



ORGANIZATION FOR SECURITY AND CO-OPERATION IN EUROPE  
Mission to Serbia and Montenegro

# WAR CRIMES BEFORE DOMESTIC COURTS

OSCE Monitoring and empowering of the  
domestic courts to deal with War Crimes

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RULE OF LAW AND HUMAN RIGHTS  
DEPARTMENT

*BELGRADE, OCTOBER 2003*

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## ACKNOWLEDGEMENTS

# **WAR CRIMES BEFORE DOMESTIC COURTS**

## **I. Introduction**

Since its establishment in March 2001, the Organisation for Security and Co-operation in Europe (OSCE) Mission to Federal Republic of Yugoslavia/Serbia and Montenegro<sup>1</sup> (hereafter referred to as the Mission), provides assistance and advice to Serbia and Montenegro authorities, as well as to interested individuals, groups and organisations<sup>2</sup>. In its support to the rule of law, the Mission assists the authorities in implementing comprehensive legislation in the areas of the Mission's Mandate as well as in restructuring and training the judiciary.

The Mission has established as a priority for 2003 the need to support the capacity of the Serbia and Montenegro judiciary to conduct its own war crime trials. The war crime trials monitoring project is funded by the Royal Netherlands Embassy in Serbia and Montenegro. This report covers the period from January to October 2003. The current assessment is that the national judiciary lacks full capacity to conduct war crime trials in accordance with universally adopted standards. The development of the full capacity of the national judiciary to conduct war crime trials will prepare Serbia and Montenegro in dealing with the challenges ahead.

Bearing this in mind, the Mission has elaborated a strategy to enhance the potential of national courts to deal with war crime trials, and launched a parallel Selected Trials Monitoring Project. The Mission welcomes the effort made by the Government of Serbia in establishing a Special Court for War Crimes, and encourages the Government to ensure that this initial commitment is translated into the end of impunity for war crime perpetrators, and that justice is delivered to the victims of these crimes.

ICTY completion strategy relies on the domestic judiciary to try those responsible for war crimes that will not be tried by the Hague Tribunal. In this regard, the need to reinforce the domestic courts is of paramount importance to end with impunity and foster reconciliation.

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<sup>1</sup> In accordance with the OSCE PC Decision 533 the title of the Mission has been changed to "OSCE Mission to Serbia and Montenegro"

<sup>2</sup> In accordance with the Mandate determined by the OSCE Permanent Council Decision 401 of January 11, 2001 on the establishment of the Mission to the Former Republic of Yugoslavia

## II. The Selected Trials Monitoring Project <sup>3</sup>

### 1. Reasons and considerations that have led to the project

In light of the judiciary of Serbia enjoying concurrent jurisdiction with the International Criminal Tribunal for Former Yugoslavia (ICTY)<sup>4</sup> over the conduct of trials against individuals accountable for gross violations of international humanitarian law (i.e. war crimes), and the announcement by the ICTY that it intends to complete its investigations by the end of 2004, finish first-instance trials by 2008 and appellate procedures by 2010 and furthermore might consider to transfer its cases and the evidence collected to the respective domestic judiciaries in the region, the number of war crime trials to be held before national courts is expected to grow.

Shifting the burden to national courts can be a success only if local Prosecutors have the will and the means to prosecute these cases effectively, and if the courts act independently and impartially in accordance with international fair trial standards. Since the Serbian judiciary is not familiar with war crime trials, there is a strong likelihood that they will entail a lot of problems and challenges.

Domestic war crime proceedings have been carried out in a number of countries, including East Timor, Sierra Leone, Belgium, Bosnia and Herzegovina, Canada, Kosovo (Serbia and Montenegro) etc. The experience of these and other countries in conducting war crime trials provides significant insight into the challenges and difficulties in pursuing a policy of accountability for the sake of obtaining justice.

The investigation and prosecution of war crimes has proved to be a highly complicated and tough task. There are various reasons for this: As a rule, these crimes were committed several years ago on foreign territory. Local investigation is often not feasible. The options for gathering evidence by requests for mutual assistance are limited. Sitting regimes are not always willing to give full co-operation. Moreover, governments may have an interest in providing biased information on members of their own party and members of the opposition. Atrocities are rarely recorded and if so, such documents are not open for inspection. Up to now, evidence of war crimes strongly relies on witness statements. These witnesses must be found and be willing to make incriminating statements. In several cases, such statements cannot be made freely. Witnesses may be intimidated or be threatened with reprisal. In many cases, witnesses will be more prepared to give anonymous evidence, for instance for use in reports prepared by non-governmental organizations such as Amnesty. However, European Court of Human Rights case law provides that a person's conviction may not be solely or substantially based on anonymous statements. Furthermore, witnesses willing to make a statement may have an interest in incriminating rival groups. And even witnesses who act in good faith may be unable to give accurate statements. Having been a witness to or a victim of atrocities deeply affects a person. This, together with the lapse of time, may have a severely

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<sup>3</sup> Project funded by the "Royal Netherlands Embassy, Belgrade"

<sup>4</sup> The International Criminal Tribunal for the former Yugoslavia (ICTY) was established by the Security Council Resolution 827. This resolution was passed on 25 May 1993 in the face of the serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991, and as a response to the threat to international peace and security posed by those serious violations.

disturbing impact on a person's recollection. It is also a well-known fact that contacts with fellow-victims during the course of time can make it more difficult to sharply distinguish between personal and communal experiences. Although War Crime Tribunals can operate under special conditions, few individual states have been successful in bringing war criminals to justice.<sup>5</sup>

As Serbia has embarked on its own war crime trials, it is prudent to keep expectations in line with the considerable impediments that the country will inevitably encounter while pursuing this goal. Achieving the goal is possible, but only if the Government's long-term commitment goes hand in hand with substantial resources and unwavering political will. The international community is very keen to find out if national courts are capable of conducting this type of trials properly, with due regard for effective prosecution and the right to a fair trial.<sup>6</sup>

The Mission, as well as other organizations dealing with judicial reform need to have exact information about possible problems and difficulties. Monitoring the war crime trials and other selected trials of high sensitivity is very important insofar as it also provides a good evaluation of the needs for activities to support the ongoing judicial reform process. This could be more than helpful not only for the judiciary itself, but also international and national organizations focused on judicial reform.<sup>7</sup>

## **2. Strategy for National War Crime Trials**

With a view to supporting the establishment of satisfactory conditions for conducting war crime trials in Serbia and Montenegro the Mission has developed a Strategy for National War Crime Trials.

The Mission's comprehensive strategy has been designed to provide assistance and expertise to build up the national capacity to conduct war crime trials. The Mission's strategy takes into consideration all aspects and areas that this programme needs to tackle in order for war crime trials to be conducted with all internationally recognized guarantees.

The Strategy consists of six steps necessary for the establishment of a proper background for war crime trials:

- Assessment of needs
- Establishment of a legal and institutional framework
- Establishment of a strong network of regional co-operation (evidence gathering, forensic expertise and a witness protection programme)
- Education and training
- Public opinion and transparency of the proceedings
- Co-operation and exchange of information with ICTY

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<sup>5</sup> Needs Assessment Report by Mark Ellis, Executive Director, International Bar Association, to the OSCE Mission to Serbia and Montenegro.

<sup>6</sup> Ibid.

<sup>7</sup> Ibid.

Since the Serbian judiciary has already conducted several war crime trials, the Mission has, alongside the implementation of the Strategy, launched the Selected Trials Monitoring Project in order to:

- Monitor selected trials in Serbia for a nine-month period (from January to October 2003)
- Prepare and publish a report based on the conclusions, suggestions and recommendations from interim trial monitoring reports produced until the end of October.
- Organize, after the Report is published, a Roundtable with representatives of the Serbian judiciary and relevant international and national organizations, to present the report's conclusions, suggestions and recommendations and selected trial monitoring experiences.

### **3. Objectives of the Selected Trial Monitoring Project**

The main objective of the Project is to evaluate the ability of domestic courts to conduct war crime trials properly, and to find out if the national legislation provides an adequate legal basis. Monitoring activities aim at fulfilling the following objectives:

#### **Main objective:**

To evaluate the fairness of a trial in the light of its conformity with applicable domestic laws and international human rights and fair trial standards.

#### **Additional objectives:**

- To make the courts, the competent local authorities and the general public aware of international interest and concerns about the trial in question;
- To contribute to an atmosphere that may encourage the courts to ensure that all the rights of the defence are properly protected (defence lawyers in all parts of the world have frequently commended the change in the atmosphere in the courts and the facilities afforded to the defence as a result of the presence of international observers);
- To obtain information about the conduct of a trial, the nature of the case against the accused and the legislation under which s/he is tried;
- To provide moral support for the accused, victims and witnesses and/or their families;
- To collect background information about the political and legal circumstances leading to the trial.

### **III. Retrospective of war crime trials conducted in Serbia and Montenegro**

This Chapter offers a list and a brief account of war crime trials that have been conducted so far before the courts of Serbia and Montenegro. The mention of these trials is to help the reader see if there is a genuine will to process such trials within the national judicial system, and to make a comparison between the number of trials opened so far and the number of registered war crimes referred to in the next chapter.

### **1. "Yellow Wasp Case"**

Serbia's first war crime trial was the 1996 trial of two brothers, Dusan and Vojin Vuckovic. They were charged with war crimes against civilians committed while the brothers were members of the "Zuta Osa" (Yellow Wasp) paramilitary formation in Bosnia and Herzegovina. Dusko, nicknamed Repic, was charged with crimes against civilians, rape and robbery, and Vojin, nicknamed Zuca, was charged with impersonation and illegal possession of weapons and explosives.

They were tried in July 1996, before the District Court of Sabac. After an appeal, two years later, the Supreme Court of Serbia sentenced Dusko Vuckovic to ten years in prison for war crimes against civilian population and rape. The Court had previously established beyond reasonable doubt that Repic had killed 17 and wounded 20 Bosniacs in late June of 1992, in the Culture Hall in Celopek near Zvornik, and raped Husnija Coric. The Supreme Court sentenced Vojin Vuckovic to four months in prison for illegal possession of firearms, ammunition and explosives.

### **2. "Strpci Case"**

On 9 September 2002 at the Bijelo Polje Higher Court in Montenegro, Nebojsa Ranisavljevic was sentenced to a prison term of 15 years for "a war crimes against civilian population" (Article 142 of the FRY Criminal Code). According to the indictment, he was among some 20 paramilitaries under the command of Milan Lukic (tried in absentia at the Belgrade District Court in the Sjeverin case, and indicted and wanted by the ICTY) who abducted and subsequently murdered 20 civilians (19 Bosniacs and 1 Croat). The victims were abducted from the train on the Belgrade-Bar railway line, at the Strpci railway station in Bosnia and Herzegovina.

### **3. "Ivan Nikolic Case"**

The first war crime trial in Serbia in connection with the 1999 Kosovo war was the trial of Ivan Nikolic, a former Yugoslav Army (VJ) soldier. The trial was held in Prokuplje in 2001-02. Nikolic had been originally charged with murder (the killing of two Kosovo Albanian civilians in the Kosovo town of Podujevo, on 24 May 1999), but the charges were amended to "a war crime against civilian population". He was sentenced to eight years in prison.

### **4. "Captain Petrovic et al. Case"**



Late in 2000 the Nis-based Military Court found Captain Dragisa Petrovic and two Army reservists, Nenad Stamenkovic and Tomica Jovic, guilty of the murder of two Kosovo Albanian civilians, committed on 28 March 1999. Dragisa Petrovic was sentenced to four years and ten months in prison, and Nenad Stamenkovic and Tomica Jovic to a prison term of four and a half years each. The Supreme Military Court ordered a re-trial, but the new rulings by the Nis Court were virtually the same.

#### **5. "Colonel Mancic et al. Case"**

In the indictment of 19 July 2002, a military Prosecutor charged Yugoslav Army Lieutenant-Colonel Zlatan Mancic and Captain Rade Radojevic with incitement to murder, and privates Danilo Tesic and Misel Seregi as accomplices. In addition, Mancic was charged with abusing his official position over a longer term and with killing Kosovo Albanian civilians and burning their bodies in Kosovo 1999.

The Supreme Military Court sentenced Mancic to 14 years, Radojevic to nine years, Tesic to seven and Seregi to five years of imprisonment.

#### **6. "Orahovac Case"**

On 9 May 1999 in Orahovac (Kosovo) the two accused, Petkovic Boban and Simic Djordje, both members of the Serbian police reserve, murdered three Albanians, Ismail Durguti, Sezair Miftari and Sefkija Miftari.

The trial started in June 2000. Under the first indictment, the two defendants were accused of a "simple" murder, not a war crime. The indictment was amended twice and the final charge was for "war crimes against civilians."

In the first judgment of the District Court of Pozarevac, both defendants were sentenced to imprisonment (Petkovic to four years and ten months, and Simic to one year). The Supreme Court of Serbia annulled the ruling, and ordered re-trial.

In a new trial, the Pozarevac District Court sentenced the first defendant, Petkovic Boban, to five years in prison, while the second defendant, Simic Djordje, was acquitted.

