

## Lessons from the former Yugoslavia

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### I. Introduction

The Nazi crimes committed during the Second World War were so egregious, inconceivable, and systematic on a wide scale, that they compelled world leaders to act. How should the perpetrators be punished? The U.S. Treasury Secretary Henry Morgenthau proposed that they be killed by firing squads comprised of UN soldiers.<sup>1</sup> The Secretary of War Henry Stimson opposed Morgenthau's calls for vengeance. Instead, he argued that "punishing these men in a dignified manner" would have "all the greater effect upon posterity."

Stimson asserted that U.S. standards of justice in an international arena were the best defense against any future threat of Germany. His efforts and perseverance led to the creation of the first international military tribunal in Nuremburg.<sup>2</sup> He was convinced that an international court would "afford the most effective way of making a record of the Nazi system of terrorism" and would "terminate the system and prevent its recurrence." It was a novel concept at a time when both Russia and England were calling for retribution against the Nazis. A new system had to be created, "on which," Nuremburg's chief prosecutor Robert Jackson stated, "History will judge us tomorrow. To pass these defendants a poisoned chalice is to put it to our lips as well."<sup>3</sup>

While legal scholars have criticized the trials in Nuremburg and, later Tokyo, declared they dispensed victor's justice, promoted politics rather than "historical truth," and failed to prevent subsequent mass atrocities, all say that the tribunals, and their Charters, furthered the development of international law by establishing individual criminal accountability for human rights abuses.<sup>4</sup> State sovereignty was no longer a shield for leaders to act with impunity. And in the half century since the trials, "the justifications for international criminal liability for perpetrators of the international crimes of genocide, war crimes, and crimes against humanity have remained essentially unchanged."<sup>5</sup>

The two ad hoc tribunals, in the former Yugoslavia and Rwanda, created respectively in 1993 and 1994, owe their inception to the Nuremburg process. The tribunals' goals as articulated by legal scholars and those involved in the ICTY have evolved from their predecessors. Their declared aims include restoring faith in the rule of law, denouncing and preventing the recurrence of mass atrocities in the former

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<sup>1</sup> Michael R. Marrus, *The Nuremburg War Crimes Trial 1945- 46* (Boston: Bedford/ St. Martin's, 1997), p. 26-7. Stimson sent Roosevelt a "Memorandum Opposing the Morgenthau Plan" on September 9, 1944.

<sup>2</sup> See Telford Taylor, *Anatomy of the Nuremburg Trials* (New York: Alfred A. Knopf, 1992), p. 65. Taylor asserts the memorandum was crucial for setting up the trials.

<sup>3</sup> *Ibid.*, p. 627.

<sup>4</sup> See Jose E. Alvarez, "Lessons from Rwanda," *The Yale Journal of International Law* 24:365, 1999, pp. 396 – 400. Also see Steven R. Ratner and Jason S. Abrams, *Accountability for Human Rights Atrocities in International Law* (London: Oxford University Press, 2001) Chapter 1.

<sup>5</sup> *Ibid.*, pp. 365 -6.

Yugoslavia,<sup>6</sup> deterring barbarism anywhere,<sup>7</sup> reforming the perpetrators,<sup>8</sup> and breaking with the past and achieving national reconciliation.<sup>9</sup>

I will analyze these aims as observed in recent domestic and ICTY war crimes cases in Bosnia, Croatia, Serbia-Montenegro and the province of Kosovo. Instead of focusing on these areas in isolation as much of the scholarship, I have examined key cases within the three states and province to form a more generalized picture of the whole. It is through comparing and contrasting these cases across territorial and ethnic divides that a deeper understanding can be achieved. This study is by no means exhaustive and political and socio-economic factors, international law, and the international community's attention to the region are all evolving and impact the work of the Tribunal.

The ICTY was created as the Bosnian war was escalating in 1993 and is seen by some as a symbol of international impotence to mass murder. The 1949 Geneva Conventions, UN Charter, conventions against torture and genocide, and series of Security Council resolutions had done little to deter the ethnic cleansers. The systematic violence, including torture, rape and mass killing had reached such proportions that the UN Security Council considered it "a threat to international peace and security."<sup>10</sup> Bypassing the usual red tape of the General Assembly, the Security Council, backed by the Secretary General established an international tribunal as "an enforcement measure under Chapter VII"<sup>11</sup> to counter the rising number of mass killings. Yet with few arrests initially, the court's credibility suffered. In 2001, eight years after its inception the court's authority was bolstered when Serbian authorities surrendered Slobodan Milosevic, the architect for the wars in Croatia, Bosnia and Kosovo to The Hague. Since his arrest, seven other top Serbian officials<sup>12</sup> have handed themselves in to local authorities and even Milosevic's former allies have testified against him.<sup>13</sup>

Milosevic's trial before the ICTY has been a watershed, but there are many obstacles to the international court. State authorities' lack of cooperation with the Tribunal is a constant source of friction with the chief prosecutor, Carla Del Ponte. Her public declarations emphasizing the ICTY's primacy have outraged politicians, religious leaders and their followers, and some even blame Del Ponte for the Serbian Premier's

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<sup>6</sup> Alvarez, "Rush to Closure: Lessons of the Tadic Judgment," *Michigan Law Review* 96:7, June 1998. p. 2032

<sup>7</sup> Interview with Vojin Dimitrijevic, an international law professor from Belgrade University, New York, October 18, 2002.

<sup>8</sup> See Judgments from Drazen Erdemovic and Tihomir Blaskic. <[www.un.org/icty/judgement.htm](http://www.un.org/icty/judgement.htm)>

<sup>9</sup> See Alvarez, *Op Cit.* p. 2032 and Antonio Cassese, "On the Current Trends towards Criminal Prosecution," *EJIL* 9 (1998), p.10. Cassese was president of the tribunal from 1993 – 1997.

<sup>10</sup> Report of the Secretary General, Doc. S/25704, May 3, 1993, paragraph 28.

<sup>11</sup> *Ibid.*

<sup>12</sup> The officials are: Dragoljub Ojdanic, former Yugoslav Defense Minister, Nikola Sainovic, federal deputy PM charged with Milosevic for crimes in Kosovo. Milan Martic, former president of Krajina, accused of crimes in Croatia. Mile Mrksic charged with crimes in Vukovar. Momcilo Gruban charged with crimes in Prijedor at the Omarske camp. On April 22, 2003 Miroslav Radic, also charged with crimes in Vukovar, surrendered to local authorities and is expected within days to be handed over to the ICTY. Also, in 2001 Milosevic was detained several months in Serbia until a law of cooperation was passed.

<sup>13</sup> Milan Babic, former self-proclaimed mayor of Knin, Krajina, witness C-61, revealed his identity on December 6, 2002. He blamed Milosevic for exacerbating tensions and escalating the war in the region controlled by Serbs from 1991-5, and regained by Croats subsequent to Operation Storm in 1995.

assassination on March 12, 2003. Also, Western critics assert the Tribunal has operated at snail's pace, prosecuted only a fraction of the Balkan mass murderers, and cost hundreds of millions. Some argue that the political situation has dramatically changed. No wartime president<sup>14</sup> currently holds office and all have been replaced by democratically-elected leaders committed to the rule of law. The conditions in Bosnia, as well as, Croatia and Serbia-Montenegro appear to be more conducive to national trials, which should not be overlooked. They can empower nascent democratic institutions, restore people's faith in the rule of law, and aid tremendously in rebuilding a war-shattered country.

In the first section, I examine the ICTY's goal of restoring faith in the rule of law in Croatia, Serbia-Montenegro and Bosnia and the challenge to international justice. Debate is often framed in terms of the legalist/realist arguments that dominate international law.<sup>15</sup> The legalists hold that criminal prosecutions of individual human rights abusers are necessary to uphold international law and re-establish stability and lasting peace. The realists assert that international law is a fiction and international justice encroaches on the sacred domain of state sovereignty. Instead, they believe each state should prosecute its own citizens. I will take this one step further and examine the impact of international justice in Bosnia, Croatia, Serbia-Montenegro and argue that the ICTY has galvanized reform. In the next section, I will consider Michel Foucault's discussion of penal reform that aimed to transform the individual, in two cases, one of a Bosnian Croat, Drazen Erdemovic, and another of a Bosnian Serb, Biljana Plavsic. I follow with a look at the most often stated aims of criminal prosecution---deterrence--- in the context of the Kosovo crisis. Lastly, I assess the success of the Tribunal at bringing about truth and reconciliation, the most difficult challenge and ultimate test of the international court's effectiveness.

## II. The ICTY Mandate

National courts are the optimal location for the prosecution of crimes. Rules of procedure and evidence are established. Law enforcement agencies and prisons are part of the state's apparatus and are coordinated with the work of the court. All these essential features of a functional criminal justice system are much more complicated at the international level. Unlike Nuremburg, which was part of the occupied American zone, the ICTY is dependent on state cooperation. The Yugoslav tribunal does not have its own police force. It must rely on state law enforcement agencies or NATO troops, whose members often have their own political agendas.<sup>16</sup> The biggest impediment to the Tribunal's work is the lack of cooperation from state authorities; many view the prosecutor's demand for state documents and war heroes as counter to their domestic

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<sup>14</sup> The former war-time presidents, Bosnian President Alija Izetbegovic, the late Croatian President Franjo Tudjman and the then-Serbian President Slobodan Milosevic signed the Dayton Accords on November 21, 1995, which effectively ended the Bosnian war. Kosovo was not included.

<sup>15</sup> See Alvarez; supra note 4, pp. 368 -369. Also, see Mark Osiel, *Obeying Orders* (New Brunswick: Transaction Publishers, 1999) pp. 161 -172. Osiel suggests a third approach to the legalist/realist debate. He considers a norm or social practice within the military as a technique of preventing atrocities.

<sup>16</sup> French troops were the least robust in apprehending war crimes suspects. During 1998 at least eight war crimes' suspects were living in the French zone, in and around the Bosnian Serb town of Foca. Some of the suspects were easy to find and interview. Other nations, including the Americans, did not see capturing war crimes suspects as a priority, especially if it risked their troops' lives.

political aims. Although state authorities have allowed ICTY investigators access to war crimes sites, official government documents and witnesses unthinkable before democratically-elected leaders won office in 2000, cooperation with the Tribunal is still inadequate.

