

Chaillot Paper

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War crimes,
conditionality and
EU integration in
the Western Balkans

*Judy Batt, Vojin Dimitrijevic, Florence Hartmann, Dejan Jovic,
Tija Memisevic and Jelena Obradovic-Wochnik*

Edited by Judy Batt and Jelena Obradovic-Wochnik



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	Preface Álvaro de Vasconcelos	5
<hr/>		
	Introduction	9
<hr/>		
Judy Batt and Jelena Obradovic-Wochnik		
1	Croatia after Tudjman: the ICTY and issues of transitional justice	13
<hr/>		
Dejan Jovic		
• <i>Introduction</i>		13
• <i>The pre-2003 situation</i>		14
• <i>Explaining the radical change in 2003</i>		17
• <i>The remaining problems</i>		24
2	Strategies of denial: resistance to ICTY cooperation in Serbia	29
<hr/>		
Jelena Obradovic-Wochnik		
• <i>Introduction: the political context</i>		29
• <i>Cultural resistance, denial and relativisation of war crimes</i>		33
• <i>The issue of war crimes in Serbian politics</i>		35
• <i>Accounting for denial and public resistance to acknowledging war crimes</i>		41
• <i>Karadzic's arrest: political and cultural change</i>		45
3	EU conditionality in Bosnia and Herzegovina: police reform and the legacy of war crimes	49
<hr/>		
Tija Memisevic		
• <i>Introduction</i>		49
• <i>The legacy of war crimes</i>		51
• <i>Bosnia and the EU</i>		54
• <i>Police reform in Bosnia and Herzegovina</i>		56
4	The ICTY and EU conditionality	67
<hr/>		
Florence Hartmann		
• <i>Introduction</i>		67
• <i>Reluctance in cooperation</i>		68
• <i>The ICTY exit strategy: a tradeoff between justice and realpolitik?</i>		78

5	Domestic war crimes trials in Serbia, Bosnia-Herzegovina and Croatia	83
	Vojin Dimitrijevic	
	• <i>Introduction: attitudes towards the ICTY</i>	83
	• <i>Trials before national courts</i>	86
	• <i>Regional cooperation</i>	95
	• <i>The role of the international community</i>	96
	• <i>Conclusion</i>	97
	Annexes	101
	• <i>About the authors</i>	101
	• <i>Abbreviations</i>	102

The Balkans: a European story *might be imagined as the title of a remake of the Lars von Trier film Europa, reflecting the fact that the countries of the Western Balkans experienced all the upheavals that defined Europe in the twentieth century. Their history has spanned the spectrum from communism to extreme nationalism and mass murder, from war to European integration and association among states. Now, over a decade after the wars that erupted following the breakup of the former Yugoslavia, they face the urgent need to address issues of memory and justice.*

Today the challenge to the European Union, in the Balkans, is to coherently modulate its policy from crisis management to European integration. The countries concerned need to come to terms with the war crimes of the 1990s and go through the painful but essential process of breaking free from the stranglehold of the nationalist ideologies that led to the wars and assume justice, human rights and interstate association as the paradigm of a new national identity. The crimes against humanity that were committed by the Serbian nationalists but also by Croatian nationalists make the Balkans unique in relation to past enlargements. The change that has taken place in the region may be gauged by the degree to which countries in the Balkans have gradually begun to accept the need to deal with war criminals, whether under the auspices of international or domestic courts, as some of the authors of this Chaillot Paper show. The Balkans have introduced a new and very important dimension to European conditionality, by expanding the Copenhagen criteria to include full cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY). In fact, EU policy towards the Balkans is predicated on the need to bring about the delegitimation of extreme nationalist ideologies as a pre-condition for EU accession. This was not required of either Portugal or Spain, post-nationalist democracies when they joined the EU, or of the Central European states where anti-soviet nationalism persisted at the time of accession. The conviction was, in the previous waves of enlargement, that the process of integration itself would exorcise the demons of the past, dissolve historical enmities and make reconciliation among neighbours a natural consequence of EU membership. The consciousness of sharing a common destiny would ultimately overcome and delegitimise extreme nationalism.

As Dejan Jovic argues in the first chapter of this volume, it was only after 'the radical change of its policy towards the ICTY ... that Croatia became a candidate for EU membership' due to the fact that there was a sea change in Croatian politics following the death of Tudjman, resulting in a political climate that was more favourable towards EU positions and improved cooperation with the ICTY. This pattern is one that has also allowed for progress in the Serbian integration process since the fall of the Kostunica government. These altered circumstances led to the arrest of Radovan Karadzic in Belgrade in July 2008. As Jelena Obradovic-Wochnik remarks in chapter two, 'the breaking of the Karadzic myth came from inside Serbia', but at the same time the persistence of EU war crimes conditionality, including the suspension of the Stabilisation and Association Agreement, has shown that the price to pay for shielding a notorious war criminal from justice ultimately proved to be too high for the Serbs. This illustrates the fact that the international community and the EU in particular have played a crucial role, as Vojin Dimitrijevic emphasises in chapter five.

In Bosnia Herzegovina there is huge support for the EU, the idea of Europe being, according to Tija Memisevic (chapter three), formed around the notion of 'democracy, freedom, justice, pluralism and prosperity'. However, even with the Union having such strong appeal, the situation in Bosnia is extremely complex: of the two entities that make up the Bosnian state, one, the Federation of Bosnia Herzegovina, identifies itself with the victims of the murderous ethnic cleansing campaign of 1992-1995. For this reason, according to Florence Hartmann (chapter four), they have over the years been 'the only ones in the region to show genuine will to cooperate with the ICTY'. But paradoxically the European future of the Bosnians is linked to that of the Republika Srpska, whose political leaders have shown reluctance to bring war criminals to justice.

If the EU policy of conditionality in relation to Croatia seems to have ultimately borne fruit, the same cannot be said of the policy as it has been conducted towards Bosnia Herzegovina and in particular the Bosnian Serbs. Before any move towards European integration, the war criminal Ratko Mladic will have to be arrested and handed over to the ICTY, and both the Republika Srpska and Serbia must acknowledge the role that Serbians both from Bosnia and from Serbia proper played in the genocide committed in Srebrenica. There will be no prospect of EU accession for Serbia

unless this happens. This should be crystal clear. But should the Bosniaks have to pay for the lack of progress of others? This is one problematic issue that emerges from this Chaillot Paper.

The authors also raise the important issue of how to ensure that after EU integration the question of war criminals will remain high on the agenda. Experience shows that the Union is good at applying conditionality to candidate countries but has a lot of difficulty in exerting the same pressure on Member States. When the Balkan states become members of the European Union, the ICTY will have completed its mandate and it will then be the role of the domestic courts to guarantee that no war crime will be left unpunished. This of course means that the rule of law and probity of the legal system will be of paramount importance. The EU cannot water down its standards for the sake of the other components of its strategy. As this Chaillot Paper confirms, the only viable strategy consistent with the EU's values is to make sure that fugitives like Mladic are brought to justice before the International Tribunal. If necessary, the end of the tribunal's mandate must be delayed in order to ensure that this is achieved.

For the European Union it is essential to continue to apply conditionality in order not only to guarantee the European destiny of the Balkans, but also to make sure that when countries seek to join the EU they are fully aware of their obligations regarding human rights and the rule of law. The EU Member States that border the Balkans should not create artificial obstacles to EU enlargement for those countries like Croatia that comply with the Copenhagen-plus criteria. For to undermine the credibility of the membership perspective would weaken the credibility of the entire enlargement strategy.

Paris, June 2009

Introduction

War crimes, conditionality
and EU integration in the
Western Balkans

Judy Batt and Jelena Obradovic-Wochnik

The baleful legacy of the wars of the 1990s continues to dog the states and societies of the former Yugoslavia and has played a not insignificant part in the disappointingly slow, hesitant trajectory of the region towards the EU. At the start of the new millennium, with the removal of key wartime leaders from the political scene in both Croatia and Serbia, it was widely hoped that the region would prove able to 'leave the past behind' and rapidly move on to the hopeful new agenda of EU integration. The EU's Copenhagen criteria, which in 1993 first explicitly set out the basic political conditions expected of aspirant EU Member States (functioning democratic institutions, the rule of law and respect for human and minority rights) proved effective in the case of the new democracies of Central and Eastern Europe in supporting the entrenchment of democratic norms and practices, and stimulating reconciliation and good neighbourly relations among states and societies with unhappy histories.

Thus the Stabilisation and Association Process (SAA), launched for the countries of the Western Balkans in 1999, building on this experience, included both full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and regional reconciliation among the political conditions set for advancing these countries on the path to EU integration successfully trodden by the countries of Central and Eastern Europe in the 1990s. EU political conditionality was intended to support the efforts of new political leaders to redefine national goals away from the nationalist enmities of the past and focus firmly on tasks related to building a better future. Has it worked? The various chapters in this volume suggest that this is like asking whether a glass is half-empty or half-full – it depends on what one expected (or hoped) it to achieve. The authors are mostly somewhat ambivalent on this.

Dejan Jovic, in chapter one, argues with respect to Croatia that the EU's firm insistence on full compliance with the ICTY eventu-

ally did produce results in terms of delivery of key war crimes indictees to the Hague, which led to a gradual shift in public perceptions of their 'war heroes' as the truth about their wartime behaviour emerged. But he also makes the important point that this has by no means been enough to provide a firm launching-pad for the process of reconciliation between ethnic groups and neighbouring states, which is arguably the fundamental aim of the EU's conditionality.

The case of Serbia, as discussed by Jelena Obradovic-Wochnik in chapter two, demonstrates the intractability of public resistance to acknowledging the wrongs done in the 1990s in the name of 'the Nation'. The Serbs have not come to terms with the successive defeats they underwent in the pursuit of their nationalist agenda, and continue to feel peculiarly misunderstood and victimised by the 'international community'. Under the leadership of the nationalistic President Kostunica, Serbia's fitful and evasive pattern of cooperation with the ICTY only under heavy pressure became a major irritant in relations with the EU, and brought Serbia's EU integration perspective to an impasse. The legacy has been an enduring mutual mistrust between Serbia and the EU with which the post-Kostunica leadership of Boris Tadic still has to contend. The Serbian government now professes commitment to meeting its international obligations to the ICTY but, at the Netherlands' insistence (and not without tacit support from several other member states), 'full compliance' for Serbia means nothing short of the arrest of the last two fugitive indicted war criminals, Bosnian Serb General Ratko Mladic and the Croatian Serb leader Goran Hadzic. This has only confirmed Serbs' feeling of being 'unfairly' treated: they are doing everything possible, they argue, yet the EU has still not implemented the long-delayed Stabilisation and Association Agreement, while Croatia, on the other hand, was allowed to advance right to the point of opening accession negotiations before being blocked for failure to arrest its last fugitive indictee.

Key chapters in this volume raise the vital questions of leadership and political will. EU political conditionality does not work unless the EU has a partner ready and willing to 'play the game', which presupposes that EU integration has become the overriding priority on the national political agenda. As Jovic clearly shows, after the death of Tudjman the new leadership of the HDZ under Sanader changed course and proved able to muster the necessary

political consensus to face down undoubted local opposition to ICTY compliance. Despite the continuing political sensitivity of the war legacy, EU integration had become an even more important national goal. Croatia had decided to move on, and the HDZ leadership was ready to recognise that.

Serbia has taken longer to effect that shift in priorities, and one important question suggested by Obradovic's chapter is the responsibility of the Kostunica leadership for that. It appears that EU integration was always second to the 'national question' in Kostunica's priorities, while President Tadic and his Democratic Party felt politically too weak to confront the deeply entrenched public discourse on Serbia's 'victimhood'. However, by early 2008, it seems that Serbia's voters had decided finally to 'choose Europe', re-electing President Tadic and returning a new DS-dominated government. Policy towards the ICTY is now 'full cooperation', but nevertheless this is justified in strictly instrumental terms, not as a value in itself: ICTY cooperation is an unfortunate and resented imposition that must be complied with for other reasons, namely to satisfy the EU but also to bolster Serbia's international credibility when it comes to contesting Kosovo's independence in terms of international law. Meanwhile, leading politicians still readily accuse the ICTY of anti-Serb bias, thus following public opinion rather than reshaping it.

The case of Bosnia and Herzegovina, as covered in chapter three by Tija Memisevic, is one that shows the weak traction of the EU in a country that is still dominated by the politics of bitterly competing nationalisms, centred on the issues of the war. Memisevic argues that societies in the region will not be able to look to the future without facing the past, but laments that the EU seems to have been unable to help in this. She focuses on the failure of police reform, initially promoted by EU conditionality as a means of furthering the post-war peace and reconciliation agenda by de-politicising and professionalising the police, and, in the case of Republika Srpska police, rooting out the substantial numbers of suspected war criminals still harboured in their midst who have obstructed the goal of refugee return and resettlement. While duly critical of BiH's nationalist leaders, she directs most of her fire at the weakness of the EU itself as a political actor, lacking in the political will to set tough conditions and the necessary political nerve to face down the challenges that were to be expected from nationalist politicians. Her view is rather representative of wide

sections of Bosnian society which, she argues, often feel betrayed by the EU.

Florence Hartmann's chapter four reflects on the performance of the ICTY on the basis of her direct experience as spokesperson of the former Chief Prosecutor Carla del Ponte. A full assessment of the ICTY and the lessons to be learned for international justice would require a separate volume, and that is not the purpose here. What Hartmann shows is that without the support of the EU's conditionality, the ICTY could hardly have achieved anything. Nevertheless, Hartmann points to the inconsistencies of the EU in setting and insisting upon political conditions: each of the Member States has its own agenda and priorities, and its own judgement on the degree of compliance. Clearly, political conditionality, over which the Member States retain close control, is harder to make work effectively than the more neutral and technical conditions spelled out in the SAA and accession process, which refer more directly to clear elements of the *acquis*.

In chapter five, Vojin Dimitrijevic looks at the performance of local war crimes courts in Western Balkans countries. The achievements here have been patchy, to say the least, and there would have been little progress at all in the absence of strong international pressure. This area will remain a weak point in these countries' credibility in implementing the rule of law, a key condition for EU accession. Dimitrijevic acknowledges the usefulness of technical support to the courts provided by the EU, along with other international donors; but also notes that the 'small minority of brave and dedicated prosecutors and judges' cannot be left to tackle the huge task of bringing war criminals to justice on their own. As his chapter confirms, the general political climate in the Western Balkans is far from supportive of their courageous efforts. Which brings us back to the key points made by other chapters: even if Western Balkans countries do meet the EU's condition of 'full compliance' with the ICTY, this will at best be only the first necessary step towards 'coming to terms with the past' and regional reconciliation. This remains a challenge that the EU cannot evade, but it is above all one for Western Balkans political leaders to confront.

Croatia after Tudjman: the ICTY and issues of transitional justice

Dejan Jovic

War crimes, conditionality
and EU integration in the
Western Balkans

1

Introduction

Croatia became a member of NATO in April 2009 and is well on the way to becoming a full member of the European Union in the near future. The prospect of membership in these two international organisations has shaped both Croatian domestic and foreign policy over the past decade. The main obstacle to Croatia's earlier membership of the European Union was its incomplete and insufficiently impressive record on the issues of *transitional justice* in general, and of its (long-delayed) co-operation with the International Criminal Tribunal for the former Yugoslavia (ICTY).

As Victor Peskin and Miecyslaw Boduszynski argue in their pioneering attempt to explain the Croatian policy of transitional justice,¹ 'no issue has polarised the post-authoritarian Croatian political scene as much as the issue of cooperation with the International Criminal Tribunal for the Former Yugoslavia (ICTY)'. It was only following the radical change of its policy towards the ICTY after the 2003 period that Croatia became a candidate for EU membership. In this chapter, the author will explain the reasons for this radical change, and indicate what problems remain still unresolved in Croatia's current approach to transitional justice. It is argued here that while Croatia has indeed significantly improved its cooperation with the ICTY, its achievements on the issue of addressing war crimes domestically (in the legal, political and social spheres) have been less impressive. The chapter concludes on a semi-pessimistic note, by questioning the prospects of further improvement in the area of transitional justice once the external pressure is removed following Croatia's accession to the EU.

1. Victor Peskin and Miecyslaw P. Boduszynski, 'International Justice and Domestic Politics: Post-Tudjman Croatia and the International Criminal Tribunal for the Former Yugoslavia', *Europe-Asia Studies*, vol. 55, 2003, no. 7, pp. 1117-42.

The pre-2003 situation

Only a month after the passing away of its founder and first leader, Franjo Tudjman (in December 1999), his party, the Croatian Democratic Union (HDZ), lost power in parliamentary elections to an anti-Tudjmanist coalition of six parties, led by the Social-Democrat Ivica Račan. Soon after this, the HDZ presidential candidate, Mate Granic, came only third in presidential elections, which were won by another outspoken critic of Tudjman's policy since 1993, Stjepan Mesić. Soon afterwards, the ICTY indicted three Croatian generals (Rahim Ademi, Janko Bobetko and Ante Gotovina) for crimes committed during the 1990s. As Peskin and Boduszynski argue, once in opposition the HDZ developed a rhetorical strategy of equating 'the tribunal's indictment against Croatia's war heroes with attacks on the dignity and legitimacy of the so-called Homeland War.'² The 'Homeland War' – as Tudjmanist narrative insisted on referring to the conflict of the 1990s in Croatia – was the main element of the official narrative about the political identity of the new (post-1990) Croatian state. Built up into a new myth, the official interpretation of the 'Homeland War' contained all important aspects of historical Croatian myths, which were re-interpreted in the contemporary context.³ Criticism of the 'Homeland War', and especially court indictments of its main 'heroes', were presented as an attack on the very essence of Croatian independence.

This strategy worked. Not only did the ultra-cautious and internally heterogeneous Račan government already in mid-2001 cease to fully cooperate with the ICTY, but it also adopted nationalist rhetoric and – to the surprise of many in international politics – it even began to openly criticise the tribunal's indictments of leading Croatian army and civilian participants in the conflict. The second-strongest party in government, the Croatian Social Liberal Party (HSLP) soon left the government, arguing that Račan should have been more explicit in defending the 'dignity of the Homeland War', which the ICTY had apparently disregarded by indicting some of its main leaders.

The HDZ in opposition organised massive public protests against the ICTY, against domestic courts (which in 2001 finally began to raise first charges for crimes committed by Croats), and against the Croatian government. The largest rally for the 'defence of the dignity of the Homeland War', held in Split on 11 February

2. Ibid, p. 1117.

3. For historical Croatian myths, see Ivo Zanic: 'The Symbolic Identity of Croatia in the Triangle Crossroads-Bulwark-Bridge', in Pal Kolsto's excellent edited volume, *Myths and Boundaries in South-Eastern Europe* (London: Hurst & Co, 2005).