#### **7. "Sjeverin case"**

The Belgrade District Prosecutor preferred several indictments before the District Court of Belgrade against:

- Lukic Milan , 36 years old, from Visegrad, Bosnia and Herzegovina
- Krsmanovic Oliver, 40 years old, from Visegrad, Bosnia and Herzegovina
- Dragicevic Dragutin, 35 years old, from Srebrenica, Bosnia and Herzegovina
- Sevic Djordje , 31 years old, from Ruma, the Federal Republic of Yugoslavia

for committing war crimes against civilians, referred to under Art. 142 of the Criminal Code of the Federal Republic of Yugoslavia (FRY). The Prosecutor accused the defendants of having participated in the abduction and subsequent murder of 17 Bosniacs from Sjeverin, in the Yugoslav municipality of Priboj, on 22 October 1992.

## **8. "Podujevo case"**

The District Prosecutor of Prokuplje preferred before the Prokuplje District Court an indictment against:

- Cvjetan Sasa , 27 years old, from Novi Sad, Vojvodina
- Demirovic Dejan from Beska, Vojvodina

for committing a war crime against civilians, referred to under Art.142 of the FRY Penal Code, larceny, Art. 166 of the Penal Code of the Republic of Serbia (RS), (Cvjetan only) and illegal possession of firearms, Art. 33, par.1 of the RS Penal Code (Cvjetan only).

The Prosecutor accused the defendants of having taken part in the murder of four identified and several unidentified civilians of Albanian origin in Podujevo, the Province of Kosovo, on 28 March 1999, during the NATO air campaign. In addition, Sasa Cvjetan was accused of larceny and illegal possession of firearms.

The Supreme Court of Serbia decided on 27 November 2002 to transfer to the Belgrade District Court further jurisdiction over the trial of defendants Cvjetan Sasa and Demirovic Dejan.

The decision was based upon a motion filed by the acting Public Prosecutor in Prokuplje. The Prosecutor argued in the motion that a transfer of territorial jurisdiction was necessary if an undisturbed interrogation of witnesses of Albanian ethnicity was to be provided.

In the rationale of the writ, the Supreme Court of Serbia accepted the reasons of the acting Public Prosecutor of Prokuplje, and designated the jurisdiction to the Belgrade District Court under Art. 36, para. 1 of the Criminal Procedure Code.

## **9. "Ovcara Case"**

In November 1991, some 260 non-Serb captives were taken from the Vukovar hospital by the Serb forces, and eventually killed at the nearby Ovcara farm.

In an indictment issued in 1995, the ICTY Prosecutor charged Mile Mrksic, Miroslav Radic and Veselin Sljivancanin (better known as the "Vukovar Three") with killing at the Ovcara farm approximately 260 captive non-Serbs, who had been taken from the Vukovar hospital on 20 November 1991. Their responsibility for the crimes is individual and/or command responsibility.

The judiciary of Serbia in co-operation with the ICTY started the proceeding against the direct perpetrators of the crime.

The District Prosecutor in Novi Sad filed a request on 5 June 2003 for the investigation of six persons for the criminal offence of "a crime against prisoners of war," under Article 144 of the Basic Criminal Law of Serbia and Montenegro.

The investigation of the alleged direct perpetrators of the crimes began on 6 June 2003, the request for investigation being based on individual responsibility.

The "Ovcara case" is still at the investigation stage, and the indictment has not been issued yet. The trial will be transferred to and resumed by the Belgrade District Court's War Crimes Panel, instituted by the new Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, enacted on 1 June 2003.

Serbia's courts are now processing three cases - "Sjeverin", "Podujevo" and "Ovcara." Two of these trials ("Sjeverin" and "Podujevo") are carried out by the Belgrade District Court, and one ("Ovcara") by the District Court of Novi Sad.

The perpetrators have been charged with "war crimes against civilians" pursuant to Article 142 ("Sjeverin" and "Podujevo") and "war crimes against prisoners of war" under Article 144 of the Basic Criminal Code, in the "Ovcara" case.

During the implementation of the Selected Trials Monitoring Project, the MISSION trial monitors covered the "Sjeverin" and "Podujevo" trials.

## **IV. Assessment of potential war crime trials in Serbia and Montenegro**

### **1. Introduction**

Within the Mission's Project, the trial monitors prepared a preliminary evaluation of the potential war crime caseload for the national courts in May 2003. The aim of this assessment was to identify the number and the nature of war crime cases that could be tried by the Serbia and Montenegro judiciary, and to establish the following information:

1. Number of war crime cases processed in front of civilian or military courts in Serbia and Montenegro (the cases that have entered the procedure or have been completed).
2. Plans for the improvement of the capacity of courts and Prosecutors to conduct war crime trials.
3. Number of war crime investigations conducted so far.
4. Number of potential war crime trials that might be conducted in Serbia and Montenegro (registered war crimes).
5. Priorities of the national judiciary in terms of caseload (i.e. which cases would they prioritize: Kosovo (Serbs or Albanians), Bosnia and Herzegovina, Croatia?)

In order to get the information, the trial monitors contacted the relevant governmental and judicial bodies (the Ministry of Justice, the Ministry of Internal Affairs, the Prosecutor's Office, the Ministry of Defence, the Supreme Military Court), national and international organizations (Humanitarian Law Centre, Human Rights Watch, Amnesty International, Helsinki Committee).

They worked together with their colleagues at the OSCE Missions to Bosnia and Herzegovina and Croatia to identify the priorities of the judiciary in the neighboring countries (i.e. Bosnia and Herzegovina and Croatia), in processing war crimes involving the citizens of Serbia and Montenegro (not only as possibly accused, but also as potential victims or witnesses).

The only reply from the authorities was a letter from the Ministry of Internal Affairs and another one from the Ministry of Defence of Serbia and Montenegro.

Local media were yet another source of information (statements by high-ranking officials and governmental bodies, press articles about the ongoing war crime trials, statements by representatives of the most respectable NGOs, etc.).

More information was gathered at the meetings with the Republican Prosecutor, representatives of the Ministry of Justice and other high-ranking officials.

The following publications were also used as a source of information:

- “Application of Rules of the International Humanitarian Law - Yugoslav Army and Kosovo 1998-1999”, by Ivan Markovic.
- “Under Orders - War crimes in Kosovo”, published by Human Rights Watch.
- OSCE Report: Human Rights in Kosovo: "As seen as told", October 1998 - October 1999.
- “Under Scrutiny” (“Pod Lupom”), by the Humanitarian Law Center.

## 2. Procedures concerning committed war crimes

In a letter dated 12 May 2003, the Ministry of Internal Affairs wrote:

“The police are investigating several events that had happened on the territory of Former Yugoslavia and as a consequence had crimes against humanity and international law”.

The Ministry reported about the investigations into the mass graves of Batajnica, Petrovo Selo, Perucica as well as the “Hladnjaca” (Freezer Truck) case. Investigations were also underway into the events that happened in the Kosovo village Suva Reka, usually described as the “Berise case”, along with the “Ovcara” and “Lovac” cases related to the events in Vukovar, Croatia.

The Ministry had also submitted to the District Prosecutor of Negotin a crime record concerning the killings of brothers Argon, Jili and Mehmed Bitici, US citizens of Albanian origin. A relevant investigation is still in progress before the Negotin-based District Court.<sup>8</sup>

The interior ministry also submitted the criminal records of a few hundred criminal acts of terrorism, committed by ethnic Albanians in Kosovo, in 1998-1999. So far, the Ministry has forwarded eight crime records to the ICTY Prosecutor, together with more than 10,000 pages of documents containing evidence and witness testimonies. These materials offered information about 125 members of the Kosovo Liberation Army (KLA), mostly officers, suspected of having committed war crimes - genocide, crimes against humanity, grave violations of the 1949 Geneva Convention etc. The material of the Ministry of Interior also offered information on 114 killings, 120 abductions, 120 property crimes, 457 cases of destruction and looting of the sacral objects, as well as about the forced expulsion of 237,151 persons from Kosovo.

The conclusion is that the Ministry of Interior has largely investigated crimes committed by KLA soldiers and only a few cases where potential perpetrators were Serbian police and security forces. The underlying reason for the latter investigations was that the public had learnt about them, and the police had no choice but to begin an investigation.

The information on proceedings related to war crimes committed by Yugoslav army soldiers is based on a letter by the Ministry of Defence of Serbia and Montenegro dated 30 June 2003, and the military publication “Application of Rules of the International Humanitarian Law - Yugoslav Army and Kosovo 1998-1999” by Ivan Markovic.

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<sup>8</sup> The trial monitors have sent a letter to the president of the District court in Negotin to obtain information regarding the trial, and the possibility of monitoring it, but no reply was obtained yet.

According to the mentioned sources, the Military Prosecutor and the Military Police initiated criminal procedures against 304 persons for criminal offences committed in Kosovo between 1 March 1998 and 26 June 1999, that included elements of humanitarian law violations.

Of those 304 persons, proceedings for property-related criminal offences were instituted against 267 persons, and for criminal offences against humanity and international law, life and body, human integrity and morals against 38 persons. Thirty-eight were placed under investigation for criminal offences against humanity and international law. Twenty-six were investigated over murder, and eight for rape. Investigation was suspended in two cases, while 12 investigations were transferred to civil courts.<sup>9</sup> Investigation of three persons is in progress, and 21 persons have been indicted.

### **3. Potential war crime cases**

The assessment of potential war crime trials that could or should be processed in Serbia and Montenegro was one of the main targets of the project. However the exact number of committed war crimes and the exact number of potential trials is almost impossible to assess. Consequently, only the major war crimes that resulted in mass killings of the civilian population have been mentioned. War crimes were committed in and outside Serbia and Montenegro (the Former Federal Republic of Yugoslavia) for nearly a decade (1991-1999).

In Priboj, a town in the Serbian region of Sandzak, largely populated by Bosniacs, different military and paramilitary groups from Serbia and Bosnia and Herzegovina were constantly present during the conflicts. Besides the notorious cases “Sjeverin” and “Strpce”, the Helsinki Committee reported on many other separate killings and abductions of Sandzak’s Muslims. Very few perpetrators have either been accused or tried so far.

The Yugoslav Army (VJ) and the Serbian security forces were present beside Kosovo also in Bosnia and Herzegovina and Croatia during the conflicts and there are indications that some still active officers were involved in some of the major war crimes. The trials of some senior army officers, allegedly involved in those crimes, are already developing before the ICTY. Lower-ranking officers and direct perpetrators, who are still at large, should be tried by domestic courts.

Human Rights Watch (HRW) published the book “Under Orders – War Crimes in Kosovo”, offering a series of reports on torture, killings, rapes, forced expulsions and other war crimes that the Serbian and Yugoslav government forces committed against Kosovo Albanians between 24 March and 12 June 1999, during the NATO air campaign against Yugoslavia.

Three chapters of this book have also documented abuses committed by the Kosovo Albanian insurgency KLA, which abducted and murdered civilians during and after the war, as well as abuses by NATO, which failed to minimize civilian casualties during the bombing of Yugoslavia. In the words of the author, the goal of this book is to provide a credible account

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<sup>9</sup> The trial monitors sent letters to the presidents of civil (district) courts that took over these military cases in order to trace these cases, to obtain information regarding the trials, and the possibility of monitoring. Eight District courts were contacted and so far five have responded. In only two cases were the charges for committed war crimes, and the others for murder or rape. Two persons were relinquished, one was sentenced to eight years of imprisonment, one person was acquitted and against the others trials are on going.

of the terrible events that have taken place, in the hope that the perpetrators will be brought to justice.

A Human Rights Watch research showed that 3,453 people were killed by the Serbian or Yugoslav government forces, but the figure is definitely lower than the total.

Since July 2001, the ICTY has exhumed approximately 4,300 bodies believed to have been victims of unlawful killings by Serbian and Yugoslav forces in Kosovo. Most importantly, there is incontrovertible evidence of grave tampering and the removal of bodies by Serbian and Yugoslav troops, as the post-Milosevic Serbian government was beginning to confirm in the summer of 2001. Human Rights Watch documented attempts to hide or dispose of bodies in Trnje/Ternje, Djakovica/Gjakove, Izbica/Izbice, Rezala/Rezalle, Velika Krusa and Mala Krusa/Krushe e Madhe and Krushe Vogel, Suva Reka/Suhareke, Slovinje, Poklek, Kotlina /Kotline, and Pusto Selo/Pastase).

Furthermore, the International Committee of Red Cross (ICRC) reports that 3,525 persons, including ethnic Serbs, have gone missing during the clashes.

The OSCE Report "Human Rights in Kosovo, As Seen, As Told", from October 1998 to October 1999, analyses the nature of the broad range of human rights and humanitarian law violations committed in Kosovo in the reporting period. The expert report shows that both parties to the conflict committed summary and arbitrary killings of civilians.

