'The Stabilization and Association process for South East Europe – Third Annual Report' (COM(2004) 202 final) (30 March 2004) available at <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2004:0202:FIN:EN:PDF>,

<sup>261</sup> Interview conducted by DOMAC in The Hague (January 2009).

<sup>262</sup> Documenta et al., 2009 Report, *supra* note 249.

Furthermore, the act of participation in the “homeland War” is routinely used by courts as a mitigating set of circumstances, a privilege reserved exclusively to Croat defendants.<sup>263</sup> The lingering inequality between Croat and Serb defendants has not gone unnoticed in the latest report by the EU,<sup>264</sup> and the UN HRC’s comments on the second periodic report submitted by Croatia under the ICCPR in 2009. The Committee noted in its concluding observations regret on “the lack of statistical information provided by the State party on the ethnicity of the perpetrators and victims in national war crimes proceedings”.<sup>265</sup>

Croatia’s most recent effort to weed out unsubstantiated war crimes proceedings has been an action plan to review all outstanding indictments and investigations (against both identified and unidentified persons) as well as review of all *in absentia* verdicts with a view to dismissing unsubstantiated verdicts.<sup>266</sup> The latter review was made possible by the amendment of the CPA in December 2008 that now enables the State Attorney to file requests for ‘renewed’ trials in cases where a verdict was issued *in absentia*.<sup>267</sup>

The action plan has been initiated 'Based on previous agreement and upon the request of the Director General of DG Enlargement of the European Commission seeking additional clarification of the work done on war crimes.'<sup>268</sup> The ICTY's involvement, however, should also be noted: the action plans are the product of almost three years of abovementioned OSCE-sponsored plenary meetings<sup>269</sup> where negotiations conducted between Delegation of the EC and the ICTY Liaison Office with

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<sup>263</sup> Ibid.

<sup>264</sup> Commission of the EC, 'Croatia 2009 Progress Report' pp. 8-9, available at <http://www.delhrv.ec.europa.eu/files/file/progres%20report/CROATIA%202009%20PROGRESS%20REPORT.pdf>.

<sup>265</sup> UN HRC, “Concluding Observation of the Human Rights Committee” UN Doc. CCPR/C/HRV/CO/2 (29 October 2009) para. 10.

<sup>266</sup> State Attorney Office, 'Action Plan for the implementation of Instruction Number O-4/08 related to work on war crime cases' (12 December 2008); General Police Directorate, 'Letter of the Director General of DG Enlargement of the EC, Action Plan of the Ministry of the Interior' (15 December 2008) (on file with DOMAC).

<sup>267</sup> Article 504 (2) stipulates that the application for renewal of criminal proceedings may be filed by the parties and counsel in the case of Article 501. Paragraph 1 item 3 this Act if the defendant tried in absentia... whether the convicted person is present. Article 501(1)(3) stipulates that “that a criminal procedure concluded with a legally valid verdict will be re-opened to the benefit of the convicts regardless of the fact whether they were present or not, providing that “new facts or new evidence is presented which, by itself or in relation with previous evidence, might lead to the release of a person who was convicted or for him/her to be sentenced pursuant to a more lenient law”. Criminal Procedure Act 2009, available at <http://www.pak.hr/Default.aspx?art=1322&sec=120> (hereinafter 2009 CPA).

<sup>268</sup> 'Letter of the Director General of DG Enlargement of the EC, *supra* note 141, 1.

<sup>269</sup> See text accompanying note 177 *supra*.

the Minister of Justice, Chief State Attorney, and representatives of the Supreme Court and the Ministry of Interior.<sup>270</sup>

Pursuant to the plans, the State's Attorney's Office announced at the beginning of 2009 that:

- Following a review of *in absentia* convictions, requests for the re-trial are to be filed with respect of 62 persons. Additional police investigations are to be conducted in relation to 53 persons and all data necessary for submission of requests for the possible re-trial are to be collected.
- Following a review of on-going war crime cases (encompassing 667 persons currently under indictment) for war crimes, criminal prosecutions against 104 people have been indicated as disputable; criminal prosecution are to be terminated against 27 persons; additional investigations are to be conducted in cases including 98 persons; lastly, regarding 24 persons, criminal acts of war crimes with which they are charged should be re-qualified as criminal acts encompassed by the Amnesty Law.
- Following a review of current war crimes investigations (involving 571 persons), investigations of 54 persons are to be terminated; criminal prosecution against another 63 persons has been indicated as questionable; and in cases involving 40 other persons the charges for which they are investigated are to be re-qualified as criminal acts encompassed by the Amnesty Law.
- In the category of cases with *unidentified perpetrators*, out of the total of 624 cases, motions for initiation of investigations have been filed in 227 cases, and in 351 cases the police and other state bodies have been requested to collect circumstantial evidence and other data necessary for the identification of direct perpetrators and the commanding military structure for the purpose of the possible prosecution of military commanders based on the principles of “guaranteed” command responsibility. In 23 cases a decision on the dismissal of criminal charges