2001, was attended by 150,000 supporters. The main speaker, Tudjman's successor as leader of the HDZ, Ivo Sanader, revived the ultranationalist rhetoric of his late predecessor, when opposing the indictment of General Mirko Norac by Croatian courts on charges of crimes against humanity and the killing of approximately 40 Serb civilians near Gospic in October 1991.⁴ In his speech the then leader of the opposition said:

The [election of] 3 January 2000⁵ was one big misunderstanding. I am joining here all these who will never give up in their pride and persistence. No nation would abandon its heroes. Nor will the Croatian nation abandon the best of all Croatian sons – and these are General Bobetko, and all the other generals, including one who is not with us physically but who is with us in spirit – General Mirko Norac ... The shameful politics of this government forces our generals, our Croatian officers, into hiding; they are forcing them to be ashamed of themselves and of what they did for Croatia ... Here is our message to that government: we are proud of our Croatian generals, we are proud of our Croatian officers, we are proud of all those who defended the homeland, and we are proud of our noble Mirko Norac.⁶

This tough line against the first attempts to address war crimes both in domestic courts and by full cooperation with the ICTY helped HDZ to quickly recover from what seemed to be a disastrous loss of support in 2000-2001. In the January 2000 election the HDZ won 30.5 % of the vote, which translated into 46 of 151 seats in Croatian parliament. On 25 January its presidential candidate, the former foreign minister Mate Granic, came only third with 22.5% of the vote. By the end of 2000, opinion polls showed that only 5% of the electorate approved the policies of the previous HDZ government. This was largely due to media reporting on various cases of corruption, abuse of office and financial malversations by the leading members of the party. The HDZ was facing a serious danger of being marginalised or even disappearing from Croatian politics altogether.

It was by its sharp criticism of the ICTY that the HDZ reinvented itself and staged a quick comeback. In May 2001, the party was supported by 16 % of the electorate, in June 2002 by 23% and in February 2003 by 30%. According to public opinion surveys, in September 2002, 84 % of Croats opposed sending General

4. In 2003, Norac was sentenced by a Croatian court to 12 years in prison for these crimes. In addition, the ICTY indicted him for crimes committed in another location in 1993 (the murder of 28 people, of which 23 were civilians and five prisoners of war) – but transferred the case to Croatian courts. On 30 May 2008, Norac was sentenced for another seven years for these crimes.

5. This was the day of parliamentary elections that were lost by the HDZ.

6. Author's translation of original speech. See: <http://www.youtube.com/watch?v=DWDi06iA-QY>.

Bobetko to the Hague, with 71 % stating that they were against even if this meant that economic and political sanctions were to be introduced.⁷

Presenting itself as the main opponent of the ‘devaluation of the Homeland War’ was not the only reason for HDZ’s success at the 2003 elections, but it was certainly one of the most significant. At these elections, HDZ won 66 seats (or 43.4% of the vote) – enough to form a government, although not without a coalition with a number of smaller parties and representatives of national minorities. On the basis of the HDZ’s strong protests against the ICTY, political analysts expected that once in power the party would continue to pursue a sovereignist policy, and *de facto* halt any further cooperation with the ICTY.

This, however, did not happen. On the contrary, since 2003 the HDZ has completely abolished its anti-ICTY rhetoric and reformed its foreign policy. It also changed important aspects of its domestic policies, although reforms in this area were less radical. In 2003-2007, the HDZ government removed those obstacles to cooperation with the ICTY that it had inherited from the previous government. Thus by the time of the latest parliamentary elections in 2007, the state television (under strong influence of the HDZ-led government) refused to broadcast a paid political advertisement by the Croatian Party of Rights (HSP), which consisted only of short extracts from Ivo Sanader’s radically anti-ICTY speech in Split six years before.⁸ Sanader in opposition was so much different from Sanader in power that he did not want the general public to be reminded of this change.

This radical U-turn was of the utmost importance. The ICTY does not have its own mechanisms to implement policies, but largely depends on the will of nation-states to cooperate. Without domestic political changes in Croatia itself, it is hard to see how the ICTY could successfully pursue charges against Croat participants in the conflicts of the 1990s. The U-turn had enormous consequences for the domestic political scene in Croatia too. While in the whole period since its formation in 1989 the HDZ had been the key organiser and political instrument of nationalist extremism, the political change after 2003 deprived the extremists of representation in the main political institutions in Croatia. By its repositioning itself from extreme right to moderate conservative pro-EU centre-right party, the HDZ contributed to the marginalisation of extremist political options in Croatian politics.⁹ This

7. Peskin and Boduszynski, op cit. in note 1, p. 1134.

8. For the full text of Sanader’s speech in Split see <http://www.mprofaca.cro.net/sanader.html> (accessed on 10 May 2008). The HSP spot that was banned from HTV is available at: <http://www.hsp.hr/content/view/351/lang,hr> (accessed on 10 May 2008). The HSP however managed to diffuse another political broadcast – in which Sanader’s promises of non-cooperation with the ICTY in 2001 were contrasted to a statement by one of the leading HDZ politicians, Vladimir Seks, that General Gotovina should be ‘identified, located, arrested and extradited to the Hague.’

9. This marginalisation became obvious in the 2007 elections, in which the extreme right party, the HSP, won only one seat (of 153).

internal reform of the HDZ enabled the *second (post-nationalist) transition* to take place in Croatia. So, how can this change be explained?

Explaining the radical change in 2003

In explaining the reasons for Sanader's U-turn in 2003, one should pay attention to changes in the Croatian political context after the death of Tudjman, leading to changes in Croatia's foreign policy, and creating a more receptive environment for EU conditionality to work. In this context, the coordinated and consistent efforts of the ICTY and the EU to secure Croatia's cooperation with the ICTY bore fruit.

The changing political context

When Franjo Tudjman died, the HDZ was looking for a new leader. Two candidates emerged as the strongest pretenders: the former chief domestic policy advisor to Tudjman, Ivic Pasalic, and Tudjman's former *Chef de Cabinet*, Ivo Sanader. Pasalic represented hardliners, extreme nationalists, and various interest groups suspected of being linked with organised crime. Born in Herzegovina, Pasalic was also associated with some of those Herzegovinan Croats who in the late 1990s had already been indicted by the ICTY for crimes committed during the Bosniak-Croat atrocities in 1993-1994.¹⁰ By 2000, the majority of the Croatian electorate opposed the significant influence that Herzegovinan Croats had over policy-making in Croatia during the time of Franjo Tudjman. Following the death of Tudjman's right-hand man, the Minister of Defence Gojko Susak¹¹ (another influential Herzegovinan), Ivic Pasalic became the main protector and representative of Herzegovinan interests in Croatian politics.

On the other hand, Ivo Sanader was representative of a more moderate wing of the party. Born in Split, Sanader has a Ph.D in literature from an Austrian university, and was a theatre artistic director and a publisher before entering politics. During the first year and a half after Tudjman's death the two factions (Sanader's and Pasalic's) fought an internal battle for control over the HDZ. In the final episode of his battle, in April 2002, Sanader managed to win the intra-party elections, although rather narrowly: with 1,005 delegates at the party congress voting for him, and 912 for

10. In 1997 the ICTY indicted Tihomir Blaskic, the General of the Croatian Defence Council (HVO), the armed formation of Herzegovinan Croats for crimes committed in Lasva Valley. In 1998, six other Herzegovinan Croats were indicted for the same crimes. One of them, Dario Kordic, was the leader of the Bosnia-Herzegovina branch of the HDZ.

11. Susak died on 3 May 1998. For more on him, see Paul Hockenos *Homeland Calling: Exile Patriotism and the Balkan Wars* (Ithaca and London: Cornell University Press, 2003).

Pasalic.¹² In the whole period between 2000 and 2003, however, Sanader's leadership was under threat. If he wanted to secure it, Sanader simply could not afford losing votes even from more radical quarters of the party. At the same time, however, he had to modernise the party and move it towards the centre-ground. His Split speech was styled to satisfy the radical oponents within the party, and to revive its chances of becoming once again the dominant force in Croatian politics. It was only with his success at the 2003 parliamentary elections that Sanader definitely managed to consolidate his leadership within the HDZ. He was now free to make a radical break with extremism – and this is what he subsequently did.

Meanwhile, in March 2003, Serbian Prime Minister, Zoran Djindjic was assassinated in a joint action of various groups belonging to the underworld network of organised crime and parts of the Serbian police Unit for Special Operations (JSO). The case demonstrated that the link between state structures that were loyal to the former President, Slobodan Milosevic, and the criminal underworld are still strong in Serbia. But, for the main part of the 1990s, Croatia and Serbia were 'Siamese Twins' of the conflict – the political and security situation in one of them inevitably influenced the other. As it would turn out, some of the main organisers of this assassination (for example, Milorad Lukovic Ulemek Legija) had links with the Croatian underworld. Cooperation between organised crime groups in the Western Balkans flourished during the 1990s. While in public various warlords presented themselves as uncompromising nationalists, beneath the surface they developed networks of support with each other (regardless of ethnic, ideological and political backgrounds) and worked together when this suited their interests.¹³

The assassination of Zoran Djindjic sent a clear message to all politicians in the region – and especially in Croatia – that the forces that dominated in the 1990s had not yet been fully defeated. The assassination of Djindjic – which happened only days after his appointment of a special state prosecutor for war crimes – was an additional motive for Croatian politicians to act against the extremists who belonged (or claimed to belong) to 'their own' side – especially those still in official positions in the army and police, who were suspected of developing links with the criminal underworld. Once he became Prime Minister, Sanader in fact welcomed

12. See: <http://vijesti.hrt.hr/arhiv/2002/04/22/> (accessed on 26 May 2008).

13. For cooperation between various groups belonging to the criminal underworld, see Misha Glenny: *McMafia: Crime Without Frontiers* (London: The Bodley Head, 2008), and Milos Vasic, *Atentat na Zorana* (Belgrade: Narodna knjiga, Politika, Vreme, 2005).

some of the ICTY indictments as they enabled him to eliminate such a threat in the most elegant way – by extradition to The Hague.

Political changes in the Western Balkans following the end of Tudjman's and Milosevic's reign in Croatia and Serbia respectively, opened a realistic perspective for all countries of the region to move closer to membership of the European Union – but not without serious domestic reforms and enhanced mutual cooperation within the region. In addition, with the defeat of Slobodan Milosevic in Serbia, and subsequent confederalisation of the Federal Republic of Yugoslavia into the State Union of Serbia and Montenegro (SCG) in 2002, Croatia no longer had any reason to fear that Belgrade would favour the re-creation of a 'new Yugoslavia.'

Thus, in the first months after becoming Prime Minister, Ivo Sanader indicated the change of policy towards Belgrade. He proposed close cooperation, and found it easy to work with new Serbian Prime Minister, Vojislav Kostunica. In this he was supported and encouraged by the Croatian business elite, which saw its chance in opening up the Serbian market to foreign investors. This has had profound effects on domestic politics in Croatia, and it opened the space for further (joint or at least co-ordinated) action on war crimes. However, as will be explained further in this chapter, the results were rather limited.

The next significant factor in Sanader's change of course was coalition politics. Out of political necessity, in 2003 the HDZ entered into a coalition agreement with the main party of Croatian Serbs, the Independent Democratic Serb Party (SDSS). This coalition survived elections in 2007, when its position was further consolidated by a representative of the SDSS, Slobodan Uzelac, being appointed the Deputy Prime Minister in charge of regional development. The HDZ-SDSS coalition eased tensions between ethnic Serbs and ethnic Croats throughout the country. It also introduced a model of bi-national cooperation rather than conflict at the highest and middle levels of politics. Less has been done on lower levels, in municipalities and villages. This has been a slow and painful process. Nevertheless, with the main Serb party now in government, it became more difficult to avoid and/or undermine ICTY cooperation from within the official institutions. Although the SDSS has been cautious on the issue of the 'Homeland War', it nevertheless used its new position to *de facto* challenge some of its

main aspects, as well as to actively raise issues of crimes committed against ethnic Serbs in 1995. This has been done with mixed success.

Meanwhile, some of the leading participants in the 'Homeland War' started to tarnish its mythical image. The official discourse developed by Croatian elites in the aftermath of the conflict presented Croatia as both victim and victor in the war. On 13 December 2000 a special declaration was enacted by the Croatian parliament, which defined the character of Croatian participation in the war in the 1990s as 'just and legitimate, defensive and liberating.'¹⁴ Peskin and Boduszynski identify the adherence to such a one-sided definition of the war as being one of the main impediments to Croatia's cooperation with the ICTY. Although the text of the Declaration also invites Croatian courts to process all 'possible instances of individual crimes' committed during the war, actual indictments of Croatian participants were seen as contravening Article 5 of the Declaration by which the state was invited to 'provide full protection, respect and welfare' of all the 'defenders'.

However, in recent years there have been several cases in which some of the main participants in the Homeland War, including some of its 'heroes', were exposed in illegal or unethical situations. The most extreme example is that of General Ivan Korade, the former commander of 7th Army Brigade, the first to enter Knin upon its re-taking by Croatian forces in August 1995. In March 2008, Korade murdered four civilians and a policeman before committing suicide in what was the worst case of uncontrolled use of weapons in the post-war Croatia.¹⁵ Then stories of other crimes committed by this 'hero' (who was never indicted by the ICTY) became public. Among them was the case of five Serb prisoners of war whose murder he allegedly ordered in 1995.¹⁶ Public prosecutors – as it turned out – knew about the case, but had decided to not pursue it further, apparently because no witnesses were willing to testify. It was only when Korade committed crimes against (Croat) civilians that these previous crimes came to public attention.

Another General, Vladimir Zagorac, was indicted by Croatian courts on charges of embezzlement of about 5 million euro of the funds collected by the Croatian diaspora for defence purposes during the 1992-1995 period.¹⁷ In 2007 Zagorac fled to Austria and – unsuccessfully, as it would turn out – launched legal action in order to avoid extradition to Croatia. It was only then then it

14. The full text of the declaration is available in *Narodne novine* (the official gazette of the Republic of Croatia) at: <http://www.nn.hr/clanci/sluzbeno/2000/1987.htm> (accessed on 27 May 2008).

15. See: http://www.totalportal.hr/article.php?article_id=187528 (accessed on 28 May 2008).

16. See: <http://www.jutarnji.hr/clanak/art-2008,4,3,,114666.jl> (accessed on 28 May 2008).

17. See: <http://www.balkantimes.com/cocoon/setimes/xhtml/bs/features/setimes/newsbriefs/2007/12/11/nb-08> (accessed on 17 May 2008).

was 'discovered' that he also had strong links with networks of organised crime – both within Croatia and elsewhere in the Western Balkans. On 2 March 2009 he was sentenced to seven years imprisonment and a confiscation of property amounting to 39.4 million kuna (about 5.25 million euro).

Cases such as these – to mention but a few – undermined to a degree the myth of the Homeland War, enabling a more critical reflection on the recent past. This was also the case because they openly posed a question of justice and equality between those ordinary soldiers who were drafted (often under threat) to the 'Homeland War' in which they risked their lives, and those in high positions of authority during that war who did not really see much of the frontline, yet had done extremely well for themselves. All this only further facilitated the government's cooperation with the ICTY.

Changing foreign policy priorities

During the 1990s, Croatia's official attitude towards the project of European integration was mixed. On the one hand, HDZ under Tudjman argued that Croatia had 'always' belonged to Europe for historical, geographical, cultural and political reasons, and should thus, naturally, 'return to Europe' by 'leaving the Balkans behind'. However, Tudjman was also critical of the European Union, for both ideological and pragmatic reasons. In his books, he argued that multi-cultural entities are not viable in the long-term.¹⁸ The lesson from the collapse of Yugoslavia – a multicultural and largely confederal political structure – should have been learnt, he said, by Brussels too. Thus the very project of the European Union – especially in its post-Maastricht phase – was viewed with scepticism and suspicion. For Croatian nationalists, it was difficult to accept that one day, in an enlarged European Union, there would be no heavily guarded border with Serbia, or Bosnia-Herzegovina (and in particular with its Republic of Srpska), and that the level of integration with these neighbours would become higher than it had been in the last years of Yugoslavia.

Tudjman's criticism of the EU was also based on its alleged failure to support Croatia during the most difficult times of the conflict – in particular prior to the destruction of Vukovar, in November 1991. Had it not been for the decisive support by the US in 1995, Tudjman argued, Croatia would have waited much longer for the reintegration of its territory. When the EU criticised him

18. See, for example, his book *Nacionalno pitanje u suvremenoj Europi*, 5th edition (Zagreb: Nakladni zavod Matice Hrvatske, 1996).

for not punishing crimes committed by Croatian troops in former Krajina and Bosnia-Herzegovina, and for his authoritarian style of governance, he responded with anger:

Some European states dare to teach us lessons on how to treat minorities. They have forgotten that a democratic France, for example, does not even recognise the existence of minorities on its soil. Or, they urge us that we must return all Serbs who fled Croatia during the war back to Croatia, but they forget that they could not solve problems like that between the Czech Republic and Germany, etc.¹⁹

Following such rhetoric, Croatia's relationship with the EU entered a most difficult phase, and was *de facto* frozen in 1995-2000. This changed only in January 2000, when HDZ lost parliamentary elections. The EU reacted quickly and enthusiastically. Already in November 2000, the heads of states and governments of the EU held the summit in Zagreb that launched the Stabilisation and Association Process, and in 2001 the SAA was signed with Croatia. However, the lack of cooperation with the ICTY halted the process of EU accession once again. Thus, Croatia missed not only the chance to join the EU in the 'big bang' of 2004, but also in 2007 – with Bulgaria and Romania.²⁰

With marginalisation of the Tudjmanists in Croatian politics as of 2003, the most significant obstacles to EU accession disappeared. The two largest parties – the HDZ in government and SDP in opposition – agreed to form an informal 'Pact for Europe' and to support each other in jointly leading the country towards the EU. But the lack of full cooperation with the ICTY remained an obstacle which led to a new delay in the ratification of the SAA. This obstacle was fully removed only after the arrest of General Gotovina, in December 2005.

At the same time, Croatia changed its policy towards the countries of the Western Balkans. During the Tudjman era, regional cooperation was ruled out by the president's fears that it might lead to a 'reconstruction' of some 'new Yugoslavia' (despite the fact that actually there was no desire for its reconstruction in any other parts of former Yugoslavia, including in Serbia). However, by 2003 Croatia realised that one possible road to Brussels leads via the capitals of the neighbouring countries: primarily Belgrade and Sarajevo. Stability and reconciliation in the Western Balkans became a pre-

19. 'Interview Predsjednika Republike dr Franje Tuđmana glavnim i odgovornim urednicima hrvatskih javnih glasila, 22 listopada 1996 u Predsjedničkimi dvorima' (an Interview to editors-in-chiefs of the Croatian media), available at the Official Site of the President of the Republic of Croatia, on 19 November 1996: <http://www.predsjednik.hr/iv-2210.htm> (accessed in December 1996).

20. More on development of EU-Croatia relations in this period is available in an article by this author, 'Croatia and the European Union: a long-delayed journey', *Journal of Southern Europe and the Balkans*, vol. 8, no. 1, February 2006, pp. 85-103.

condition for accession to the European Union. For this reason too, Croatia improved bilateral relations with both Bosnia-Herzegovina and Serbia, and in 2005 (nine years after it was created) joined the Southeast European Cooperation Process.²¹

This new policy improved regional cooperation in all areas, including in security and defence. This in turn enhanced co-ordination of actions against organised crime, as well as addressing the remaining issues of war crimes and crimes committed during the conflict of the 1990s.

ICTY and EU policy towards Croatia

As already explained, the ICTY and EU coordinated to a reasonable degree their policies of 'sticks and carrots' towards Croatia. The EU accession talks were in principle conditioned upon full cooperation with the ICTY, and the reports on this cooperation were a substantive part of the decision-making process – although there was a degree of flexibility in the interpretation of their importance for this process. It was only when the ICTY confirmed that Croatia had really improved cooperation and was assisting the efforts to identify, arrest and extradite the war crime suspects, that the EU approved further steps in talks between EU and Croatia. This policy was successful. Not only did co-ordinated pressure from Brussels and The Hague secure Croatia's full commitment to working with the ICTY, but it also strengthened moderate and pro-European forces domestically. The ICTY indictments removed some of the main protagonists of extreme nationalism from the Croatian public scene. Marginalisation of the extremists domestically would have been a much more difficult task had it been left entirely to forces within Croatia itself. Once the HDZ moved away from extremism in 2003, the pressure from the ICTY assisted the process of further consolidation of moderate and pro-European policies. This was in sharp contrast to the situation in 2000-2003, when the ICTY indictments in fact became an obstacle to consolidation of the Racan government, and when they – unintentionally – helped the consolidation of the HDZ-led opposition that rallied against the 'discrediting of the Homeland War'.