According to these two sources, hardly any municipality in Kosovo was not the scene of a major war crimes that resulted in massive civilian casualties. The following is a list of only the major war crimes, which are detailed in the HRW publication:

- Three mass killings of civilians in Izbica, Poklek and Shavarina Mine of the Drenica Region - Glogovac (Glogofc) and Srbica (Skenderaj) municipalities;
- two mass killings in the Djakovica (Gjakove) municipality in the Cerim and Meja villages;
- two mass murders in villages Slovinje (Sillovi) and Malo Ribare of the Lipjan (Lipjan) municipality;
- one mass murder in the Pusto Selo (Pastasel) village of the Orahovac (Rrahovec) municipality;
- three mass killings in the Pec (Peja) municipality in villages Cuska (Qyshk), Zahac (Zahaq) and Ljubinec;
- at least four mass killings on the Prizren-Djakovica (Gjakove) Road (Orahovac (Rrahovec) and Prizren municipality;
- two mass killing in the Suva Reka (Suhareke) municipality; and
- one mass killing in the Vucitrn (Vushtrri) municipality.

Each of these killings and massacres deserves a separate investigation and trial. These trials should be conducted by Serbia and Montenegro's courts, since most potential perpetrators are probably former or still active members of the Serbian security or military forces.

Three chapters of the "Under Orders" describe the violence of the KLA insurgency, which abducted and murdered civilians during and after the war. More than 1,000 Serbs and Roma have been murdered or have gone missing since 12 June 1999. Criminal gangs or vengeful

individuals might have been involved in some incidents since the war, but KLA is clearly responsible for many of these crimes. These crimes should be processed in front of the courts in Kosovo. Most of the perpetrators are still living in Kosovo and the local courts, with international judges, and the UN-led police force are likely to handle serious investigations and these trials properly.

Apart from the above-listed crimes, the OSCE Report "Human Rights in Kosovo, As Seen, As Told", from October 1998 to October 1999, offers an insight into the killing of Kosovo Albanians committed by the Serbian security forces, as well as the KLA murders of Serbs and Kosovo Albanians believed to be "collaborators" or sympathizers with the Serbian authorities.

Most of the crimes committed between March and October 1999 that have been listed in the OSCE report were also registered by the HRW, so herein are only mentioned some of the registered killings committed by the Serbian security forces from October 1998 to March 1999, and not those committed by the KLA.

The mass killing at Racak/Recak (Stimlje/Shtime municipality) on 15 January 1999, when 45 Kosovo Albanians were killed, together with two other incidents later that month in the Djakovica/Gjakova municipality, in the villages of Rogovo/Rogove and Rakovina/Rakovine, are the main mass killings that occurred before the spring of 1999.

The Racak events, as verified by the OSCE-KVM, indicated evidence of arbitrary detentions, extra-judicial killings and the mutilation of unarmed civilians by the security forces of the FRY.

Summary and arbitrary killings became commonplace throughout Kosovo as soon as the NATO air campaign against the FRY began in the night of 24 March 1999. The most horrible crimes happened in almost every municipality. During the forced expulsion of Kosovo Albanians, men would be often gathered together and killed arbitrarily.



## V. Analysis of the Monitored War Crime Trials in Serbia

From January to October 2003, the Mission trial monitors covered two war crime trials developing before Serbian courts. The conclusions, suggestions and recommendations this Final Report offers have been based on the monitors' observations, the information they collected and valuable experience gained during the trials.

For the sake of continuity and regularity, the trial monitors produced preliminary reports after each main hearing during the reporting period. These reports were treated as restricted documents, and were shared with the ICTY and some Embassies.

In order to have a well-structured Final Report with a substantial analysis of the monitored trials, the following chapter has been divided into five subchapters. The first subchapter lists the laws that applied to the monitored trials. The second subchapter provides a breakdown of relevant domestic and international regulations and fair trial standards. Subchapters 3 and 4 summarize and present separate analyses of each of the two monitored trials, with a critical overview. The last subchapter offers an overall analysis of the Serbian judiciary in terms of its competence and ability to conduct war crime trials.

In the preliminary reports and the Final Report alike, a heavy emphasis was placed on the procedural aspects of the trials, and their compliance with relevant national legislation and recognized international fair trial standards. The quality of the evidence presented during the two trials was not included in the study.

### 1. Applicable law (domestic and international)

#### Domestic

- The *Constitution of the Republic of Serbia* (Official Gazette No. 1/1990). Articles 15, 16, 22, 23 and 24 of the Constitution refer to fair trial.
- *Law on the Protection of Rights and Freedoms of National Minorities* (Official Gazette of FRY, No. 11 of 27 February 2002). The right to fair trial and fair trial standards are referred to under Articles 9, 14, 15, 16, 17, 18, 19, 20, 21 and 22 of the Law.
- The *Criminal Procedure Code* (Official Gazette of Federal Republic of Yugoslavia No. 70/2001 and 68/2002) came into force on 28 March 2002.

The Code has established the rules that guarantee that an innocent person shall not be convicted, and that a criminal sanction shall be imposed on the perpetrator, subject to the provisions of the Criminal Code and in lawfully conducted proceedings.

The Code begins with the basic principles of a fair trial, moving onto court jurisdiction, the rules governing the presentation of evidence and the phases of a trial, namely pre-trial procedure, investigation, main hearing and the appellate proceedings.<sup>10</sup>

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<sup>10</sup> Only a brief overview of the Criminal Code is presented without mentioning every chapter.

- The *Criminal Code of the Federal Republic of Yugoslavia (FRY)*, which has been renamed the *Basic Criminal Code*, (Official Gazette of SFRY Nos. 44/76, 36/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90 and 54/90; Official Gazette of FRY No. 35/92, 16/93, 37/93, 24/94 and 61/2001; Official Gazette of the Republic of Serbia No. 39/2003).

Chapter XVI of the Code contains criminal acts against humanity and international law. In the two monitored trials, the accused were charged with war crimes against the civilian population, as provided for by Article 142 para. 1:

“Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labor, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or imprisonment of forty years.”<sup>11</sup>

### International

- The Geneva Convention Relative to the Protection of Civilian Persons in Time of War of 12 August 1949, and the Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II) of 8 June 1977.

## **2. Selected international legal references and fair trial standards**

### Article 6 of The European Convention on Human rights:

1. In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgement shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of private life of the parties so require, or to the

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<sup>11</sup> The principle of mandatory application of a less severe criminal law is regulated in Article 4 of the Basic Criminal Code: "The law that was in force at the time when a criminal act was committed shall be applied to the person who has committed the criminal act. If the law has been amended one or more times after the criminal act was committed, the law which is less severe in relation to the offender shall be applied." Para. 2 is applicable since the 1993 amendments to the Criminal Code provide a 20-year prison sentence for war crimes against civilians.

extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.

2. Everyone charged with a criminal offence shall be presumed innocent until proved guilty according to law.
3. Everyone charged with a criminal offence has the following minimum rights;
  - a) To be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him;
  - b) Have adequate time and facilities for the preparation of his defence;
  - c) To defend himself in person or through legal assistance of his own choosing or, if he has not sufficient means to pay for legal assistance, to be given it free when the interests of justice so require;
  - d) To examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him;
  - e) To have the free assistance of an interpreter if he cannot understand or speak the language used in Court.

Article 14 of the International Covenant on Civil and Political rights:

1. All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law. The press and the public may be excluded from all or part of a trial for reasons of morals, public order (*ordre public*) or national security in a democratic society, or when the interest of the private lives of the Parties so requires, or to the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice; but any judgement rendered in a criminal case or in a suit at law shall be made public except where the interest of juvenile persons otherwise requires or the proceedings concern matrimonial disputes of the guardianship of children.
2. Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law.
3. In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
  - a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
  - b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
  - c) To be tried without undue delay;
  - d) To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice

- so require, and without payment by him in any such case if he does not have sufficient means to pay for it;
- e) To examine, or have examined, the witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions
  4. as witnesses against him;
  - f) To have free assistance of an interpreter if he cannot understand or speak the language used in court;
  - g) Not to be compelled to testify against himself or to confess guilt.
5. In the case of juvenile persons, the procedure shall be such as will take account of their age and the desirability of promoting their rehabilitation.
  6. Everyone convicted of a crime shall have the right to his conviction and sentence being reviewed by a higher tribunal according to law.
  7. When a person has by a final decision been convicted of a criminal offence and when subsequently his conviction has been reversed or he has been pardoned on the ground that a new or newly discovered fact shows conclusively that there has been a miscarriage of justice, the person who has suffered punishment as a result of such conviction shall be compensated according to law, unless it is proved that the non-disclosure of the unknown fact in time is wholly or partly attributable to him.
  8. No one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted in accordance with the law and penal procedure of each country.

*International fair trial standards<sup>12</sup>:*

1. Competent, independent and impartial tribunal established by law;
2. Fair and public hearing;
3. Public pronouncement of the judgment;
4. Equality of persons before courts and tribunals;
5. Presumption of innocence;
6. Prompt and adequate information about the charge in a language the defendant understands;
7. Adequate time and facilities for the preparation of the defendant's defense and communication with counsel of his/her own choosing;
8. Right to be tried without undue delay;
9. General prohibition on trials in absentia;
10. The right to call and examine witnesses;
11. The right to interpretation;
12. Not to be compelled to testify or to confess guilt;
13. The right to appeal;
14. Prohibition of double jeopardy;

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<sup>12</sup> See Chapter 8 (Trial Observation) of the Manual on Human Rights Monitoring, Norwegian Institute of Human Rights; Trial Observation Manual, International Commission of Jurists; Fair Trial Manual, Amnesty International

## 15. Prohibition on Retroactive Application of Criminal Laws.

### 3. Sjeverin Case

#### *Introduction - short historical background of the incident*

On 20 January 2003 an important war crime trial began before the Belgrade District Court against four Serbs accused of kidnapping, torturing, and killing 17 Muslim citizens of Serbia in 1992. The crime happened in an area of Bosnia and Herzegovina controlled by Bosnian Serbs, near the border with Serbia. As most of the victims had resided in the village of Sjeverin, in the southwest of Serbia, the trial is usually referred to as “the Sjeverin case”.<sup>13</sup> Sandzak is a region of Serbia and Montenegro bordering on Bosnia and Herzegovina and the Kosovo province. It is administratively divided between the Republic of Serbia and the Republic of Montenegro. Sandzak is an ethnically diverse area, the two largest groups being Bosniacs (Bosnian Muslims) and Serbs. According to the 1991 census, the Muslim community made up 60 per cent of the then population, and Serbs and Montenegrins the remaining 40 per cent.

The breakdown of former Yugoslavia made the Sandzak region very tense. The outbreak of armed conflicts in Bosnia and Herzegovina in 1992 only added to the already difficult situation.

The FRY authorities decided that the best response to the volatile situation in Sandzak was to boost military and police presence in the region. In the early 1990s, a long string of serious human rights abuses was reported. They were committed by the Yugoslav security forces and Bosnian Serb paramilitaries crossing into Sandzak from the Republika Srpska. Numerous cases of arbitrary arrests and interrogations, ill-treatment or torture have been reported and documented in connection with these raids, in which political activists and journalists appear to have been particularly targeted. The authorities have reportedly taken little or no action to investigate or put a stop to these abuses. Thousands of Bosniacs were reported to have left the Sandzak region since 1992 and found refuge in various Western European countries.<sup>14</sup>

Harassment, intimidation and violence against the local Muslim population were particularly intense in the Sjeverin-Bukovica border area from 1992 to 1994. Bosnian Serb irregulars and paramilitary units are believed to have been behind most of the abuses, but it seems that the Yugoslav army and police did little to stop the incursions and protect the population. Furthermore, the FRY military and police are alleged to have participated in some violent attacks.

A number of large-scale abductions of Bosniacs have occurred in the 1992-1994 period, mainly in the areas around Sjeverin and Bukovica.

- On 22 October 1992, 17 persons from Sjeverin were abducted.

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<sup>13</sup> Balkans Justice Bulletin: The First Phase of the Sjeverin Trial, Human Rights Watch, March 2003

<sup>14</sup> Data of Amnesty International and the Humanitarian Law Center

- On 15 February 1993, Bosnian Serb irregulars allegedly took 11 Bosniacs from their homes in Bukovica village in Montenegro.
- On 27 February 1993, a passenger train on the Belgrade-Bar railway station was stopped at the Strpci station. A group of armed men wearing unmarked camouflage uniforms kidnapped 19 Muslim men from the train.
- Other cases of smaller-scale abductions have also been reported, the last one on 6 April 1993.<sup>15</sup>

Official investigations launched by the Serbia and Montenegro Ministries of Interior into these abduction cases have been inconclusive.

The Sjeverin incident attracted extensive publicity. The Bosnian Serb Army commander, General Ratko Mladic, publicly condemned the act and denied that his soldiers had been involved. Serbian and federal officials stated they were unable to pursue and prosecute those responsible for the abduction of 17 Yugoslav citizens, because the crime was committed on the territory of the Republika Srpska, in Bosnia and Herzegovina, which was an internationally recognized state. The president of the Federal Republic of Yugoslavia, Dobrica Cosic, announced that he had appointed a state commission to investigate the abduction. No official information about the fate of the passengers has ever been made public.