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<sup>270</sup> OSCE June 2008 Report, *supra* note 171.

has been adopted, while in 4 cases criminal acts of war crimes have been re-qualified"<sup>271</sup>

According to statistics provided by Croatia to the UN HRC in August 2009, the competent county State Attorney offices submitted requests for the renewal of criminal proceedings in favor of persons convicted *in absentia* in respect of 14 cases regarding 90 persons. Requests were granted with respect to five cases in respect of 30 persons, and rejected in two cases in respect of 22 persons.<sup>272</sup>

### 7.3 CAPACITY BUILDING

This section examines the impact the ICTY has had on the capacity of the Croatian judiciary to process war crime trials. What is apparent from our research is that the ICTY has been helpful in cultivating the expertise required for war crime prosecutions in Croatia once it was so tasked and once forums enabling cooperation between ICTY and Croatian professionals became available. That being said, the ICTY was able to become an influencing player only after local political and judicial reforms took place.

The notable point is that the impact of the ICTY on the capacity of Croatian authorities to process war crime cases appears to have been both positive and negative. As noted in Section 6 *supra* Croatia was excluded from the work of the ICTY in the years following the Tribunal's establishment. According to some NGO members and ICTY officials, the failure to include the Croatian authorities in war crime investigations early in the process has had an adverse effect on their ability to develop capacity in a sense that such disconnect effectively excluded Croatia from the learning process of dealing with war crimes prosecutions. This conclusion refers not only to general expertise but also to familiarity with specific criminal cases that Croatian authorities are now expected to adjudicate but have no sufficient knowledge of or evidence to substantiate. Examples to that effect include:

- The issue of exhumation and identification of missing persons. Bodies excavated by ICTY teams were under their exclusive jurisdiction. As there was no involvement of local coroners, medical examiners and investigative

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<sup>271</sup> State Prosecutor's Office, The report on the application of the Instruction No. O-4/08 related to the application of provisions of the Basic Criminal Law of the Republic of Croatia and the Criminal Procedure Code in war crime cases' (13 January 2009) 1-2 (on file with DOMAC).

<sup>272</sup> "Replies to the List of Issues", *supra* note 66.

judges possessing the legal authority to issue death certificates, families of victims were unable to locate loved ones. What's more, the lack of documentation on personal' deaths has had many legal and administrative implications such as issues of inheritance, re-marriages etc.

- The lack of involvement of local state and court officials meant that national authorities had no case files concerning the investigations.
- Problems regarding admissibility of evidence obtained by the ICTY in Croatian courts. In cases where testimonies and other types of evidence were not gathered by Croatian authorities but rather by the ICTY investigative teams, issues of admissibility have arisen, especially under the 1997 PCA which precluded admissibility of testimonies taken at the initial part of the investigations by the police. In fact, police officers could not even testify in court regarding any information they acquired during their inquiries. Under the 1997 CPA only testimonies taken by an investigating judge were admissible.<sup>273</sup> Evidence collected by ICTY investigators was thus unusable in Croatian courts.
- Lastly, there was no exchange of legal expertise and members of the legal profession in Croatia were unfamiliar with the Tribunal's decisions as these were not translated until 1999.<sup>274</sup>

Granted, the abovementioned exclusion was based on concerns over the state of the Croatian justice system and the political constraints it operation under. Indeed, prosecution of war crime is but one function of the judiciary and the general state of the judiciary is a pertinent consideration. In Croatia's case, the lack in capacity to try war crime cases following the war emanated not from the ICTY but from the poor professional, financial and organizational state of the judiciary outlined in Section 3.3 *supra*.

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<sup>273</sup> CARDS report on pre-trial proceedings in Croatia, *supra* note 63, 100-101.

<sup>274</sup> *Supra* note 135. V Dimitrijevic, 'The War Crimes Tribunal in the Yugoslav Context', 6 E. Eur. Const. Rev. (1996) 85, 92; I Nizich, 'International Tribunals and their Ability to Provide Adequate Justice', 7 ILSA J. Int'l & Comp. L. (2000-2001) 353, 361; Interviews conducted with Croatian prosecutors, Belgrade (November 2009). It should be noted, however, as indicated by one interviewee that as far as criminal law knowledge went, local lawyers were ahead of their counterparts in the Tribunal which consisted of international law lawyers that were not necessarily experts in criminal law and procedure. Interview conducted in Zagreb (May 2008).