One can only conclude that domestic forces played a very important role in the success of the ICTY in achieving its objectives. On this particular issue (cooperation with the ICTY) the external factors played an important and largely constructive role in supporting the anti-extremist forces in Croatian politics, but it

21. In 2007 Croatia's deputy foreign minister, Hidajet Biscevic, even became the Secretary-General of the newly established Regional Cooperation Council. See: http://www.setimes.com/cocon/setimes/xhtml/en_GB/features/setimes/features/2007/05/25/feature-02.

was primarily the transformation of the domestic political scene that secured a break with the Tudjmanist policy of isolationism and nationalist extremism. This change was due to both a significant shift in Croatian public opinion in the post-conflict period, and to changed circumstances in the region. It was possible only once Franjo Tudjman died – not before.²² Above and beyond all these contributing elements, change after 2003 was caused by enhanced understanding among Croatian nationalists that the membership of the European Union can only secure and enlarge – not endanger or diminish – the level of *de facto* sovereignty of the new Croatian state.

Although internationally recognised back in January 1992, Croatian internal and external sovereignty remained rather unfulfilled and largely symbolic throughout the 1990s. Even when Croatia re-integrated the breakaway regions of Krajina, Western and Eastern Slavonia under its legal sovereignty, it still remained the subject of various international inspections and observations. Throughout the 1990s there were UN and OSCE missions on Croatian territory, and the ICTY commanded authority that superseded that of the domestic legal system. This – from the nationalists’ point of view entirely undesirable – supervision hurt their pride, and prompted them to do what was necessary in order to transform Croatia from an ‘internationally supervised state’ into a ‘fully sovereign state’. Croatian moderate nationalists – including those in the HDZ – concluded that it was only via membership of the EU that these forms of external supervision would cease. Thus, they decided to cooperate.

The remaining problems

Croatia’s improved record of cooperation with the ICTY since 2003 has not been matched with similar improvement in all areas of transitional justice, which has been largely due to the lack of external pressure on the government in Zagreb. The results are particularly weak when it comes to raising public awareness of the war crimes committed by Croats in Bosnia-Herzegovina and the breakaway region of Krajina. In fact, for a long time there was no serious will to openly discuss war crimes committed by Croats. Content analysis of the news programmes of the state-owned Croatian Television and of the largest-circulation daily *Vecernji List*, concludes

22. It is very difficult to imagine anything similar to the 5th October (2000) protests against Milosevic (in Serbia) happening in Croatia. It is also very unlikely that Tudjman would have been removed from power, arrested and extradited to The Hague had he been indicted – as Milosevic was in June 2001.

that these topics were ‘covered very little and very superficially’.²³ There are some honourable exceptions to this trend though: the Split-based weekly *Feral Tribune* has since its first issue (in 1993) been an outspoken reporter on crimes committed by all sides, and so were two marginal publications: the anti-war magazine *Arkzin*, and the left-wing monthly *Hrvatska Ljevica*. But all three have since closed down, due to financial and political pressure against them. These pressures were – at least in part – a consequence of its writing about the war crimes. State television is still very wary when it comes to dealing with the topic of the war crimes, with the possible exception of the popular political talk-show *Latinica*.

In line with other former Yugoslav states (with the partial exception of Bosnia-Herzegovina), Croatia decided not to implement lustration of those who held public office in the 1990s. Even those who were currently facing trials for war crimes or indeed those who (like General Mirko Norac) have been sentenced for them are still treated primarily as the ‘defenders in the Homeland War’, not as accused and convicted of committing serious crimes. Croatian law does not allow for a military rank to be taken away from retired military personnel, thus the generals sentenced for crimes (such as Norac) can still count on a high state pension and privileges based on their military rank.

The state contributes to funding the legal defence of those on trial at the ICTY, and assists their defence teams in building the case. Public opinion polls conducted in Croatia reveal a high degree of animosity towards the ICTY, which is still often portrayed as being ‘anti-Croatian’. The main complaint about its activities is on account of the ICTY’s alleged attempt to promote an ‘artificial balance’ between Serb and Croat war crimes. The overwhelming majority of Croats see Croatia as being the victor of the legitimate, defensive and just war, and the victim of (Serbian) aggression. They ask themselves: can the side that is acting in self-defence be said to have committed war crimes? The idea that some Croats too committed crimes against others is difficult to accept.

There are few NGOs in Croatia focused on issues of war crimes, and *transitional justice* in general. In addition to the Croatian Helsinki Committee for Protection of Human Rights (HHO), the most active is Zagreb-based *Documenta*. Its recent report identifies four major problems with regard to issues of transitional justice in Croatia.²⁴

Firstly, trials for war crimes in domestic courts are still often biased against ethnic Serbs, and/or in favour of ethnic Croats.

23. Stojan Obradovic, *ICTY Coverage on Croatian Television and in Vечernji List*, available at: <http://www.mediaonline.ba/en/?ID=175> (accessed on 29 May 2008).

24. See ‘Transitional Justice in post-Yugoslav countries’, Report for 2006, *Documenta*, ‘Fond za humanitarno pravo’, Istrazivacko-dokumentacioni centar, Zagreb, Belgrade and Sarajevo, 2006.

Members of the Serb minority are much more likely to be indicted and sentenced for such crimes than members of the Croat majority (on this, see also chapter three). Secondly, many of these trials were conducted *in absentia*, without the accused being present.²⁵ Thirdly, there is a complete lack of adequate witness protection, and some witnesses (or potential witnesses) for the ICTY have been murdered in circumstances that have not been clarified.²⁶ During the trial of the wartime commander of defence of Osijek, Branimir Glavas, the media openly revealed the identity of key witnesses, who were subsequently harrassed and subjected to threats. The same was the case in the trial against members of the military police suspected of the torture and killing of a number of Montenegrin and Serb prisoners in an *ad hoc* prisoners camp, Lora, in Split.

Fourthly, there is still insufficient legal representation of the victims. In addition, there is not much political or media pressure to address the crimes committed against Croatian Serbs. This is largely due to the fact that many of them – about 300,000 according to some official estimates²⁷ – left Croatia following the military and police actions of Croatian forces against the self-declared Krajina in 1995. Only about 120,000 have returned since, but a very large number of them only formally, to regulate citizenship and property rights – rather than to physically move back permanently.²⁸ Subsequently, they have not participated in discussions in the Croatian media. Despite its position in government, the main Serb party (SDSS) is in no position to insist on the issue of crimes committed by Croatian forces being raised publicly. Serb politicians expect their Croat partners in government to take a lead on this sensitive issue. They did, however, put the issue of property return on the agenda – both in the physical sense and in terms of property rights. Whereas the Croatian state has funded restitution of the property destroyed during the war (regardless of to whom it belonged), it is still the case that tenancy rights that were cancelled in court proceedings during and after the war have not been restored to ethnic Serbs. According to estimates by Serb political parties, in Croat-controlled areas, there were about 23,700 cases in which ethnic Serbs lost tenancy rights following extended absence from their socially-owned flats.²⁹ In addition, there were thousands of similar cases on the territory once controlled by the ethnic Serb entity in Krajina.

All these aspects indicate that since 2003 the Croatian government has indeed been much more successful in improving its

25. See also Thierry Cruvelier and Marta Valinas: 'Croatia: Selected Developments in Transitional Justice', ICTY *Occasional Paper Series*, December 2006.

26. See the case of Milan Levar, reported in: <http://news.bbc.co.uk/2/hi/europe/901987.stm> (accessed on 30 May 2008).

27. See Human Rights Watch at: <http://hrw.org/english/docs/2003/09/03/croati6342.htm> (accessed on 28 May 2008).

28. According to a recent study on the return of Croatian Serbs commissioned by the UNHCR office in Zagreb, only between 46,000 and 54,000 of those Serb refugees who returned to Croatia in fact live in Croatia – whereas the remaining 51,000 – 60,000 still live outside Croatia, most often in Serbia, despite registering an address in Croatia. See Milan Mesic and Dragan Bagic: 'Sustainability of Minority Return in Croatia', UNHCR, Zagreb, 2007, p. 92.

29. See *Documenta* report for 2006, op. cit. in note 24.

cooperation with the ICTY than in addressing the problems of transitional justice domestically. Although the reasons for the new policy towards the ICTY were primarily to do with domestic issues (competition within the HDZ, consolidation of sovereignty, preservation of the governing coalition etc.), without the pressure from outside (from both the EU and ICTY) the change would have been much slower and limited in scope. The internal impetus for change might not have been sufficient had it not been also for external pressure. Where these external influences were weaker the change of policy was less successful.

For this reason, it seems legitimate to wonder about the prospects of transitional justice in Croatia in the aftermath of the announced closure of the ICTY in the foreseeable future. In addition, the question must be asked: what is the future of transitional justice once Croatia becomes a member of the European Union? The new policy of cooperation with the ICTY was – among other things – a *condition sine qua non* of any further accession moves. Once its main foreign policy objective is achieved, Croatia is more likely to slow down all further reforms of its various domestic policies – including in the sensitive, controversial and unpopular area of transitional justice, which is so directly linked with both the official interpretation of national identity and with still raw personal and collective memories of the traumatic recent past.

Strategies of denial: resistance to ICTY cooperation in Serbia

Jelena Obradovic-Wochnik

War crimes, conditionality
and EU integration in the
Western Balkans

2

Introduction: the political context

The arrest of Radovan Karadzic has demonstrated that the attitude of the Serbian political elite – and perhaps of the public – towards those accused of war crimes is changing. His arrest, on 21 July 2008, some three weeks into the new DS (Democratic Party)-SPS (Socialist Party of Serbia) coalition government, reinforced the idea that Serbia's history of reluctance to cooperate with the International Criminal Tribunal for the Former Yugoslavia (ICTY) since 2000 had been in large part due to the machinations of Vojislav Kostunica. Soon after Kostunica had stepped down, and the DS-SPS government was formed, Rasim Ljajic, president of the National Council for Cooperation with the Hague Tribunal, declared that the new government would 'intensify' its efforts to find the (then) three remaining fugitives. A new security chief, Sasa Vukadinovic, was appointed. Within weeks Karadzic had been located and arrested in circumstances which are currently being investigated, but which are said to have featured the involvement of the Serbian security services.

Karadzic's arrest in Belgrade, followed by revelations that he had been living openly in the city, practising alternative medicine while giving lectures under the assumed name 'Dr. Dragan Dabic', was undoubtedly embarrassing for the new Serbian government. This was especially the case since Ljajic had declared only two days before that 'we do not know where the fugitives are'. Not only was this an assertion that had been continually repeated since 2000, but it also followed the June 2008 report by ICTY chief prosecutor Serge Brammertz who accused the (then Kostunica) government of not doing enough within its power to locate the fugitives, observing that there was a perceptible lack of will to do so. In response to the Brammertz report, Ljajic stated that 'we have no strategy for arresting war criminals'. Only days later, Stojan Zupljanin was located and arrested in Pancevo.

The position of the ICTY has long been that the Kostunica government did not demonstrate adequate political will for ICTY cooperation. Following Milosevic's fall from power in 2000, it had been expected that Serbia would start to rid itself of 'relics' from the Milosevic era, such as Karadzic and Mladic. The initial flurry of action and commitment to war crimes prosecution and eradicating corruption after 5 October 2000 ended with the assassination of Zoran Djindjic in 2003. The subsequent government of Zoran Zivkovic promised further action, which it never delivered, being too caught up in the fallout from the Djindjic assassination and internal problems to deal with war crimes as well.

From 2004 the Kostunica government, in coalition with DS, probably proved the biggest obstacle to cooperation. Kostunica has never been pro-ICTY and his increasingly nationalist stance highlighted his real opinions on the war, crimes and international justice. The pro-European, anti-Milosevic DS, which could have been expected to challenge the views of Kostunica, never did so with much conviction and instead behaved like a 'junior partner', allowing Kostunica to constantly default on his promises of delivering Mladic and Karadzic to justice.

The security sector and transitional justice

But this should not be regarded as reflecting a lack of will or complacency on the part of the DS: this government had to contend with a set of complex problems, all which had the effect of disabling any attempt to collaborate with the ICTY by politicians who genuinely wished to do so. Most notably, Kostunica and the DSS were in control of the (largely unreformed) security sector, responsible for tracking the suspects.

The security sector (including the police and army and various intelligence services) has always been suspected of playing a role in the war in Bosnia, organised crime and the assassination of Djindjic. It has undergone some attempted reforms since the fall of the Milosevic regime, but these were never as extensive as was expected or needed.¹ Suspicions surrounding the security sector and its involvement in shielding Mladic and Karadzic increased following revelations that Mladic was in receipt of a military pension up until 2002, and in 2005 that members of the MUP (*Ministarstvo Unutrasnjih Poslova* – Ministry of Internal Affairs) were involved in assuring his protection.²

1. Dejan Atanasijevic quoted in Nedim Sarac, 'Serbia: Will the New Government Cooperate with the ICTY?', Institute for War and Peace Reporting, *Tribunal Update* 559, 11 July 2008. See: www.iwpr.net.

2. See Fond za Humanitarno Pravo (FHP), *Izvestaj o Tranzicionoj Pravdi u Srbiji, Crnoj Gori i na Kosovu 1999-2005* (Belgrade: Fond za Humanitarno Pravo, 2006).

There were also constant suggestions that some parts of the security sector have been involved in the protection of the fugitives. Ljubodrag Stojadinovic, a security analyst, views the security forces as split: the majority (even under Kostunica) were (and still are) doing their job in war crimes investigations honestly and genuinely, but are continually undermined by a small minority of 'loyalists' who perhaps know where Mladic is and are sabotaging investigations and covering up tracks.

Despite these complications, EU conditionality has always been strict and the Serbian government has been put under constant pressure to fulfil its promise that Mladic will be delivered. However this conditionality has never taken into account the complexity of the different factors at play: the fact that power to order arrests and extraditions of the fugitive suspects was decentralised across various parts of the government, the failure of transitional justice programmes in the country, and the strong element of public resistance towards confronting the legacies of the 1992-1995 wars which meant that even key politicians in power (e.g. Kostunica) never really pursued the ICTY project with any great degree of personal conviction or urgency.

In practical terms, real cooperation was almost rendered impossible, because the different segments of the Serbian government and its security services were seemingly working in diametrically opposite directions.

Not only this, but the mechanisms of transitional justice – such as laws on war crimes, investigations, tribunals and commissions – were never fully developed, or had no real political support. Laying the foundations of a strong justice system in the country would have ensured better support for ICTY cooperation. At the very least, it would have indicated a real commitment on the part of the democratic leadership to confront the legacies of the past, and would have given legitimacy to the tribunal in the public sphere. Instead, after the death of Djindjic, different governments made some feeble attempts to deal with the war crimes issue, with every attempt being severely undermined or criticised by large and vocal parties such as the SRS.

Those initiatives have included the Special Tribunal for war crimes established in 2003 (see chapter five by Vojin Dimitrijevic in this volume), plagued with its own problems from the start and whose unpopularity is still evident today – its chief prosecutor Vladimir Vukcevic is reported still to be receiving death threats,

which only intensified after the Zupljanin and Karadzic arrests. In 2000, Vojislav Kostunica also initiated the Truth and Reconciliation Commission, whose mandate was to investigate the ‘internal and external’ events which led up to the war in the former Yugoslavia (see pages 36).

In this context, the EU conditionality has been criticised as being difficult to meet since it reduced Serbia’s ICTY cooperation to a single issue, i.e. the handover of specific war crimes suspects.³

But there also existed (and still exists) a strong undercurrent of general public reluctance towards any kind of open discussion of the 1990s wars and war crimes, which had an even more disabling effect on politicians such as Tadic, who did wish to cooperate with the ICTY. The depth of this reluctance, in which the ICTY was overwhelmingly unpopular and war crimes largely denied or indeed justified, also meant that pro-European leaders were unable to openly condemn war criminals or engage in effective debate. The fate of Zoran Djindjic, who opened up not only a debate regarding the recent past, but also initiated a ‘purge’ of known criminals, hung ominously over all those who believed that Serbia ought to start moving forward.

Unpopularity of the ICTY

This resistance and denial of Serbian involvement and responsibility has existed since the early 1990s, but has not been homogenous throughout that time. It has undergone various shifts, but what has remained almost constant is the unpopularity of the ICTY and the extent to which parties such as the Serbian Radical Party (SRS) and SPS manipulated public hostility to the court and its reluctance to acknowledge Serbia’s guilt. Both parties have continued to use these public attitudes to shape public debate.

The Serbian public has overwhelmingly opposed cooperation with the tribunal, ever since its founding. For example, a study which surveyed the population’s attitudes towards war crimes tribunals between 2001 and 2005, has found that two thirds of the general public do not know the extent and nature of ICTY operations and, moreover, do not trust them.⁴ Since 1993, the tribunal has almost exclusively been represented in negative terms across most public and media outlets (exceptions include *B92* and *Danas*). The mainstream media have continuously generated their own conspiracy theories and depicted the tribunal as a ‘prison for Serbs’. The ICTY has been portrayed as a political court whose

3. See Iavor Rangelov, ‘EU War Crimes Policy in the Western Balkans’ in Denisa Kostovicova and Vesna Bojicic-Dzelilovic, (eds.) *Austrian Presidency of the EU: Regional Approaches to the Balkans* (Vienna: Renner Institute, 2006).

4. Beogradski Centar za Ljudska Prava i Strategic Marketing Research, *Javno Mnenje u Srbiji: Stavovi Prema Pravosuđu za Ratne Zlocine i Haskom Tribunalu* (Belgrade: 2005).

purpose is to dispense a ‘victor’s justice’ and to change the historical record to the detriment of the Serbs and in favour of other nationalities. The court became even more unpopular after the NATO airstrikes, as the NATO forces were perceived as having committed a war crime against Serbia, for which no one had been indicted.

The fact that the tribunal was set up by the international community plays into the hands of the propagators of such views and perceptions, as the SRS and their sympathisers are only too ready to point out that the international community must have ‘hidden agendas’ and aims in prosecuting the Serbs. In this, they have often been joined by the SPS, especially since Milosevic died in his prison cell in 2006, a fact which both the SPS and SRS readily exploited and continue to describe as ‘suspicious’.

Cultural resistance, denial and relativisation of war crimes

The unpopularity of the ICTY is part of a wider, post-war phenomenon. There has been a marked resistance among the Serbian population to acknowledge Serb-committed atrocities during the 1990s, as well as a lack of a critical approach to figures such as Mladic and Karadzic. This has often been described as ‘Serbia’s failure to come to terms with the past’, and has sometimes been the focus of examinations of notions of collective guilt⁵ or various NGO initiatives for ‘reconciliation’. Many analysts have put this kind of attitude down to ‘resurgent nationalisms’ and see it as connected with high support for the SRS.

Studies and surveys⁶ conducted among the Serb population have highlighted the polarisation between two segments of society: the first uncritically believes that all blame lies with ‘the other side’, and that Mladic, Milosevic and Karadzic are victims of a global anti-Serb conspiracy. The second group has no illusions about crimes committed by the Serbs, and believes that the nation has to confront them. A third and, in the author’s view, the far largest group, can be described as follows:

They are undecided with regard to what happened, and what the truth is about the ex-Yugoslav wars, and there is much confusion about Serb involvement in those events. At the same time, they are clear that the blame lies with the international community, and

5. Eric Gordy, ‘Accounting for a violent past by other than legal means’, *Southeast European and Black Sea Studies*, vol. 3, no. 1, January 2003, pp. 1-24; J.N. Clarke, *Serbia in the Shadow of Milosevic: The Legacy of Conflict in the Balkans* (London: IB Tauris Academic Studies, 2008).