The main battles between the ICTY and state authorities have taken place in Croatia and Serbia-Montenegro where government authorities have sovereign rights. Kosovo is a defacto UN protectorate<sup>17</sup> backed by a NATO-led force. State authorities have limited powers. However, the UN court's recent indictment against mid-level Kosovo Liberation Army commanders indicates to many that the UN lacks the political will to target bigger fish that investigators possess more compelling evidence against.<sup>18</sup> In Bosnia, the Office of the High Representative (OHR), a scaled-down version of the UN in Kosovo,<sup>19</sup> oversee the work of local authorities, which along with international troops have effective control. Yet former nationalist zealots still retain considerable influence in Bosnia, particularly *Republika Srpska*, and have effectively hindered the work of the Tribunal. Twenty-five indicted war criminals remain at large, including the Bosnian Serbs Ratko Mladic and Radovan Karadzic, who are accused of genocide.<sup>20</sup> All are thought to reside in either *Republika Srpska* or Serbia-Montenegro.

Many human rights groups fault NATO troops and domestic authorities for lack of resolve and failure to gain custody of war criminals and prosecute them in an international court of law. Yet some legal scholars criticize this view. They say approaching human rights violations with "a strong retributive impulse"<sup>21</sup> and a singular focus on punishment at all costs is short-sighted and counterproductive. Carlos S. Nino believes that an international duty to prosecute war crimes can weaken a fragile democracy and entrench hardliners.<sup>22</sup> The Argentinean law professor argues that a policy of "mandatory punishment" despite the consequences "is too blunt an instrument to help successor governments" re-establish democracy<sup>23</sup> The Argentinean President Raul Alfonsin's efforts towards prosecuting military generals, who reacted violently against the government, is case on point. Although Nino's critique refers to the prosecution of human rights' abuses in national courts, his analysis raises valid questions about the ICTY's attitude towards Croatia and Serbia-Montenegro. The recent assassination of the Serbian Premier Zoran Djindjic, whose well-publicized success at transferring Milosevic to The Hague earned him the wrath of ultra-nationalists, has sparked fierce debate.

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<sup>17</sup> A look at UN Resolution 1422 and the broad sweeping powers assigned to the Special Representative to the Secretary General SRSG, who can decree laws, give the UN executive authority over the province.

<sup>18</sup> In the western Dukagjini region, the bodies of 34 Serbs' and ethnic-Albanians were found at Radojnic lake in September 1998, according to UN officials interviewed in August 1999. Ramu sh Haradinaj was the KLA commander responsible for the region. Investigations have been launched but there is little will to pursue an indictment against Haradinaj who is popular in Kosovo and has uttered rhetoric in support of the UN mission.

<sup>19</sup> The High Representative Paddy Ashdown can also decree laws and fire politicians who violate the Dayton Peace Accords, but unlike the UN and his Kosovo counterpart, Michael Steiner, OHR and Ashdown do not have executive authority. For the OHR mandate, see <[www.ohr.int](http://www.ohr.int)>

<sup>20</sup> See "ICTY at a Glance." <[www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm)>

<sup>21</sup> Carlos S. Nino, "The Duty to Punish Past Abuses of Human Rights Put into Context: the Case of Argentina," *The Yale Law Journal* 100:2619, 1991, p. 2620.

<sup>22</sup> *Ibid.* p. 2634. Nino asserts international pressure would have increased the military opposition to President Alfonsin's efforts to prosecute past human rights abuses.

<sup>23</sup> *Ibid.*, pp. 2620-2621, 2638.

When Djindjic was assassinated many questioned the most outspoken-to-date chief prosecutor for her strong-arm tactics. Even moderates inquired if the former Swiss attorney general went too far in her relentless pressure against Serbian officials to handover war crimes fugitives. Much of the criticism against the Tribunal is waged against Del Ponte whose frequent declarations and overt political tone have made her many enemies. Also, Del Ponte's opponents contend she wields too much authority and is one woman judging their state. There is some truth to these assertions. The office of the Prosecutor is the biggest office in the Tribunal, and it receives the largest portion of the ICTY's budget. Her high profile targets from the past include Sicilian mafia members, the former Pakistani prime minister, Benazir Bhutto, and the former Mexican president's brother, Raul Salinas. She has been called "the new Gestapo,"<sup>24</sup> a label she apparently relishes. She says it proves that she is doing her job. Her position as chief prosecutor allows her considerable power for the duration of her 4-year Security Council appointment subject to renewal. She can "initiate investigations," which are compiled "on the basis of information obtained from any source."<sup>25</sup> The Prosecutor also determines if there is sufficient evidence for a case. She can amend an indictment at virtually any time<sup>26</sup> and can order a judge to keep its contents sealed until it is "served on the accused."<sup>27</sup>

The ICTY's decision to issue what is popularly called a "secret indictment" has angered leaders throughout the Balkan region, including even the most vocal ICTY proponent Croatian President Stipe Mesic.<sup>28</sup> As the late Serbian Prime Minister, Zoran Djindjic, explained: "the constant anticipation that the names from the tribunal's 'sealed indictments' be made public and then the question of the number of such indictments, weakens reformist forces and strengthens "extremist opponents." <sup>29</sup> Balkan leaders say a more transparent process would help them convince a still traumatized public that the ICTY is not against them.

Tribunal officials have explained that "non-disclosure"<sup>30</sup> of an indictment may be necessary to secure the custody of a suspect, who would otherwise escape. Less than a quarter of the 79 indictments submitted to authorities in Bosnia, Croatia, and Serbia-Montenegro have been sealed. Del Ponte countered Djindjic's criticism by pointing out that "the FRY authorities [as all authorities in the former Yugoslavia] know the identity" of all persons "in the sealed indictments," and the authorities' failure to handover a number of war crimes suspects still at large is for "political reasons, which are not relevant to the Hague tribunal."<sup>31</sup>

The chief prosecutor, Del Ponte, and her office wield enormous power. However, it is not "unlimited," as several Tribunal judges have noted. Once the Prosecutor makes

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<sup>24</sup> "Profile: Carla Del Ponte," *BBC*, February 12, 2002.

<sup>25</sup> See ICTY statute, Part III. and Articles 16 & 18 <[www.un.org/icty/basic/statut/s25704.htm](http://www.un.org/icty/basic/statut/s25704.htm)>

<sup>26</sup> See Rules and Procedures. Rule 50. <[www.un.org/icty/legaldoc/index.htm](http://www.un.org/icty/legaldoc/index.htm)>

<sup>27</sup> *Ibid*, Rule 53.

<sup>28</sup> Zoran Vodopija, "Croatian Commentary Defends President Mesic's Stand on Bobetko." Indictment," *Jutarnji List*, September 28, 2002.

<sup>29</sup> "Serbia's Djindjic Supports Extraditing 'Most Important' Indictees to ICTY," *Tanjug*, Belgrade, February 11, 2002.

<sup>30</sup> *Op Cit*, See Rule 53.

<sup>31</sup> "Hague Chief Prosecutor 'Dissatisfied' With Yugoslavia's 'Poor' Cooperation," *Beta*, Belgrade, October 22, 2001.

an indictment, it is subject to the review of a judge.<sup>32</sup> The 14 permanent and 27 part-time judges, who comprise two trial chambers and one appeals chamber, are members of different nations from all over the globe.<sup>33</sup> Criticism of Del Ponte's aggressive stance, which has at times had unfortunate consequences,<sup>34</sup> does not negate the overall, long-term benefit of the ICTY. The apprehension of Balkan mass murderers and subsequent trials in The Hague has stabilized the situation on the ground encouraged legal reform, and in the recent case of Serbia provoked a crackdown on criminal networks that is supported by the populous.<sup>35</sup>

### III. The ICTY's Impact on Restoring Faith in the Rule of Law

#### A. Bosnia

Bosnia, which was by far the bloodiest and longest of the post-World War II Balkan conflicts, presents the biggest challenge to sustaining the rule of law. Tribunal investigators have estimated from 15 to 25,000 individuals in the region could be subject to war crimes' prosecution.<sup>36</sup> The majority are presumed to live in Bosnia. Initially, the investigators were hampered by insufficient funds to track down witnesses, collect evidence, and exhume mass graves.<sup>37</sup> Once, however, the ICTY began issuing indictments and apprehending suspects, its authority was bolstered. In the summer of 1997, British SAS (Special Air Service) officers shot one Bosnian Serb suspect dead.<sup>38</sup> The Croats and Bosniaks applauded the international community's robustness. Serbs were outraged. The key Bosnian Serb international interlocutor, the former president, Biljana Plavsic, rebuked SFOR for "murder" and told the mission's American commander "it made a delicate situation in RS [*Republika Srbska*] worse."<sup>39</sup> In 1997 British troops claimed their deadly shots were justified since the suspect was armed and had resisted arrest. The following year another prominent arrest of a Bosnian Serb suspect 85 miles inside Serbian territory indicated the ICTY "had teeth."<sup>40</sup> Recent analysts have concluded whatever the anti-NATO reaction at the time, the long-term impact of such high-profile arrests has been positive. It cleared the way for further

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<sup>32</sup> *Op Cit*, see Rule 28.

<sup>33</sup> See Scharf; *supra* note 33, pp. 63-66. The appointment of judges is subject to a UN SC vote. The first 11 judges were chosen in 10 contentious rounds in September 1993. Today they include Asian, Middle Eastern and Latin American nations, which were not involved in the most recent NATO air campaign. Also see Diane Orentlicher, "Who Will Judge the Court Itself?" *Washington Post*, July 8, 2001

<sup>34</sup> Some senior UN officials have noted that Serbian officials may have surrendered Milosevic earlier if Del Ponte had led a less political campaign. Also, according to the U.S. Embassy political officer (June 2001), the Serbian Minister of Interior Dusan Mihajlovic was threatened almost every day after he first announced the presence of Albanian mass graves at SAJ police training sites in Serbia. Del Ponte's high-profile attack made it harder for him to carry out the needed investigations.

<sup>35</sup> BETA Commentary: "Serbia at a Crossroads" *Beta*, Belgrade, April 23, 2003.

<sup>36</sup> ICG Balkans Report No. 137, *The Continuing Challenge of Refugee Return in Bosnia and Herzegovina*, December 13, 2002. p. 19. <[www.icg.crisisweb.org](http://www.icg.crisisweb.org)>

<sup>37</sup> See Scharf; *supra* note 33 & 43, p. 81.