The current capacity of the Croatian system to process war crimes proceedings has come a long way since the 1990s. Institutional and legislative reforms allow, at least in principle, better resources and expertise to conduct war crimes proceedings.

- Four County courts were designated as specialized war crimes courts (in Osijek, Rijeka, Split and Zagreb). They include expert judges and special investigation departments.<sup>275</sup>
- The establishment of a position of public attorney for war crimes, which is a deputy of the Chief Public Prosecutor.<sup>276</sup>
- The establishment of a new special police department for war crimes opened at the Ministry of the Interior.<sup>277</sup>
- Evidence gathered by the ICTY can be used in courts ‘on condition that this evidence has been established in the manner foreseen by the Statute and the Rules of Evidence and Procedure’ of the ICTY.<sup>278</sup> Moreover, “The state prosecutor may exceptionally issue an indictment without conducting an investigation and obtaining the consent of the investigative judge, before the competent court in the Republic of Croatia, based on evidence obtained from the International Criminal Court.”<sup>279</sup>
- Additional Further provisions in the 2009 CPA help facilitate cooperation of local prosecutors and investigators with the ICTY: the term “police” in the CPA has been expanded to include “a foreign police official who, according to the international law and based on a written approval from the minister responsible for internal affairs, conducts the activities on the territory of the Republic of Croatia, or on board its ship or airplane”<sup>280</sup>; interrogation of defendants and examination of witnesses may be executed “under the conditions and in a manner prescribed by an international treaty”;<sup>281</sup>

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<sup>275</sup> ICC Law, *supra* note 224, Article 13.

<sup>276</sup> *Ibid.* Article 14.

<sup>277</sup> *Ibid.* Article 15.

<sup>278</sup> ICC Law, *supra* note 224, Article 28(4). Article 28 pertains to the ICC, but Article 49(2) applies these provisions to the ICTY.

<sup>279</sup> ICC Law, *supra* note 224, Article 28(3).

<sup>280</sup> 2009 CPA, *supra* note 267, Article 202 (23).

<sup>281</sup> *Ibid.* Articles 282 and 293 respectively.

“evidence collecting actions obtained by way of international legal assistance” are part of criminal case files;<sup>282</sup> the use of video-link testimony in proceedings before Croatian courts has also been regulated.<sup>283</sup>

- The Judicial Academy provides training programs on war crime trials to Croatian judges and state attorneys. In 2007, the Croatian Bar Association founded the Law Academy for the professional training of attorneys who take part, inter alia, in war crimes cases.<sup>284</sup>
- In 2004 the new Witness Protection Act entered into force.<sup>285</sup> In January 2006 a Department was set up within the Directorate for International Legal Assistance, Co-operation and Human Rights to provide support to witnesses and participants in criminal proceedings related to war crimes. The main task of the Department is to provide support for legal and physical protection, to offer psychological assistance and support in finding, preparing the departure and organizing the travel of witnesses and other participants in trials and investigation procedures in criminal proceedings related to war crimes.<sup>286</sup> The new 2009 CPA requires judicial investigations to be confidential<sup>287</sup> and imposes a criminal penalty for breach of confidentiality;<sup>288</sup> the 2009 CPA also obligates the prosecutor to ensure measures of protection for witnesses as soon as she becomes aware of circumstances mandating the designation of protected witness.<sup>289</sup>

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<sup>282</sup> Ibid. Article 366(2)(5).

<sup>283</sup> Ibid. Articles 192-195, 314(2).

<sup>284</sup> 2008 National Program, *supra* note 297, 77.

<sup>285</sup> Available at [http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation\\_\\_Witness-protection-Act.pdf](http://www.vsrh.hr/CustomPages/Static/HRV/Files/Legislation__Witness-protection-Act.pdf).

<sup>286</sup> According to the 2008 national program, *supra* note 297, 77, in the first ten months of 2007, the Department of Support to Witnesses and Participants in Proceedings Related to War Crimes acted in 20 war crimes cases conducted before domestic and foreign courts, and contacted a total of 415 witnesses:

- 15 witnesses from abroad invited to testify before Croatian courts;
- 363 witnesses from Croatia invited to testify before domestic courts;
- 57 domestic witnesses invited to testify before foreign courts.