### *The indictment*

The Deputy District Prosecutor in Belgrade on 20 November 2002 preferred an indictment against:

1. Lukic Milan , 36 years old, from Visegrad, Bosnia and Herzegovina
2. Krsmanovic Oliver, 40 years old, from Visegrad, Bosnia and Herzegovina
3. Dragicevic Dragutin, 35 years old, from Srebrenica, Bosnia and Herzegovina
4. Sevic Djordje , 31 years old, from Ruma, the Federal Republic of Yugoslavia

for committing a war crime against civilians pursuant to Article 142 of the FRY Criminal Code. The Prosecutor accused the defendants of alleged participation in the abduction and subsequent murder of 17 Bosniacs from Sjeverin, in the Yugoslav municipality of Priboj, on 22 October 1992.

That morning, a bus carrying workers from the Bosnian town of Rudo to their workplace in Priboj, in the FRY, was stopped near the village of Mioce, in the Rudo municipality in Bosnia and Herzegovina by armed men in uniforms. The kidnapped passengers were driven in a truck to the "Vilina Vlas" motel in Visegrad, Bosnia and Herzegovina, where they were brutally beaten by the perpetrators in the lobby of the motel, and eventually murdered on the bank of the river Drina.

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<sup>15</sup> Helsinki Committee for Human Rights Sandzak

### *Jurisdiction and composition of the court*

Territorial jurisdiction has been governed by Articles 27 to 32 of the Criminal Procedure Code (CPC). The general rule is that the Court with jurisdiction over the territory where the criminal offence was committed or attempted should be competent. (Article 27)

Since the crime was committed on the territory of another state, the presumption is that the trial should be held before the Belgrade District Court, pursuant to Article 30 para. 1 stipulating that if the place in which a criminal offence was committed is unknown or outside the territory of the Federal Republic of Yugoslavia, jurisdiction shall be granted to the Court within whose territory the defendant's domicile or residence is located.

Article 22 para. 1 of the Law on the Organization of Courts specifies the subject matter jurisdiction of district courts over criminal offences punishable by imprisonment of ten years or a more severe sentence.

The trial was held before a panel of five judges, two professional and three lay judges, pursuant to Article 24 para. 1 of the CPC.

- President of the panel: Judge Nata Mesarovic;
- Members of the panel: Judge Snezana Nikolic Garotic and lay judges: Matjas Dragoslav, Sanja Radosavljevic, Slobodan Zugic.

### *The course of proceedings*

#### *Pre-investigation procedure*

The pre-investigation procedure, under which the police collected information about the criminal act(s) and the offender(s), was carried out in accordance with the previous CPC, valid until 28 March 2002, when the new CPC came into force.

The police had interrogated Djordje Sevic before he was accused. He gave a statement without his defence lawyer, which was allowed the previous CPC. Under the new CPC, the verdict cannot be based on this statement. The police also interviewed several witnesses and obtained the photographs of some victims and perpetrators, made in the "Vilina Vlas" motel during the torture.

#### *Investigation*

Acting upon a request by the District Public Prosecutor, an investigating judge ordered an investigation of the defendant Sevic Djordje on 20 March 2002 and the defendants Lukic Milan, Krsmanovic Oliver and Dragicevic Dragutin and Kovacevic Sinisa on 21 March 2002.

The investigating judge interrogated the defendant Sevic Djordje in the absence of his lawyer, which was permitted by Article 70 para. 1 of the previous CPC. According to Article 71 para. 1 of the new CPC, if proceedings are carried out for criminal offences punishable by imprisonment of ten years or more severe sentence, a defendant must have a defence lawyer present during the first interrogation.

The interrogation of the accused Sevic Djordje without his defence lawyer was a substantive violation of criminal procedure and could be a reason for challenging the judgement, provided that the breach influenced or could have influenced the lawful and faithful rendering of a judgement as provided by Article 368 para. 2 of the CPC.

During the investigation, the investigating judge ordered the identification of the defendants. The identification is a novelty in the domestic criminal procedure, introduced for the first time by Article 104 of the newly enacted CPC.

Once the investigation was completed, the District Public Prosecutor (DPP) preferred an indictment against the four above-named defendants for committing a war crime against civilians, referred to under Article 142 of the FRY Criminal Code.

The defendant Dragutin Dragicevic had been detained before the indictment was issued, while the defendant Sevic Djordje was detained on the Prosecutor's request. It was impossible to obtain accurate information on the duration of two detentions.

The other two defendants, Lukic Milan and Krsmanovic Oliver were tried in absentia, as they were inaccessible to the authorities. According to Article 304 para. 2 of the CPC, defendants can be tried in absentia if particularly important reasons exist. The Court issued warrants for the arrest of the two defendants, as the requirements specified by Article 566 para. 1 had been met.

### *Trial*

A total of 13 main hearings were held during the Sjeverin trial. The final judgement was pronounced on 29 September 2003.

The main hearings were normally open for public, but the panel decided to exclude the public from one hearing to protect public order and for moral considerations, in accordance with Article 292 of the CPC. The panel nevertheless allowed for the presence of monitors from interested organizations.

The underlying reason for the above decision was to prevent possible incidents during the questioning of the crown witness. The Court requested the police to undertake special witness protection measures, because the witness had received anonymous threats. The witness protection measures were introduced by Article 109 para. 3 of the new CPC. During the presentation of evidence, 14 witnesses and 11 witnesses/injured parties were questioned at the main hearings.

The Court took into consideration the case files of the Belgrade District Court - Ki 566/94 - and the District Court of Uzice - Ki 118/92 - (both covering the trials of Lukic Milan for other criminal offences), Lukic's certificate of citizenship, a certificate issued by the Visegrad brigade, a Belgrade police report, a report by the security agency and the presented photographs.

Before the closing arguments of the parties, a Deputy to the Republican Prosecutor amended the indictment to read as follows:



- The incident was a violation of Article 3 para. 1 of the IV Geneva Convention of 12 August 1949 and Article 13 of the Protocol II.
- The crime was committed by members of *an armed group*, instead of a paramilitary formation called "Osvetnici" (Avengers), which was the term used in the original indictment.
- The victims of the crime were *16 Muslim civilians*, instead of 17 as stated in the original indictment.
- The defendant Dragicevic Dragutin *was among the six perpetrators who surrounded the bus*, whereas his name was not mentioned in this context in the first indictment.
- The spelling of the names of the victims, which were misspelt in the original indictment, was corrected.

In his closing argument, the Deputy Republican Prosecutor proposed a prison term of 20 years<sup>16</sup> for the defendants, which he was not entitled to do. Article 344 states that in the closing argument, the Prosecutor may present his assessment of the evidence examined at the trial, the conclusions on the facts relevant for the decision, a substantiated motion regarding the culpability of the accused, the provisions of the Criminal Code and other statutes which should be applied, as well as the aggravating and mitigating circumstances which should be taken into account in sentencing. The Prosecutor cannot propose the level of a punishment, but he may suggest that the Court order a judicial admonition or suspended sentence. He might make an abstract suggestion as to the sentence, for instance a mild or severe sentence.

#### *Pronouncement of the judgement*

The president of the panel read out the judgment on 29 September 2003. The panel found all the defendants guilty of war crimes against civilians, as stipulated by Article 142 para. 1 of the Basic Criminal Code of Serbia and Montenegro.

The defendants were sentenced as follows:

- Lukic Milan, tried *in absentia*, to 20 years in prison;
- Krsmanovic Oliver, tried *in absentia*, to 20 years in prison;
- Dragicevic Dragutin, to 20 years in prison;
- Sevic Djordje, to 15 years in prison.

Once the verdicts were pronounced, the President of the panel gave an oral rationale of the judgment. The Court accepted the following evidence as crucial: A testimony by witness Stojkanovic Velisav (the driver of the bus from which the Bosniacs were abducted), a testimony by witness Udovicic Miloje (a truck driver forced to tow the defendants' vehicle carrying the abducted Bosniacs), a testimony by protected witness DD<sup>17</sup>, and the photo album with pictures taken on the day of the massacre at the motel "Vilina Vlas" and the Drina river bank, showing the defendants and the victims.

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<sup>16</sup> See footnote 11

<sup>17</sup> The institute of protected witness does not exist in the domestic criminal procedure. This formulation is used, because the President of the panel requested physical protection for the witness.

Both parties have the right to appeal within fifteen days upon the receipt of a written verdict, which, according to Article 360 para. 1, has to be issued in writing within eight days of its pronouncement, exceptionally within fifteen days if the case is very difficult. If the verdict is not drawn up within the pre-set deadlines, the President of the panel is bound to inform in writing the President of the Court about the failure. The President of the Court shall undertake measures to have the verdict drawn up in the shortest period of time.

### *Notified insufficiencies of the trial*

Generally speaking, the Court respected the international fair trial standards and domestic criminal procedure during the trial. Some of the insufficiencies noted during the trial are listed below.

- *Records of the trial*

The Defence Counsels and representatives of the injured made frequent remarks to the substance of the trial records. The witness testimonies were not recorded directly, but were formulated and dictated by the President of the panel, which is a routine in accordance with the CPC. In reality, the essence of the testimonies was altered, as the records do not contain the exact words of the witnesses.<sup>18</sup>

- *Composition of the panel*

The trial was held before a five-member panel, consisting of two professional judges and three lay judges, as specified by Article 24 para. 1 of the CPC. As a matter of fact, the President of the panel conducted the trial, while the other members of the panel remained passive, with the exception of the other professional judge who occasionally interfered. The lay judges were not interested in the case and the trial, and their presence was a pure formality requested by the CPC.<sup>19</sup>

- *Protection of witnesses*

The CPC refers to witness protection in Articles 109 para. 3 and Article 504p, which hold that upon a motion by the investigating judge or the President of the panel, the President of the Court or the State Prosecutor may request the police to undertake special measures to protect a witness or an injured party. This, however, can hardly guarantee the protection of a witness. The behavior of the coronal witness during the questioning clearly indicated that she was under pressure and very frightened, which in the monitor's opinion had a very strong effect on her testimony.

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<sup>18</sup> Article 16 of the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes introduced the audio recording of all proceedings at a main hearing, as a procedural novelty. It also provides that the sound recording referred to under para. 1 of this Article shall be transcribed within 72 hours, the transcript being an integral part of the written minutes. The audio recording and transcript are kept as written minutes.

<sup>19</sup> Article 504g of the newly introduced Chapter XXIX of the CPC, (the provisions of which are applicable to organized crime and war crimes court proceedings) provides that first-instance proceedings are held in front of a three-member panel, and second-instance proceedings before a panel of three professional judges.

It is the monitors' opinion that the lack of regulations providing for the protection of witnesses in general, as well as the lack of a special protection programme are serious flaws of the CPC. This is the main reason why it is often difficult for the Court to find key witnesses willing to testify in this type of cases. Without an effective witness protection programme, which could guarantee the full safety of the witnesses and their family, one can hardly expect any improvements in this respect.

- *Questioning of the witnesses*

The President of the panel often insisted that the Prosecutor, Defence Counsel and representatives of the injured persons question the witnesses indirectly, through the President of the panel, although direct questioning is envisaged by the CPC under Article 331. Following the panel President's request, witnesses heard every question twice, which may have prevented a spontaneous reaction and, consequently, affected the testimonies.

During the interrogation of witnesses, the President of the panel decided to reject the answers to certain questions, which were mostly asked by the representatives of the victims. According to Article 331 para. 2 of the CPC, the President of the panel is entitled to forbid a question or reject the answer to a question already posed if the question is impermissible or unrelated to the case. If the President of the panel bans a question or an answer, the parties can request the panel to decide on the matter. The rejections in this case were invariably explained away with the argument that the questions exceeded the limits of the indictment.

A proper balance between the principle of finding the material truth and the limits of the indictment might not be easy to strike, but the President of the panel demonstrated inconsistency in rejecting the answers to certain questions.

His decisions to reject answers were, at times, properly substantiated, but in other cases, the President's arguments were insufficient. The CPC says in Article 296 para. 5 that the panel's rulings should always be pronounced and entered in the trial records along with a brief rationale. The CPC does not expressly require the argumentation for a ruling by the President of the panel, but for the sake of consistency and analogy with the panel's rulings, it is important that his/her decisions too should contain a rationale.

The inconsistency the President of the panel demonstrated, while rejecting the answers to the questions posed by the representatives of victims without explanations, might jeopardize the principle of equality of arms of the parties. It is also in breach of the obligation of the President of the panel, provided in Article 296 of the CPC, to make sure that the case is discussed thoroughly and the truth established.

It is noteworthy that the Court also rejected a whole list of witnesses proposed by the representatives of the injured parties, with the explanation that they did not have any direct knowledge of the abduction. The Court added that the representatives had failed to clarify what elements those testimonies would address.

Some of the key witnesses were not questioned properly during the interrogation. The representatives of the injured parties were not prepared for the questioning as meticulously as

they could have been. Consequently, they proposed late in the proceedings the re-appearance of witnesses for further questioning.<sup>20</sup>

- *Professional attitude of the Judges and Defence Counsel*

During the interrogation of one of the witnesses, the defence lawyers and the President of the panel showed a degree of irreverence towards the injured parties and their families.

One of the defence lawyers commented on the questions posed by the victims' representatives in a manner that made other defence lawyers and the panel laugh. To make matters worse, the same happened again until the family members of the victims, who attended the trial, eventually protested such an offensive behavior. One of them walked out of the courtroom.