<sup>38</sup> "Serb Official Calls Drljaca Killing 'Premeditated Murder'" *Beta*, Belgrade, July 10, 1997. .

<sup>39</sup> "SFOR Action 'Undermined' Plavsic," *AFP*, July 11, 1997.

<sup>40</sup> Jacqueline Pietsch, "Todorovic Refuses To Plead Owing to Beatings After Arrest," *AFP*, September 30, 1998. See *supra* 18. Dimitrijevic said that after Bosanski Samac police chief Steven Todorovic was arrested, the "Serbs saw that the tribunal had teeth."

Bosnian Serb arrests, which has been “crucial” for “large scale return”<sup>41</sup> of those displaced by the conflict.

With the removal from power of war crimes’ suspects, who often control illicit business activities in their area, the security situation and rule of law has vastly improved. This has been seen throughout the region from all sides. The Bosnian Army General Mehmed Alagic, who served after the war as the Sanski Most mayor until the High Representative suspended him from holding office in 1999,<sup>42</sup> was accused of numerous counts of corruption including the theft of \$ 450,000 of Saudi aid he allegedly gave his brother to open a bank.<sup>43</sup> Alagic, who surrendered voluntarily, appeared last summer in The Hague along with two others indicted for the murder and cruel treatment of “at least 200 Bosnian Croats and Serbs”<sup>44</sup> in Central Bosnia (1993-4). During his provisional release this spring he died of a heart attack.<sup>45</sup> The long term impact of Alagic’s absence from the political scene will become clearer in subsequent months. The Croatian government’s surrender of 10 Bosnian Croat war crimes suspects in late 1997 helped stabilize the situation on the ground immensely. The group included the notorious Bosnian Croat political leader Dario Kordic,<sup>46</sup> whom UN officials identified along with the Bosnian Serb suspect Radovan Karadzic as the “main obstacle”<sup>47</sup> to the first post-war elections (1996). Kordic was widely reported to have enriched himself as a war profiteer in his position as a high-ranking member of nationalist party, the Croatian Democratic Union (HDZ) in Bosnia. His removal from office and subsequent 25-year sentence by the ICTY reduced tensions and allowed Bosniaks cleansed from the Lasva Valley (1992-3) to return to their pre-war homes.

OHR officials say that it is too soon to tell what the impact on the ground is of the recent arrest and surrender of Bosniak Naser Oric to ICTY authorities.<sup>48</sup> Oric has been indicted for the murder of 6 Bosnian Serbs and wanton destruction in Srebrenica during 1992-3.<sup>49</sup> Critics say his crimes pale in comparison to the Srebrenica massacre of an estimated 7,000 Bosniaks, which occurred two years later.

The ICTY has used a variety of methods to gain custody of the perpetrators of mass killings. In Bosnia, international troops, particularly British, have acted as the Tribunal’s police force. In Croatia and Serbia, U.S. officials have threatened Balkan

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SAS officers inside Bosnian territory probably worked in tandem with Serbian mercenaries in neighboring Serbia to carry out the task.

<sup>41</sup> ICG Balkans Report No. 137, p. 19. Also, see ICTY judgments: Sikirica et al., Kvocka et al, for Omarska and Keraterm camps near Prijedor. Simo Drljaca, who was killed by SFOR, was identified in the judgment as the main person who officially established 3 concentration camps near Prijedor.

<sup>42</sup> “Mayor Alagic Suspended,” *Office of the High Representative Press Release*, July 20, 1999.

<sup>43</sup> Chris Hedges, “Leaders in Bosnia are said to Steal up to \$ 1 billion,” *New York Times*, August 17, 1999.

<sup>44</sup> See ICTY indictments, Case No: IT-01-47-PT.

<sup>45</sup> “Over 20,000 Mourners Attend Funeral of War Crimes Indictee Gen Alagic,” *ONASA, Sarajevo*, March 9, 2003.

<sup>46</sup> See ICTY indictments, Case No: IT-95-14/2-T. The IMF blocked loans and the U.S. Balkan envoy Robert Gelbard threatened the Croatian President Franjo Tudjman with further measures if he did not comply with the ICTY demands. Kordic is named in the indictment as an organizer of the Ahmici Valley massacre. He was sentenced to 25 years, significantly less than Blaksic, the military commander of the region, who was sentenced to 45 years.

<sup>47</sup> “UN’s Ivanko Warns of Croat Separatist Tendencies,” *Beta*, Belgrade, June 19, 1996.

<sup>48</sup> Conversation by phone with OHR officials in Sarajevo, April 21, 2003.

<sup>49</sup> See ICTY Indictments, Case No. IT-03-68-I.

political leaders with sanctions and withholding IMF funds if authorities fail to handover war crimes suspects.<sup>50</sup> These means are blunt. Yet the long-term impact of removing war criminals from positions of legitimized authority has been crucial. It has advanced the reform process and allowed those committed to the rule of law to exert some influence.

## B. Croatia

The Croatian President Stipe Mesic, who testified at the Milosevic trial, last October, is a notable exception to recalcitrant Balkan leaders. He has made bold statements in support of the Tribunal, explained that no one is above the law and has criticized his government's failure to handover indicted Croatian war crimes' suspects. The majority of Croats, however, oppose his pro-ICTY stance.<sup>51</sup>

Last year in Croatia, a Catholic bishop echoed a popular sentiment when he denounced a Hague indictment against General Ante Gotovina for the war in 1995 as "humiliating and dishonoring" Croatia's "defenders."<sup>52</sup> His capture remains elusive. Gotovina is charged with the murder and cruel treatment of Croatian Serbs in August 1995, when an estimated 150,000 to 200,000 ethnic Serbs fled the Krajinan region.<sup>53</sup> During the summer of 2002 the ICTY also issued an indictment against the 83-year-old retired, ailing General Janko Bobetko for crimes against humanity, committed against ethnic Serbs in 1993. He recently died just weeks after the Tribunal agreed to postpone his trial because of his acute medical condition.<sup>54</sup> Thousands attended what was described as a "hero's funeral,"<sup>55</sup> and even the fugitive Gotovina sent flowers. The indictments come in the wake of the Tribunal's second longest sentence-to-date<sup>56</sup> of the popular Bosnian Croat general Tihomir Blaksic, who surrendered himself to the international court in April of 1996. The ICTY handed Blaksic a 45-year sentence for command responsibility<sup>57</sup> of gross human rights abuses in the Lasva Valley (1992-4). His lawyer argued that the most serious charge of the indictment, a massacre of Bosniaks in the Central Bosnian village of Ahmici, was organized "behind [Blaksic's] back."<sup>58</sup> Right-wing politicians have lambasted the government for cooperation with the "anti-

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<sup>50</sup> See *infra* note 23. U.S. Balkan envoy threatened Tudjman with sanctions if he did not comply with ICTY demand.

<sup>51</sup> Ian Traynor, "Croatia Refuses to Hand Over General Accused of War Crimes," *Guardian*, September, 26, 2002. Poll showed "84% of Croats backed Gen Bobetko and almost as many favored abandoning cooperation with The Hague."

<sup>52</sup> "Croatian Bishop Criticizes Government's Cooperation with Hague Tribunal," *AFP*, August 5, 2001.

<sup>53</sup> See Ante Gotovina indictment <[www.un.org/indictment](http://www.un.org/indictment)>, and author's interview with Croatian Presidential candidate Stipe Mesic, Zagreb, Croatia (January 2000). The fall of Serb-occupied (1991-5) Krajina has been contested. When Croatian troops began an offensive in Krajina, Serb military leaders were reported to have abandoned their positions. Croatian President Stipe Mesic claimed that Milosevic was uninterested in the region and had planned to move ethnic Serbs from Krajina into Kosovo.

<sup>54</sup> See ICTY indictments, order Bobetko

<sup>55</sup> "Croat Hero Janko Bobetko, Charged With War Crimes," *Associated Press*, May 2, 2003.

<sup>56</sup> Radislav Krstic has been handed the longest sentence-to-date -- 46 years -- for genocide in Srebrenica as commander of the Drina Corps

<sup>57</sup> See ICTY Statute, Article 7 (1) and (3). See Zoran Vodopija, "Croatian Commentary Defends President Mesic's Stand on Bobetko Indictment," *Jutarnji List*, September 28, 2002. Mesic explained in a public speech that "command responsibility signifies the responsibility of a person who either ordered crimes, or knew about them, but failed to prevent them, or who learned of them, but failed to punish the perpetrators."

<sup>58</sup> "Mesic: Ahmici Perpetrators Should Face Trial in BH, ICTY," *Hina*, Zagreb, June 2, 2000.



Croat” court. Blaksic, and the two generals, Bobetko and Gotovina, have all been charged with crimes they ordered or were committed by their subordinates whom they failed to punish. As Mesic has explained in public speeches, if a military commander orders and instigates war crimes, it is as important as; if he fails to prevent or punish acts committed by his subordinates. As one commentator noted, the key phrase was “he knew or had reason to know.”<sup>59</sup> The right-wing opposition says this criminalizes their “Homeland War” against Serbian aggressors.

While some commentators have claimed the ICTY’s approach is counterproductive and will lead to heightened nationalism and anti-Western sentiment,<sup>60</sup> a more thorough analysis shows this is often not true. During the summer of 2001 after the Yugoslav Tribunal achieved its greatest feat and gained custody of Milosevic, the ICTY stepped up their pressure against Croatian authorities to hand over two former Croatian generals, Rahim Ademi, who surrendered and was transferred to The Hague and Gotovina, who went into hiding. The Racan government appeared to be in crisis as right-wing politicians blamed the reformers for cooperating with the “anti-Croat” court. The situation became increasingly tense and many observers predicted the government would collapse. After a spate of resignations, Racan called for a vote of confidence in the government which he won and the street demonstrations quickly petered out.<sup>61</sup> In fact, Racan emerged stronger after the crisis. The key seems to be decisiveness. Mesic has maintained his popularity with a clear consistent stand in support of the court. Despite the view of many Croats that the court is against them, polls show that many Croats accept that their soldiers also committed war crimes.<sup>62</sup> Mesic has offered his people a roadmap forward and has been essential to open dialogue on what otherwise would remain taboo.