Witnesses were granted legal assistance in 115 cases, whereas psychological assistance was provided in 120 cases. Transportation was organized for 20 witnesses from Croatia who were invited to testify before the Belgrade District Court and for 5 domestic witnesses who were invited to courts in the Republic of Croatia. Several witnesses were approved physical protection in co-operation with officers of the Croatian Ministry of the Interior, Protection Unit, and accommodation was reserved for 4 witnesses in co-operation with the Witness and Injured Party Support Service of the Belgrade District Court.

<sup>287</sup> 2009 CPA, *supra* note 267, Article 231(1).

<sup>288</sup> Ibid. Article 231(2).

<sup>289</sup> Ibid. Article 295(1).

Protected witnesses are guaranteed special examination methods including giving testimony via audio or video devices.<sup>290</sup>

- The Free Legal Aid Act came into force on 1 February 2009 and can be utilized to represent victims of war crimes.<sup>291</sup> This is especially important in view of the right of victims to take an active part in the court proceedings under the 2009 CPA.<sup>292</sup>

The abovementioned developments were only made possible following the initiation of extensive reforms of the Croatian justice system that developed the overall financial and professional capacity of the system. Since 2002 Croatia has been engaged in a comprehensive reform of its justice system with a view to upgrading the efficiency and transparency of the police and judiciary as well as the professional quality of police officers, judges and prosecutors. The greatest motivation for reform initiatives has been the need to bring the Croatian system up to EU standards, an immediate priority set out by the EU as a condition for Croatia's accession.<sup>293</sup> The scale of the reform has been extensive:

- Police reform has been underway since 2002 in an effort to transform the outdated and repressive model of the Croatian police to a modernized, efficient, transparent and accountable organization.<sup>294</sup> Reform centered on depoliticizing the police; setting criteria for recruitment and developing transparency in the recruitment and promotion procedures; enhancing the

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<sup>290</sup> Ibid. Article 297(1). Other relevant provisions are set in Articles 294-299, 342(3)(1).

<sup>291</sup> OSCE 2008 report, *supra* note 75, p. 26-27.

<sup>292</sup> 2009 CPA, *supra* note 267, Articles 16, 43-46. The victim of a criminal offence is entitled to the effective psychological and other professional assistance. The victim is also entitled to participate in a criminal procedure as an injured party (i.e. entitled, inter alia, to bring the court's attention to facts and to present evidence, participate in the court hearings on the presentation of evidence, participate in the hearings and participate in the evidentiary procedure as well as to deliver a final speech; to review files and objects; be notified of the outcome of the criminal procedure.) The victim of a criminal offence for which imprisonment for five or more years is provided is entitled to counsel at the expense of the State budget before giving a statement in criminal proceedings.

<sup>293</sup> Council Decision (2006/145/EC), *supra* note 14.

<sup>294</sup> The so-called 'community policing' concept. The "Community Policing Action Strategy" was adopted by the Ministry of Interior in December 2002.

- professional and financial capacity of the police academy.<sup>295</sup> Such developments were incorporated into the new Act of Police 2009.<sup>296</sup>
- The judiciary has gone through constant reforms since 2000. Training of judges and attorneys has been institutionalized with the establishment of the Judicial Academy; new codes of ethics have been adopted as well as better disciplinary measures and criteria of performance evaluation of judges. Additional laws have been passed standardizing courts trainees, legal experts and interpreters. The backlog of cases has been reduced through reform of the enforcement of judicial decisions and the reorganization of the land registries, misdemeanor courts and redistribution of cases from overburdened courts to other courts. There has also been an improvement in the technological capacities of courts following investments in the computerizing of many courts and creation of databases. More funds have been invested in the infrastructure of courts.<sup>297</sup>
  - The entire pre-trial criminal procedure has been substantially altered with the entry into force of the 2009 CPA. The main responsibility for the investigation phase has been transferred from investigating judges to prosecutors and a closer, better defined collaboration model with the police has been established. Pre-trial procedures are expected to become more efficient and victim oriented.

Croatia has had many partners in these reforms the US<sup>298</sup> the UK<sup>299</sup> and UNDP<sup>300</sup> are but a few. The largest contributor, though, has been the EU.<sup>301</sup>

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<sup>295</sup> See the “Program Guidelines of the Ministry of the Interior for the period 2004- 2007” and the PHARE 2005 Project Fiche, available at [http://ec.europa.eu/enlargement/fiche\\_projet/document/HR2005\\_6\\_1%20PF%20HR%20and%20Police%20Academy.pdf](http://ec.europa.eu/enlargement/fiche_projet/document/HR2005_6_1%20PF%20HR%20and%20Police%20Academy.pdf).

<sup>296</sup> Law on Police Work and Authority – 30 June 2009 (OG 76/09).