6. For example, S. Logar and S. Bogosavljevic, ‘Vidjenje istine u Srbiji’, *Rec*, no. 62/8, pp. 7-34, pp. 15.

the separatism of former Yugoslav republics, rather than with Milosevic. Defenders of ‘Serbdom’ such as Karadzic, Mladic and Arkan are still held on a pedestal.⁷

This public attitude was also reflected in the reactions to the ‘Scorpions tape’ incident of 2005⁸ – after the initial shock and condemnations had worn off, most people took the view that the incident had been staged, or resented the fact that for the upcoming Srebrenica anniversary, precedence was being given to Muslim victims while Serb victims were ignored. A month after the tape was made public, the Belgrade NGO Youth Initiative for Human Rights posted images of Srebrenica on billboards in order to commemorate the anniversary of the massacre. This provoked angry reactions both from the public and from politicians, and while no politician condemned the vandalism of the boards with Ratko Mladic slogans, several ministers publicly complained about the type of message the NGO was trying to send out.⁹

All of this would certainly appear to indicate that Serbia is a society ‘in denial’, which has failed to come to terms with its past. The facts of wars, evidence and judgements have been available in the public domain for a long time, yet the information seems to be routinely rejected. However, rather than indicating an irrational inability of Serbian society to comprehend the magnitude of the crimes, these trends point to a problem between knowledge and *acknowledgement*.¹⁰

The culture of denial, evident in the public sphere, is reflected in mainstream political discourse, and parties such as the SRS have incorporated denial of war crimes as an acceptable and normative way of dealing with the legacy of Serbia’s involvement in the wars.

But how does denial become an acceptable discourse in a context where so much evidence points otherwise? Various surveys that have been conducted suggest that certain atrocities are no longer negated as never having happened, but are explained away, justified or relativised. Denying certain outcomes, minimising events and resorting to euphemisms are, broadly speaking, coping strategies for members of the general public who usually find it difficult to comprehend or accept the extent of violence against other civilians. For political elites, the same strategies are useful disaster management tools – thus, genocide becomes ‘population transfer’, and killing of civilians ‘collateral damage’.¹¹ It is worth

7. *Ibid.*, p. 32.

8. In July 2005, a video tape of a Serbian paramilitary unit, the ‘Scorpions’, executing six civilians during the Bosnian war, was shown at the Milosevic trial and then broadcast across all major TV networks in Serbia.

9. For instance, the then Culture and Information Minister, Dragan Kojadinovic, said: ‘This is clearly a form of political campaign that surpasses mere information’: quoted in Andrej Nosov, (ed.) *Serbia and Srebrenica 1995 - 2005* (Belgrade: Youth Initiative for Human Rights, 2006). Available at: <http://www.yi.org.yu/english/Publications/Documents/knjiga%20Srbija-Srebrenica.pdf> (accessed 4 January 2007).

10. Stanley Cohen, ‘State crimes of previous regimes: knowledge, accountability and policing of the past’, *Law and Social Enquiry*, vol. 20, no. 1, 1995, pp. 7-50.

11. *Ibid.*, p. 15

pointing out that quite often, Serbian political elites have denied war crimes by claiming that they are also the result of various Western or ‘NATO’ conspiracies, and this strategy has been clear in the trial of Milosevic and most recently, with Karadzic’s various court appearances. These former leaders have alleged that suspected war crimes they are accused of are not the result of Serbian aggression but are fabrications on the part of the ICTY, the international community or NATO. This is closely related to the similar view held in Serbia on the NATO airstrikes, which are overwhelmingly seen as a part of a conspiracy against Serbia.¹² This conspiracy theory often involves a plan for ‘Kosovo occupation’ and often, the suspected war crimes are claimed to be ‘fabrications’ engineered by the international community so that it could justify its airstrikes against Serbia.

Several elements are at work here, namely the disenfranchisement of the ordinary people and their failure to influence any political developments since 1989, and the Serbs’ subsequent experience of marginalisation, which certain political elites have successfully manipulated. They have seen that the strategy of blaming NATO and the international community for their own wrongdoings has paid off, since Serbia’s own deeply ingrained notion of victimhood makes it ripe territory for conspiracy discourse – and the idea that larger, malevolent forces are at play and are beyond Serbia’s control.

The issue of war crimes in Serbian politics

The SRS

The overall unrepentant attitude of the public has been reflected across the political spectrum, where denial of war crimes is to be found among mainstream parties, rather than being the prerogative of extreme or marginal movements.¹³ Since the death of Djindjic, the SRS-dominated discourse (opposed by very few voices), has been in the ascendant. It contains two main elements: Serb victimhood and the undermining of the ICTY. In parliament, which has never seen a session dedicated to war crimes, the SRS nevertheless used every opportunity to dispute either the validity of the court, or evidence of war crimes. For instance, the SRS opposed the introduction of a law on cooperation with the ICTY in 2003 and, at the time, SRS member Dragan Pavlovic stated:

12. See Jovan Byford and Michael Billig, ‘The Emergence of antisemitic conspiracy theories in Yugoslavia during the war with NATO’, *Patterns of Prejudice*, vol. 35, no 4, 2001, pp. 50-63.

13. Some extreme movements include the ‘1389 Movement’ and youth organisations ‘Nomokanon’ and ‘Dveri’.

Isn't the Hague tribunal a big enough evil for the Serbs, without us judging ourselves according to how the West dictates to us ...? This law has as its aim to show to the world that Serbs are war criminals. But are you going to take the KLA to court, for their wrongdoings?¹⁴

Similarly, Vojislav Seselj's¹⁵ viewpoints are, like those of Milošević and now Karadžić, based on the idea that the ICTY is an 'illegal tribunal' and a part of an anti-Serb conspiracy. Seselj and the SRS regularly circulate the idea that witnesses at trials in The Hague are intimidated into appearing as prosecution witnesses,¹⁶ or are manipulated, as the title of his self-published book – *The Hague's Exploitation of Fake Witnesses* – suggests.

In 2005 in parliament, Milorad Vučelić dismissed Srebrenica as 'pure fabrication' and Serb involvement was again denied by Tomislav Nikolić:

What does Serbia have to do with any kind of [war] crime, which was committed in Srebrenica? Why do we need that on the Evening News?¹⁷

In response to the Srebrenica billboard campaign referred to previously, Nataša Jovanović from the SRS declared that the pictures depicting massacres were an 'insult to the Serb people' and that the messages they conveyed were 'false'. Soon after that, Aleskandar Vučić said of the Special Tribunal for war crimes:

I don't know why there is such glorification of that special court. It's a political lobby with a mission to sentence everyone who crosses their path, and for that they will receive congratulations from every foreign embassy and from Nataša Kandić.¹⁸

More recently, after Zupljanin was arrested SRS's official publication *Velika Srbija* referred to this as the arrest of 'a Serbian fighter, a Serbian patriot' and said that its timing was deliberate, that 'they arrested him much earlier but they had to wait for the extradition and the say-so of their Hague mentors and foreign order-issuers.'¹⁹ When Karadžić was arrested, Vučić stated that the news is 'horrifying for Serbia' and that 'Tadić has done everything he can so that Serbia disappears, and that people who are symbols of patriotism disappear.'²⁰

When it comes to denial, as a populist and relatively well-

14. Dragan Pavlović, SRS, 1 July 2003. Quoted in FHP, op. cit. in note 2, p. 14.

15. Vojislav Seselj, a figurehead of the SRS, is currently on trial at the ICTY.

16. *Velika Srbija* no. 2774, March 2007. Available at: www.srs.org.yu.

17. Quoted in FHP, op. cit. in note 2.

18. Aleskandar Vučić, 16 December 2005, quoted in FHP, op. cit. in note 2, p. 18.

19. *Velika Srbija*, July 2008.

20. 'Stranke o hapšenju Karadžića', *B92*, 22 July 2008. Available at: www.b92.net.

respected party, SRS is often not far behind the truly active extremist groups. For example, in May 2007, when the extremist group ‘1389 Movement’ put up posters representing street signs around Belgrade bearing the name ‘Ratko Mladic Boulevard’, the SRS did not condemn the action, but joined in – Aleksandar Vucic was pictured in *Politika* putting such a poster up himself. The SRS also organised a protest meeting for the occasion, ‘against the dictatorial regime of Boris Tadic.’

The FHP²¹ noted that even though the SRS encountered no opposition from the Democratic bloc for such comments, it has become ‘noticeably worried that space has been opened up for the debate on “that” past, for which they are partly responsible. Hence their rather transparent hiding behind “defence of the people” and criticism of the Special Tribunal.’²²

However, more is at stake than just the SRS’s fear of losing power should re-examinations of the past become an actively debated topic. Its entire strategy of confronting accusations of Serb war crimes is to discredit the ICTY through various conspiracy theories, and to suggest that not all is quite what it seems with the tribunal – this is evident through the constant references to ‘foreign embassies’ and doing ‘what the West dictates’. The discourse is also replete with ideas of betrayal and treason and it is clear that they do not engage in disputing evidence of Serb war crimes on any rational basis. They do not, for example, counter evidence of mass graves with evidence to the contrary but with counter-accusations that the evidence is ‘false.’

Even though the SRS logic appears irrational to the outsider, their ideas resonated with the Serbian public, because they drew on acceptable ideas within Serbia about the 1990s wars. This is where SRS support and attitudes towards war crimes do not necessarily marry up. While many Serbs may privately or publicly agree with the SRS rhetoric and ICTY policy, this does not necessarily translate into SRS votes. As the FHP notes, the SRS rhetoric is very much a throwback to the Milosevic era politics that resulted in Serbia’s isolation and societal and economic breakdown.²³

The DSS and SPS

The SRS has been presented here as possibly an example of the most extreme behaviour among the political establishment, but Kostunica’s DSS does not emerge in a much more favourable light. Instead of resorting to the same finger-pointing as the SRS, the

21. Fond za Humanitarno Pravo (Humanitarian Law Fund), A Belgrade-based NGO.

22. FHP, op. cit. in note 2, p. 17.

23. FHP, op. cit. in note 2, p. 18.

DSS has often managed to adopt the same position as the Radicals, but veil it in a much more 'rational' and acceptable form. The DSS does not often engage in tirades and parliamentary polemics as the SRS does, but tends rather to react to specific events.

For example, just after the 'Scorpions tape' scandal broke, a 'Srebrenica Declaration' (effectively, an apology for Srebrenica and other war crimes) was proposed in parliament by Natasa Micic and Zarko Korac. After consultations, it turned out that such a declaration would be supported by the DS, SPO and the Social Democrats, while the SRS, SPS and DSS (in power at the time) rejected it.

Most notably, the DSS, as the ruling party up until Kostunica stepped down in 2008, has demonstrated its stance towards war crimes by not only failing to extradite war criminals on time (Mladic is a case in point) but also failing to engage in critical debates about the consequences of the extraditions that did take place. While not necessarily a strategy of denial akin to the SRS, avoiding engagement in such debates, combined with the fact that it is seen as being opposed to any public condemnation of war criminals, sends out a very clear message about the DSS's stance.

For example, with the exception of the Zupljanin and Karadzic arrests, all other arrests took place either in Republika Srpska (RS) or discreetly and with minimum media coverage. Kostunica's regime very much created the impression that Serbia was entering into a Faustian pact with the EU, handing over wartime 'heroes' in return for the 'empty' promise of Europe. While Kostunica can point to the fact that all but four suspects were extradited during his rule, all such instances were purely mechanical exercises and were not based on any apparent moral or political conviction.

Kostunica's real attitude to war and war crimes was evident with his creation of the 'Truth and Reconciliation' Commission. Its mandate was to determine the causes that led up to the war in the former Yugoslavia, including the actions of all former Yugoslav republics and external actors, but notably not internal ones and it did not focus on war crimes. The Commission was heavily criticised for not being victim-centred, as is traditional for all such bodies, and several experts walked out once its real aim became clear. Not only was Kostunica attempting to propagate the notion that others were to blame for the wars, and that there were no war crimes worthy of investigation, but according to some critics, his main aim was to discredit the ICTY. The Commission ceased operating before it had produced any reports.

More recently, Kostunica carried on in the same vein after the Karadzic arrest. In a *Glas Javnosti* interview, he did not condemn Karadzic but solely focused on questioning the ‘legitimacy of the ICTY’. He claimed that the new Serbian government ‘does not have the courage to raise the question of The Hague’s legitimacy ... lest it falls foul of the global centres of power’²⁴ He then discredited the actual indictments of the Serbs by focusing attention on crimes committed against the Serbs:

It cannot be demanded of Serbia to send Serbs to the Hague, when the Hague tribunal has declared as innocent those who have without a doubt committed war crimes against the Serbs.²⁵

With such actions and statements, Kostunica and the DSS have demonstrated that they are not too different from the SRS. They are caught up in a logic of self-victimisation, and also intent on shifting blame onto others.

This is why, when Milosevic and then Karadzic claimed that the court or NATO were ‘trying to kill them’, it was relatively easy for the Serbian public to believe their allegations. By then, such ideas had become common currency. For years, Serbian power figures have been attempting to portray Serbia’s war crimes and responsibilities to the ICTY as the fault of somebody else, and specifically, trying to portray Serbia as a victim or as a pawn of the intricate power games of shady international actors.

Such conspiratorial ideas are almost wholeheartedly supported by most of the mainstream Serbian media. *Glas Javnosti* and *Vecernje Novosti* are explicit in their denials and glorification of Mladic and Karadzic, while *Politika* is less so, but still fails to engage critically in issues of war crimes, preferring to stick to a discourse characterised by veiled suggestions and implicit Serb victimhood, much along Kostunica’s lines.

Media which do engage with war crimes in a much more critical and reflective manner, e.g. *Danas*, *Vreme*, *B92* and various NGO publications, are invariably treated as ‘traitors’ by the public sphere at large. As a notable example, after the Scorpions tape was broadcast in 2006 and after the initial shock had worn away, the public turned on the media organs, such as *B92*, that had brought the tape to light, as well as on Natasa Kandic, accusing them of having being ‘paid’ to have it aired.

24. Interview in *Glas Javnosti*, quoted in ‘Koštunica: Vlada nema hrabrosti’, *B92*, 27 July 2008.

25. Ibid.

The DS and the democratic bloc

It is fairly easy to accuse the ‘usual suspects’ of the SRS-DSS-SPS and the ‘patriotic’ media bloc of continuing to discredit the ICTY and justifying war crimes as part of a strategy of self defence – such assertions are entirely in line with their political convictions. But what of the pro-European, democratic parties? Another set of ‘usual suspects’, the Liberal Democratic Party (LDP) and G17+ Party, have always been explicitly against the nationalist war rhetoric and have always supported cooperation with the ICTY, while their individual members have been vocal in condemning crimes and have played a key role in bringing about initiatives such as the Srebrenica Declaration. But LDP and G17+ are small and are not as influential either the SRS or DSS. Indeed, their anti-war and pro-ICTY stance have always made them a target of suspicion among the Serbian public. They are seen as outsiders, as foreign-funded ‘mercenaries’ that are linked to NGOs and are thus regarded as completely implausible political parties. Their attempts at engaging with war crimes as a serious issue have therefore never been given much legitimacy, and unfortunately did not gain enough influence to instigate any kind of change in the public debate.

Such an effect could have only been achieved by a popular, much more legitimate and powerful democratic party – the DS. The party prides itself on its European vision and its rupture with the Milosevic past, but its efforts at confronting the war crimes issue have been lukewarm at best. While Tadic had no real power over arrests or the security sector, he did have some options at his disposal, such as creating a legitimate counter-discourse to the SRS-DSS-SPS rhetoric. But this never happened. Tadic shied away from any kind of real engagement, and while a single leader cannot be expected to change the public mood and cultural values which determine the ways in which war crimes are seen, he did not even attempt to counter some of the SRS’s more implausible and damaging claims.

Without any credible or influential counter-discourse existing in the public and political sphere (NGOs notwithstanding), war crimes perpetrated during the Milosevic era continued to be hailed as ‘fabrications’ and the ICTY was largely perceived by the Serbian public as an instrument of political blackmail on the part of Europe. In a post-Milosevic democratic Serbia, the war crimes debate was shaped by the Radical Party and supported by the patriotic media, while Tadic made some weak attempts at voicing

his view. Considering the fate of Djindjic and the attempted assassination of journalist Dejan Atanasijevic after he appeared as an ICTY witness, plus the constant death threats received by Vukcevic, Serbia is perhaps not the most auspicious of political environments for a lone politician to be opening up the war crimes debate. However, it must be noted that even Vuk Draskovic, whose Srpski Pokret Obnove party (SPO) once funded a paramilitary unit, was far more vocal than Tadic in condemning Serb war crimes and doing so unconditionally.

Tadic's most notable action in the war crimes debate has been his apology on the tenth anniversary of Srebrenica. He did not have institutional backing for the apology, and the speech he gave was heavily criticised in Bosnia as relativising the seriousness of crimes that had been committed by the Serbs during the war. In the speech, Tadic apologised, but also alluded to his own family's experiences during the Second World War. His speech also contained no clear admission that war crimes had been committed by the Serbs, or condemnation. Again, compared to, for example, Draskovic and the SPO's own Srebrenica Declaration in 2005,²⁶ in which they explicitly condemned 'crimes committed by the Serbian hand', Tadic's apology seems somewhat tepid and indecisive and certainly not enough to counter even the mildest SRS rhetoric.

Tadic's missed opportunity was in failing to engage the sections of society which were ready to open up the debate and confront Serbia's wartime past. This represents a sizeable proportion of the public, mainly consisting of the young and democratically-oriented or the NGO sectors. Without Tadic's support, those who were ready to start exploring war crimes issues never received public legitimacy and were relegated to the margins of political debates.

Accounting for denial and public resistance to acknowledging war crimes

The views outlined above all have one point in common. They are all premised on the notion that all of the wars of the 1990s were acts of self-defence, rather than aggression. Denial of war crimes is closely dependent on and related to specific factors including: the Serbian understanding of the 1990s wars (and how they have been

26. 'Srebrenica: deceniju posle: Sve propale deklaracije', *Danas*, 12 July 2005. Available at: www.danas.co.yu.

understood in the broader historical context); the socio-political context of extreme isolation, disenfranchisement and marginalisation, prevailing since the early 1990s, and Serbia's relationship with the 'outside world', especially the international community as represented by the ICTY, EU, NATO and the UN, parties which are perceived to have failed Serbia in many ways.

All these factors have also been played out against a backdrop of a very turbulent two decades: internally, as well as three wars, Serbia has experienced several changes of government, sanctions, high levels of corruption and organised crime, NATO airstrikes, the assassination of a prime minister, Kosovo independence, and what is perceived as the continual pressure from the ICTY and EU to hand over Mladic and Karadzic – figures many do not believe to have been war criminals in the first place.