### **C. Serbia-Montenegro**

In Serbia-Montenegro, as Croatia, the ICTY has had to rely on the good will of local authorities rather than international peacekeepers to apprehend war crimes suspects. Cooperation with the Tribunal was limited until recently. During more than a month of an imposed state of emergency in response to Djindjic’s assassination, hundreds were arrested and questioned by the police. The new Premier, the former mayor of Nis, Zoran Zivkovic, did what no Serbian politician had dared; he confronted powerful criminals who had operated with virtual free reign. The former head of the State Security Service (DB), Jovica Stanisic, and the founder of a notoriously brutal gang, the Red Berets, Franko Simatovic, were arrested and await trial. The Tribunal followed the Serbian police arrest with an indictment against the two for crimes against humanity in Bosnia and Croatia.<sup>63</sup> The recent crackdown by Serbian authorities on organized crime is a

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<sup>59</sup> *Op Cit* and see ICTY Statute, Individual Criminal Responsibility 7(3)

<sup>60</sup> Daniel Simpson, “Croatia Protects a General Charged with War Crimes,” *New York Times*, December 3, 2002.

<sup>61</sup> See Vodopija.

<sup>62</sup> See ICG Balkans Briefing, “*Croatia: Facing Up to War Crimes*,” p. 7.

<sup>63</sup> See ICTY Indictments, Case IT-03-69 (May 1, 2003).

radical shift from the past and has been supported by the majority of Serbs.<sup>64</sup> Also, it encouraged at least one war crimes fugitive to surrender to local authorities.<sup>65</sup>

Participation with the Tribunal has been otherwise uneven and problematic. The Yugoslav Army has protected its members and refused to release documents the ICTY has demanded. Also, Yugoslav generals and special units in the police (only recently disbanded) have impeded the investigations of Serbian officials into crimes committed during the Croatian, Bosnian and Kosovo wars.<sup>66</sup> Although the Yugoslav Foreign Minister Goran Svilanovic has voiced support for the international court, he has little significant sway over the army.<sup>67</sup> The Yugoslav President Vojislav Kostunica, who has relied on the Army for support, has criticized the court as anti-Serb and has done nothing to facilitate the apprehension of Mladic and other former JNA officials believed to be residing in Serbia.<sup>68</sup> In a November 2002 visit to Kosovo and Belgrade, UN Secretary General Kofi Anan reiterated Del Ponte's message that Serbian-Montenegrin officials had to fulfill their commitments to the ICTY.<sup>69</sup> Unlike Croatia, Serbian-Montenegrin leaders' reluctance to handover war crimes suspects is based on internal power struggles rather than fear of a public reaction. Milosevic's arrest sparked only minor protests, and Mladic's and Karadzic's arrests are expected to provoke a similar response.<sup>70</sup>

Many asked when Djindjic was assassinated if it were an act against reform. The Yugoslav Tribunal's chief prosecutor was warned by the Serbian-Montenegrin Foreign Minister Goran Svilanovic not to come to Djindjic's funeral<sup>71</sup> since her presence would undoubtedly provoke reactions by a nation in mourning. Yet as the chief prosecutor countered, the "criminal gangs" that had "run rampant" were to blame rather than ICTY pressure against domestic authorities. "The war criminals are strongly connected with organized crime." Del Ponte told journalists in Geneva.<sup>72</sup> The recent crackdown by Serbian-Montenegrin authorities and the apparent success of their efforts seem to confirm the chief prosecutor's claims. If anything, ordinary Serbs' support for the pro-reform coalition is even greater than it was before. As one newspaper

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<sup>64</sup> "BETA Notes Benefits of Anti-Crime Campaign for DOS Popularity, ICTY Cooperation," *Beta*, April 23, 2003.

<sup>65</sup> Miroslav Radic surrendered himself to local authorities in April. He is indicted for crimes against humanity in Vukovar in 1991.

<sup>66</sup> Interviews with U.S. and Serbian officials in June 2001. Mihajlovic has had numerous difficulties in finding out the identity of those responsible for burying Albanian victims at SAJ police training sites. Also see "BETA Analyzes FRY's Inability To Commit to ICTY Cooperation," *Beta*, Belgrade, November 27, 2002. Red Beret Units protested after they realized they were used to arrest the Banovic brothers.

<sup>67</sup> The Yugoslav Army has failed to meet NATO's Partnership for Peace criteria.

<sup>68</sup> See Mrksic et al., Case (IT-95-13a-I) Veselin Sljivancanin, a major in the JNA in command of a military police battalion, was operation commander in Vukovar. He is the only remaining military official at large in the indictment. The other two have surrendered themselves to local authorities. One has already appeared before judges in The Hague. The other is currently being held by Serbian officials.

<sup>69</sup> "ICTY Cooperation," *Beta*, November 27, 2002. "The authorities in Belgrade do not expect any strong public reaction if Sljivancanin or Mladic are arrested. The arrest of Milosevic sparked only lukewarm protests."

<sup>70</sup> *Ibid.*

<sup>71</sup> "Serbia's Svilanovic Says Hague's Del Ponte 'Not Welcome' at Djindjic's Funeral," *Beta*, March 14, 2003.

<sup>72</sup> "Hague Tribunal's Del Ponte Hopes Serbia Continues To Cooperate on War Criminals," *Beta*, March 17, 2003.

commented, “the average voter is now much less interested in so-called patriotic matters, such as vaguely defined national interests and the need to oppose the ICTY.”<sup>73</sup>

#### IV. War Crimes Cases in Bosnia.

Throughout the former Yugoslavia nationalist tensions have obstructed war Crimes trials. Bosnia is by far the most complex case. There are four levels of government and law making powers – one state, 2 entities (Croat-Muslim Federation and Serb entity – *Republika Srpska*), 10 cantons in the Federation, and the Brcko district with its own separate administration. The three different legal and policing systems in the two entities and Brcko make prosecuting war crimes nearly impossible<sup>74</sup> The Bosnian Serb entity, the Federation and Brcko each act as if they are “sovereign states,” and there is virtually no cooperation in investigations or law enforcement across internal boundaries.<sup>75</sup>

In early 1996, procedural requirements for domestic trials in Bosnia, the “Rules of the Road,” were adopted.<sup>76</sup> The 1996 Rome Agreement was intended to facilitate return and prevent politically motivated trials by those set on revenge in the immediate aftermath of the Bosnian war. Under the Agreement, the ICTY has the authority to decide if sufficient evidence exists for a domestic case under international humanitarian law, when a state of armed conflict exists.<sup>77</sup> The Tribunal’s jurisdiction “in the territory of the former Yugoslavia” began in 1991 and includes four different international crimes: 1) Grave breaches of the 1949 Geneva Conventions, 2) Violations of the customs of war, 3) Genocide, 4) Crimes Against Humanity.<sup>78</sup> Unlike the Rwanda Tribunal which is limited to 1994, Del Ponte has stated that the Yugoslav Tribunal’s temporal jurisdiction applies to Kosovo and Southern Serbia after the arrival of NATO troops since “continuing violence” fulfills the “armed conflict” requirement.<sup>79</sup> The *Rules of the Road* review and the ICTY Statute give the Yugoslav tribunal authority to have a Bosnian court case deferred to ICTY jurisdiction. However since the court is confined by only three court rooms and is supposed to finish investigations of some 200 cases by 2004, complete the trials by 2008 and appeals process by 2010,<sup>80</sup> this has happened in very few instances. For the most part, the ICTY’s attempt to target the “architects” and “worst offenders”<sup>81</sup> has precluded their interest in common thugs with little influence. It is

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<sup>73</sup> *Ibid.*

<sup>74</sup> See ICG Balkans Report No. 127, *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*, March 25, 2002. p. 4.

<sup>75</sup> *Ibid.*

<sup>76</sup> See “Rome Agreement,” Office of the High Representative, Bosnia, February 18, 1996. <[www.ohr.int](http://www.ohr.int)> “Cooperation on war crimes and respect for human rights” was one of five measures signed by Presidents Izetbegovic, Tudjman and Milosevic in Rome as a follow up to the Dayton Peace Accords.

<sup>77</sup> See ICTY Statute, Art. 5 and Tadic Judgment, para 70. IHL covers internal or international armed conflict. “An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities or between such groups within a State.”

<sup>78</sup> See ICTY Statute, Art. 1 (Competence of the Int. Tribunal) and Articles 2-5.

<sup>79</sup> ICG Report No.134, “*Finding the Balance: The Scales of Justice in Kosovo*,” Sep. 12, 2002 pp. 18-19.

She has also talked about amending Art. 5 to omit the reference to “armed conflict” so that the ICTY could prosecute such cases.

<sup>80</sup> “Address by the Prosecutor of the ICTY, Carla Del Ponte to UN Security Council,” November 27, 2001. <[www.un.org/icty/pressreal/p642-e.htm](http://www.un.org/icty/pressreal/p642-e.htm)>

doubtful that today after gaining custody of top political and military officials, the Tribunal would pursue cases against former prison camp guards, such as, the young Bosniak, Esad Landzo, or Bosnian Serb café owner, Dusan Tadic, as they did in their early stages. Instead the ICTY has handed such cases to national courts. Recent conversations with ICTY officials and international authorities in Sarajevo have confirmed, however, that no investigations which were initiated by the ICTY have been handed over to local courts.<sup>82</sup> The *Rules of the Road* review and the ICTY Statute ensure Bosnian courts follow stricter rules for establishing a case than are required of their counterparts in Croatia or Serbia-Montenegro.

The ICTY's real impact on the ground can be seen by observing local trials. Reform will require more than piecemeal strategies but structural change developed over the long-term. Bosnian courts have taken on controversial war crimes cases; however it is not clear if the local judiciary can "competently" or "fairly" handle the cases.<sup>83</sup> Also, the legacy of socialist rule is still a formidable obstacle to change. War crimes cases have sometimes languished in local courts or been dismissed for a lack of evidence. On April 21, 2003 a Bosnian Serb, Zarko Pandurevic was acquitted of war crimes charges by a Sarajevo cantonal court. The judge deemed there was insufficient evidence despite a year-long investigation and the ICTY's approval for local authorities to go ahead with the case. As the ICTY's mandate nears its end, domestic courts in Bosnia will need to take on added responsibilities for prosecuting war criminals at home. According to officials from the Office of the High Representative (OHR), there are currently four ongoing war crimes cases, which have met the ICTY *Rules of the Road* criteria.