<sup>297</sup> For a detailed account on the judicial reform see annual reports on 'National Program for the Integration of the Republic of Croatia into the EU' prepared by the Croatian Ministry of Foreign Affairs and European Integration which are available at <http://www.mvpei.hr/ei/default.asp?ru=573&sid=&akcija=&jezik=2>.

<sup>298</sup> The US allocated millions of dollars via USAID, including the donation of digital equipment designed to alter witnesses' voices and images, [http://zagreb.usembassy.gov/press\\_releases/2006-press-releases/government-of-croatia-eu-cards-and-usaid-present-public-procurement-manual](http://zagreb.usembassy.gov/press_releases/2006-press-releases/government-of-croatia-eu-cards-and-usaid-present-public-procurement-manual); US Embassy in Zagreb, 'United States Donates Equipment to Strengthen Croatia's Judicial System' (27 January 2005) available at [http://zagreb.usembassy.gov/press\\_20050127\\_en.html](http://zagreb.usembassy.gov/press_20050127_en.html); <sup>298</sup> US Embassy in Zagreb, 'United States Funds Witness Protection Training for Croatians' (13 June 2005) available at [http://zagreb.usembassy.gov/press\\_20050613b\\_en.html](http://zagreb.usembassy.gov/press_20050613b_en.html). The American Bar Association is also credited with reform projects. See ABA/CEELI, 'Judicial Reform Index for Croatia' (April 2002) available at <http://www.abanet.org/rol/publications/croatia-jri-2002.pdf>.

Against this backdrop of massive reforms, the ICTY's contribution to the development of capacity might seem modest, limited to knowledge building in the field of war crimes proceedings. This view would be blind to the abovementioned reactionary character of the Croatian war crimes policy. As noted in section 7.2 *supra*, said policy seems to have been susceptible to public perceptions of the ICTY. As the Tribunal began preparing to transfer cases to Croatia as part of the completion strategy, the latter demonstrated a strong desire to prove itself worthy of handling these cases. Such desire propelled many of the war crimes related reforms necessary for ensuring adequate national judicial standards required by Rule 11 *bis*.<sup>302</sup> Croatia acted as *Amicus Curiae* in the referral proceedings of the Norac and Ademi case before the Tribunal and submitted extensive information regarding the applicable legislation to the Tribunal in an effort to allow for the transfer of the case.<sup>303</sup> The OSCE reported that the Croatian Ministry of Justice, 'in recognizing the need to enhance the capacity of the judiciary for purposes of dealing with cases that may be referred from the ICTY' began the series of trainings in May and June 2004.<sup>304</sup> Furthermore, according to the EU 2005 Progress Report, the Special Investigative departments in the four County Courts in Split, Zagreb, Rijeka and Osijek,<sup>305</sup> have received reinforcement and additional training as part of Croatia's preparations for the adjudication of 11 *bis* cases.<sup>306</sup>

It looks as if the most important contribution of the ICTY to capacity building in Croatia has been the transfer of expertise from the Tribunal to the Croatian national authorities. What seems to be clear from conversations with ICTY officials from the OTP,

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<sup>299</sup> The UK financed a project called "Capacity Building Support for the Judicial Academy".

<sup>300</sup> UNDP assisted with the development of the support system for witnesses and crime victim.

<sup>301</sup> Through its CARDS program (an instrument of technical-financial assistance of the EU for Southeast European countries encompassed by the Stabilization and Association Process) and recently through the Phare 2006 program that introduced court case management system into 60 courts across the country. See <http://www.delhrv.ec.europa.eu/?lang=en&content=1732>. See, The European Union's CARDS Program for Croatia, 'Reform of Judiciary: Support for Croatian Training Center for Judges: Final Report' (2004-2005) available at <http://www.pak.hr/DOWNLOAD/2006/05/11/051214FinRep.pdf>. The report notes that 'we could recognize no significant differences in standard between the Croatian judicial staff and their colleagues in EU member states. May be without one exception that might worth mentioning: we generally noticed that the number of excellent judges and prosecutors is relatively small and there is a noteworthy gap between them and the average level. But all things considered, there is no justification for organizations or individuals from abroad to make hypercritical remarks about the situation in Croatia and on the other hand no reason for a Croatian inferiority complex' *ibid*, 12.

<sup>302</sup> *Supra* notes 158-172.

<sup>303</sup> *Prosecutor v Ademi and Norac*, Decision for Referral, *supra* note 172.

<sup>304</sup> OSCE, 'Background Report: Domestic War Crimes Trials 2003' (22 June 2004), p. 3-4, available at [http://www.osce.org/documents/mc/2004/06/3164\\_en.pdf](http://www.osce.org/documents/mc/2004/06/3164_en.pdf).