Serbia has, in effect, been in a permanent state of crisis ever since 1989, and a large number of socially and politically destabilising events have taken place in a very compressed period of time. In addition, the nature of the 1990s wars has been crucial in determining today's perceptions. Whereas many Western observers tended to interpret the wars of the 1990s either as an atavistic resurgence of 'repressed ethnic hatreds' or a war borne out of the state-building strategies of Milosevic and Tudjman, in Serbia itself the war was often perceived as a continuation of ethnic hostilities from World War II, or as a part of the Serbs' continual historical struggle against aggressors. This notion stems from a reading of Serbian history as one of oppression and frequent warfare, which commenced with the fall of the Serbian empire to the Ottoman occupiers and continued up to the twentieth century when Serbia experienced a series of bloody wars. Regardless of their circumstances, the majority of those conflicts (the Balkan wars, World War I, World War II, the civil war of the 1940s) were perceived as having the same aim, i.e. the liberation of the Serbian people.

The view that the 1990s wars were closely related to the hostilities of the 1940s was forged out of the nature and indeed the location of fighting in Bosnia, which took place mostly in villages which had already experienced similar types of violence in World War II. The perpetrators too were not just unfamiliar army representatives but included former friends and neighbours, adding a particularly horrific dimension to the new war. Furthermore, the Serbian public was always well-informed of events taking place in

Bosnia. Refugees and returning soldiers related stories of not only Muslim and Croat atrocities, but also Serb ones, and various activist anti-war groups often initiated information campaigns. Media outlets such as *Vreme* and *B92* carried war stories that belied Milosevic propaganda and illustrated the horror of the atrocities committed in e.g. Bijeljina, Zvornik and various concentration camps.

But, due to the particular brutality and proximity of the Bosnian war, many people initially had trouble accepting that Serb forces could engage in inhuman atrocities (stories of which constantly circulated in Serbia). In the history of Serb warfare against external aggressors, the wars of the 1990s, especially the Bosnian war, stood out awkwardly and could not be understood in terms of the already available cultural framework of wars of liberation and bravery. They had no precedent in Serbian history.

Milosevic was well aware of this – therefore, he began his political rise by emphasising invisible ‘threats’ to the Serbs, using ancient Kosovo mythology to make (then) contemporary problems appear as continuities of the past. Part of his success lay in his constant repositioning of economic problems and personal instability faced by many at the time, as problems of an ethnic nature and part of a constant outside threat.²⁷ He knew that the wars in Croatia and Bosnia would not be supported and even before the wars started, engaged in stagemanaging events in order to make the upcoming wars appear acceptable. His propaganda was so successful because he relied on already available historic events and popular beliefs – the notion of Serb martyrdom and self-defence – which he skilfully exploited.

In contrast, once the wars were over and incontrovertible evidence of Serb war crimes came to light, most indictments, evidence and accusations were dismissed precisely because they introduced ideas alien to existing beliefs, but also because they were often introduced by ‘outsiders’ (for example, the ICTY). Given that Serbia was a society that was always suspicious of the international community, believing it, for the most part, to have been instrumental in causing the break-up of the former Yugoslavia and the conflicts that ensued,²⁸ indictments coming from a representative body of this community were simply dismissed as fabrications.

This was perhaps Milosevic’s most lasting legacy. He succeeded in undermining the international community and its motivations

27. See for example Glenn Bowman, ‘Xenophobia, fantasy and the nation: the logic of ethnic violence in former Yugoslavia’, in Victoria A. Goddard, Joseph R. Llobera and Cris Shore (eds.), *Anthropology of Europe: identity and boundaries in conflict* (London: Berg, 1994).

28. See for example Nebojsa Petrovic, *Psiholoske osnove pomirenja izmedju Srba, Hrvata i Bosnjaka* (Belgrade: Institut za Psihologiju, Univerzitet u Beogradu and Dokumentacioni Centar ‘Ratovi 1991-1999’, 2005).

for getting involved with the ICTY to such an extent that today it is almost impossible to counter these myths, which continue to be propagated by the SRS.

Tadic's motivations for not countering the SRS-DSS-SPS ideological bloc was perhaps born out of the understanding that the population needs to be left alone to understand the past by itself, without being forced to take on versions of the past that were at odds with their own experience. The SRS and SPS, on the other hand, used their own strategies in order to preserve the legitimacy of their leaders on trial for war crimes, and to make their own involvement in the darker past less suspicious and less amoral. Above all, no one wanted to look as though they had been wrong for the last two decades, and to admit that the political decisions they had made had had adverse effects.

The problem with Serbian constructions of the past is that they are vastly at odds with interpretations proffered by non-Serbs: by Croats, Muslims, Albanians, the EU, UN, ICTY, NATO and all other actors involved. It is clear that this has resulted in significant tensions with the EU in particular, where the EU war crimes conditionality has been entirely contrary to what most Serbs are ready to believe, and what most Serbian politicians are ready to publicly declare. Tensions with its neighbours over the past has led to stalled reconciliation efforts and further distancing between Serbs and Croats and Bosniaks. As long as Serbs in Serbia feel that they have been singled out for punishment, these tensions will persist, especially if no initiative for regional war crimes cooperation ever takes place.

Thus, in one sense, perhaps the strongest sense of resentment comes from the Serbian perception that war crimes procedures have been entirely out of their control, being, as they are, primarily managed by an external court and political processes (such as the EU conditionality). The perception of being 'singled out' for punishment would be greatly diminished if Serbia took ownership of its own war crimes procedures - the domestic war crimes court has contributed to this in some ways - but, paradoxically, this appeared to have been the very last thing most national politicians wanted. With Tadic in power, and with the Karadic arrest, the tide seems to be turning.

Karadzic's arrest: political and cultural change

The arrest of Radovan Karadzic signalled the faint beginnings of a cultural and political change in Serbia.

The arrest demonstrates a political shift: there has finally been a real demonstration of willingness to change and progress towards Europe. The arrest also brought with it a perceptible change in terms of the attitudes of the Serbian public. For so many years now, the Serbian public has perceived anything connected to the ICTY as suspicious. The reactions were always angry and based on resentment, regardless of the specific facts of a given case.

But, once the initial surprise surrounding the discovery and arrest of Karadzic had died down, the ubiquitous 'nationalist backlash' that analysts always seem to expect from Serbia never materialised.

Only a handful of small protests in RS and Belgrade were recorded. On the eve of Karadzic's extradition to the ICTY, the SRS organized a protest in Belgrade, which 15,000 people attended. However, according to media reports from the attendees, only a small number of young extremists from groups such as 'Obraz' turned to violence during the night. In addition, it must be noted that there were virtually no spontaneous protests, demonstrations or vigils (save for the handful of youths) – certainly no outpouring of popular support.

What can account for this unprecedentedly subdued reaction from the Serbian public? Very simply, as soon as revelations of Karadzic's bizarre life as a New Age healer were revealed, the myth of 'Ratko and Radovan' as brave soldier-heroes swiftly started to collapse. For the entire duration of Karadzic's fugitive life, there had been speculation among the public that both he and Mladic were hiding in various Bosnian mountains or Montenegrin monasteries; but, far from being secluded in such noble sanctuaries, Karadzic was revealed to have been working as a 'charlatan doctor'. In addition, as his lawyer Svetozar Vujacic told *Vecernje Novosti*, 'he wasn't hiding, he was living openly, he gave lectures.' Karadzic also had a website under his alias, where he also listed his mobile phone numbers. He lived in New Belgrade and often went to a café where a photograph of himself and Mladic was prominently displayed by the owners.

His sheer audacity in openly living as an eccentric bohemian is now the biggest grievance that most Serbs have with Karadzic. For

many years, Serbia has suffered isolation and been stigmatised as a pariah state because Karadzic and Mladic were ‘in hiding’ – however, to some extent, this burden could be borne because, interpreted within the ‘justified war’ rhetoric, it was seen as a stand against the ICTY. Furthermore, it was a stand for the whole nation because it would stop further revelations about Serbian involvement in war crimes coming to light. After the initial suspension of Stabilisation and Association Agreement (SAA) negotiations, the view changed somewhat – people began to think that, if the fugitives were real heroes, they would sacrifice themselves for the good of their nation. Even so, the perception persisted that the two were heroically enduring their exile in great discomfort for the sake of the Serb nation.

All these ideas were dispelled with the revelation that, ultimately, Karadzic was a fraud, stripping him of his aura of heroism. Karadzic had finally undermined his own myth – something that the ICTY, EU and other external parties had unsuccessfully attempted for years.

This time, however, the breaking of the Karadzic myth came from inside Serbia itself and not from ideas proposed by an external party such as the ICTY. Previous revelations, such as the Scorpions tape, did not have the same effect, contrary to what has been argued.²⁹ The initial shock and disgust did not last because they swiftly turned into resentment and anger. The tape was seen as an unwelcome intrusion from the outside, but with the Karadzic case, the revelations were such that for the first time ever they were difficult to dismiss as conspiracy theory, external intervention or treason on the part of NGOs.

Just as Dejan Jovic points out in chapter one of this volume, in Croatia the Homeland War myth was finally undermined only once its generals exposed themselves as criminals and human beings susceptible to error. Karadzic is now where Milosevic was towards the end of his rule – finally exposed as a self-seeking charlatan and a criminal. This is the ‘breakthrough’ that Serbia has waited for all these years. The exposed secret life of Radovan Karadzic will generate a national debate on himself and Mladic as war criminals, or at least the first such debate in Serbia that contains a significant element of criticism of figures formerly regarded as heroes.

However, even this is not going to prompt an automatic critical examination of war crimes among the Serbian people. The process

29. See, for example, Ivan Zvezhanovski, ‘Watching war crimes: the Srebrenica video and the Serbian attitudes to the 1995 Srebrenica massacre’, *Journal of Southeast European and Black Sea Studies*, vol. 7, no. 3, September 2007, pp. 417-30.

will take time. As Serbian cultural analyst Milena Sestic Dragicevic has noted, 'everyone now talks about Radovan Karadzic, aka Dragan Dabic, but people in Serbia still do not talk about Srebrenica.'³⁰ The transition will take time, but the important thing is that the myth of the war hero has finally started to crumble away. It is to be hoped that, eventually, acknowledgement of the role played by the Republika Srpska and Serbian armies in Srebrenica will follow.

30. In Iva Martinovic, 'Karadzic's secret life draws tourists', *IWPR Tribunal Update* no. 564, 18 August 2008.

EU conditionality in Bosnia and Herzegovina: police reform and the legacy of war crimes

Tija Memisevic

War crimes, conditionality
and EU integration in the
Western Balkans

3

Introduction

Bosnia and Herzegovina signed the Stabilisation and Association Agreement (SAA) with the EU on 16 June 2008, and was thus the last of the countries in the Western Balkans region to formally reach this stage in the EU integration process. The decision to sign the SAA came after the parliament of Bosnia and Herzegovina (BiH) adopted two laws as a basis for police reform and therefore formally met the remaining condition stipulated by the EU for entry into the SAA. However, these two laws fall significantly short of the criteria for police reform as formulated by the EU in 2003. The numerous attempts to reach a political agreement on police reform among BiH leaders, in which the EU played an active role, had been failing one after another, until the required content and reach of the reform was watered down to a minimum.

As will be discussed here, the difficulties surrounding the restructuring of the police forces in BiH as a priority condition for entering into the SAA eloquently illustrate the shortcomings of the EU strategy towards BiH with regard to war crimes. The critical relationship between post-conflict policing and transitional justice has never been at the core of the criteria for police reform laid down by the EU. Instead, the criteria have been technical, based on considerations of financial and organisational efficiency, and, as will be shown here, very vague, leaving the whole process vulnerable to political pressure. EU representatives have not shown enough political determination and courage in formulating criteria for the process of police restructuring that take account of the bitter legacy of war crimes in BiH.

During the 1992-1995 war, police forces participated in carrying out the notorious campaign of ethnic cleansing and genocide. This later proved to be a great obstacle to, among other things, the return of the local population to their pre-war homes. More than 2 million citizens of BiH were displaced (approximately 1 million

IDPs and 1.2 million refugees who fled abroad). Ethnic division was institutionalised by the Dayton Peace Agreement (DPA), so the police forces have remained divided and organised along new administrative lines (Police of Republika Srpska, Police of the Federation of BiH, Police forces of ten cantons of the Federation of BiH, and Police of the Brcko District). So-called minority returnees (those having fled or been expelled and returning to their homes now under the majority control of another ethnic group) have often had to face those same policemen who perpetrated crimes against their community during the war. In many areas of BiH, especially in Republika Srpska, the police have played an active role in an intimidation campaign to discourage people from returning.

The UN International Police Task Force (IPTF) established by the Dayton Peace Agreement in 1995 with the task of monitoring and advising local law enforcement agencies, attempted to redeem the situation by initiating large-scale lustration of the police force across BiH. Criteria for being granted a certificate by the IPTF allowing an individual to remain on active duty as a policeman included having a sufficient professional qualification but also a clean wartime record. This project met with fierce political resistance, and the leadership of Republika Srpska refused to cooperate with it until 2000. Lustration was carried out hastily over the next two years, and in November 2002 the IPTF announced its decision to deny certificates to 598 out of approximately 17,000 policemen vetted. This process has since raised many controversies, ranging from accusations of non-transparent procedures to the increasing number of active (therefore certified) policemen being either investigated or prosecuted for war crimes after the completion of the vetting process, cases which will be referred to again later in the chapter.

In January 2003, the European Union Police Mission (EUPM) took over from the IPTF, and has ever since been closely involved in police reform in BiH. Restructuring the police forces in BiH has become a formal part of the EU integration process, and a set of criteria conditioning the progress of BiH in integration has been gradually defined. However, these criteria have never explicitly addressed the issue of the police force's involvement in war crimes and its negative impact on return, reconciliation and transitional justice.

The legacy of war crimes

Bosnia and Herzegovina is scarred by a grave legacy of war crimes. During the war 100,000 citizens of BiH were killed, while more than 2 million people out of a prewar population of 4.5 million inhabitants became refugees. The war was devastating both demographically and materially, and wartime atrocities included concentration camps, mass executions, ethnic cleansing, mass rapes and genocide. In Sarajevo over 12,000 citizens were killed and 60,000 wounded during a three and a half year long siege, while in Srebrenica in July 1995 approximately 8,000 Bosniaks were killed in the course of three days. Today, there are between 13,000 and 16,000 cases of war crimes being investigated or prosecuted in BiH, of which more than 12,000 at the state-level Court of BiH.¹

The internal configuration of BiH, as part of the Dayton Peace Agreement from 1995, corresponded with the military and political situation on the ground at the time that the Agreement was signed. As such, it is based on the outcome of the war campaign. BiH was divided into two entities, the Serb-dominated Republika Srpska (49% of the territory), and the Federation of BiH (51% of the territory, further divided into ten cantons, of which eight with either a Croat or Bosniak majority), while the territory of Brcko (a corridor dividing Republika Srpska into two separated territorial units) gained the status of District under the jurisdiction of the State of BiH in 2000. Both entities were given extensive powers at the expense of the state, including law enforcement.

The efforts to provide restorative justice, including facilitation of the return of refugees and displaced persons to their pre-war places of residence and the restitution of property, have been obstructed primarily due to the institutionalisation of ethnic division. The wartime political parties remained in power after the 1996 general elections and for the most part have focused on preserving ethnic homogeneity and control over respective territories, for which they now have powerful institutional tools. Returnees have been exposed to organised intimidation and have often been marginalised both politically and economically. In the report published in 2000, 'Unfinished Business: Return of Displaced Persons and Other Human Rights Issues in Bijeljina', Human Rights Watch quotes the case of how police discouraged non-Serb returnees to Bijeljina by warning them that their safety could not be guaranteed, while some members of the police occu-

1. It is impossible to give an exact number, due to the absence of a centralised database, and lack of communication and cooperation between different courts. The majority of cases are being investigated and prosecuted at the Court of BiH, War Crimes Department, and by SIPA, the State Investigation and Protection Agency (approximately 12,000 cases).

pied returnees' homes.² In 2003, for example, there were 277 incidents against returnees reported through UNHCR field network, including five deaths (none of the murders have been solved to date), while in 2004 through the same network 137 incidents were reported, including the murder of a returnee leader in Teslic, who was also a witness against a local alleged war criminal at a cantonal court. In the same report UNHCR gave an account of the work of the police, which has been very slow or reluctant to react in such cases, while if cases have reached the stage of being investigated and prosecuted, the sanctions against perpetrators have been lenient compared to the seriousness of their crimes. Local authorities have also been reluctant to publicly condemn violence and intimidation against returnees, only doing so when under strong pressure from representatives of the international community.³

Vast institutional and extra-institutional (i.e. the majority of the media) powers over territorial units at the hands of nationalistic elites have ensured that patterns and structures of ethnic homogenisation created during the war have been maintained almost intact throughout BiH. The dominant strategy of political elites of keeping groups internally homogenous and isolated from each other has been based on the fear of 'others' and on a revisionist attitude to recent history with regard to war crimes and goals of war campaigns. The denial of war crimes, justification of crimes on the grounds of higher 'ethnic' interest or justification of crimes as being a reaction to a crime committed against the group in the past,⁴ has characterised the Serb majority's understanding and approach to war crimes, establishing an ethnic group as a safe haven for actual perpetrators. War criminals, from Radovan Karadzic and Ratko Mladic to locally praised perpetrators, have been venerated as heroes in certain ethnic groups, and many of their horrible deeds have become celebrated. Crimes ascribed to a 'national hero' have been denied and glorified at the same time. For example, while there has been widespread denial of the Srebrenica genocide, at public events such as football games, there have been cases where the crowd would chant 'Noz, zica, Srebrenica!' ('Knife, wire, Srebrenica!') if it was a match between teams coming from Republika Srpska and the Bosniak-majority region, or between BiH and Serbia.

The manipulation of facts, fabrication of evidence, commemorations of mythical war deeds, deliberate refusal to distinguish between civilian and military casualties in order to even numbers,

2. Human Rights Watch, 'Bosnia: Bijeljina minorities unable to return home', 30 May 2000. See: <http://www.hrw.org/en/news/2000/05/30/bosnia-bijeljina-minorities-unable-return-home>.

3. UNHCR, 'Update on Conditions for Return to Bosnia and Herzegovina', January 2005. See: <http://www.unhcr.ba/publications/B&HRET0105.pdf>.

4. During the 2008 commemoration in Jasenovac, Croatia (a concentration camp in the Independent State of Croatia during the Second World War, where Serbs, Jews, Roma and other ethnic groups, as well as political opponents of the fascist regime, were executed in large numbers - approximately 70,000 victims), the Prime Minister of Republika Srpska, Milorad Dodik stated that '... causes of the recent war can be found in this place.'

the mass production of revisionist works on war crimes – all this has been almost always supported or indeed orchestrated by the political leadership.

In the months preceding the tenth anniversary of the genocide in Srebrenica in 2005, the Ministry of the Interior of Republika Srpska initiated a large-scale media campaign highlighting the fate of the 10,000 Bosnian Serbs killed in Sarajevo during the war. They organised or participated in events where for example photographs of victims or exhumations of mass graves of Bosnian Serbs in Sarajevo, which actually related to entirely different persons or events, were displayed.⁵ The Ministry of the Interior even compiled a controversial list of 10,000 names that contained incomplete names and in some cases simply listed unidentified persons, with no further identifying description, which raises doubts about the presumed nationality/ethnicity of the victims.⁶ One of the intentions of the campaign was to shift the focus away from the impending Srebrenica anniversary.

The Sarajevo-based Research and Documentation Centre (RDC) have conducted extensive research on war victims and over the years developed a list of names based on careful collection of data and multiple cross-checking, which was verified by the international expert community. Their research established the number of casualties in Sarajevo (including all pre-war municipalities, therefore also those under the control of Bosnian Serb forces) during the war at approximately 16,000. The latest total number of victims in the whole of BiH has been estimated at 97,207, and based on previous research, RDC experts do not expect the number to rise much beyond 100,000.⁷

This, however, was not well received by the Bosniak authorities, both political and religious, who insist on a figure of 270,000 killed (a number that international organisations initially accepted, until they realised that the figures were based on names duplicated on different lists). It seems that leaders of each of the ethnic groups, demonstrating a high degree of political cynicism, wished that more people, preferably from their own group, had been killed during the war.