The Rules of the Road Procedures have aided the reform process, but they are far from adequate. There are no guidelines for judges on how to conduct a trial once it begins, and many question the court's ability to act impartially. Clearly, Bosnia, as Serbia-Montenegro, and Croatia will have to begin seeking justice through their own national courts as the ICTY's mandate comes to an end. The question is how. One potential solution is the addition of international judges, who were not party to the conflict, can aid in the process of legal reform and ensure neither victim's nor victor's justice is dispensed.

## V. War Crimes Cases in Croatia

Croatia's record is mixed. Although the country has been the most productive of the former Yugoslav states and prosecuted hundreds of war crimes cases, the vast majority have been politically motivated against Croatian Serbs. Almost all have been in absentia. This has deterred many displaced refugees from returning to their pre-war homes.<sup>84</sup> There have been only a few trials where Croats were accused -- "most amounted to a little more than whitewashing."<sup>85</sup> The 2002 Lora prison case illustrates some of the limits of the

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<sup>81</sup> *Ibid*, and Interview with Chief ICTY Investigator for Kosovo, Pristina, Kosovo, July 1999. Del Ponte noted that in between "the big fish" and "small fish" are those who carried out the plans at "the district and local level." They are as big an obstacle to the peace process in the war-torn communities as the "architects." The chief investigator used the term "worst offender."

<sup>82</sup> Conversations with OHR officials in Sarajevo by phone, April 15, 2003.

<sup>83</sup> ICG Balkans Report No. 127, *Courting Disaster: The Misrule of Law in Bosnia & Herzegovina*, March 25, 2002. p. 33.

<sup>84</sup> ICG Balkans Briefing, "Croatia: Facing Up to War Crimes," Zagreb/Brussels, October 16, 2001. p. 2.

<sup>85</sup> *Ibid*, p.2

Croatian justice system. Eight Croatian military officers were charged with the torture and murder of Serbian and Montenegrin prisoners in 1992, which had been widely reported by local and international NGOs.<sup>86</sup> The Split County public prosecutor was reportedly threatened and filed a motion with the Supreme Court to have the case transferred to another court in the first days of the five-month trial. The witnesses, including a former Croatian military police officer who spoke out about the abuse, were repeatedly intimidated by the defendants' supporters. In late November (2002) all eight Croatian officers -- one who failed to appear in court at all, and the seven others who went into hiding mid-way through the trial -- were all acquitted.<sup>87</sup>

As the international court has gained in credibility throughout the former Yugoslavia, political leaders have increasingly looked toward the ICTY as the most effective and impartial means of justice for war crimes committed against their nationals. In December the Yugoslav Foreign Minister demanded the Tribunal, rather than courts in either Montenegro or Serbia, takeover the Lora case.<sup>88</sup> For Michel Foucault the effectiveness of any penal system is based on the obvious -- individuals' belief that they are "liable to punishment."<sup>89</sup> Even Milosevic recognized in a heated exchange with the Croatian leader Mesic that "criminals should certainly be prosecuted and brought to justice."<sup>90</sup> Yet Milosevic and many other Balkan political and military officials exclude their own culpability. Milosevic has repeatedly stated during his trial that he defended his country against "criminal aggression," attempted to preserve the federation, and is thus innocent of all charges. He has questioned the Tribunal's validity as an impartial court of law since it was not set up by the UN General Assembly.<sup>91</sup> In the first ICTY case, for the Bosnian Serb Dusan Tadic (1997), the appeals chamber rejected the same claim. The court argued that "the establishment of the Tribunal was well within the broad powers of the Security Council under Chapter VII of the UN Charter."<sup>92</sup> Most of the post-war Balkan leaders accept the international court's legitimacy, but all see themselves as victims rather than criminal perpetrators. Bosniaks, Croats, Serbs, Montenegrins, and Kosovo Albanians insist that the ICTY sentence the war criminals that made them suffer. Implicit in this demand, however, is the acceptance of criminal liability for their own nationals. Mesic has understood this. He has explained that the Croatian generals are as culpable of war atrocities as Milosevic, who knew, issued orders, and did not punish the

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<sup>86</sup> "Croatia: Victims and witnesses in war crimes trials must be adequately protected," *Amnesty International*, June 20, 2002. Local and international NGOs widely reported that an estimated 70 Lora detainees "disappeared." There was an investigation into the murder of two prisoners.

<sup>87</sup> "Lora War Crimes Trial Ends," *Hina*, Zagreb, November 20, 2002.

<sup>88</sup> "FRY Asked Tribunal to Takeover 'Lora Case'," *Tanjug*, Belgrade, December 5, 2002.

<sup>89</sup> Michel Foucault, "What is Called 'Punishing,'" *Essential Works Volume III*. (The New Press: New York, 1994) p. 392

<sup>90</sup> See ICTY indictments, Milosevic Transcript, October 12, 2002, p. 10,652.

<sup>91</sup> See ICTY indictments, Milosevic Transcript, August 30, 2002. p.1. He has said the ICTY is an illegal institution since it was set up by the UN Security Council instead of the GA.

<sup>92</sup> Scharf, *Balkan Justice*, p. 105.

perpetrators.<sup>93</sup> No other Balkan leader has taken as bold a stand. The institutional demands of the ICTY have provided Mesic with an opportunity to offer his people an enlightened view point.

## VI. War Crimes Cases in Serbia-Montenegro

Despite the political obstacles, legal reform in Serbia-Montenegro has taken place. Internal disciplinary measures against police accused of looting and wanton destruction in Kosovo has resulted in the sacking of scores of Serbian policemen since late 2000.<sup>94</sup> Since the surrender of Milosevic (2001) and top-ranking Serbian political and military officials (2002) to the international court, controversial war crimes cases against non-Serb victims have been prosecuted in local courts. In September 2002, a Montenegrin judge sentenced Nebojsa Ranisavljevic, a volunteer who served in the Bosnian Serb Army, to 15 years for the murder of 19 Yugoslav Muslims abducted from a Belgrade-Bar train in February 1993. Although the sentence is light for the gravity of the offence and none of the senior military officials or police who issued the orders or organized the abduction have been prosecuted,<sup>95</sup> the trial in Bijelo Polje is one of the first for crimes against non-Serb victims. Also, officials from the rail company cooperated with the court and supplied documents which implicated their members, the Bosnian Serb Army and Serbian-Montenegrin police units in the crime. This is a major breakthrough and shows an increasing willingness to tackle such cases, which languished under Milosevic's reign.<sup>96</sup> The arrests of high-ranking Serbian officials and continued pressure from the Tribunal have undoubtedly opened the door for such trials. Also, a court in Serbia convicted a Yugoslav Army reservist, Ivan Nikolic, for the murder of two ethnic-Albanians during the armed conflict in Kosovo, which ends "the long standing practice of allowing war crimes to go unpunished."<sup>97</sup> Although, local and international human rights groups have declared Nikolic's light sentence of eight years disproportionate to his crime, the presiding judge's statement that "the murder" of "two civilians" made Nikolic a "war criminal" rather than a "patriot"<sup>98</sup> is a step forward. Three additional trials for war crimes against non-Serb victims are currently before local courts. This is a major breakthrough for Serbia-Montenegro, where national courts are assuming responsibility for prosecuting war crimes against non-Serbs, cases that local courts would never have prosecuted during the Milosevic era.

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<sup>93</sup> See Vodopija, supra note 38.

<sup>94</sup> Interviews with Serbian police officials and U.S. Embassy officials in June 2001.

<sup>95</sup> Humanitarian Law Center Report, "*Senior Military, Police and Civilian Officials Responsible for Abduction of Train Passengers*," Belgrade, May 17, 2002.

<sup>96</sup> Sefko Alomerovic, Open Letter to Montenegrin President Milo Djukanovic, "Trial as Extended Crime," *Danas*, Belgrade, February 22 -23, 2001. <[www.cdsp.neu.edu/info/students/marko/danas/danas78.html](http://www.cdsp.neu.edu/info/students/marko/danas/danas78.html)> 37-year-old Ranisavljevic was arrested in Oct. 1996, but the trial did not begin until May 1998. In 1997 a Montenegro court attempted to transfer the case to a Serbian court, which failed. The Montenegrin president of the court postponed the case a number of times, and it was not until 2002 and a visit by the ICTY chief prosecutor that the case was completed.

<sup>97</sup> HLC Report, "*Prokuplje Court Hands Down Sentence for War Crimes*," July 11, 2002.

<sup>98</sup> *Ibid.*

## VII. Reform of the Individual: Erdemovic and Plavsic cases

Foucault asserts the eighteenth century reformers of penal law considered a criminal an individual who had “broken the social contract.”<sup>99</sup> The criminal was no longer seen as simply transgressing natural law, moral or religious codes, but as an enemy of society. Penal law was used as a means to repair the harm caused by the individual to society<sup>100</sup> and prevent the disturbance from recurring. Crimes needed to be denounced. The offenders should be humiliated and shamed.<sup>101</sup> The ICTY indictments,<sup>102</sup> apprehensions and prosecutions against Bosniaks, Serbs, and Croats are a means of discrediting the perpetrators of war crimes, crimes against humanity and genocide. They are disgraced and ostracized by the international community of nations. These denunciations are the ICTY’s most potent method of deterring future gross human rights abuses at home and abroad. Although mass murder and a systematic plan of ethnic cleansing continued even after the Tribunal’s inception in 1993, the delinquent leaders, their cohorts and would-be followers have been inhibited over time.

Contemporary legal scholars have debated whom an international court should prosecute for crimes that shock the conscious of the entire world. The eighteenth century reformers’ theories were based on the obligations of states. By the nineteenth century, Foucault asserts, there was a shift in penal law from what was “socially useful” to reform of the individual.<sup>103</sup> Reform though has little relevance for most perpetrators of mass atrocities. Milosevic’s lack of remorse and indifference to witnesses who lost family members has even appalled Serbian television viewers in his native capital.<sup>104</sup> The Tribunal’s indictment has merely reinforced his adversarial position against the ICTY. There are only a few cases, where the Yugoslav tribunal’s judges decided that the defendants were “reformable.” All involved admissions of guilt. The most unique example is that of a Bosnian Croat, Drazen Erdemovic. A non-Serb, who joined the Bosnian Serb Army “to feed his family,” initially pleaded guilty to crimes against humanity for the summary execution of an estimated 100 Bosniaks at a farm, northwest of Srebrenica, in July of 1995.<sup>105</sup> Hundreds of Bosniaks, who were bussed out of the UN safehaven, were killed by Erdemovic’s execution squad at the Pilica farm -- included in the 7,000-plus victims of the Srebrenica massacre. Erdemovic, who confessed to his crimes before the Tribunal issued an indictment, fled Bosnia and attempted to contact the ICTY prior to his arrest in Serbia and eventual transfer to The Hague (March 1996). His detailed description of his participation in the mass killing to a foreign and a local journalist<sup>106</sup> provoked local authorities to hunt him down. At The Hague, his cooperation with the Tribunal’s investigation into the Srebrenica massacre advanced their work significantly. His explanation of the Bosnian Serb units most culpable for the Srebrenica

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<sup>99</sup> See supra note 12 & 16 Foucault, “Truth and Juridical Forms,” *EW III*, pp. 53-55. Also, see Foucault, *Discipline and Punish*, pp. 92 -99.