<sup>305</sup> *Supra* note 225-226.

<sup>306</sup> EU 2005 Progress Report, *supra* note 227, 24-5.

the Registry and Judges, is that once the Tribunal began to implement the completion strategy and engage in dialogue with the Croatian authorities a new level of openness has been detected on the part of the latter.<sup>307</sup> As indicated in Section 6.1 *supra*, ICTY members have participated in conferences and seminars participated by Croatian judiciary, lawyers and ministries.<sup>308</sup> The daily interaction between the OTP's transition team and Croatian judges and prosecutors provides the latter with great amount of evidence and advice crucial to investigation and litigation of domestic war crime cases in Croatia.<sup>309</sup>

Measuring the success of the ICTY's contribution should take stock of two important factors: First, it is the political context that sets the contours of potential influence of the ICTY on capacity building in Croatia. Thus, its contribution was untenable during Tudjman's regime; before the completion strategy; and without general reforms. In the same vein, the current political climate plays an important role in the manner with which the influence of the ICTY can be absorbed by the Croatian justice system. Lack of political will to completely abolish impunity still hampers the capacity of Croatian authorities to properly handle war crimes proceedings.<sup>310</sup> Second, the jurisdiction to try war crime cases in Croatia is decentralized, resulting in a larger pool of members of the legal profession that require training. The limited resources available to the ICTY and the voluntary nature of participation by ICTY's employees in education programs necessarily limit the potential scope of impact. Indeed, many challenges remain:

- Police performance in investigating war crimes is only average. Despite the establishment of a special police department at the national level, the handling of war crimes investigations is still decentralized. The functioning of the special department, which since 2007 has been an independent

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<sup>307</sup> Interviews conducted by DOMAC in The Hague (January 2008).

<sup>308</sup> Address of Judge Theodor Meron to the UN Security Council (23 November 2004) available at <http://www.un.org/icty/pressreal/2004/p916-e.htm>. Most notably were the six seminars on training to judges and prosecutors organized by the ICTY in 2004.

<sup>309</sup> OSCE, August 2007 Report, *supra* note 68, 7; Interview with ICTY official (April 2008): 'Right now the ICTY office allows Croatian prosecutors full access to their materials (although not all information flagged by them is printed and transferred to them. If there are restrictions by government or witnesses we act as a liaison asking whether the restriction could be lifted). When they assemble a case they come back for more materials.'

<sup>310</sup> Documenta et al., 'monitoring of War Crimes Trials 2009', *supra* note 249.

police unit,<sup>311</sup> is not transparent. It has been difficult to assess its performance and the regulations upon which it operates. Nor is the division of labor between the department and county police departments clear. In interviews conducted by DOMAC, Croatian NGOs have indeed voiced their dissatisfaction with the less than cooperative approach of the department. The decentralized nature of police investigations is disconcerting especially in light of lingering difficulties with the performance of police in several counties that are still reluctant to investigate crimes committed against non-Croats.<sup>312</sup>

- Judicial capacity to properly prosecute war crime trials is still lacking in many counties in Croatia. The four special chambers are rarely utilized as such and "do not have adequate personnel capacity nor do they operate functionally, serving only as a possibility to be utilized in exceptional cases."<sup>313</sup> Indeed, the vast majority of cases are still investigated and prosecuted locally and there has been very limited use of the power of the Chief State Attorney to ask the Supreme Court to transfer war crimes cases to the special chambers.<sup>314</sup> County courts are overwhelmed by many difficulties: many County courts still lack enough criminal judges and courtroom space required for the management of war crime cases.<sup>315</sup> Training on war crimes cases is considered a specialized program by the judicial academy and too few courses are available in its program;<sup>316</sup> courts are burdened by backlog of inadequate war crimes cases that have to be reprocessed.<sup>317</sup> This includes the review of *in absentia* judgments under

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<sup>311</sup> The department was separated from the department for terrorism in the ministry of interior in 2007.

<sup>312</sup> 'Croatia 2009 Progress Report', *supra* note 264, 9.

<sup>313</sup> Documenta et al., 'Monitoring of War Crime Trials – A Report for the Period of January-June 2008' (26 September 2008) p. 3 available at <http://www.documenta.hr/eng/documents/report08.pdf>.

<sup>314</sup> Amnesty International, 'Croatia's Stabilization and Association Council 28 April 2008' (23 April 2008) available at [http://www.aieu.be/static/documents/2008/B772\\_-\\_Presidency.pdf](http://www.aieu.be/static/documents/2008/B772_-_Presidency.pdf).