Articles 173, 298 and 299 of the CPC say that the Court is bound to protect the honor and reputation of the parties and other participants in the proceedings from insults, threats and any other assault. The Courts shall warn and/or fine the defence lawyer, legal representative, legal guardian, injured person, private Prosecutor or subsidiary Prosecutor who in their briefs or orally offend the Court or a person participating in the proceedings.

The President of the panel failed to implement any of the above-specified measures to protect the authority of the court and the dignity of the attending relatives of the injured.

- *Recommencing of the trial*

The trial had to recommence twice during the last two hearings. Although this did not have a major impact on the outcome of the trial, it prevented a smooth continuance of the trial, caused an additional waste of time, burdened the proceedings and necessitated a repetition of formalities (the reading of the indictment, the interrogation of defendants, the presentation of evidence).

Article 295 para. 1 of the CPC is explicit that the President of the panel, the members of the panel, and the Court reporter and alternate judges shall be present at the trial continuously. Article 287 holds that if the trial is expected to last longer, the President of the panel may file a request to the President of the Court to assign one or two judges or lay judges to attend the trial, in order to replace members of the panel who would be unable to perform their duties.

Given the importance of the trial, it is the monitors' belief that the President of the panel could have easily avoided the recommencing of the trial and the ensuing formalities if he had used the possibilities offered by Article 287.

- *Concerns regarding the work of the Public Prosecution*

The Deputy Republican Prosecutor amended the indictment before the closing arguments.

The wording was changed in as much as to describe the perpetrators as members of an armed group, instead of a paramilitary group mentioned in the first indictment. The Republika

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<sup>20</sup> This is particularly true of the questioning of witness Luka Dragicevic, ex commander of the Visegrad brigade.

Srpska army was not mentioned in the amended indictment at all, even though a very important witness, a senior Republika Srpska army officer, testified that no paramilitary group operated under the command of the Visegrad brigade. The monitors' opinion is that the phrase "armed group" is too vague and does not accurately describe the perpetrators.

Furthermore, the amended indictment not only includes the four defendants who had been tried but five unidentified persons, who were also charged with the crime. Given the great number of people present at the crime scene, watching the torture and murder of the civilians, and given that the Prosecutor possessed the list of all members of the Visegrad brigade, the question is if he put enough effort in identifying all the perpetrators. Indeed, Article 17 of CPC underlines the duty of the Court and state authorities participating in the criminal proceedings to establish all the facts necessary to render a lawful decision truthfully and completely.

Besides, the number of victims was reduced in the new indictment from 17 to 16. It was known from the beginning that one civilian had been abducted in front of his own house the night before the other sixteen civilians were kidnapped from the bus. The trial failed to clarify what had happened, or help bring light as to who kidnapped this person and why.

The Deputy District Prosecutor and the Serbian Deputy Prosecutor (whom the National Assembly elected the Special War Crimes Prosecutor<sup>21</sup> following the proposal of the Minister of Justice) kept a low profile throughout the trial. The Prosecution failed to offer new evidence or witnesses, despite the fact that there was not enough evidence to support the indictment, and failed to help identify the perpetrators.

#### **4. Podujevo case**

##### *Brief overview*

The District Prosecutor of Prokuplje preferred before the Prokuplje District Court an indictment against:

- Cvjetan Sasa, 27 years old, from Novi Sad, Vojvodina
- Demirovic Dejan, from Beska, Vojvodina

for committing a war crime against civilians, Art.142 of the FRY Penal Code, larceny, as provided for by Art. 166 of the RS Penal Code (Cvjetan only) and illegal possession of firearms, under Art. 33, para.1 of the RS Penal Code (Cvjetan only).

The Prosecutor accused the defendants of alleged participation in the murder of four identified and several unidentified civilians of Albanian origin in Podujevo, the Province of Kosovo, on 28 March 1999, during the NATO air campaign. In addition, Sasa Cvjetan was accused of larceny and illegal possession of firearms.

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<sup>21</sup> Article 4 of the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes has provided for the establishment of the Office of the War Crimes Prosecutor

### *Short description of the event*

According to the indictment and the statements of the accused and the witnesses, three buses carrying the “Scorpions” unit arrived from Prolom Banja, a spa at the Kosovo border, to Podujevo early in the morning of 28 March 1999. When they reached the center of the city, the Commander and his Deputy went to the headquarters to confer with Supreme Officers, while the rest of the unit was ordered to remain in the buses until further command. Contrary to the order, the soldiers left the buses to find appropriate housing for the night, as some of them explained later. They went into the streets near the police station, and began to enter the front yards. Shortly after, the shooting began. Later on, a dozen dead civilians, including four wounded children, were found in the backyard of a house in Rahmana Morine Street, some 50 metres away from the police station. Many soldiers and policemen from different units came to the scene of the shooting soon enough, but, according to their statements, none of them saw who shot at the civilians. The children who survived the shooting were transported to the Pristina hospital, where the corpses were also sent for autopsy.

### *The course of proceedings*

The investigation and part of the trial were carried out in front of the District Court of Prokuplje, southern Serbia. The trial was discontinued in November 2002, when the Supreme Court of Serbia transferred the jurisdiction of the case to the Belgrade District Court, in accordance with Art. 36 para. 1 of the CPC and Art. 27 para. 2 of the Law on the Organization of Courts of the Republic of Serbia. The Supreme Court ruling was to ensure competent and effective proceedings. The District Court of Prokuplje held four main hearings, whereas the Belgrade District Court held eight so far.

### *Procedure in front of the District Court in Prokuplje*

#### *Pre-investigation proceeding*

The procedure began with the investigation of the crime scene, conducted on 30 March 1999 by the investigating Judge of the District Court of Prokuplje, Mijat Bajovic.

The record indicates that the investigating Judge carried out the investigation of the crime scene very superficially. The Judge only gave a brief description of the bodies found on the crime scene. Mr. Bajovic failed to describe any other circumstance or evidence that may have directed the investigation towards potential perpetrators or shed some light on the crime.

The police interrogated Cvjetan Sasa before he was accused and in the absence of his defence lawyer. Cvjetan complained at the main hearing that two policemen tortured him, which eventually led him to sign a “confession.” His signature, however, was deliberately changed, which Cvjetan wanted to use in Court as evidence that he was forced to sign the document. On 23 May 1999, the Podujevo police forwarded a crime report to the District Prosecutor of Prokuplje, in which the accused Cvjetan Sasa and Demirovic Dejan were described as possible perpetrators of the crime.

### *Comment*

Since the monitors have not seen the crime report, it is not known which evidence the police used to label the two accused as potential perpetrators is unknown.

### *Investigation*

The investigating Judge of the District Court of Prokuplje Mijat Bajovic interrogated the two indictees on 24 May 1999. Mr. Bajovic questioned Cvjetan in the absence of his defence attorney. The defendant stated at the main hearing that the investigating judge only read his earlier statement and dictated it on the record, failing to allow Cvjetan to produce his own defence or inform him of the right to have legal counsel.

However, the official record says that a lawyer appointed by the Court was present during the interrogation. The accused denied this and underlined that he did not receive an official Court ruling on the appointment of a lawyer.

Cvjetan's defence lawyer Kalanj Djordje objected to the investigation record, because the Court reporter had failed to sign it, even though her signature, inter alia, was essential for the validity of the records. The lawyer implied that a police officer, instead of the Court reporter, had typed the statement. He also filed a motion over the presence of police officers during the interrogation, which is in breach of the CPC.

On that same day, 24 May 1999, the investigating judge, acting upon a request by the District Public Prosecutor, issued a decision on the conduct of the investigation and ordered the detention of the accused Cvjetan and Demirovic.

The investigation began into a criminal offence of murder, as provided by Art. 47, para.2, point 6 of the RS Criminal Code. Cvjetan was additionally suspected of larceny (Art. 166, para.1, point 4 of the RS Penal Code) and illegal possession of firearms (Article 33, para.1 of the Law on Firearms and munitions of Republic of Serbia).

The Prokuplje District Court panel issued a ruling ordering discontinuance of the investigation and vacated the detention on 16 July 1999.

The district Prosecutor repeated his request for the investigation and detention of the defendants on 11 July 2001, this time in connection with a war crime against civilians, as stipulated by Art. 142 of the FRY Criminal Code. Cvjetan was also suspected of larceny (Art. 166, para.1, point 4) and illegal possession of firearms (Article 33, para.1 of the Law on Firearms and munitions of Republic of Serbia).

The same investigating judge interrogated Cvjetan in a prison in Bjelo Polje, on 11 July 2001. The defendant was serving a sentence for another felony in the Bjelo Polje prison. The investigating judge, once more, questioned defendant Cvjetan without the presence of a defence lawyer. The judge also failed to advise the defence lawyer of his intention to interrogate the accused in prison, despite the fact that a power of attorney was in the Court files. The record of the interrogation does not contain the names of persons who attended, and it was not signed by the Court reporter.

The investigating Judge rendered again a ruling on the conduct of the investigation and ordered detention against the accused Cvjetan and Demirovic on 19 July 2001. Upon this ruling, defendant Cvjetan was deprived of liberty on 14 November 2001, while defendant Demirovic has been inaccessible to the authorities since. During the investigation, another investigating Judge, Ljubomir Jovanovic, who replaced Mr. Bajovic, took statements from several witnesses. None of them confirmed that the accused had committed the crime.

### *The trial*

The panel of the District Court in Prokuplje held four hearings within the main trial (on 9, 10, 11 October and 11 November 2002).

The main hearing was held in front of the panel of two judges and three lay judges.

- President of the panel: Judge Milorad Lapcevic
- Members of the panel: Judge Svetozar Milojevic, Lay Judges Milocevic Miodrag, Vukajlovic Jovanka and Postic Zoran
- Defense lawyers: Kalanj Djordje, Goran Rodic and Bozidar Filipovic

Following the reading of the indictment, the accused Cvjetan gave his opening statement. The testimony the accused had given during the investigation was then read. In his testimony, the accused had confessed to participating in the murder of the civilians.

### *Comment:*

*As for the reading of the testimony, the Court made several procedural mistakes:*

- *The main hearing should have been conducted in accordance with the new CPC, which came into effect in March 2002.*
- *The new CPC, Art. 71 para. 1, holds that if the proceedings are carried out for a criminal offence punishable by a prison term of ten years or a more severe punishment, the defendant's defence lawyer must be present during the first interrogation.*
- *The interrogation of the accused Cvjetan without his defence lawyer was a substantive violation of criminal procedure and can be a reason for challenging the judgement (Art. 368 para. 2 CPC). Under Art.89, para.9 and 10 of the same Law, the decision of the Court may not be based on such a testimony.*
- *The CPC, Art.178, para. 1, specifies in that if the Court decision cannot be based on the statement of the defendant, the investigating Judge shall, by virtue of the office or upon a motion by the parties, render a ruling to exclude the record of that statement from the case files immediately.*



Dejan Demirovic's lawyer requested an explanation of the court decision to hold the trial in the absence of his client, since he could not find a single piece of evidence in the Court files that his client had been hiding or avoiding to receive the indictment or other Court documents.

*Comment:*

*Art. 304 para. 3 and 4 of the CPC say:*

*“The accused may be tried in absentia only if he/she has fled or is otherwise inaccessible to justice, provided that particularly important reasons exist for such a trial. Upon a motion of the Prosecutor, the panel shall issue a decree on a trial in absentia. An appeal shall not delay the execution of the ruling”.*

*Since the monitors did not see the Court decision, they are not able to provide an opinion on the panel's reasons for the decision or its compliance with the law.*

The panel refused the motion and decided to read the statement that the accused Demirovic had given during the investigation.

Demirovic's lawyer stated that, according to the Court records, his client was questioned before the Prokuplje Court, whereas he was in possession of evidence that Demirovic was interrogated in prison. The defence lawyer also argued that his client was not offered a lawyer of his own choosing, but was forced to accept the lawyer appointed by the investigating judge. He also challenged the validity of the minutes, which were not signed by the Court reporter. The Court also questioned several witnesses.

The Court decided to question Mr. Mijat Bajovic, the first investigating judge assigned to the case, in order to establish whether or not the accused had received legal assistance during the investigation. Mr. Bajovic said that, aside from the accused, the judge, a defence attorney, the Court reporter and prison guards attended the hearing. The investigating judge denied the presence of police officers during the investigation.

However, Mr. Bajovic could not explain why his court reporter did not sign the official record and why he failed to check whether the document was properly signed. He was also unable to explain why “no objection to the official record” was written at the bottom of page 3 of the notes of the questioning proceedings in the court of Bijelo Polje, when two more pages followed.

Ms. Radica Marinkovic, the court reporter, said in her statement that she attended the Cvjetan interrogation with only three other persons: Investigating Judge Bajovic and two plain-clothes police detectives.

### *Transfer of jurisdiction*

As mentioned before, the Supreme Court of Serbia decided on 27 November 2002 to transfer jurisdiction over the Cvjetan & Demirovic Case to the Belgrade District Court (DC).

The court decision was based on a motion by the Acting Public Prosecutor of the Prokuplje District Court. The Prosecutor maintained in the motion that the transfer of territorial jurisdiction was necessary with a view to an undisturbed interrogation of Albanian witnesses. In the rationale of the writ, the Supreme Court of Serbia accepted his reasons, and transferred the jurisdiction of the case to the Belgrade District Court, under Art. 36 para. 1 of the CPC.