<sup>100</sup> *Ibid*, p. 54.

<sup>101</sup> *Ibid*, p. 54.

<sup>102</sup> Del Ponte has said at least 2 investigations against KLA figures have been launched. Also, the ICTY has asked Macedonia to defer several cases against ethnic-Albanians and Macedonians to the Tribunal.

<sup>103</sup> See supra note 103. pp. 56 – 60.

<sup>104</sup> See supra 18 & 49. Although Milosevic won some domestic support for his defiance of the ICTY, Dimitrijevic said many Serbs were shocked how he badgered witnesses who had lost family relatives.

<sup>105</sup> See ICTY indictments, Erdemovic, Case (IT – 96 – 22)

<sup>106</sup> Le Figaro foreign correspondent Renau Girard and ABC Belgrade producer Dragana Jovanovic

massacre led to the court's first conviction of genocide. The Drina Corps commander, Novica Krstic, was sentenced in August 2001 to 46 years, the longest ICTY sentence to date. Erdemovic, who suffered post-traumatic stress from the war, had been by all accounts a reluctant participant in the killings. Tribunal judges considered his admission of guilt and numerous expressions of remorse for his victims as a "mitigating factor" in his sentence.<sup>107</sup> He told the court: "I only wish to say that I feel sorry for all the victims, not only for the ones who were killed then at that farm. I feel sorry for all the victims in the former [sic] Bosnia and Herzegovina regardless of their nationality."<sup>108</sup> On appeal, Erdemovic pleaded guilty to the lesser offence of war crimes and the prosecutor dropped the count of crimes against humanity.<sup>109</sup> His sentence was reduced from ten to five years and the court decided the foot soldier was "reformable" and "should be given a second chance to start his life afresh upon release, whilst still young enough to do so."<sup>110</sup>

Few, ICTY indictees have shown such remorse as Erdemovic. Even the former Bosnian Serb President Biljana Plavsic's December 2002 confession of guilt in The Hague seemed more aimed at appeasing the guilt of Serbs than remorse for the victims of Bosnian Serb atrocities. Her explanation that egregious crimes had been motivated by Serbs' "blinding fear," which led to an "obsession" that they would "never again become victims," as they had in World War II, had little resonance in non-Serb quarters.<sup>111</sup> Few can forget the woman, who was once shown on local TV, stepping over a Bosniak corpse to kiss and congratulate the Serbian warlord Zeljko Raznjatovic, known as, Arkan. His notorious paramilitary gang had just taken the Eastern Bosnian town of Bijeljina by force in April of 1992 and purged it of non-Serbs. Later she apparently transformed from a rabid nationalist into a moderate. Internationals have lauded her crucial support in implementing the Dayton Peace Accords. Despite her cooperation, she continued to advocate "the ultimate goal" of "a joint Serb state [RS and Serbia]," which, she thought, could best be achieved "in peace."<sup>112</sup> Her admission of guilt is a step forward though. At least one Bosniak survivor of the Srebrenica massacre described her guilty plea as a "moral act."<sup>113</sup> Also, the testimony of Plavsic, as a former head of state, makes it harder for other Serbian authorities to deny the commission of wartime atrocities. Plavsic pleaded guilty to persecution on political, racial and religious grounds, a crime against humanity, and dismissed all other counts, including the most serious charges, genocide and complicity to commit genocide. Her sentence was reduced to 11 years. Some, including Plavsic, said anything more for a 72-year-old woman would have been equivalent to life imprisonment.

The greatest response to Plavsic's testimony came from Belgrade. A local TV station aired callers' response to her testimony. Some expressed respect for her "courage," but most criticized her confession, which, they thought, blamed Serbs

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<sup>107</sup> See ICTY Judgments, Drazen Erdemovic, March 5, 1998.

<sup>108</sup> *Ibid.*

<sup>109</sup> See ICTY at a glance, Erdemovic (IT – 96 - 22)

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

<sup>111</sup> "Plavsic Tells UN Tribunal Serbs 'Victimized Countless Innocent People in Bosnia,' " *ONASA*, Sarajevo, December 17, 2002.

<sup>112</sup> "Beta Profiles the former Bosnian Serb President Plavsic's Political Career," *Beta*, Belgrade, January 11, 2001.

<sup>113</sup> "Plavsic case to aid reconciliation if she gets significant sentence," *AFP*, Sarajevo, December 19, 2002.



collectively for wartime atrocities.<sup>114</sup> This was not the ICTY's intention. As an ICTY prosecutor has explained, "The events of the war [in the former Yugoslavia] point to a deliberate strategy for power."<sup>115</sup> Officials from the African and Yugoslav tribunals have repeatedly declared if those who incited ethnic strife and "motivated"<sup>116</sup> mass violence are prosecuted, their respective societies will be freed of collective guilt.

Alvarez has criticized the ICTY goal of absolving a whole society from blame when such massive crimes required wide-scale complicity of the population.<sup>117</sup> Yet the critical self-examination, which, Alvarez argues, is necessary for all including Western countries, is not precluded by the ICTY's prosecutions. The anti-ICTY reactions in Croatia and Serbia, which have been widely interpreted as the international court's failure to effect real transformation of these societies, may just be the first stage in a reckoning with the past. As one Belgrade analyst noted, the TV viewers' sense of guilt prompted by Plavsic's confession was a sign that they had questioned their own roles. As he explained, many Serbs and Croats who supported "Milosevic, Karadzic, and Tudjman even after it became clear that these leaders were responsible or (likely to have been) for [war] crimes" oppose the international court because the "ICTY evidence" causes them to feel morally liable for their leaders' actions.<sup>118</sup>

A more important question is: how should these leaders be punished if their crimes are to be deterred? Do the same theories of deterrence apply to political leaders, such as, Plavsic, as common criminals? Are her crimes political offences, which are committed for the "good of the community,"<sup>119</sup> rather than personal gain? Plavsic is one of the few former Yugoslav leaders who maintained her nationalist credo at all costs, however misguided it was. At the end of 1993, as vice president of the self-proclaimed republic, she and the RS Assembly rejected the Vance-Owen Plan despite pressure from Milosevic. She stuck to her maximalist position of "all Serbs in one state"<sup>120</sup> and refused to shake the Serbian strongman's hand. This caused a rift with Belgrade, and Plavsic lost political clout until three years later. Few other Balkan politicians were willing to uphold their nationalist faith, if it meant either a loss in profits or power. Plavsic may well have believed that she was acting in the Serbs' best interest. As she told a Serbian newspaper in 1997, "I was radical, the most radical of all; it was war, and any lukewarm solution would have cost a great number of lives."<sup>121</sup> It is unclear what caused Plavsic five years later, in 2002, to show remorse for the Muslim and Bosniak victims of Bosnian Serb atrocities. Was it a calculated act to reduce her sentence or was it genuine remorse? It is doubtful that the former Sarajevo university dean would have admitted her guilt in any other setting than the ICTY. Yet deterrence of Plavsic or any other ICTY indictee is

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<sup>114</sup> E-mail from Serbian Human Rights Watch Researcher Bogdan Ivanisevic, December 23, 2002.

Ivanisevic described a Studio B program, "Utasak nedelje," which solicited calls from the public.

<sup>115</sup> Payam Akhavan, "Can international criminal justice prevent future atrocities?" *The American Journal of International Law*, 95:1, (January 2001), p. 6.

<sup>116</sup> See supra note 87. "Del Ponte Address to SC." She includes those "at the district or local level."

<sup>117</sup> See supra notes 4, 13 & 65. Alvarez, pp. 454 -458.

<sup>118</sup> Ivanisevic. *op cit.*

<sup>119</sup> Andreas O'Shea, *Amnesty for Crime in International Law and Practice* (The Hague: Kluwer Law International, 2002), pp. 76-80. O'Shea surveys theorists' rationale for punishment.

<sup>120</sup> See supra 116, "Beta profile". Milosevic's motto was "all Serbs in one state." However, in his case it was mere rhetoric. In her case, she seemed to believe it.

<sup>121</sup> *Ibid.* Plavsic was quoted in a Dnevni Telegraph interview, published in July 1997.

almost incidental to the court's purpose. Like Plavsic, most no longer hold their political or military posts. Some have the ability to influence events on the ground, such as, Karadzic and Milosevic. Yet their indictment and prosecution is more important for its symbolic value than anything else. As an ICTY prosecutor opined, the court's effectiveness should be judged by how well it has "prevented further interethnic violence and human rights abuses."<sup>122</sup> The Tribunal's aim has been to deter future war criminals in Republika Srpska, the former Yugoslavia and set a standard for international justice worldwide.

### **VIII. Deterrence and the Kosovo Crisis**

In May of 1993 the Yugoslav Tribunal was set up as a means to restore peace and security to a region in the midst of war. About a year later an estimated 800,000 Rwandans were slaughtered in 100 days. In the former Yugoslavia thousands were persecuted, murdered, deported and terrorized. Milosevic, Karadzic, Mladic, Tudjman and their cohorts did not appear deterred in their policies in 1995 when "more territory changed hands than at any time since the beginning of the war."<sup>123</sup> The Bosnian Serb Army killed thousands of Bosniaks in the Srebrenica massacre in July of 1995, as the poorly-armed UN peacekeepers evacuated their safehaven. The following month, Croat forces launched a blitzkrieg in the Serbian-occupied region of Krajina, and an estimated 150,000 ethnic-Serbs fled the onslaught, which appeared to have been sanctioned by Washington. Is it realistic to expect the international court to deter war crimes in the midst of an interethnic war once it has already begun?