<sup>315</sup> Documenta et al., 2008 Report, *supra* note 313, 4.

<sup>316</sup> The courses on offer in 2009 were comprised only of five one-day seminars on re-opening of criminal proceedings in the case of trial in absence by virtue of application of the new CPA (in cooperation with the Supreme Court and the State Attorney's Office); a regional conference on war crimes (in cooperation with the OESS); training of attorneys as defense counsels in war crime trials (in cooperation with the Croatian Lawyers Academy). Judicial Academy, 'The 2009 Professional Training Program' 37 available at <http://www.pak.hr/Default.aspx?sec=131>.

<sup>317</sup> Documenta et al., 'monitoring of War Crimes Trials 2009', *supra* note 249.

the state attorney's action plan.<sup>318</sup> This gave rise to the impression raised in interviews conducted with ICTY and OSCE that the ICTY has had only limited influence on the knowledge and expertise of the Croatian judiciary (with the exception of certain individual judges).<sup>319</sup>

- In the area of witness and victims support there also remain many problems. According to the OSCE, in 2008 there were many instances where courts failed to respond to threats made against witnesses; the identity of witnesses was unlawfully revealed; the level of existing services supporting witnesses and victims varies from one court to the next; and many courts still lack video-link equipment making it impossible for witnesses from abroad to testify.<sup>320</sup> Relevant 2009 CPA provisions will enter into force with respect to war crimes proceedings only in 2011 and support services for witnesses and victims are at the pilot stage only at the four specialized courts.<sup>321</sup>

## 8. CONCLUSIONS

As concluded by Part 7 *supra*, the ICTY appears to have impacted war crime prosecutions in Croatia to a certain, albeit limited, extent, both positive and negative:

- As far as the law applicable to period of the war, there has been little infusion of the ICTY's jurisprudence into Croatian law.
  - Croatian Courts consistently avoid invocation of the Tribunal case-law. While the central contributing factors were initially political reluctance and a largely unprofessional judiciary, the facts that ICTY's materials were not translated into Serbo-Croat until 1999, nor were they easily accessible to most legal professionals in Croatia until the early 2000s led to unfamiliarity with the Tribunal's jurisdiction which also accounts for the limited normative impact.

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<sup>318</sup> *Supra* notes 266-272.

<sup>319</sup> Interview taking place in April 2008.

<sup>320</sup> OSCE 2008 report, *supra* note 75, p. 24-27.

<sup>321</sup> Documenta et al., 'monitoring of War Crimes Trials 2009', *supra* note 249.

- The only discernable effect on the Croatian law applicable in war crime trials is the application of the doctrine of command responsibility. Considering that the main case in which the doctrine was applied was transferred to Croatia by the ICTY through Rule *11bis* (and Croatia was obliged to apply the doctrine to the case as part of the original indictment), it remains to be seen whether the legal construction employed for that purpose will have general effect on Croatia's case-law.
- In terms of rates of prosecutions, the ICTY has had no direct impact on the domestic level. The assertion that the ICTY created a culture of legal accountability in the Balkans is problematic to establish in the case of Croatia:
  - With regard to the prosecution of Serbs for war crimes, trials in Croatia began in 1991, well before the establishment of the ICTY. It is also difficult to establish any direct contribution between the work of the Tribunal and the initiation of prosecutions against Croats beginning 2001. That being said, there have been two notable changes in prosecution rates in Croatia: a decrease in trials conducted annually in general and an increase in rate of prosecutions against Croats. Those changes correlate with improvements in the quality of trials and attempts to reduce the blatant ethnic bias against Serbs in war crime proceedings. These latter factors seem to be in direct consequence to international pressure which manifested itself most effectively by the EU conditionality. Croatia's efforts in this respect have been expressly attributed by it to its obligations towards the EU. There is a possibility that Croatia's desire to receive cases from the ICTY under Rule *11bis* has also contributed to such efforts, yet it is unlikely that it played a central role.
  - On the other hand, there are indications of indirect impact by the Tribunal on war crime proceedings in Croatia in the sense that it has been used to legitimate the earlier policies. Negative perceptions by the Croatian public of the ICTY as anti-Croat were utilized to justify

existing prosecutorial policies which targeted Serbs and enabled a high percentage of trials *in absentia*. In turn, improvements in public perceptions of the Tribunal's record have made the changes in these policies easier to justify publically. Notably, improved public opinion resulted from better understanding of the work done by the Tribunal. Familiarity with the ICTY only began upon the initiation of outreach activities since 1999 (which included a liaison office, translation of ICTY materials, pronouncements in the media, grassroots activities and streaming of court proceedings via the Internet). By then, however, anti-ICTY sentiments had been firmly internalized in the Croatian mindset.