*Comment:*

*Prior to the Court approval of the transfer of jurisdiction, the Deputy Public Prosecutor of Prokuplje had forwarded two requests for the transfer to the Supreme Court of Serbia - one through the Prokuplje District Court and one directly to the Supreme Court of Serbia.*

*Having found the reasons listed by the Deputy Prosecutor and the Prokuplje Court unimportant for the transfer, the Supreme Court of Serbia rejected both his requests. The concerns cited for the transfers were mostly related to personnel (lack of judges and Prosecutors and their qualifications), workspace, and technical and security conditions. They also argued that it would be easier to question the witnesses in Belgrade, since most of them reside in Belgrade or Novi Sad.*

*The Supreme Court of Serbia based its decision to grant the third request for the transfer of territorial jurisdiction on Art. 36 para. 1 of the CPC. The argument held that a court established by law in a Member Republic may, within its jurisdictional territory, designate another court having subject matter jurisdiction to conduct the proceedings, if it is evident that the proceedings will be facilitated or if there are other important reasons.*

*As for the subject entitled to forward a request for a transfer of territorial jurisdiction, para. 3 of the same article stipulates that the court may render the decision referred to under para. 1 and 2 of this article, upon a motion filed by, inter alia, the Public Prosecutor that has jurisdiction over the case.*

*Yet another important reason for the transfer or territorial jurisdiction, apart from the undisturbed interrogation of Albanian witnesses, is that the Prokuplje Court is not competent for conducting a trial of such importance. This is also the general conclusion of the monitors, as per the analysis of the Prokuplje District Court proceedings.*

*Severance of the procedure for the defendant Demirovic*

The President of the panel in the trial of Cvjetan Sasa and Demirovic Dejan filed a request to a three-member panel of the Belgrade District Court for the severance of proceeding against the two accused, for the sake of efficiency.

The reasoning was that the two defendants should be tried separately, because Demirovic was detained in Canada on 16 January 2003, and it is unclear how long the extradition procedure might take.<sup>22</sup> The other defendant Sasa Cvjetan has been in detention since 15 November 2001. The Demirovic case can resume as soon as the extradition procedure is over.

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<sup>22</sup> Demirovic has been tried in absentia under the Decision KV-23/02 the Prokuplje District Court made on 08 February 2002, having found that the defendant had been inaccessible to the authorities

Pursuant to Art. 34 para. 1 and 2 and Art. 24 para. 6 of the CPC, the panel of three judges of the Belgrade District Court acted upon the request of the presiding judge and decided in favor of the severance of the proceedings against Demirovic Dejan and Cvjetan Sasa.

*Comment:*

*Art. 34 para. 1 of the CPC holds that, at any time up to the end of the trial, the court may act upon a motion by the parties or by virtue of the office and decide for important reasons or for the sake of efficiency to separate proceedings or defendants, complete the proceedings separately thereupon or refer them to another competent court.*

*Art. 24 para. 6 of the same Law stipulates that first-instance courts sit in a panel of three judges when rendering first-instance rulings outside the main hearing.*

*The presiding judge referred to a three-member panel since the decision was made outside the main hearing.*

*Alternatively, the President of the panel could have ordered severance during the trial, a decision he would have made within his duty to run and direct the trial. (Art. 296 para. 1 of the CPC).*

The acts and decisions in this matter were in accordance with the CPC.

#### *Detention of the defendant Cvjetan*

The investigating judge in the Prokuplje District Court ordered the detention of the accused Cvjetan and Demirovic on 19 July 2001. Upon this decision, the defendant Cvjetan was deprived of liberty on 14 November 2001 (detention began on 15 November), while the other defendant Demirovic remained inaccessible to the authorities.

The District Prosecutor of Prokuplje issued an indictment against the Cvjetan Sasa and Demirovic Dejan, on 5 April 2002, accusing the two of war crimes against civilians, Art.142 of the FRY Penal Code, larceny, under Art. 166 of the RS Penal Code (Cvjetan only) and illegal possession of firearms, under Art. 33, para.1 of the RS Penal Code (Cvjetan only). The Prosecutor requested detention of the accused, claiming that conditions for mandatory detention had been met. The Prokuplje District Court decided to extend Cvjetan's detention on 15 October 2002.

The Belgrade District Court panel extended the detention twice – on 16 December 2002 and 19 February 2003. Both times, the panel acted *ex officio*, pursuant to Art. 146 para. 2 of the CPC. The panel found that the reasons provided by Art. 142 para. 1 point 1 of the CPC for obligatory detention existed, as the defendant is tried for a war crime against civilians referred to under Art. 142 para. 1 of the Criminal Code of the FRY, punishable by a prison term of up to 40 years.

*Comment:*

*The detention of defendant Cvjetan was extended in accordance with Art. 146 para. 2 of the CPC. (Even without a motion by the parties, the panel is bound to review the grounds for detention every month until the indictment becomes final in order to extend the detention or release the suspect. The panel shall do so in two-month intervals after the indictment becomes final.) The panel ruled ex officio and within the time frame of two months as specified by Art. 146 (to be exact, the panel's first decision to extend the detention was one day late, and the second was made three days after the deadline.)*

*In this particular case, detention is mandatory under Art. 142 para. 1 point 1 of the CPC, which provides that detention shall be ordered of a person reasonably believed to have committed a criminal offence punishable by a prison term of twenty years or a more severe punishment. The defendant is tried for a war crime against civilians from Art. 142 par. 1 of the FRY Criminal Code, for which a sentence of 40 years in prison has been prescribed.<sup>23</sup>*

### ***The procedure before the Belgrade District court***

The trial commenced on 12 March 2003 in front of the panel of two judges and three lay judges.

- President of the panel: Judge Biljana Sinanovic
- Members of the panel: Judge Sinisa Vazic,
  - lay judges: Pajovic Ivica, Rakic Ljubisa and Nikolic Nada

The hearing began with the reading of the indictment. The trial resumed in accordance with the Article 309 of CPC.

*Comment:*

*Art. 309, para. 3 of the CPC provides that if a trial is to continue after more than three months, or is held before another president of the panel, it must be recommenced and all evidence must be examined again.*

The hearing resumed with the opening statement of the accused Sasa Cvjetan. The Court noted that he completely repeated the statement he gave at the hearing before the District Court of Prokuplje on 9 October 2002. He again denied any involvement in the killing of Albanian civilians. The court also interrogated one witness.

The Court ordered Kandic Natasa of the Humanitarian Law Center to present the original copy of a power of attorney signed by the victims.

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<sup>23</sup> See footnote 11

*Comment:*

*The objection by defence lawyer Rodic Goran related to the status of representative of the injured parties Kandic Natasa, which he questioned because she was not a lawyer, is unacceptable since this is not explicitly required by the CPC.*

*Article 66 para. 1 of the CPC states that the private Prosecutor, the injured person, the subsidiary Prosecutor as well as their legal guardians may exercise their procedural rights through representatives.*

*Para. 2 of the same Article provides that when proceedings are carried out upon a request by the subsidiary Prosecutor for a criminal offence punishable by a prison term of more than five years, the court may honor his/her request for a legal representative if this is to the benefit of the proceedings and if the subsidiary Prosecutor cannot afford legal representation. The investigating judge or the president of the panel shall decide on this request, and the president of the court shall appoint a legal representative from the Bar Association.*

At the end of the hearing the Prosecutor and the representative of the injured parties proposed new witnesses. The defense lawyers objected to the proposal with the explanation that this would extend the trial, suggesting that the Court should refer the whole case back to the pre-trial proceedings if it decided to accept the new witnesses.

*Comment:*

*Article 326 para. 4 allows the parties and the injured person to propose that new facts be investigated and new evidence obtained, and to repeat motions already rejected by the president of the panel or the panel until the conclusion of the trial. The presiding judge and the panel respected this procedural guarantee.*

*Article 335 of the CPC states that during the main hearing and following the interrogation of the parties, the panel may decide to request an investigating judge to perform certain actions necessary to clarify certain facts, if the performance of these actions at the trial can delay the proceedings or cause considerable difficulties. When the investigating judge performs upon such a request, the provisions related to investigation shall apply.*

*In the monitors' opinion, a high number of potential witnesses cannot be sufficient reason to engage an investigation judge to perform certain actions necessary to clarify certain facts, since it is not a delaying factor in this case. The principle of the establishment of material truth as provided by Article 17 of the CPC requires the Court to determine all the facts necessary for rendering a lawful decision truthfully and completely. In addition, Article 16 provides that the court shall be bound to carry out the proceedings without delay and prevent any abuse of the rights of the participants in the proceedings.*

*Having in mind that the Belgrade District Court held the first main hearing on 12 March 2003 (the procedure had to recommence because of the transfer of territorial jurisdiction from Prokuplje to Belgrade), and the number of proposed witnesses, the monitors can conclude that the Belgrade District Court has been quite efficient and respectful of the above*

*mentioned Articles of the CPC. It is noteworthy that trial began nearly two years ago, in July 2001, with the Prokuplje investigation.*

A lawyer of the injured party, Teki Boksi, suggested that much more evidence should be examined in this case. He argued that the panel was not able to efficiently collect all evidence and interrogate all potential witnesses, and recommended that the case go back to the investigation phase, in accordance with Article 335 of the CPC. As an alternative, Boksi suggested that the panel should authorize the President of the panel to conduct investigative actions.

*Comment:*

*Article 335 of the CPC states:*

*"In the course of the trial and after the interrogation of the parties, the panel may decide to order an investigating judge to undertake certain actions necessary to clarify some facts, if undertaking such actions during the trial is likely to cause delays or other considerable difficulties. When the investigating judge performs upon such a request, the investigation-related provisions shall apply."*

*None of the provisions of the CPC stipulate that the president of the panel may be authorized by the panel to undertake investigative actions. Article 334 states that the panel may order the president of the panel or a judge of the panel to take a statement from the witness who is unable to appear before the court, or to carry out the investigation of a crime scene or the reconstruction of a crime if necessary.*

The Deputy District Prosecutor dismissed the proposal, arguing that the repetition of pre-trial proceedings would be a retrogressive step. Mr. Boksi stated that the Defence had already suggested that the case should be re-investigated, warning that the indictment was issued without valid evidence to justify the detention of the accused. The panel decided to resume the hearing, to be followed by the motion ruling. The hearing commenced with the interrogation of witness.

*The Identification held in the Central Prison of Belgrade, on 8 July 2003*

In collaboration with the Humanitarian Law Centre, the Court helped the Albanian children who survived the Podujevo incident to arrive in Belgrade from their new home in Great Britain. They came by plane the day before the identification parade in the Belgrade central prison. A police unit to combat organized crime protected them throughout their stay in Belgrade. Special protection measures were evident during the main hearing.

The President of the panel did not allow monitors to observe the identity parade, explaining that technical requirements have not been met for the attendance. The monitors received the record of the identification.

All the witnesses went through the same identification procedure. The identification was carried out by L.B., 13 years old, F.B., 16 years old, S.B., 18 years old and J.B., 15 years old. The witnesses recognized the accused in the lineup.

*Comment:*

*Article 104 of the CPC reads:*

*“If it is necessary to determine whether a witness can recognize a particular object or a person he/she has described, that person shall be shown to the witness in a line with other unknown persons with similar traits, and the given object together with other objects of the same or similar kind. The witness shall be asked to declare whether he/she can identify the person or the object with certainty or some probability, and if the answer is affirmative, the witness shall be asked to point at the identified person or object. In the pre-trial proceedings, the person to be identified cannot see a witness, nor the witness can see this person before the identification begins. In the pre-trial proceedings, the identification of a person shall be carried out in the presence of the State Prosecutor.”*

*The police cannot carry out this investigative action even if an investigating judge approved it or a Prosecutor requested it.<sup>24</sup> The identification is not evidence, but a witness statement is. The identification is only a method to verify the authenticity of a witness’s statement.*

*The Main Hearing held in the Belgrade District Court on 9 July 2003*

The Court noted that victims S.B., F.B., J.B., I.B. and S.B. approached to the Court. For security reasons, they were placed in a separate room. A representative of the injured proposed that the public be excluded from the trial during the interrogation of juvenile witnesses/victims. Having interviewed the witnesses, the court psychologist declared that they were ready to testify, but nevertheless supported the motion of exclusion of the public, since the victims they were underage.

The Prosecutor had no objection to the motion, explaining that it was in conformity with Article 292 of the CPC.

*Comment:*

*Article 292 reads:*

*“From the opening of a session to the conclusion of the main hearing, the panel may at any time, by virtue of the office or on the motion of the parties, but always after hearing their statements, exclude the public from all or part of the main hearing, if this is necessary to protect the confidentiality of information, public order, morals, the interests of a minor or the personal or family life of the accused or the injured.”*

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<sup>24</sup> Professors Tihomir Vasiljevic and Momcilo Grubac, Comments on the Criminal Procedure Code, Official Gazette, Belgrade, 2002.