It is all part of the political project to preserve institutionalised gains from the war and protect war criminals. Individual victims became mere statistics in a cynical game of arithmetic where there was no concern for the value of human life. Grief, redemption, confrontation with guilt, catharsis, solidarity towards and

5. 'Istinom do pravde' conference, held in Pale on 25 March 2005. See: http://www.mup.vladars.net/zl/r_zlocin.htm.

6. See: <http://www.mup.vladars.net/zl/pdf/ubijeni%20sarajevo.pdf>.

7. See: <http://www.idc.org.ba/presentation/index.htm>.

between survivors, empathy – all indispensable for healing the trauma and for reconciliation – have been carefully neutralised by the master narrative created to perpetuate fear and resentment as the ways to control ethnic groups and preserve ethnic homogeneity. Viewed through the prism of such a narrative, the nature of crime and responsibility became distorted to the point of causing the complete erosion of a system of moral values and a false version of reality which denies basic logic. For instance, in the spring of 2008, RTRS (the public television channel of Republika Srpska) broadcast a TV show with guests representing the association supporting Biljana Plavsic (former President of Republika Srpska convicted of war crimes). Mrs. Plavsic was praised for many qualities, including for being a great humanist – despite the fact that she was convicted, among other war crimes, of crimes against humanity.

Bosnia and the EU

The perception of the EU is heavily influenced by the conditions prevailing in BiH. EU integration is seen as the process that will bring society the cures for all the problems it faces. The broad support for EU membership, fluctuating between 70% and 80% across the whole country, is based on the association of the EU with economic prosperity and the rule of law. But beyond that, the symbolism of Europe, and of European values, plays an important role – the idea of Europe is formed around notions of democracy, freedom, justice, pluralism, and prosperity. It is a general perception that both political and technical conditions for EU membership are based on the core values of the EU and aim at creating mechanisms that will restore a system of values and justice in BiH.

The transition to democracy of Central and Eastern Europe in the 1990s was driven not only by the prospect of economic prosperity, but primarily by the idea of rejoining the club of free nations, and experiencing the restoration of democracy and all that accompanies it, that those societies had lost under their experience of totalitarian rule during half a century. There was almost a romantic element to the transformation of those societies. That decade was the era of universal values and human rights, where general optimism and the promise of a better society softened the negative effects of transition. BiH, however, has a much worse

starting point. It is a society traumatised by war and still suffering its consequences, undergoing the transition in a period of altered priorities, and feeling threatened in a rapidly changing international environment. EU integration is the best framework for a society that has been so badly damaged by war and the events that occurred in its aftermath. Every failure on the part of the EU to insist on core principles and values, and tendency to succumb to local political pressures and make substantial compromises, has a far-reaching negative impact on BiH society. The EU in BiH has a long tradition now of setting conditions very broadly, so as to leave enough space for political bargaining in the face of its constant fear of political crises. One of the most telling examples of such an approach was a campaign in 2003-2006 targeting the constitution of BiH as not compatible with EU standards – many voices were raised from within the EU, both among politicians and experts, against the BiH constitution, but without stating clearly which elements are actually incompatible with the EU.⁸ The negotiations over constitutional reform between BiH political leaders that followed, with the participation of international community representatives, were consequently hampered by the lack of clearly defined criteria. Furthermore, one of the elements of the constitution identified by the EU as incompatible and unacceptable, so called entity-based voting in the parliament of BiH, became the subject of negotiations among BiH political parties looking for the compromise which necessarily fell short of EU standards. The EU had not dealt with the challenge properly – it left too much space for political negotiations and compromise over what was supposed to be a clearly defined standard of the EU and ended up backtracking on its initial insistence that existing elements in the constitution were entirely unacceptable.

Negotiations over constitutional reform resulted in the so-called April Package, a substantial compromise over the initial proposal, which failed to tackle the issue of entity-based voting under pressure from representatives of Republika Srpska. The April Package itself failed in the BiH Parliament, when several political parties, most importantly SB&H (Party for Bosnia and Herzegovina) seized the opportunity to exploit the issue in a populist manner, turning down the Package and requiring substantial constitutional changes, knowing the process was irreversible at the time, but hoping for more Bosniak votes favouring the strengthening of the state at the expense of the entities.

8. An exception to this is the report by the Venice Commission, 'Opinion on the Constitutional Situation in Bosnia and Herzegovina and the Powers of the High Representative adopted by the Venice Commission at its 62nd plenary session', CDL-AD(2005)004, Venice, 11-12 March 2005. Very clear and firm opinions articulated by the Commission had not become major guidelines in the political negotiations about constitutional reform in BiH. Instead, some elements of the constitution identified by the Commission as unacceptable based on EU standards and principles became the subject of political negotiations among local stakeholders with the aim of keeping them in place in their basic form.

Ever since, the constitutional reform process has been in deadlock, occasionally being revived for a brief period of time whenever this has served the interests of local political leaders in daily politics and in their relations with the EU. The latest example has been the so-called Prud Process, greeted by the EU with relief and encouraged by EU representatives who take that attitude that ‘whatever local politicians have agreed upon, it is acceptable to the EU.’ In reality, the Prud Process served the short-term political interests of the three political leaders involved.⁹ With the EU constantly lowering expectations, BiH leaders found themselves in the comfortable position of being able to play clever political games with the EU, and still gain a vote or two from unsuspecting and ill-informed citizens. The latter do not have full information on prospects of integration and conditions set by the EU against which to compare the performance of their local politicians.

Police reform in BiH, as has already been mentioned, serves as a good example of the relationship between EU conditionality and war crimes in the broadest sense, revealing all the weaknesses of EU strategy aiming primarily at stabilisation but not substantial democratisation.

Police reform in Bosnia and Herzegovina

The mandate of the IPTF (International Police Task Force, set up by the Dayton Peace Agreement) expired at the end of 2002, and as of January 2003 the European Union Police Mission (EUPM) took over.

The lustration of policemen in BiH that had been carried out by the IPTF by the end of 2002, resulting in 598 policemen being denied certificates, was part of the attempt by the international community to reform police forces in BiH. Aside from the issue of the consequences of police forces having participated in war crimes, complex state bureaucracy and internal procedures resulted in additional serious obstacles to efficient policing. As was mentioned before, the organisation of the police reflects the internal organisation of the state, without the state having authority over law enforcement. There has been a lack of cooperation and communication between the different police forces, and the jurisdiction of the police forces stops at the borders between the entities. Without even basic coordination on state level or a

9. Milorad Dodik, Prime Minister of Republika Srpska and leader of the SNSD (Party of Independent Social Democrats, leading Bosnian Serb party) used the process to improve his all-time low rating with the EU; Sulejman Tihic, leader of the SDA (Party of Democratic Action, a leading Bosniak party) entered the Prud Process to use it as a way of attacking SB&H and its leader Haris Silajdzic, and to project a pro-European image towards the EU and with regard to impending party elections; Dragan Covic of HDZ (Croatian Democratic Community) participated in Prud in order to become more visible after scoring well in local elections against competing Bosnian Croat parties.

central database, the police forces in BiH can easily fail to address major EU security concerns such as terrorism and human trafficking.

In addition, the cost of the complex yet inefficient organisation of police forces is 9.2% of total public expenditure, which is exceptionally high by international standards (approximately three times higher than in Slovenia, and twice as high as in Hungary).¹⁰

The issue of police reform has begun to be comprehensively addressed as BiH has moved towards establishing a formal relationship with the EU as a potential future Member State. EUPM was given a mandate to establish sustainable policing arrangements in BiH, to develop the police's capacity to fight organised crime and corruption, and to improve the financial viability of the police.

The first formal call for police reform by the EU came in the 'Report on Bosnia's Readiness to Negotiate a Stabilization and Association Agreement' (Feasibility Study) of 2003. The EU defined police reform as a crucial and necessary step in the establishment of the rule of law and one of the priorities in BiH progress towards the EU.

However, in connection with the war crimes legacy, concern was raised by the international community over the fact that the Police of Republika Srpska have not made a single arrest of war criminals indicted by the ICTY (International Criminal Tribunal for former Yugoslavia).

In parallel with the EU, the Peace Implementation Council (PIC) began to raise the issue of police reform as early as in 2000, and by 2003 it expressed support to the then High Representative in BiH, Paddy Ashdown, to initiate police reform based on the highest EU standards and to establish a Police Restructuring Commission (PRC).

Based on the initiatives undertaken by the European Commission and PIC, and on the June 2004 report on 'Financial, Organisational and Administrative Assessment of the BiH Police Forces and State Border Service', High Representative Paddy Ashdown announced on 5 July 2004 the Decision Establishing the Police Restructuring Commission, outlining the mandate of the PRC and 12 criteria for police reform in BiH. Among others, principles for police reform included requirements that policing in B&H be structured in an efficient manner and according to best EU practices, be financially sustainable, reflect the ethnic structure of the

10. 'Financial, Organizational and Administrative Assessment of the BiH Police Forces and State Border Service', Final Assessment Report, 30 June 2004. Available at: http://www.esiweb.org/pdf/bosnia_BiHPoliceFinalReport_2004-06-30.pdf.

population in BiH, be protected from improper political interference, and that its effective capacity to investigate war crimes be guaranteed throughout the entire territory of BiH. In addition, several of the principles hinted at the necessity for the state to be granted authority over law enforcement.¹¹ The PRC was given the mandate to propose police reform and the legislation to serve as a basis to carry out the reform. Wilfred Martens was appointed the Chairman of the PRC, hence the PRC is also known as ‘the Martens Commission’.

EU institutions played an active role in the work of the PRC. In October 2004, Christopher Patten (then European Commissioner for External Relations) and EU Secretary-General Javier Solana outlined minimum requirements on the part of the EU for police reform in BiH:

1. The institutions of BiH must be invested with all competencies for police matters in BiH;
2. This includes legislation and budgeting for police matters exclusively at state level;
3. Political oversight should be exercised by the Ministry of Security at state level and
4. The size and shape of local policing regions should be determined according to criteria that make sense from the point of view of effective policing, rather than by political considerations.¹²

The aforementioned 12 principles and 4 criteria merged and reshaped into three major criteria for police reform, including the requirement that police should be managed from state level (which meant unification of entity-segregated police along the same lines as the already realised unification of the BiH Army), be free from political influence, and that police regions should be organised and determined according to technical and professional criteria. These three criteria were unfortunately defined sufficiently broadly to allow excessive political bargaining to take place.

The Police Restructuring Commission, proposing the police reform based on set criteria, ‘understood’ the third criterion – police regions to be determined based on the condition of technical efficiency – as the opportunity to weaken entities and reduce their authority in policing by establishing police regions across the entities’ lines and covering ethnically mixed territories.¹³ They

11. ‘Decision Establishing the Police Restructuring Commission’, 5 July 2004. Available at: <http://www.ohr.int>.

12. ‘Final Report on the Work of the Police Restructuring Commission of Bosnia and Herzegovina’, Sarajevo, December 2004. Available at: <http://www.ohr.int/ohr-dept/presso/pressr/doc/final-prc-report-7feb05.pdf>.

13. *Ibid.*

thus understood that this criterion provided an opportunity to bring about a desirable outcome, especially with regard to removing political control of police forces and facilitating the return of refugees and displaced persons. However, the problem arose from the fact that the EU never publicly and officially defined the criteria in this way, although it was consistently pushing for such a solution. Consequently, the political parties, especially from RS, argued that this had never been an actual requirement of the EU and rejected any of the proposals set forth by the Commission, providing their own interpretation of the criteria in quite the opposite spirit from that of the EU and parties from FBiH – which they were able to do as the criteria were so broadly defined. In addition, the Office of the High Representative (OHR) began to push for the abolition of police forces on the level of entities (Police of Republika Srpska and Police of the Federation of B&H), which was fiercely resisted by representatives from Republika Srpska.

After the prolonged negotiations over the PRC proposal, a Framework Agreement was passed through all three BiH parliaments (state and entity-level parliaments, including the National Assembly of Republika Srpska), which did not elaborate on details the parties involved could not agree upon, but contained commitment to carry out police reform in accordance with the three EU principles and establish an integrated, state-level police force within 5 years.

After the 2006 General Elections, the newly appointed prime minister Milorad Dodik rejected all previously reached agreements on police reform and initiated a new negotiation process, forcing the EU onto the defensive on the substance of the criteria by using the strategy of applying pressure by orchestrating (artificial) political crises.

Changed political conditions, including a new political strategy by the RS leadership embodied in Dodik and exploiting the EU's fear of Kosovo's declaration of independence spilling over into BiH in the form of a crisis, as well as leaning on Russia's new strategy in the Balkans and Russian support for Bosnian Serb and Serbian leadership goals, raising the spectre of confrontation with the EU on numerous issues, led to the EU adopting a defensive stance. The initial proposals for police reform were reduced to two laws introducing only superficial change without profound reform: this was understood as only the first phase of police reform, with the second to be negotiated after the constitutional

reform scheduled to be initiated at the end of 2008. On the one hand, given the tense political conditions, EU officials took the view that formal police reform leading to signing the SAA was better than continuing in the deadlock on this issue. On the other hand, the EU has shown once again that it does not have the will, resolution and strength to push through or impose the required substantial reform.

Two laws on the police reform that were adopted prior to signing the SAA were the Law on Independent and Monitoring Bodies of Police Structure of BiH and the Law on the Directorate for the Coordination of Police Bodies and on Agencies for the Support of Police Structure of BiH. These two laws require the establishment of a total of seven agencies on the level of the State. However, these agencies are only supportive bodies without well-defined competencies as the laws are not clear on the relationship between those agencies and the police structure in BiH. To date, not only have negotiations on constitutional change, which are a precondition for the second phase of police reform, remained in stalemate, but none of the agencies required by the laws on police reform have been established.

The fact is that the police reform was initially targeted at increasing the efficiency of the management of police forces by unification, removal of political influence and the restoration of the multiethnic composition of the police. But police reform as originally envisaged was also aimed at dismantling the police force of RS, entirely under the political control of the local leaders and, more importantly, discredited and tainted by its involvement in war crimes.

The judgment by the International Court of Justice in the case *BiH vs. Serbia (and Montenegro)* from February 2007 designated the police of RS as one of the wartime RS institutions which carried out the genocide in Srebrenica.¹⁴ RS police have a very dubious record concerning war crimes in general, and in the period after the war a very poor record with regard to reform, arresting suspected war criminals, facilitating the return of non-Serb refugees and establishing the rule of law.

Lustration has never been carried out among RS policemen in relation to their war record, except for the certification carried out by the IPTF by 2002 among all police forces in B&H, which proved somewhat flawed and ineffective as it turns out that many RS policemen currently being investigated or prosecuted for war crimes have certificates granted by the IPTF.¹⁵ The report of the

14. International Court of Justice Judgment of 26 February 2007 on the case 'Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina vs. Serbia and Montenegro)'. See: <http://www.icj-cij.org>.

15. For example 'Lelek je do hapsenja bio aktivni policajac u Visegradu', ONASA, Sarajevo, 23 May 2008. See: www.onasa.com.ba. Also, on the Court of BiH website, it is possible to go through the indictments and trials in Chamber 1 (War Crimes Chamber), where a significant number of indicted or convicted war criminals served as active policemen in the Police of Republika Srpska prior to their arrest (cases like Nikacevic Miodrag or Boban Simsic). See: <http://www.sudbih.gov.ba>.

government of RS on the Srebrenica genocide from 2005 lists more than 18,000 persons who participated in the atrocities, including soldiers, members of paramilitary units, policemen and members of civilian protection units. This list included names of 892 persons performing public duties, among whom many were policemen on active duty.¹⁶ The High Representative in BiH, Miroslav Lajcak, decided in summer 2007 to have the travel documents of 93 persons seized due to suspicion of their involvement in war crimes and participation in the network protecting suspected war criminals in relation to the Srebrenica genocide. 35 of the individuals concerned are active RS policemen.¹⁷

Returnees, especially to Eastern Bosnia, have frequently reported meeting wartime torturers or executioners who are active policemen.¹⁸ The most recent case is one raised at the conference on transitional justice in Brcko, held on 29 April 2009. The case concerns Vasilije Andric from Bijeljina, who was the Chief of the Police of Bijeljina during the war and who received a commendation from Radovan Karadzic, and has remained the Head of Bijeljina Police Headquarters until today. Bijeljina is the city situated in northeast BiH, and was one of the first to witness extensive war crimes against the non-Serb population perpetrated by paramilitary units from Serbia (Arkan's Tigers), and the Bosnian Serb Police and Army.¹⁹

RS police have performed very poorly also in facilitating the return of non-Serb refugees. Around 100 non-Serb returnees to RS were killed in the period since the end of the war without any of those cases being solved up until the present.

It seems that as an instrument in the hands of the political elite, RS police both served in carrying out the Serb leaders' wartime goals as well as in the preservation of ethnic homogeneity and territorial division after the war.

RS police have never made a single arrest of a suspected war criminal indicted by the ICTY on the territory of RS.²⁰ All ICTY-related arrests have been made either by international forces or by the State Investigation and Protection Agency (SIPA). Also, there have been cases of arrested or sentenced Bosnian Serb war criminals 'escaping' while under the guard of the RS Police. The most notorious case took place in May 2007, when convicted war criminal Radovan Stankovic escaped from prison in Foca under very suspicious circumstances. RS Police put up roadblocks to search for runaways only in the direction of Sarajevo, which is the last direc-

16. 'Oslobodjenje objavljuje spisak Komisije za Srebrenicu', *Oslobodjenje*, 24 August 2006, Sarajevo.

17. 'Order Seizing Travel Documents of Persons who Obstruct or Threaten to Obstruct the Peace Implementation Process', and 'Decision to remove Dragomir Andan from his position as Deputy Head of Administration for Police Education of the Ministry of the Interior of the Republika Srpska', 10 July 2007. See: www.ohr.int.

18. 'Prezivjele zatrazile izdvajanje Srebrenice iz Republike Srpske', *Oslobodjenje*, 8 July 2007, Sarajevo.

19. 'Objaviti imena i danas aktuelnih ratnih funkcionera', *Oslobodjenje*, 30 April/1 May 2009.

20. Except for the arrest of Zdravko Tolimir in summer 2007, but there was a suspicion that he actually surrendered in Serbia and was delivered to authorities in RS.

tion in which a convicted Bosnian Serb war criminal would head. At the same time, according to the official reports, he managed to make his way to Montenegro quite easily.²¹ This case was mentioned in relation to the issue of prison security across BiH during the visit of ICTY President, Fausto Pocar, who also made a visit to Foca, where he visited the prison from where Stankovic escaped.²²

In addition, cases have been recorded of RS police destroying wartime documents and evidence important for investigating war crimes. In the court case 'Jakovljevic and others' the police in Prijedor are alleged to have destroyed all evidence about the murder of Tomislav Matanovic and his parents. Police documentation from the police station in Visegrad is missing. In the Human Rights Watch Report 'A Chance for Justice? War Crime Prosecutions in Bosnia's Republika Srpska' the head of a special team within the Republika Srpska Ministry of Interior, Simo Tusevljak, is quoted as acknowledging that in some police stations in Republika Srpska wartime files were destroyed.²³

The decision of the Constitutional Court of BiH from 2000 stating that all constituent peoples of BiH (Serbs, Croats and Bosniaks) have an equally constituent status throughout the whole territory of BiH led to amendments being introduced to the constitutions of both entities to cater for this decision. Before that decision, RS was organised and constitutionally defined as the unitary 'state' of Bosnian Serbs. Introduction of power-sharing mechanisms to entities involving all three constituent peoples, alterations of the wording in the preamble of constitutions, and other changes required by the decision of the Constitutional Court of BiH were accompanied by the law requiring the ethnic composition of the police force to correspond to the ethnic composition of population as recorded in the 1991 census. Non-Serbs constituted almost 50% of the population in 1991 on what is today the territory of RS.²⁴ Among all administrative units of BiH, including entities and cantons, the RS police has the poorest record of employing members of the non-Serb population (currently the figure is at around 7%).²⁵ Given all the above-mentioned facts, the obstacle that the RS Police represents to the return of the non-Serb population is obvious.