As already discussed, by the fall of 1998 the Yugoslav Tribunal had taken a more proactive stance. As its credibility increased, so did its ability to deter political and military leaders from carrying out egregious violations of human rights. Although the main suspects of genocide, Mladic and Karadzic, were still at large,<sup>124</sup> the ICTY trial of the Bosnian Croat General Tihomir Blaskic showed the Tribunal had more than ornamental powers. Also, in the fall of 1997, U.S. Special Envoy Robert Gelbard convinced the late Croatian President Franjo Tudjman to handover 10 Bosnian Croats to the ICTY or face international isolation.<sup>125</sup> Tudjman complied. As a Tribunal prosecutor, Payam Akhavan, has argued, "in an integrated world community, international legitimacy is a valuable asset for aspiring statesmen, no matter how remote their fiefdoms may be."<sup>126</sup> In Dayton, Ohio during the marathon peace negotiations between the Serbian, Bosnian, and Croatian presidents, Holbrooke noted, most important for Milosevic was "lifting sanctions."<sup>127</sup> As the American negotiators realized, the threat of further sanctions was their most effective bargaining chip against the Serbian autocrat. The Serbian strong man, a former banker and lawyer was more concerned with his

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<sup>122</sup> See Akhavan, *op cit.*, p. 3.

<sup>123</sup> Laura Silber and Allan Little, *The Death of Yugoslavia* (London: Penguin Group and BBC Worldwide Ltd., 1996) p. 345.

<sup>124</sup> See ICTY at a glance, Case Information Sheet, Krstic. Radislav Krstic was apprehended by SFOR on December 2, 1998. The former Drina Corps commander Krstic, who was the first to be convicted of genocide, received a 46-year sentence on August 2, 2001.

<sup>125</sup> See Chris Hedges, "10 Bosnian Croats Surrender to War Crimes Tribunal," *New York Times*, October 7, 1997. Also, Interview with Robert Gelbard, from Kosovo enroute to Belgrade, March 12, 1998.

<sup>126</sup> Akhavan, *op cit.* p. 8.

<sup>127</sup> Richard Holbrooke, *To End a War* (New York: Random House, 1998), p. 88.

international reputation than holding on to Serbian land. He easily conceded the Serb-held part of Sarajevo and told the Bosnian Prime Minister Haris Silajdzic, “You deserve Sarajevo because...you fought for it and those cowards [Bosnian Serbs] killed you from the hills.”<sup>128</sup>

In 1998 as the conflicts in Croatia and Bosnia simmered, Kosovo was flaring up. The province had been ignored by the international community through the nineties. When the Serbian government abolished Kosovo’s 1974 constitution by force in 1989, Kosovo’s politicians moved underground. By 1991, after Slovenia and Croatia gained statehood, Kosovo’s Albanians were no longer willing to accept anything but independence from Serbia and Yugoslavia. A small disjoint band of ethnic-Albanian insurgents, the Kosovo Liberation Army (KLA) began hit-and-run operations in 1996. Until 1998, however, the shadow president Ibrahim Rugova, who advocated non-violent tactics, dominated Kosovo’s politics.

The Tribunal served as a much more effective instrument of prevention than most legal scholars realize. Ordinary Serbian policemen at checkpoints throughout the province acted more cautiously in front of foreign journalists, diplomats and officials. Some felt that their actions could be subject to prosecution in “The Hague”<sup>129</sup> Morale in the Yugoslav Army was low, and the number of deserters rising. Few wanted to go fight another one of Milosevic’s wars.<sup>130</sup> Although persecution, torture, murder and forced displacement continued as it had before, this time the Serbian leader waited until he had or (thought he had) international authorization. He had signed the Dayton Peace Accords (Nov. 21, 1995) as a representative of both Serbs and Bosnian Serbs. This ensured Western negotiators would come to him for any future peace negotiations. On February 28, 1998, a date that many defined as the beginning of the war, Serbian security forces murdered 24 ethnic-Albanians including a pregnant woman in the northwestern village of Cirez.<sup>131</sup> The killings appeared to have been sparked by the murder of two policemen shot dead in a KLA ambush. It occurred less than one week after the U.S. Special Envoy to the Balkans, Robert Gelbard labeled the KLA a “terrorist group.” Serbian state media replayed the statement repeatedly throughout their broadcasts. Many later interpreted Gelbard’s comments as a green light for Milosevic to order the attack. International pressure aided in mitigating Serbian security forces subsequent action. They refrained from large-scale operations until the end of May. When U.S. and Western diplomats’ positions lacked decisiveness,<sup>132</sup> Milosevic launched a full-scale onslaught against the KLA. Most of the hundreds of victims killed in the summer of 1998 were civilians. Their homes were burnt to the ground, damaged from shelling and machine-gun fire, and tens of thousands fled in terror from their villages. Critics may say these events confirm

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<sup>128</sup> Little & Silber, *op cit*, p. 374.

<sup>129</sup> From November 1997 to the first week of NATO airstrikes, April 1, 1999 policeman repeatedly asked the author, why Serbs were vilified by the world. They often mentioned that their behavior could be subject to action by “The Hague,” as they referred to the ICTY.

<sup>130</sup> Rising discontent was especially marked in Kragujevac and Krusevac. Deserters were jailed.

<sup>131</sup> Also, on March 5, 1998 a Serbian attack against the KLA commander Adem Jashari was launched in Prekaz. 56 ethnic-Albanians including 22 from Jashari’s extended family were murdered that day. Jashari became a martyr. Many authors lump Cirez and Prekaz together, but the two events were very different. Jashari, a well known KLA rebel, had already been targeted twice before. The victims in Cirez included the Ahmeti family, whom police randomly chose that day to kill.

<sup>132</sup> Discussion with the Macedonian Ambassador Chris Hill, Pristina, Kosovo, August 5, 1998.

that the ICTY was an ineffective tool of deterrence. Yet it was not the Tribunal which failed, but representatives from NATO, the EU, and U.S. to take a consistent, unified stand against the Serbian strong man. The steady stream of regular visits by Western diplomats and military officials must have convinced Milosevic that he was essential to securing peace. In October of 1998, senior U.S. official Richard Holbrooke, went to Belgrade to bargain with his former Dayton interlocutor. Milosevic appeared again as the peacemaker when he allowed almost 2,000 unarmed monitors from the Organization for Security and Cooperation in Europe (OSCE) to enter Kosovo. They stayed until a few days before NATO airstrikes (March 24, 1999) began.

When the former ICTY chief prosecutor, Louise Arbour issued an indictment against Milosevic, the Alliance had already been bombing for two months. In this instance critics would be correct in their assessment that an ICTY indictment did not prevent the torture, rape, murder and the forced exodus of ethnic-Albanians from Kosovo. Yet what other instrument could have deterred the Yugoslav President? The NATO airstrikes represented failed diplomacy. Milosevic's strategy to wait until the Alliance cracked almost worked. Critics claimed NATO violated international humanitarian law by targeting civilians. Teams of lawyers informed NATO commanders if targets were permissible under international legal standards. The Alliance's unity was maintained by a Spanish General Secretary, Javier Solana, a shrewd diplomat, and an American Supreme Commander, Wesley Clark, an able military strategist. When the Serbian autocrat finally did capitulate, it was because he feared a ground invasion of NATO troops.<sup>133</sup>

The Tribunal's real impact has been seen in the last two years since Milosevic's arrest and subsequent trial. Croats, Bosniaks, Serbs, Montenegrins and ethnic-Albanians are all acutely aware that they are subject to war crimes prosecution. Although the court is winding down, and should finish its investigations by 2004, the Tribunal has continued to serve as a deterrent. In Macedonia, ethnic-Albanian rebel commanders could be heard during the 2001 crisis instructing their fighters to avoid civilian casualties.<sup>134</sup> The Yugoslav Tribunal's repeated statements that they would also investigate KLA crimes helped prevent large-scale massacres in the recent southern Serbian and Macedonian crises.<sup>135</sup> Also in Kosovo, former KLA commanders are aware of an imminent Tribunal indictment against the KLA.<sup>136</sup> They have shown increased readiness to comply with the international community's demands. In the summer, one KLA commander, Ramush Haradinaj, was even filmed by a local TV<sup>137</sup> crew turning in his brother, a criminal suspect, to United Nations police.

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<sup>133</sup> Conversation with NATO Supreme Commander Wesley Clark, Pristina, Kosovo, November 1999.

Also, Interview with Russian official Oleg Levitin, Pristina, Kosovo, September 1999.

<sup>134</sup> Interview with villager from Poroc, Macedonia, July 2001.

<sup>135</sup> See ICTY indictments, "Decision on the Prosecutor's Request and Deferral and Motion for Order," <[www.un.org/icty/misc/decision-e28115138.htm](http://www.un.org/icty/misc/decision-e28115138.htm)>The ICTY has asked Macedonian courts to defer five cases to their competence in involving crimes committed by both Macedonian Security Forces and National Liberation Army (NLA) commanders. There were no large-scale killings by either side. In the Presevo Valley, tension remains, but the war crimes were mitigated.

<sup>136</sup> 34 corpses of Serbs and ethnic-Albanians were found near Radonjic Lake in September 1998. The murders were committed in Haradinaj's zone of command. In the recent Dukagjini Trial one of the suspects for the Radojnic Lake crimes, Idriz Balaj, was convicted for the murder of 3 ethnic-Albanians in June of 1999 after NATO forces entered.

<sup>137</sup> RTV 21 filmed Ramush Haradinaj handing over Daut, to Italian police in Peja/Pec in August 2002.

## IX. Truth and Reconciliation

As its African counterpart, the Yugoslav Tribunal has been an experiment. Much has been learned since it began almost a decade ago. The progeny of the ICTY has been the development of international humanitarian law, as seen in the 1998 Rome Statute for the international criminal court. The model of Nuremberg has been adapted to a very different modern society where the divisions of state power are often blurred. The Yugoslav Tribunal's mix of common and civil law practices, two systems and traditions of law, has led to a rich, corpus of law that is continually developing. Since the court began in 1993 in the first post-Cold War years much has changed in the former Yugoslavia and throughout region, once called the Eastern bloc. The ICTY has helped restore the rule of law, galvanized legal reform and helped prevent the recurrence of mass atrocities in the former Yugoslavia and, to some extent, worldwide, but the establishment of truth and reconciliation will take decades. As the ICTY prosecutor Akhavan concludes, "even if all the senior accused are arrested and prosecuted, the hardest test is whether the tribunals have contributed to postconflict peace building and reconciliation."<sup>138</sup>

The ICTY's main drawback is the limits imposed by the prosecution's singular goal of conviction. It has narrowed the Tribunal's focus, and important facts, even mass killings, are omitted because they lack relevance to the prosecution's strategy in a particular case. The indictment against Milosevic and four other top Serbian officials (Vojislav Stojilkovic committed suicide outside Parliament after a law of cooperation was passed clearing the way for Milosevic's transfer to The Hague) was welcomed by Kosovo Albanians. Yet for many it was incomplete and did little to vindicate their suffering. None had seen Milosevic except on TV. Most ethnic-Albanians' anger was much more directed at local leaders than politicians in Belgrade who seemed remote from the violence in their villages.