- It looks as if the ICTY has had an impact on the capacity of Croatian authorities to try war crime cases.
  - In terms of direct impact, the ICTY may have had both negative and positive effects on domestic capacity. Up until the 1990s, the ICTY intentionally excluded Croatia from investigations conducted by the OTP in relation to the war in Croatia. Early inclusion might have prevented situations of multiple investigations, waste of limited national resources and dependence on unwilling local investigators; allowed for the specialization of local officials in the field of war crime investigations; provided early access to many witnesses and perpetrators that are located outside the country as well as access to foreign information which the Croatian authorities would otherwise have no access to; prevented the grim situation where Croatian authorities had insufficient access or knowledge of excavated bodies under the jurisdiction of the Tribunal; and lastly, might have prevented professional mistrust between Croatian officials and their counterparts at the ICTY. Constructive impact on capacity is detected from approximately 2004 onwards. It includes transfer of legal and investigational expertise through seminars, conferences and court visits as well as the transfer of evidentiary materials and consultation by the OTP Transition Team.

- In addition, the ICTY may have made a broader indirect contribution to capacity building in Croatia. The ICTY's extensive experience in investigation techniques, witnesses and victims support, trial management etc. has been used as a yardstick by which Croatia's progress in war crime proceedings has been judged. Furthermore, capacity-building initiatives by the EU, donor states and NGOs were largely based on said experience as can be seen, for example, by the introduction of video-link equipment or the training provided to judges and prosecutors by the EU supported Croatian Judicial Academy.

As noted in Part 1 of the report, Croatia constitutes an invaluable case-study for the study of potential impact of international criminal tribunals on domestic war crime proceedings because of the unique potential its situation presented. While it is correct to assert that the state of the judiciary and political manipulation made a poor starting point for fair and effective war crime prosecutions, the same can be said about many other post-conflict countries. In many respects, Croatia presented an 'easier' case for impact assessment by international legal mechanisms in the sense that its justice system was relatively functional and that the majority population was in fact the 'principal' victim of the atrocities. International negative perspectives of Serbia were also potentially helpful as a basis of trust between the international community and Croatia. In view of these conditions, failures in enhancing fair and effective war crime prosecutions by the ICTY are easier to identify despite of other intervening factors.

In view of the resources allocated to the ICTY, the knowledge accumulated by it throughout its existence and its temporary nature, the ICTY could have been utilized to contribute to the capacity of the Croatian justice system to prosecute war crimes. This did not occur, at least not during the first six years following the end of the war, for lack of cooperation between the Tribunal and Croatia. The situation is explained by the ultra-nationalistic policies of the government which opted for seclusion from the international community which the ICTY represented. It could also, however, be explained by the absence of proper consideration of the Croatian justice system in the design of the ICTY and in its operation. The primacy principle enshrined in the Statute of the Tribunal further informed subsequent practice of the Tribunal's chief prosecutors and judiciary whereby Croatia was barred from taking part in the work of the ICTY. With Croatia excluded from

war crime investigations, an opportunity to familiarize it with investigation techniques was missed. In what was perceived in Croatia as adding insult to injury, the ICTY refused to disclose information and evidentiary materials while at the same time demanded such disclosure from Croatia. This manner of operation did little to endear the ICTY on Croatia. Croatia was not made to feel as a viable partner in the effort to hold perpetrators of war crimes in the former Yugoslavia accountable.

Furthermore, the Tribunal failed to conduct outreach activities that would provide information on its activity, leaving the Croatian public in the dark as to what the Tribunal was up to. This provided fertile ground for misinformation and manipulation of facts by right wing elements in Croatian politics. The Tribunal was easily portrayed as insensitive to the experience of the Croatian war, at best, and as hostile to Croatia's interests and security, at worse. The feelings of exclusion and 'persecution' alienated Croatia and did little to help Croatia's efforts to carve out its 'own' justice. It provided no incentives on the part of Croatia to hold fair trials against Serbs, to be more diligent in prosecuting Croats for war crimes and to cooperate with the Tribunal.

Later efforts to engage the Croatian authorities by the ICTY, such as the transfer of the Ademi and Norac case as well as Category II cases, were of limited scope. The transfer of knowledge by the Tribunal to members of the Croatian legal profession has been, for the most, voluntary and un-institutionalized. The ICTY's Outreach Program was funded by outside sources and does not form part of the ICTY's budget which considerably limited its capacity.



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