The defence lawyer opposed the closed hearing, underlying that the presence of the public during the questioning of the Albanian witnesses was an advantage for the Defence. He suggested that the court psychologist might interfere at any time to assist the juvenile witness.

The Court decided to exclude the public from the part of the hearing in which the Albanian children would testify. The Court ruled under Article 292, since witnesses F.B., J.B. and L.B. were under 16 years of age, and had been under 12 at the time of the incident.

The Court allowed the representatives of the injured parties, as well as non-governmental and international organizations that had applied for attending the interrogation, to be present during the questioning of the witnesses.

### ***Notified insufficiencies of the trial***

- *Investigation of the crime scene*

The investigation of the crime scene carried out by the investigating judge of the Prokuplje District Court was largely incomplete. The record indicates a lack of professionalism, and offers scarce information about the crime, perpetrators or any useful evidence, as should have been the investigation's main purpose.

- *Police torture*

During the main hearing, the defendant Cvjetan declared that the police questioned and tortured him in order to extort a confession. Police torture is difficult to prove, given the traditional lack of evidence, and given that only the tortured have direct knowledge of the event.

The new CPC has reduced to a minimum the role of the police in the proceedings. The new legislation has set strict time limits for the appearance of a suspect before a judge, precisely in order to protect the suspect's rights and prevent police torture. It is forbidden and punishable to employ any kind of violence on a person who is deprived of liberty or whose liberty is restricted, as well as to extort a confession or any other statement from the defendant or any other person participating in the proceedings.

- *Interrogation without defense lawyer*

The right to a counsel is one of the main principles of a fair trial. The investigating judge of the Prokuplje District Court interrogated the defendants without their lawyers, even though their presence was obligatory. Moreover, it has been alleged that the judge acted in a wholly incorrect and misleading manner when he stated the opposite in the record. The CPC is explicit that a judgment cannot be based on a defendant's testimony issued in the absence of a counsel.



- *Records of the trial*

The contents of court records and the mode of keeping them are expressly regulated by the CPC. The investigating judge of the Prokuplje District Court broke the rules stipulated by the Law and has apparently acted in a wholly unprofessional and wrongful manner.

During the main hearings, the presidents of the panels of the Prokuplje and Belgrade courts recorded the witness statements in the minutes by dictating them directly.<sup>25</sup>

- *Witnesses, the role of the court in finding the material truth*

The District Court in Prokuplje was not overly intent to find the material truth. Not a single witness was called to testify on behalf of the injured party. The monitors can only speculate whether the reason for this was the lack of guarantees for the protection of Albanian witnesses, the difficulties in organizing their travel from Kosovo or some hidden political or other concerns.

On the other hand, thanks to a close co-operation between the Belgrade District Court working and the Humanitarian Law Centre, the Albanian children who survived the Podujevo shooting came to Belgrade from Great Britain to testify. Not only did their testimonies help to realize the full abomination of the crime, but also contributed to the efforts of the court to find the material truth.

The President of the panel was for the most part in charge of the questioning. She directly questioned the witnesses, while the other judge just had a few questions. The lay judges remained mostly silent.

- *Questioning of the witnesses by the parties*

Since testimonies appear to be critical evidence in war crime cases, it is of utmost importance to question witnesses thoroughly and properly.

However, the Prosecutor and the representatives of the injured parties had no adequate experience in such interrogations. It is a very demanding and difficult task, which requires extensive preparations, knowledge and experience. The general impression was that some of the witnesses did not tell the Court everything they knew, not because they did not want to, but rather because they were not asked the right questions.

The representatives of the injured asked most of the questions, but the majority of the witnesses were not questioned properly, so their answers shed little or no light on important circumstances. Moreover, some of the witnesses who were summoned to testify had no direct knowledge of the event.

The Prosecutor asked very few questions and often they would not clarify anything of importance to the trial.

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<sup>25</sup> See footnote 18

## **5. Comparison of the two monitored trials with international fair trial standards**

The aim of the following subchapter is to evaluate the fairness of the two monitored trials in light of their conformity with the applicable domestic law and international human rights and fair trial standards. The fair trial standards have been defined by Article 6 of the European Convention on Human Rights and Article 14 of the International Covenant on Civil and Political Rights.

### ***Competent, independent and impartial tribunal established by law***

- *"Podujevo case"*

The investigation carried out by the Prokuplje District Court failed to meet the criteria for a fair trial or for a competent and impartial tribunal. The investigating judge demonstrated a clear lack of competence, and conducted the investigation of the crime scene neglectfully. He also did not respect the rights of the accused, breached the procedure and, if the alleged matters are correct, he acted in a wholly unprofessional and wrongful manner, as explained in "the Podujevo case" subchapter.

The Prokuplje District Court has been in need of qualified staff, in particular judges, for some time. The Court has a single investigating judge covering a large area (from Podujevo, in Kosovo, up to the town of Dimitrovgrad, at the border with Bulgaria). Only two judges were in charge of criminal cases, and both were members of the panel in the Podujevo case.

The President of the Prokuplje panel was clearly overwhelmed by the importance of the trial. He was appointed shortly before the trial began. Prior to the new appointment, he worked with a municipal court in Blace, a small town some 30 kilometres away from Prokuplje. In all likelihood, he was not experienced enough for war crime cases of such scope.

The Prosecutor of the Prokuplje District Court Prokuplje, one of the two District Prosecutors, shared the same shortcomings.

The decision of the Supreme Court of Serbia to transfer the jurisdiction over the case to the Belgrade District Court was not only a guarantee that the most competent court in the country would take over the case, but also a stark message that the District Court in Prokuplje was neither competent enough nor ready to handle such a delicate case.

The trial before the Belgrade District Court met the international fair trial standards and the domestic criminal procedure was generally respected. The President of the panel proved to be competent and capable of conducting the trial in accordance with the CPC, particularly in view of the unsatisfactory investigation carried out by the Prokuplje court and the obstacles he to surpass to ensure the presence of the witnesses.

- *"Sjeverin case"*

The Belgrade District Court panel demonstrated a sufficient level of competence and impartiality in the conduct of the trial. The observers did not notice any open influence or

pressure on the Court, either from the parties, the Executive, or the media. The President of the panel was a very experienced judge, who in the meantime has been appointed as one of the Serbian Supreme Court justices. The insufficiencies of the trial mentioned before cannot mar the overall positive impression the Court deserves, owing to its independence, competence and impartiality.

### ***Fair and public hearing***

- *"Podujevo case"*

The Prokuplje District Court only honored this principle during the main trial. All hearings were open to the public. The President of the panel respected the rights of the accused, and allowed them to challenge the Prosecutor's motions and file their own. The defendant, Cvjetan Sasa, was permitted to protest against false information published by the daily "Danas".

Contrary to the main hearings, the pre-trial procedure left much to be desired in terms of fair trial standards. The investigating judge violated both the procedure and the rights of the accused.

The right to a fair and public hearing was fully respected by the Belgrade District Court. The hearings were normally open to the public, with the exception of the hearing of the underage Albanian children. The President of the panel respected the rights of the accused, allowing him to challenge the Prosecutor's motions, freely interrogate the witnesses, file his own motions and object to the decisions of the panel regarding the course of the procedure.

- *"Sjeverin case"*

The Belgrade District Court respected the right to a fair and public hearing throughout the trial. Only the third hearing was closed to the public, in line with the procedural law and international standards. The underlying reason for this decision was the sensitivity of a witness's testimony that could have provoked incidents and disorder in the courtroom. Also, the Court wished to safeguard the dignity and safety of the protected witness.

### ***Equality of parties (equality of arms)***

- *"Podujevo case"*

During the main trial the Prokuplje District Court provided equal treatment for the Prosecution and the Defence. Both accused were properly represented at the hearings. The Court granted free access to evidence to the defence lawyers, allowing them to question and present witnesses.

The Prokuplje District Court failed to ensure participation of the injured party in the procedure. The Court did not try to contact the relatives of the victims or procure their statements. In addition, since some of them are also potential witnesses and victims, the Court disregarded its duty to determine all the facts required to render a lawful decision truthfully and completely.

The investigating judge of the Prokuplje District Court did not respect the principle of equality. He failed to ensure the presence of defence counsels during the interrogations. The defendants complained at the main hearing that they were not allowed to freely produce their defence. Instead, the investigating judge simply dictated to the court reporter the statements that they had been forced to give to the police.

During the main trial, the Belgrade District Court provided equal treatment for the Prosecution and the Defence. The accused was properly represented on the hearings. The Court granted defence lawyers free access to evidence, and allowed them to question and present witnesses.

As already explained, the Belgrade District Court made sure that the injured party participated actively in the proceedings. The Court succeeded in bringing the injured parties to Belgrade to testify.

- *"Sjeverin case"*

The pre-trial proceedings and the investigation were not included in the monitoring project, which means that no relevant opinion can be offered as to whether the equality of parties and arms was respected at that point of the trial.

During the main hearing, however, the parties received equal treatment. The Court granted the parties free access to evidence, and allowed them to question and present witnesses.

Some questions posed by the representatives of the injured party were rejected without valid arguments. It is important to note that the Court rejected a whole list of witnesses proposed by the representatives of the injured, with the argument that the witnesses did not have direct knowledge of the abduction, while the representatives failed to explain properly what important circumstances the witnesses would address.

### ***Presumption of innocence***

- *"Podujevo case"*

The Prokuplje District Court did not violate the principle of presumption of innocence during the procedure. The defendant Cvjetan protested against the articles published by the daily "Danas".

The headlines "The Court Obstructs the Justice", "The Verdict is Farce" or "False justice", along with the content of the articles, labeled the whole trial as an attempt by the Court to minimize or even justify the crime and the guilt of the accused. Some of the articles quoted some witnesses who had never testified in Court as saying that the accused was guilty as charged.

These articles indicated that the trial was a mockery, that the accused committed the crime and that the Court verdict was actually irrelevant.

This principle was not violated during the Belgrade District Court procedure. However, information published by some daily newspapers after the Albanian children took the witness stand, despite the panel decision to make their testimonies confidential, was in breach of this principle and can be interpreted as pressure on the Court.

- *"Sjeverin case"*

The principle of presumption of innocence was not violated during the court procedure. Prior to one of the main hearings the President of the panel objected to some media reports, without specifying any of them. She recalled the hearings were open to the public, and invited media representatives to seek whatever clarification they might need (outside the hearings), in order to report correctly and truthfully, and to respect the principle of presumed innocence.

***Adequate time and facilities for the preparation of the defence; right to be tried without undue delay***

- *"Podujevo case"*

In light of the circumstances under which the defendants were questioned by the police and the investigating judge, it was clear that they were unable to prepare their defence during the investigation phase.

More than two and a half years elapsed between the first interrogation of the accused and the decision to discontinue trial. The Belgrade District Court launched the proceedings in March 2003, and the first-instance decision is not expected before the end of 2003 or beginning of 2004. The accused Cvjetan has been detained during nearly the whole time.

The defendant's right to be tried without undue delay has been clearly disrespected, since the proceedings began as far back as May 1999.

Since July, the Belgrade District Court has held only one short hearing in October and scheduled the next for December. In short, the Court had one single hearing in five months. Moreover, the October hearing was opened only to avoid the procedural obligation stipulated by Article 309 of the CPC, stating that if the trial is postponed for more than three months, it must recommence and all evidence must be examined again. The Court has continued to violate this right of the accused to be tried without undue delay.

- *"Sjeverin case"*

The investigation took two months more (eight months in total) than prescribed by the CPC. According to Article 258, if the investigation is not concluded within six months, the investigating judge is bound to notify the president of the court of the reasons for the delay, after which the president of the court shall take the steps to conclude the investigation. The monitors have received no information as to whether the investigating judge and the president of the court respected this provision.

The defendants had two months to prepare their defence between the moment the indictment became final and the beginning of the trial, which is a sufficient delay. In addition, the court respected the obligation to schedule the trial within two months of the receipt of the indictment. (Article 283 of the CPC). The defendants' right to be tried without undue delay was generally respected. The main hearing was opened in January and closed in September.

However, the two final hearings had to recommence twice. Although the recommencement did not have a major impact on the outcome of the trial, it prevented a smooth continuance of the trial, caused an unnecessary waste of time, burdened the proceedings and reintroduced the formalities (the reading of the indictment, interrogation of the defendants, the presentation of evidence) that the President of the panel had to comply with.

The CPC provides in Article 295 para. 1 that the president, members of the panel, the court reporter and alternate judges must be continuously present the trial. Article 287 stipulates that if a longer trial is expected, the president of the panel may ask the president of the court to assign one or two judges or lay judges to attend the trial in order to replace members of the panel if need be.

Bearing in mind the importance of the trial, the President of the panel could have easily avoided the recommencement and the ensuing formalities had he exploited the option offered by Article 287.

### ***General prohibition on trials in absentia***

- *"Podujevo case"*

The Prokuplje District Court violated this principle in the case of Dejan Demirovic. The defendant's lawyer asked the Court to explain why the trial was going on in the absence of his client, since he could not find evidence in the Court files that his client had been hiding or avoiding to receive the indictment or other documents sent by the Court. The Chamber denied the motion without any explanation.