On the other hand, the case of the RS Bosnian Serb policeman Boro Zelenovic in Janja, a predominantly Bosniak village before the war in northeastern Bosnia (today on the territory of RS), who became famous for trying to protect the local Bosniak population

21. 'Stankovic: New Facts About the Escape', BIRN BiH, 6 June 2007. See: www.bim.ba.

22. 'ICTY Weekly Press Briefing', ICTY 21 May 2008. See: www.un.org/icty/briefing/2008/pb080521.htm.

23. 'Limited Assistance by Republika Srpska Police', in 'A Chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic', Human Rights Watch, March 2006. See: <http://www.hrw.org>.

24. 'Statistički godišnjak RBiH. Popis stanovništva 1991', Sarajevo, 1992.

25. It is approximately 7%. See: 'Bosnia's Stalled Police Reform: No Progress, No EU', International Crisis Group, Report no. 164, 6 September 2005. See: www.crisisgroup.org.

during the war and for assisting in their return after the war, is illustrative of RS Police being used as pawns to serve the specific war and postwar goals of political leaders. The SDS (a party of Radovan Karadzic, who was wartime president of RS from 1992 to 1996) dismissed this policeman for protecting the Bosniak population; later returnees to Janja submitted a petition asking for him to be restored to duty that met with no response from local SDS authorities. This policeman was returned to duty only after strong pressure was applied by international representatives.²⁶

Obviously, the initial criteria for police reform in BiH would not have had a direct impact on the war crimes issue in connection with the RS police. Indirect impact with regard to war crimes, if reform was carried out as initially proposed by the Commission, would be a reduction of political influence over the police force with regard to the protection of war criminals (primarily due to multiethnic police regions and the curbing of the powers of existing administrative units), facilitation of refugees' return and multiple checks and balances due to the restored multiethnic composition of the force. This is borne out by the successful record of the State Investigation and Protection Agency (SIPA) which has been efficient not only in arresting suspected war criminals on the whole territory of BiH, but also in investigating corruption and criminal activity among the highest-ranking politicians in BiH and criminal groups operating across borders between entities. Both the authority of SIPA on the whole territory of BiH and the mixed ethnic composition of the agency's forces, involving the multiple checks and balances referred to above, created the basis for efficient and professional work, at the same time revealing all the weaknesses of the current organisation of the police forces in BiH, which make the police both inefficient and prone to political control. The proposal by the so-called Martens Commission, based on initial criteria put forward by the EU, including breaking down the structure of the police into technically efficient and cross-border multiethnic administrative units and placing authority over policing at state-level, would create similar conditions to those in which SIPA operates today.

As we have seen, the major problem with EU conditionality in BiH has remained the strategy of introducing substantial changes in BiH through the backdoor and under the disguise of conditions so broadly defined as to leave too much space for political manoeuvring. This has always had negative consequences, with

26. Oscar Schindler iz Semberije', *BHDani*, no. 359, 30 April 2004 and 'Povratak otpisanog', *BHDani*, no.365, 11 June 2004, Sarajevo.

the EU resorting to tactics of appeasement in the face of (supposed) political crises and/or under pressure and blackmail by local political leaders, ultimately resulting in EU conditionality being weakened and undermined.

Due to broadly defined criteria which masked a 'hidden agenda' to dismantle the entities' police forces, the EU found itself caught up in a political game in which it was forced to react on an *ad hoc* basis to (artificially manufactured) potential crises with which the RS leadership was threatening it. Its project for police reform not only ended up without delivering any substantial results (profound reform was indefinitely postponed, as with so many other critical issues in BiH), but more importantly the whole process created an impression that the war crimes issue is not on the EU agenda at all.

BiH is seen as a specific case. The internal/constitutional configuration of BiH is widely perceived as very problematic on three levels. From the moral point of view, the internal ethno-territorial configuration of BiH is seen as problematic due to its being the inheritance and result of the war and the ethnic cleansing campaign. In terms of the EU's normative values, the current arrangement is perceived as an impediment to democratisation, liberalisation and respect for human rights, while from a pragmatic/functional perspective as an obstacle to effective decision-making and the implementation of reforms. The problem is that the EU has never had the courage to clearly voice and define any of the above-mentioned concerns in formulating conditions. Invoking the normative and especially moral aspect has always been perceived as entering a minefield, for which the EU has never shown real political will or resolve.

If BiH is seen as a specific problem, with a problematic legacy, then the process of EU integration should be firmly conditioned and clearly defined in correspondingly specific terms taking into account the war crimes legacy and its baleful consequences. What is meant by this? For example, it is obvious that there are no universal EU criteria for structuring police forces. In the case of BiH, the EU should have moved away from an excessive emphasis on technical conditions and formulated specific conditions tailored to meet BiH problems based on the EU's vision and system of values, reflecting the fundamental principles of the political systems of the EU Member Countries.

If EU conditionality was to really work concerning war crimes,

the initial criteria had to be defined based on all previously mentioned aspects (moral, normative and technical) of the internal configuration of BiH with regard to EU standards and principles and should have included lustration of policemen as an imperative and non-negotiable requirement. The minimum that needed to be done was to clearly spell out the specific political purpose of police reform in the case of BiH and justify such a reform project based on EU values and principles in the light of the issue of war crimes.

There are numerous additional setbacks concerning the war crimes issue as a consequence of the way in which the EU conducted policy towards BiH. By not insisting that the political authorities in BiH confront the war crimes legacy and by failing to firmly uphold EU conditions, the EU allowed a situation to develop where BiH political leaders rejected any political responsibility for war crimes, regardless of whether they represent political parties which took part in the war or those which did not. Populism and nationalism based on manipulating the war crime issues proved to be the easiest and most attractive way to win and keep power. Confronting war crimes issues would undermine and deconstruct the politically useful narrative and challenge the powerbase of political elites, in a situation where the territorial organisation of the state provided them with almost unlimited control over ethnically homogenous territories.

Without the EU making it unambiguously clear that it is entirely unacceptable for political leaders to manipulate the war crimes issue, thus drawing a clear line leading to the restoration of a value system and the rule of law in accordance with EU standards, BiH political leaders feel free to continue with their exploitative political narrative based on the ethnic division of society. In such an atmosphere, there is almost a complete absence of responsible public debate on war crimes, indeed the political elite intentionally creates a cacophony in the public space on those issues, leaving the truth difficult to be recognised. So Milorad Dodik can easily publicly accuse SDS (his rival political party in RS) of being organisers of the genocide in Srebrenica and add in the same sentence that now his 'party has to clear out that *mess* the SDS left behind' referring to the special political and financial assistance to Srebrenica required from his government by the international community, including additional funds from the budget of the RS to support the sustainable return of Bosniaks to

the town.²⁷ This is the same leader that EU ambassadors to BiH publicly praised as ‘the most constructive politician in B&H’ after the adoption of laws on police reform, which fell short of the initially envisaged substantial reform due to pressure from the very same Milorad Dodik and RS leadership. The latter successfully manipulated the EU’s constant fear of a political crisis erupting in BiH and new developments in the EU-Russia relationship to have police reform tailored to their political goal of preserving unchecked power over the RS institutions they control.

Without external pressure by the EU obliging BiH political leaders to confront the war crimes issue and in the absence of strict EU conditions which take into account the legacy of the war, BiH society will continue to be a hostage of irresponsible nationalistic political parties employing a manipulative narrative based on revisionism and the exploitation of deep ethnic divisions. If honest confrontation with the past does not take place, then the aims of justice and reconciliation will never be achieved, thereby preventing the emergence of a functional and democratic state.

27. It is often forgotten that Srebrenica was given to RS under the Dayton Peace Agreement, meaning that it was placed under the jurisdiction of RS institutions later indicated by ICTY and ICJ rulings as those which planned and carried out genocide in 1995 on Bosniaks in this town.

The ICTY and EU conditionality

Florence Hartmann

War crimes, conditionality
and EU integration in the
Western Balkans

4

Introduction

The prospect of closer ties with the European Union has been the most important factor in ensuring cooperation of the Western Balkans states with the Hague-based International Criminal Tribunal for the former Yugoslavia (ICTY) and the arrest of persons suspected of war crimes in the former Yugoslavia. As former Chief Prosecutor Carla Del Ponte stressed before ending her eight year mandate, '90% of all indictees brought to justice [before the ICTY] are a direct result of conditionality applied by the EU'.

In the context of a lack of genuine will among Western Balkans politicians to address the issue of war crimes and bring to account those most responsible for the worst atrocities committed in the 1990s, EU conditionality and international pressure have proved to be the only effective means of overcoming their reluctance and eliciting the cooperation without which the tribunal would not have been able to fulfil its mandate. Each time the EU intensified the pressure for cooperation with the ICTY across former Yugoslavia, it bore fruit. Each decision on the part of the EU to suspend negotiations due to the failure of one state to transfer fugitives led to intensified efforts to comply in the other Western Balkan states. But EU leaders' commitment to applying strict conditionality so that full cooperation with the ICTY was demanded in return for completion of the negotiations on association and accession has not been consistently sustained. Conditionality remains subject to political decisions made by the EU as a political actor that has sometimes prioritised other goals than those set by the ICTY.

A case in point is Serbia, towards which the EU has not always taken a principled and consistent approach. Serbia's continuing failure to cooperate fully with the ICTY (explored fully in chapter two) has often led the EU to soften its requirements and to compromise. This approach was mainly motivated by specific political

circumstances, namely, an ongoing electoral campaign or negotiations over the formation of a new government in Belgrade, or the complicated process of determining the future status of Kosovo. The more resistant Serbia's governments have shown themselves, the more the EU has compromised, applying its conditionality selectively in the hope of anchoring the state more firmly on the European path. But in the short term, such an approach has often appeared to strengthen and unite anti-European forces in Serbia and has been detrimental to the credibility of both the EU and the ICTY. On the other hand, in the case of Croatia, strict conditionality based on ICTY cooperation proved to be effective both for the ICTY and for strengthening pro-European forces in the country. Since Kosovo independence in February 2008, the EU has come closer than ever to forgetting that impunity for war crimes and genocide is incompatible with the values of the Union, and treating Serbia as a 'special case'. Thus the EU has weakened the impact of its conditionality as a positive force for change in the region which can encourage governments and societies to acknowledge and deal with the mass atrocities committed in the course of the conflicts. It has moreover fuelled perception of diplomatic double-talk among Serbia's neighbours that have done better than Serbia in meeting EU conditions but feel they have not yet been rewarded accordingly.

Despite ICTY judgements and domestic war crimes trials, ethno-national ideologies and denial of responsibility for war crimes have persisted, obstructing both the process of rebuilding the rule of law, and the goal of international justice to facilitate lasting peace and reconciliation in the Western Balkans (as the case studies in chapters 1-3 show). While countries move closer to the Union, they still demonstrate resistance in facing the past and often continue to perceive convicted war criminals as heroes.

Reluctance in cooperation

The case of Croatia

Croatia has so far made the greatest progress towards EU membership. Following the death of the wartime leader Franjo Tudjman, parliamentary elections in January 2000 and the election of Stjepan Mesic as President of the Republic in February 2000 paved the way for the emergence of consensus on the European future of Croatia,

which triggered rapid development of relations with the EU. In May 2000, the EU Commission adopted a Feasibility Study proposing the opening of Stabilisation and Association Agreement (SAA) negotiations, which proceeded rapidly and the SAA was signed on 29 October 2001. At that time, Croatia's cooperation with the ICTY was satisfactory. The warrant for the arrest of Ante Gotovina, a Croatian general, delivered to the Croatian government in summer 2001, was validated by the local judicial authorities and forwarded to the competent local organs when the SAA was signed.

When, in February 2003, Croatia applied for full EU membership, many observers considered that Croatia could join Bulgaria and Romania in the next wave of enlargement, scheduled for 2007. But such a perspective was delayed by several factors, including the failure to hand over ICTY indictees. In summer 2002, another Croatian general, Janko Bobetko, had been indicted for war crimes by the ICTY but the Croatian government declined to hand him over. However, Bobetko conveniently died in late April 2003, ending the domestic controversy surrounding his transfer to The Hague. In December 2004, the EU decided that it would open accession negotiations with Croatia in March 2005, on condition that the last remaining Croatian ICTY indictee, Ante Gotovina, was arrested and delivered to The Hague.

This clearly indicated that the EU was committed to apply the ICTY conditionality to all states of the former Yugoslavia, and to apply it strictly. The ICTY Chief Prosecutor, Carla Del Ponte, played an important role in the EU move by insisting that, in view of the lack of genuine will on the part of governments to comply, only international pressure could bring the fugitives into the custody of the ICTY. From that moment and for the following two years, it was accepted that the Chief Prosecutor's assessment would be essential in determining whether a state was complying adequately. For the ICTY, the Croatian case was key to enhancing cooperation in the region.

Once the Chief Prosecutor's assessment became crucial to a state's prospects of further Euro-Atlantic integration, governments in the region stepped up their cooperation with the ICTY. Documents or waivers requested by the ICTY that had been pending for years were suddenly delivered to the Office of the Prosecutor (OTP) and new requests were promptly answered, in an obvious attempt to get Del Ponte's 'full cooperation' certificate. As EU or US deadlines approached, governments asked Del Ponte to

establish road maps in order to meet her expectations in time. Contacts between the OTP or its field offices and local government representatives increased significantly. It appeared that most often government officials were not adequately following up on pending ICTY requests for assistance, which were stuck in some ministries with no reply or simply left on a desk. Mechanisms were established inside the government offices in order to ensure a more efficient follow-up of the ICTY requests. Despite a real improvement in cooperation, governments have continued to delay the most sensitive aspects of cooperation, in particular the arrest of high-profile fugitives, pleading elections, political instability, or the need to prepare public opinion. From the moment the international community decided to rely on the Prosecutor's assessment of cooperation, EU and US officials increased their contacts with the Chief Prosecutor and her immediate office, in order to anticipate her position or even to influence it. This apparent shift of prerogative in assessing cooperation strengthened the Chief Prosecutor's position and constrained the Western Balkan governments to take their international obligation to comply with the ICTY more seriously. Who other than the OTP could better assess states' compliance with the OTP's own legal requests? But every rose has its thorn. It quickly appeared that for the EU Member States, as for the US, ICTY conditionality was a policy tool in their overall relations with the Western Balkans, used mainly for political purposes rather than to press for justice for all victims in the fight against impunity. When the Prosecutor's assessments were not serving their goals, EU and US leaders ignored the Prosecutor's opinion or interpreted it as they wished. This was the case in November 2006, when Serbia was offered membership in NATO's Partnership for Peace (PfP); or a year later, when the EU initialled the SAA; or more recently, in March 2008 when the EU signed the SAA despite Serbia's failure to cooperate fully with the ICTY (although implementation of the SAA still depends on full ICTY cooperation). The EU and the US continue to seek the Chief Prosecutor's opinion, so maintaining additional leverage on Western Balkan states if needed – although such leverage has been weakened by repeated compromises.

Following Croatia's failure to deliver General Gotovina, the EU decided on 16 March 2005 to defer the opening of accession negotiations with Croatia until full cooperation with the ICTY was achieved. After a visit to Zagreb on 30 September 2005, Carla Del

Ponte was due to deliver to the EU an assessment of Croatia's cooperation at a crucial meeting of EU Foreign Ministers in Luxembourg on Monday 3 October, at which Croatia's and Turkey's accession bids were to be discussed. EU leaders had to decide either to keep Croatia on hold due to the failure to arrest Gotovina or give the green light for starting accession negotiations. Although the most recent reports from Del Ponte on Croatia had been negative, EU diplomats were hoping she would deliver a mixed report in Luxembourg, leaving them room for manoeuvre. Austria was opposing opening negotiations with Turkey while strongly pressing for Croatia. Many EU leaders believed they could soften Vienna's position on Turkey if they gave their blessing to the opening of Croatia's accession negotiations.

Carla Del Ponte and two of her advisors (one of whom was this author) spent the weekend ahead of the Luxembourg meeting preparing the final report in her home town of Lugano, Switzerland – far from her office and from EU officials keen to meddle in her decision. Del Ponte firmly opposed giving advance notice of her assessment despite repeated attempts to get her to do so by several EU Foreign Ministers, including the UK's Jack Straw who was presiding at the Luxembourg meeting. On Monday 3 October, she delivered a favourable verdict on Croatia: during her visit to Zagreb, the government had provided her with Gotovina's intercepted conversation with his wife, which led to locating him in Spain. As she could not yet disclose the information on Gotovina's whereabouts, she was accused by the press of giving in to pressure to certify full cooperation to enable the EU ministers in Luxembourg to decide to go ahead with both Croatia and Turkey. This was not the case, although indeed such attempts to exert pressure were made. Gotovina, accused of war crimes against Serb civilians in Krajina in August 1995, was arrested in the Canary Islands on 7 December 2005 and transferred to The Hague. Croatia took part in the process of facilitating his arrest by the Spanish authorities. Thus the conditionality mechanism was successful.

The SAA talks with Serbia

In the aftermath of that same 3 October 2005 Luxembourg meeting, the EU also decided to open the SAA talks with Serbia, without seeking Del Ponte's assessment, which they knew would be negative. For years, talks with Serbia over Euro-Atlantic integration had been quite strictly dependent on Belgrade's full cooperation with the tri-

bunal. Milosevic had been arrested in 2001 before a US deadline for meeting aid conditionality, and he was transferred to the ICTY just before an international donors' conference. The following year, the US had certified Belgrade for economic assistance only after three further accused were transferred to The Hague. In December 2004, Serbia was under increasing pressure from the EU and the US to hand over dozens of fugitives living in the country. The US had begun to reduce aid, and the EU had made it clear there would be no movement on the SAA unless Belgrade improved cooperation with the Tribunal. In office since March 2004, Serbian Prime Minister Vojislav Kostunica had asserted that none of the indictees would be arrested. Coordinated and sustained EU and US conditionality, however, appeared to be very efficient: at the beginning of 2005, Kostunica was constrained to soften his position and started convincing high-profile indictees (several generals) to turn themselves in for trial. By April 2005, Serbia had transferred 14 indictees. The EU decision of March 2005 to postpone accession negotiations with Croatia due to its failure to hand over Gotovina contributed to intensifying efforts to comply with the ICTY in Serbia and Montenegro and in Bosnia and Herzegovina. Thus in May 2005, Serbia's efforts were rewarded by the EU Commission adopting a Feasibility Study that proposed opening negotiations for the SAA.