The most recent war scars are just piled on the old, which were buried during the communist era. Discussions, debate and most importantly dialogue is needed in the whole region where each ethnic group has become increasingly isolated. In 1992 in Serbia-Montenegro, officials attempted to deal with issues connected to the tens of thousands killed by Tito at the end of World War II, but little progress was made. As one of those involved in these attempts explained, "The whole complex has not been opened."<sup>139</sup> Djindjic's death, however, has sparked a whole new era. The impunity of criminal gang members has been decried by the entire community, and chauvinist attitudes which were widespread in the early nineties have lessened.

The ICTY has brought to light many facts, some of which might have remained unknown if the court had not existed. Yet it is the people in Serbia, Montenegro, Croatia, Bosnia, and Kosovo who must ultimately deal with an accurate historical account of their past. In Serbia, before Milosevic was surrendered to the ICTY (June 2001), the Serbian Interior Minister Dusan Mihajlovic courageously announced the presence of mass graves of ethnic-Albanians, who were carted up in trucks from Kosovo during the war. The bodies had been buried at special police training sites in Belgrade and throughout Serbia.

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<sup>138</sup> Akhavan, p. 4.

<sup>139</sup> See supra notes 20 & 51. Dimitrijevic described a commission which was formed during Milan Panic's period as prime minister (1992-3) and lasted for only a short while.

The evidence implicated members of the anti-terrorist police units all the way up to Milosevic. The cases continue to languish in Belgrade courts, and little progress has been made. When Mihajlovic publically declared their findings, he was threatened, called “unpatriotic” or ignored.<sup>140</sup> The same evidence was used by the prosecution during the Milosevic trial, but there was little change in Serbs’ reactions. As one Serbian analyst suggested, many were “missing the point.”<sup>141</sup> As he opined, Milosevic’s defense was highly praised by the local media despite “a detailed account of specific criminal acts committed in Kosovo.”<sup>142</sup> Polls from late last year reflect that the majority of Serbs are opposed to the Yugoslav tribunal.<sup>143</sup> Most Serbs, he explained, “supported the war goals of Milosevic, and most voted repeatedly for him (and the parties supporting him) even after Vukovar, after Sarajevo, or after Srebrenica.” He stated, it was, thus, “unrealistic to expect that these people” would alter their view and support a Tribunal, which “criminalizes the acts they supported or were utterly indifferent about.”<sup>144</sup>

The Croatian President Stipe Mesic is the most enlightened leader throughout the former Yugoslavia. He has consistently supported the work of the Tribunal even when it was politically unpopular. Despite the political right’s campaign against the government for support of what they claim is an “anti-Croat” court, Mesic’s popularity remains high. Many Croats show a mix of conflicting tendencies. When a Croatian documentary highlighting crimes against ethnic-Serbs, shown on national TV more than a year ago, a poll showed that the majority believed the documentary, but agreed with the right that it was “anti-Croat” and “should not have been screened.”<sup>145</sup> The confused positions are indicative of a country in transition. Mesic offers his people and other Balkan nations the best path forward. He has criticized Croatian racist demagogues and is admired throughout the former Yugoslavia for his bold statements. In Bosnia, where thousands of crimes remain unpunished, few Bosniaks have taken an openly self-critical stand. In Kosovo, only a few ethnic-Albanians including a top newspaper editor, Veton Surroi, have openly criticized his people’s nationalist actions. Mesic has gone further. He is one of the few who has considered reconciliation. Three years ago he talked about the need for a Serbian Willy Brandt to facilitate dialog between Serbia and Croatia. As a political leader, Brandt offered his people dignity while he confronted the horrors of the past. As Mesic explained on the eve of presidential elections, Serbs and Croats will eventually find common ground just as the French and Germans did after three bloody wars.<sup>146</sup> The ICTY is a necessary fora for prosecuting war crimes in the former Yugoslavia. It has discredited aberrant behavior worldwide. Yet breaking with the past and achieving reconciliation requires the participation of the entire former Yugoslav society and can not be imposed from outside.

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<sup>140</sup> Interview with political officer at the U.S. Embassy in Belgrade, June 2001. Milosevic was surrendered to the Hague on June 28, 2001.

<sup>141</sup> Bogdan Ivanisevic, “Missing the Point in the Hague,” *Human Rights Watch*, March 25, 2002.

<[www.hrw.org/editorials/2002/](http://www.hrw.org/editorials/2002/)>

<sup>142</sup> *Ibid.*

<sup>143</sup> “BETA Analyzes FRY's Inability To Commit to ICTY Cooperation,” *Beta*, Belgrade, November 27, 2002. Polls show 60% of Serbs are opposed to the ICTY.

<sup>144</sup> Interview via e-mail with Bogdan Ivanisevic, November 18, 2002.

<sup>145</sup> *Ibid.*, p.7.

<sup>146</sup> See supra note 26. Interview with Stipe Mesic, Zagreb, Croatia, January 2000.

## X. Conclusion

International justice and the demands that dictators, or former dictators be prosecuted in a court of law, either international or foreign national, continue to provoke heated debate worldwide. Belgium was considered the notable exception until recent laws this spring upheld sitting heads of state's immunity and limited the ability of non-Belgian victims to file suits in the European court.<sup>147</sup>

The two most culpable for war crimes in the former Yugoslavia are Milosevic and Tudjman. Each used the nationalist cause to rise to power. Both were former communists and Tito wannabes. Although Tudjman, is admired by many in the Balkans, even his enemies,<sup>148</sup> because he succeeded in creating an independent state, his main goal appears to have been power. It is true that the two leaders exploited already existing passions and fears, but the three bloody wars - Croatian, Bosnian and Kosovo - were not predestined, as many analysts have already noted. The wars became a dirty business of despots. Karadzic, who was widely reported to have sold arms to all sides in Bosnia, epitomized the war profiteer. Also, in Kosovo, during the last phase of the conflict before NATO bombing, ethnic-Albanian rebels' main source of arms came from their Serbian foes.<sup>149</sup> In Bosnia, where the vast majority of war atrocities were committed, many did not know or care what their ethnic background was before 1992. Even after the war began, some remained unclear. A Bosniak, who joined a Bosnian Croat unit, told the Tribunal why he supported his apparent enemy: "I never hated anyone, Croats or Serbs. I have no reason for it, because I think that we were just instruments in the hands of some people who had the power to manipulate us."<sup>150</sup> Individual leaders were responsible for inciting ethnic strife in the former Yugoslavia. As Payram Akhavan asserts, "through systematic indoctrination and misinformation, political leaders created an aberrant context of inverted morality in which dehumanization and violence against members of the 'enemy' group were legitimized as purported acts of self-defense."<sup>151</sup> That is why the ICTY's model of "individual accountability for massive crimes is an essential part of a preventative strategy"<sup>152</sup> This does not exonerate the collective, but target those most culpable for mass atrocities and denounce their behavior worldwide.

The ICTY has used a variety of methods to gain custody of the perpetrators of mass killings. In Bosnia, international troops, particularly British, have acted as the Tribunal's police force. In Croatia and Serbia, the ICTY has relied on aggressive, unabashed, plain speaking U.S. officials to threaten Balkan political leaders with sanctions and withholding IMF funds if authorities fail to handover war crimes suspects. These means are blunt. The arrests, trials and subsequent sentences of mass murderers in

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<sup>147</sup> "Belgium: Anti-Atrocity Law Limited," *Human Rights Watch*, April 5, 2003, *Accessed May 11, 2003* <[www.hrw.org](http://www.hrw.org)>

<sup>148</sup> See supra notes 18 & 49, Interview with Dimitrijevic. The Belgrade law professor said many Serbs secretly admired Tudjman because he won the war and realized Croats aspirations. Also, Kosovo-Albanians, many who fought during the war with Croatian forces admired Tudjman for the same reason.

<sup>149</sup> Among Western diplomats, NATO officials, and senior UN officials this is almost common knowledge. Also, this was confirmed in 1999 interviews with KLA commanders who controlled the LAP area, which bordered Serbia. Yugoslav Army uniforms, rocket-propelled grenade launchers, AK 47s, etc. were often of Serbian origin, especially from January to March 1999.

<sup>150</sup> See Mladen Naletic & Vinko Martinovic (Tuta & Stela) Transcript, Case IT-98-34, September 19, 2001.

<sup>151</sup> Akhavan, *op cit*, p.5.

<sup>152</sup> *Ibid*, p. 5.

The Hague have provoked reactions against state authorities who cooperate with the Tribunal. Yet the long-term impact of such actions has aided stability and galvanized legal reform in the former Yugoslavia. Removal of the “key organizers and motivators”<sup>153</sup> of ethnic strife from positions of legitimized authority has allowed the reform process to begin and allowed those committed to the rule of law to exert some influence. National courts have taken on sensitive cases, which none would touch seven years ago. The *Rules of the Road* procedures for Bosnia -- a good framework especially if it were applied by an up-and-running state court -- has ensured sham trials are prevented in the state where the majority of war crimes were committed. Security issues, however, throughout the former Yugoslavia remain a problem. Local judges face considerable pressure from their immediate community. No cases have been ICTY approved for the Bosnian Serb entity, where most of the 25 war crimes fugitives<sup>154</sup> are believed to be residing. Their capture is still important, although less so than it was in the first post-Dayton years. They have impeded the reform process, but not completely derailed it. The political impact of nationalist zealots has lessened as others have gained exposure on the political scene. The ICTY is not a panacea, but it has been an essential step towards re-establishing the rule of law.

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<sup>153</sup> See supra note 86 & 97. “Address to SC,” Del Ponte includes those at the “local and district level.”

<sup>154</sup> See ICTY update at “ICTY at a glance”