The CPC prescribes in Article 304 para. 3 that the accused may be tried in absentia only if he/she has fled or is otherwise inaccessible to justice, provided that particularly important reasons exist for such a trial. Since the monitors have not seen the ruling, they cannot offer an opinion on the reasons for such a decision or its compliance with the law.

A three-member panel of the Belgrade District Court decided to separate the proceedings against Demirovic Dejan and Cvjetan Sasa for the sake of efficiency.<sup>26</sup> The Demirovic case will resume after his extradition from Canada.<sup>27</sup>

- *"Sjeverin case"*

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<sup>26</sup> Please see above in the Podujevo case, the Severance of the Proceedings for the defendant Demirovic

<sup>27</sup> The *Reuters* agency reported 22 September that witness S.B., who also testified in the Podujevo case before the Belgrade District court traveled to Canada to testify against Demirovic Dejan in the extradition proceedings against him. The Refugee Board postponed the next hearing for January 2004.

The accused Lukic and Krsmanovic are tried *in absentia* in accordance with Article 304 of the CPC, since they were not amenable to justice and the Court found that important reasons existed for such a trial.

The Court assigned *ex officio* counsel to Lukic and Krsmanovic, pursuant to Article 71 of the CPC, which provides that a defendant tried *in absentia* must have a defence lawyer as soon as the Court decides to try him *in absentia*.

The defendants have the right to request a re-opening of the criminal proceedings in their presence, as an extraordinary legal remedy. (Article 413 of the CPC)

### ***Public pronouncement of the judgement***

This standard still applies to the Sjeverin case in which a first-instance ruling has been rendered, while the Podujevo case has not been completed yet.

After the closing arguments, the President of the panel concluded the main hearing and pronounced the judgment. The President of the panel gave an oral rationale of the judgment in which he listed the facts proven and evidence crucial to the verdict. In the end, he informed the parties of their right to appeal.

### ***Other fair trial standards***

The fair trial standards that have not been covered by this analysis (prompt and adequate information about the charge in a language the defendant understands, the right to call and examine witnesses, the right to interpretation; the right not to be compelled to testify or to confess guilt, the right to appeal, the prohibition of double jeopardy and prohibition of retroactive application of criminal laws) were either implicitly included in the fair trial criteria that have been examined, or their application was not relevant to the evaluation of the two trials.

## **VI. Conclusions and recommendations**

International law is clear that not only the direct perpetrators of a crime, but also the military or political leaders who ordered the crime or failed to take steps to prevent it or punish the perpetrator should be held accountable.

The Serbian judiciary has only tried a few members of the security forces, usually ordinary soldiers or lower-ranking officers, for serious crimes such as murder or war crime. Top-ranking security officials, on the other hand, were often bountifully awarded and promoted after the war.

Bringing to justice those responsible for war crimes is one of the essential measures to restore and maintain peace and security in the region. National authorities, however, are yet to send

tangible signs of firm commitment to conduct serious and comprehensive war crime investigations in Serbia, Kosovo ( Serbia and Montenegro ) Croatia, Bosnia and Herzegovina.

Major war crimes, which resulted in heavy civilian casualties, at least, must be subjected to proper investigations and trials. Since justice in Serbia has yet to rid itself of the influence of the executive and legislative branches, the future processing of war crimes highly depends on political will.

Statements by political leaders that the Hague Tribunal is a selective court and a political instrument can hardly contribute to a positive public attitude or create an encouraging environment for domestic courts to try members of Serbian security forces responsible for major war crimes. Some politicians went as far as to say that the recently established Special War Crimes Court should focus on those who have committed war crimes against Serbs.

Regardless of their ethnicity, those who killed innocent civilians, women and children under the pretext of defending the Serb people and land, must be treated as ordinary criminals. To this effect a public campaign should be launched to explain in unambiguous terms how important it is for reconciliation and sustainable peace to bring to justice all war crimes suspects, whatever side they might have been on.

This chapter offers a list of the most important conditions the Serbian justice system is to fulfil in order to overcome the enormous challenges of a successful conduct of war crime trials.

## **1. Legal and institutional framework**

The establishment of a proper legal and institutional framework is essential for the processing of war crime cases in the future. The Law on the Organization and Jurisdiction of Government Authorities in Prosecution of Perpetrators of War Crimes was enacted in June 2003. The Mission took a very active part in the creation of this Law.

With this Law, the Serbian authorities set up a legal and institutional framework for the successful conduct of war crime trials. Yet the Law *per se* cannot guarantee success, unless other vital conditions are met, too.

The new piece of legislation is quite innovative. It creates the Office of the War Crimes Prosecutor, the War Crimes Investigation Service, the War Crimes Panel at the Belgrade District Court, the Special Detention Unit as well as some procedural novelties, including the questioning of witnesses via video link, the audio recording of the main hearing proceedings (already applied in organized crime trials) and the applicability of Chapter XXIX of the CPC (also applies to organized crime trials).

The authorities are now to support the development of these new institutions, to build up their capacity and provide ample resources for the effective and safe conduct of war crime trials.

The Government has to show its commitment and provide the following:

- Adequate and safe premises for the special institutions



- Higher salaries for judges, prosecutors and police involved in war crime cases
- Regular and adequate training for the staff
- Equipment for special institutions
- Budget to cover operational costs of war crime investigations and trials, witnesses/victim protection programmes
- Political support and media campaign to shape public opinion

## **2. Securing of Evidence / Witness Protection**

The problem of acquiring evidence and presenting it to the court through a solid case argumentation by the Prosecutor is inherent to the complex nature of war crimes. It is impossible to prosecute without sufficient evidence. When war crimes are concerned, evidence gathering appears to be particularly difficult since:

- War crimes are committed during an armed conflict, which makes a consequent investigation and the gathering of evidence very difficult, if not impossible;
- There is often a considerable time gap between the crime and the beginning of the investigation;
- The scene of the crime might be on the territory of another state;
- The perpetrator(s) might be foreign citizen(s);
- Testimonies by witnesses might be key evidence, if not the only evidence available;
- Key witnesses might be foreign citizens;
- Witnesses, foreign citizens or refugees might be reluctant to testify before a national court because of security concerns, which are also shared by local citizens summoned to testify;
- Stress and time can easily affect a witness's memory.

These and many other obstacles make it clear that the issue of acquiring evidence must be solved as a precondition for building war crime cases.

In the majority of war crime cases, testimonies appear to be the only evidence. It is crucial, therefore, to create viable conditions for as many testimonies as possible.

Serbia must adopt a proper legal framework for witnesses, as the current legislation is woefully inadequate.<sup>28</sup> The Law on the Organisation and Jurisdiction of Government Authorities in Prosecution of Perpetrators of War Crimes is more flexible in terms of testimonies inasmuch as it allows victims and witnesses to testify through a video link. In other words, the Law does not insist on the physical presence of a witness in the courtroom.

Special laws on witness protection should be enacted to include:

- Police witness protection on different levels (before, during and after the trial);
- Court witness protection on different levels. (A professional unit to protect and support witnesses and victims must be formed to support the operations of the Special War Crimes Court).

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<sup>28</sup> There is only a brief mention of witness protection in the Criminal Procedure Code in Articles 109 and 504p .

A Victim and Witnesses Unit is absolutely fundamental to the work and success of the War Crimes Court. The Unit's services would facilitate effective investigation, prosecution and defence by encouraging victims and witnesses to testify. In order to carry out its mission, the Unit must have sufficient financial and human resources at its disposal. Its effort to succeed should not be thwarted by financial and personnel-related problems. Services provided by the Unit will cover all the stages of the process, including investigation, pre-trial, trial and post-trial proceedings.

The Unit should provide protective measures for witnesses, people who are at risk because of a witness testimony, and victims appearing before the Court. Aside from the protection, the Unit will also give medical and psychological assistance to victims and witnesses.

These are the vital prerequisites to be met, with the manifold problems surrounding the appearance of victimised witnesses in court yet to be addressed. The ongoing war crime cases have shown that many witnesses fear that their lives will be in danger if they take the witness stand. Consequently, they will simply refuse to testify or suffer a memory loss as long as protection and safety guarantees are not in place.

### **3. Regional Co-operation**

Regional co-operation between the governments of Serbia and Montenegro, Croatia, and Bosnia and Herzegovina is instrumental for domestic war crime trials to be a success. The fact that a concerted effort is still missing in this field is linked to the lack of bilateral agreements, judicial assistance and extradition laws. As for the latter, the Constitutions and laws of these states have banned extradition of their citizens. Nevertheless, either these laws and Constitutions will have to be amended to allow for extradition or each state will have to at least feel comfortable about transferring case files to the other states, in order to facilitate trials.

Regional co-operation should be two-fold. It should be focused both on international legal aid and on witness protection.

In a bid to solidify international legal aid, the States of the region should insist on the implementation of the European Convention on Mutual Assistance in Criminal Matters and the European Convention on Extradition. In a parallel process, this co-operation should ensure that bilateral agreements are signed to define specific rules of legal aid in war crime proceedings. These agreements should include instruments for quick and effective co-operation in the extradition of indictees or, alternatively, the automatic transfer of the case to the country of the indictee's origin. In addition, they should guarantee assistance in providing evidence and boost other forms of co-operation.

As regards regional co-operation to fortify the protection of witnesses, the States of the region should sign bilateral agreements to facilitate witness protection programmes, including identity change and relocation of protected witnesses as ultimate witness protection measures.

#### **4. Co-operation Between ICTY and Domestic Courts**

It is of utmost importance to improve the co-operation between the ICTY and the national judiciary in the near future, since the ICTY is preparing a completion strategy. The U.N. war crimes Court plans to close its investigations by the end of 2004, finish first-instance trials by 2008 and appellate procedures by 2010. The transfer of a certain number of cases to domestic judiciaries remains a strong possibility.

Until recently, the only ex-Yugoslav judiciary to which the ICTY transferred cases was Bosnia and Herzegovina. The ICTY's standpoint is that it will only transfer its cases to a domestic judiciary capable of conducting war crime trials in accordance with universally adopted standards.

Yet the court decided last June to transfer a case to the Serbian judiciary, namely the Ovcara case (see Chapter III, item 3), in order to find out if further transfers were possible. The domestic judiciary might face a problem, however, as to the use of evidence submitted by the ICTY Prosecution. It will raise concerns about the admissibility of materials gathered by the ICTY, and the question of how exactly such information will be used once transferred to Serbian officials. The OSCE Mission to Serbia and Montenegro is conducting a study to that effect.

The development of guidelines and criteria for local judges, the use of ICTY experience and the Court's Rules of Procedure and Evidence will certainly ease the handling of the forwarded cases and materials.

#### **5. Command responsibility**

The basis of the doctrine of command responsibility is simple: military commanders are responsible for the acts of their subordinates. If subordinates violate the laws of war, and their commanders, who knew or should have known for their acts, fail to prevent or punish these crimes, the commanders can be held responsible too. The concept of command responsibility is based on the clear inference that those who occupy the superior positions and are or may be deemed to have the knowledge of criminal actions by the subordinates, have the obligation to deal with the criminal actions of the subordinates either by preventing the crimes, or by punishing the perpetrators. Command responsibility has evolved to include both military and non-military personnel.

No judicial body has done as much to clarify and expand the doctrine of command responsibility as the International Criminal Tribunal for the Former Yugoslavia. Its decisions now extend this doctrine from military to civilian officials as well. Culpability is attachable to those who wield not just *de jure* control, but to those who effect *de facto* control as well.

The recognition of the command responsibility in the Serbian legal system and its applicability is crucial and inevitable for a successful conduct of higher-level war crime trials. The Law on Organisation and Jurisdiction of State Authorities in Prosecuting Perpetrators of War Crimes failed to address the issue of command responsibility. It also failed to recognize that Serbia's international obligations imply the direct application of command responsibility, which is to be incorporated into the national legislation.

## **VII. Final Words**

The Mission welcomes the effort made by the Government of Serbia in establishing a Special Court for War Crimes, and encourages the Government to ensure that this initial commitment is translated into the end of impunity for the war crime perpetrators and justice to the victims of such crimes.

It is imperative that the Government provides ample support to these institutions and fulfill other vital conditions, in order for the recently-adopted Law on Organization and Jurisdiction of State Authorities in Prosecuting Perpetrators of War Crimes to be properly and fully implemented, and for the national judiciary to become able to conduct war crime trials in accordance with universally adopted standards.

Moreover, it is imperative for the national judiciary to provide full guarantees for the right of victims and defendants to fair proceeding. It cannot allow grave offenses, such as violations of the international humanitarian law, to go unpunished.

The Mission welcomes the international and local actors that joined the OSCE Mission to Serbia and Montenegro in its effort to help the Serbian judiciary, both substantively and financially, to conduct war crime trials successfully.

## **ACKNOWLEDGEMENTS**

The Rule of Law and Human Rights Department of the OSCE Mission to Serbia and Montenegro wishes to thank the Royal Netherlands Embassy in Serbia and Montenegro for the support and funding, which made the Selected Trials Monitoring Project and this Report possible. The Mission is also grateful to the Ministry of Justice of the Republic of Serbia, the President of the Belgrade District Court, the presiding judges and all those international and local organizations that contributed to this Report.

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**Printed**

**Number of copies**