But after the EU Foreign Ministers gave the green light, Serbia's cooperation with the ICTY stopped. Nevertheless, the EU decided to open the SAA negotiations with Serbia in October 2005, indicating its readiness to take a 'flexible' approach towards this state. However, at Del Ponte's insistence, the EU underlined that the pace and conclusion of the SAA negotiations would depend on full cooperation with the ICTY. In May 2006, frustrated by Belgrade's continuing failure to cooperate with the tribunal, the EU suspended SAA negotiations. At the same time, the US withheld from Serbia \$7 million in assistance for the fiscal year 2006. But by this time, both the EU and the US needed to have Serbia moving quickly towards Euro-Atlantic integration in order to improve regional stability and prepare the way for international negotiations on the question of Kosovo's final status. They hoped that Belgrade would react promptly to their strong message and suggested Serbia should take a number of steps that would clearly demonstrate its political will to cooperate with the Tribunal.

In July 2006, Serbia presented an Action Plan to apprehend Mladic, but failed to give evidence of any real commitment to

implement it. At the same time, US and an increasing number of EU leaders started showing signs that they might water down their insistence on full cooperation and ignore Del Ponte's negative assessments on Serbia's cooperation with the Tribunal. In November 2006, at the NATO summit in Riga, they offered Serbia to enter the Partnership for Peace (together with Montenegro and Bosnia-Herzegovina), notwithstanding the initial policy of both the EU and the US not to admit Serbia into this group without full cooperation with the ICTY. The Partnership for Peace (PfP) was the first carrot to be offered to Serbia in the hope of softening Serbia's stance on Kosovo. At this time, six indictees were still at large within Serbia, including Ratko Mladic and also Radovan Karadzic who was believed to often spend time in the country. Del Ponte appeared to have definitively lost her prerogative in the assessment of cooperation – the prerogative which for two years had strengthened the Chief Prosecutor's position and constrained the Western Balkan governments to take more seriously their international obligation to comply with the ICTY.

In mid-February 2007, EU Foreign Ministers agreed SAA talks with Serbia could restart, provided Belgrade 'shows clear commitment and takes concrete and effective action for full cooperation with ICTY.'¹ In June 2007, Serbia eventually facilitated the transfer of two more fugitives to The Hague (Tolimir and Djordjevic). The EU immediately resumed the stalled SAA talks with Serbia, and these were completed in autumn. Despite Mladic's presence in Serbia since 1997, a growing number of EU Member States pressed for signing the SAA agreement. The long-standing approach that 'full cooperation' with the ICTY entails Serbia arresting and handing over Mladic and the remaining fugitives began to be disputed by a growing number of EU leaders. Full cooperation with the ICTY started being redefined as 'leading to' the arrest of the remaining fugitives, including Mladic and (until July 2008) Karadzic – a significantly lower threshold for evaluating Serbia's cooperation with the tribunal.

On 15 October 2007, a further critical assessment of Serbia's cooperation by the ICTY Chief Prosecutor constrained the EU to postpone signing the SAA. Fearing that EU pressure on Serbia would not be long maintained in the light of the imminent independence of Kosovo, Carla Del Ponte changed her position during a visit to Belgrade on October 25. In exchange for a more positive assessment, she pressed Prime Minister Kostunica to hand over

1. GAERC, Conclusions on the Western Balkans, 12 February 2007. See: http://www.consilium.europa.eu/ueDocs/cms_Data/docs/pressData/en/gena/92758.pdf.

Mladic before the end of her mandate in December. Her new assessment praised Serbia for some progress, emphasising however that the authorities were still not doing enough to capture the remaining fugitives. This resulted in the EU initialling the SAA with Serbia on 7 November 2007. Four ICTY indictees were still at large, including Mladic and Karadzic.

So the EU had no objection to offering the prospect of membership to a state that was, according to the International Court of Justice (ICJ) ruling of 26 February 2007, in violation of the Genocide Convention due to its failure to hand over Ratko Mladic. EU leaders were moreover overlooking the fact that the ICJ had also ordered Serbia to transfer to the ICTY individuals indicted for genocide and to cooperate fully with the Tribunal.

Most EU Member States believed a softer line or significant concessions on ICTY conditionality would ease the pain of Belgrade's impending loss of sovereignty over Kosovo with its expected declaration of independence, and perhaps encourage pro-European forces in Serbia. It did not. Prime Minister Vojislav Kostunica, backed by the parliament's nationalist majority, increasingly turned away from Europe and towards Moscow and a more isolationist path. 2007 revealed the deeply anti-Western and ultra-nationalist nature of Premier Kostunica's Democratic Party of Serbia (DSS), which appeared to be ideologically much closer to the Serbian Radical Party (SRS) of war crimes indictee Vojislav Seselj and Milosevic's Socialist Party of Serbia (SPS) than to President Tadic's Democratic Party (DS), the major partner in the coalition government led by Kostunica. On 3 February 2008 in the second round of the Serbian presidential elections, pro-Western Boris Tadic was re-elected with 50.5% to ultra-nationalist Serbian Radical Party (SRS) candidate Tomislav Nikolic's 47.7%. Shortly afterwards, on 17 February, Kosovo declared independence. This precipitated the collapse of the coalition government, deeply divided between pro-Western and nationalist forces. Early parliamentary elections were scheduled for 11 May 2008.

At various points during Serbia's tumultuous spring of 2008, the EU, increasingly worried by the prospect of 'losing' Serbia to the rising radical and nationalist forces, and wishing to help boost the credibility of the EU integration promise, offered Serbia various concessions: first, an 'Interim Political Agreement' was offered at the end of January; the relaxation of visa requirements; and increasing trade cooperation notwithstanding Serbia's lack of

progress on transferring Mladic and other fugitives. Belgium and the Netherlands opposed signing the full SAA before handover of war crimes fugitives to the ICTY. EU states hoped with the interim pact to smooth over Serbia's vehement opposition to Kosovo's imminent independence. But instead, PM Kostunica rejected the proffered interim agreement, which deepened the divisions within the ruling coalition, eventually to precipitate the collapse of the government in April.

By giving away most of their leverage through repeated concessions, the EU, the majority of whose Member States backed Kosovo's independence, now had even fewer policy tools with which to influence Belgrade than before. In view of the concurrent developments in Serbian politics and the domestic reaction to Kosovo's independence, the EU decided to sign the SAA before the 11 May elections. Sharing the ICTY officials' opinion that Serbia would not hand over Mladic and the remaining fugitives if not constrained by EU conditionality, the Netherlands and Belgium initially blocked this. But, isolated in their principled stance, both countries accepted a compromise under the pressure of their EU partners in a desperate hope to keep Serbia on a European course and to help pro-Western parties win against hardline Radicals and anti-EU forces strengthened by widespread bitterness at the loss of Kosovo, low wages and stubbornly high unemployment. On 29 April in Luxembourg, EU leaders signed the SAA with Serbia on the condition that the pact would not be ratified or implemented (i.e. not giving Serbia the trade or aid benefits) until all 27 Member States were satisfied that Belgrade is fully cooperating with the ICTY. In Luxembourg, the Netherlands made it clear that Mladic must be 'on the plane' to The Hague before further steps on ties could be taken.

However, the signature of the SAA has increased the risk that war crimes indictees in Serbia will not be brought to account. Despite a convincing victory in the 11 May elections by the 'For a European Serbia' alliance around President Boris Tadic (which won nearly 39% of the votes and 102 seats), the formation of a clearly pro-European government (with the Liberal Democrats' 14 seats and the ethnic minority parties' 7 seats) did not result, due to the lack of the necessary majority in the 250-seat parliament. In order to stop Kostunica's DSS and the Radicals (with 30 and 78 seats respectively) from forming an anti-Western coalition government with the electoral bloc led by the SPS (with 20 seats), Tadic's

pro-European alliance agreed to side with the SPS of the late Slobodan Milosevic. The new government will seek further European integration but the SPS insistence on heading the Ministry of Internal affairs while opposing any transfer of fugitives to the ICTY raises the prospect that there would be no full cooperation with the Tribunal.

In view of the ICTY completion strategy deadlines, any delay in cooperation from Serbia will cause irreparable damage to the Tribunal. Only a consistent EU conditionality policy with regard to the ICTY will bring the remaining fugitives to justice. Fugitives are not the only issue for Serbia in its compliance with the ICTY. Key state and military documents sought for a pending case (Momcilo Perisic, a former chief of staff of the Serbian army) have yet to be provided to The Hague so that the accused can be tried in time. It is therefore critically important that international actors and the EU in particular consistently press Belgrade to resume its cooperation with the ICTY and request full compliance in this regard rather than softening conditionality by requesting satisfactory efforts instead of concrete results. But an overwhelming majority of EU states have already confirmed the negative shift regarding the meaning of 'full cooperation' which might lead them to no longer insist on the arrest and transfer of Ratko Mladic to the ICTY. Serbian non-compliance might therefore result in impunity for the remaining accused to be tried.

Montenegro and Bosnia-Herzegovina

EU conditionality related to ICTY also applied to Montenegro, which was part of the State Union of Serbia and Montenegro prior to its separation in May 2006. Montenegro's failure to arrest ICTY fugitives when passing through its territory was for years included in the non-compliance assessment issued by the ICTY that delayed the State Union's progress towards Europe. Since May 2006, both countries have pursued independent paths toward EU integration. The EU signed the SAA with Montenegro in October 2007 after several satisfactory assessments by the ICTY chief prosecutor.

Bosnia and Herzegovina has also sought membership in NATO's PfP programme and the completion of an SAA. For years, limited cooperation with the ICTY, especially by the Republika Srpska (RS), one of the two entities in Bosnia-Herzegovina, contributed to holding back both. In its assessment of the progress of Bosnia and Herzegovina, the EU Commission confirmed in Octo-

ber 2003 that meeting the requirement of full cooperation with the ICTY, particularly in the case of Republika Srpska (RS), must be established before it could recommend opening negotiations for an SAA. The EU's External Relations Council reaffirmed this position in January 2005, when RS authorities had not turned over a single ICTY accused. The other entity, the Federation of Bosnia and Herzegovina (FBiH), had always complied promptly with ICTY requests including arrest of fugitives. This entity's authorities appeared to be the only ones in the region to show genuine will to cooperate with the ICTY. The exception of Bosniak leaders may be easily explained by the fact that their own community suffered the greatest number of abuses in the 1992-1995 war in Bosnia-Herzegovina. Their genuine commitment to accountability for war crimes was therefore in part motivated by their will to bring justice for their own victims and in part spurred on by the prospect of seeing their former enemies who had attempted to dismantle Bosnia and Herzegovina in the dock.

The ICTY issue also provided former High Representative Paddy Ashdown with justification for removing obstructionist officials, freezing assets, and even re-shaping BiH state institutions, especially in the defence and security sectors. The EU opened SAA negotiations with Bosnia in November 2005 after Bosnia's leaders came to a preliminary agreement on police reforms. But stalled reforms in the police and other sectors have presented much more significant obstacles to concluding the SAA than incomplete ICTY cooperation. Del Ponte's assessments on Bosnia-Herzegovina were mainly balanced, noting the one entity's compliance and the other entity's reluctance to search for the remaining fugitives. However in 2005, Bosnian Serb police located several fugitives that were eventually handed over to the ICTY through Serbia. This helped Belgrade to respond to EU pressure by increasing the number of transfers of ICTY suspects. Although the ICTY was keen to believe that there were no more fugitives in the Bosnian Serb entity after 2006, the EU kept insisting that incomplete cooperation with the ICTY was among the factors to delay further Bosnia-Herzegovina's Euro-Atlantic integration process.

As noted earlier, Bosnia gained entry into NATO's Partnership for Peace programme in November 2006. After the transfer of Zdravko Tolimir in cooperation with the Serbian and Bosnian Serb police in spring 2007, the ICTY prosecutor Del Ponte has reported improved cooperation by Bosnia-Herzegovina and

praised the work of Bosnia's war crimes chamber of the state court of Bosnia in its proceedings with war crimes trials that had been transferred from the ICTY. The EU decided to sign the SAA with Bosnia and Herzegovina in April 2008 but the signature was postponed until 16 June for EU internal technical reasons, apparently due to the delays in translation of the text (which did not seem to affect the Serbian SAA, signed six weeks earlier).

The ICTY exit strategy: a tradeoff between justice and *realpolitik*?

Although willingness to cooperate with the ICTY has gradually increased since 2000, subtle forms of obstructionism persist. In most parts of the former Yugoslavia, there is limited public support for war crimes prosecutions against members of the ethnic majority. In general, governments are not seriously willing to commit themselves to creating the conditions necessary for war crimes accountability. Police assistance to ICTY requests or to domestic war crimes prosecutors remains half-hearted at best, in part because police officers are often themselves implicated in the commission of war crimes.

In that context, the transfer of ICTY cases to domestic judiciary was always going to be risky. Western Balkans leaders have undertaken steps toward establishing local war crimes courts mainly in support to the international community's efforts to wind down the ICTY and in order to press for trying before domestic courts some of the ICTY fugitives they had not yet handed over to The Hague. Croatian and Serbian governments have delayed for months or years the surrender of several fugitives (Ante Gotovina for Croatia; Sreten Lukic, Vladimir Lazarevic and other generals for Serbia) to the ICTY in the hope that they would convince the EU and the US to let them hold their trials before domestic courts. The US and some EU leaders have expressed some understanding for such requests and have occasionally, in 2004 and 2005, approached the ICTY Chief prosecutor, Carla Del Ponte, in order to push for a compromise. Due to the high profile of the accused still at large, the US and the EU leaders eventually stepped back. Soon after, the suspects were handed over to the ICTY, demonstrating once again that any time the EU and the US were ready to depart from strict conditionality it impacted negatively on the ICTY's work.

However, the transfer of ICTY cases to local judiciary did improve the relations with the local war crimes prosecutor offices and strengthened their fragile position in their own countries because local governments feared the ICTY might recall these cases on the grounds of ICTY primacy. The strong support of local and international NGOs to the ICTY and their constant efforts to convince local authorities to bring those who committed atrocities to justice had no direct impact on government willingness to cooperate with the ICTY. On the other hand, local and international NGOs' ongoing pressure on the EU and the US to apply strict conditionality brought more results. Their strong reactions each time the EU has tended towards softening the conditionality mechanism or the meaning of 'full cooperation' have surely prompted some EU leaders to stick to a more principled stance and prevented the EU for the time being from dropping conditionality on the ICTY. In the near future, they might be the only support on which the ICTY will be able to rely for pressing for the arrest of the remaining fugitives and for ensuring that adequate mechanisms are established by the international community in order to extend the validity of the indictments and the arrest warrants against Mladic and all other accused who may be still at large after the ICTY has closed its doors so that they can be arrested and brought before an international panel of judges.

By May 2008, the Hague tribunal had completed proceedings for 113 of 161 indicted suspects. Under its 'completion strategy', the ICTY was due to conclude all initial trials by December 2008 and all court proceedings by 2010. This timetable may slip a little after ICTY officials indicated in December 2007 to the UN Security Council they could not complete the proceedings according to the initial schedule. According to the ICTY President, Fausto Pocar, all initial trials related to accused already in the tribunal's custody could be completed by the end of 2009 and appeals proceedings by the end of 2011. He indicated however that one of the accused, Mladic's top aid, Zdravko Tolimir (indicted for crimes related to the genocide of Bosniaks in Srebrenica, whose surrender was delayed by Serbia until early 2007) would not be tried until the end of 2009, due to an over-booked schedule. Moreover, this programme does not include the remaining suspects still at large (besides Mladic, Goran Hadzic, former political leader of break-away Serbs in Croatia, is still at large) or Stojan Zupljanin, former

Serbian police commander in north western Bosnia, who was arrested on 11 June 2008 in Serbia.

The inability to apprehend Mladic (and up until 21 July 2008, Karadzic) may bear consequences for the UN Security Council plans to close down the ICTY in the next few years. Russia, for example, firmly opposes any further prolongation of the ICTY's mandate, while ICTY officials and international NGOs have urged the UN Security Council not to close the tribunal's doors before both Karadzic and Mladic are brought before The Hague. In 2007, UN Security member states have initiated consultations on the form of residual judicial mechanisms to remain in place following the closing of the tribunal but it is still not clear if these mechanisms will include a stand-by ICTY body to be activated whenever the fugitives are finally apprehended.

Despite conditionality policy in the Western Balkan process toward Euro-Atlantic integration, EU and US leaders failed to demonstrate a strong political will to arrest Karadzic and Mladic, with Karadzic's 2008 arrest coming only after he had spent over a decade on the run. They still maintain that they have undertaken an all-out effort to obtain the arrest of the two main architects of the Srebrenica genocide wanted since 1995. They stress that their 'tough diplomacy' had prompted the region's governments, primarily Belgrade, to hand over more than 75 indictees to the ICTY in recent years. Indeed it proved to be effective but only to a certain degree since the two men wanted for genocide are still at large.

Those sticks were sweetened by an enticing carrot: the 'completion strategy' that will bring the ICTY to a closure in 2010 or 2011 regardless of the completion of its mandate. This strategy, initially and more appropriately called 'the ICTY exit strategy' by the leading powers that imposed it on the tribunal in 2001, meant reducing drastically the list of suspects at a stage when the tribunal had finally acquired the capacity and the knowledge to investigate the command structures in-depth. It meant also delegating trials of lower-level officials to the relevant national jurisdictions and reducing the scope of its indictments. When Del Ponte or other ICTY officials protested about this, the US and EU threatened to cut the tribunal's funding, denounced its alleged mismanagement, and worked to reduce the Chief Prosecutor's prerogatives. The ICTY had no other choice than to bow to pressure from the UN Security Council, the body that had established the tribunal in 1993.

Conditioning foreign aid and future admission to NATO and the European Union on full compliance with core criteria and values has proven to be efficient when the requirements are not negotiable. Any tough diplomacy implies using both carrots and sticks. But too often this policy has led to inconsistency, modifying the original requirements or significantly lowering in the course of the process the threshold for evaluating compliance. Such negative shifts significantly diminish the proposer's leverage and the responder's will to meet the original requirements. While rewards alone have little influence on cooperation, sanctions do have some. When the two are combined the effect on cooperation is dramatic, suggesting that rewards and punishments are complementary in producing cooperation. The impact of rewards has proven to be often dependent on the availability of punishments.

Conditionality has been essential in facilitating the ICTY to complete its mandate. Deprived of its own police forces, The Hague tribunal could only rely on the goodwill of the states to get access to archives, witnesses and suspects. With no genuine will among local governments to bring war criminals to account, the ICTY could not carry out its mandate without conditionality mechanisms. But other political priorities have taken precedence over the ICTY issues, leading the international community to bend the rules. An element of cynicism can be detected, as when some European and US politicians have suggested that Del Ponte's approach was counterproductive rather than admitting that the arrest of Mladic and Karadzic is not after all the top priority. Commitment to bring to account those most responsible for the most horrendous crimes and to constrain the non-complying state to respect the core criteria and values that underpin the European Union was not the only reason for UK insistence in enforcing conditionality strictly in relation to Croatia in the Gotovina case. The UK and some of its EU partners insisted on a principled stance with a hidden agenda that might have included among other factors the desire to delay Croatia's accession in order not to let the country enter the EU far ahead of Serbia or even before Serbia.

Because it deals with the past, the tribunal has been progressively perceived as an impediment to bringing about fast changes and reforms in the Western Balkans and strengthening political leaders' interest in a forward-looking agenda. The unresolved issues of cooperation and the delay in economic and political

reforms in the Western Balkans overlapped each other, encouraging the EU to compromise on ICTY conditionality in order to press on other important issues. This has resulted in an additional delay in the completion of the ICTY mandate. The ICTY will be unable to complete its work by the agreed deadlines without the full and effective cooperation of the countries concerned, primarily Serbia. The EU and the international community are therefore likely to face a difficult choice. They will have to choose between transferring high-level cases to courts in the region and accepting impunity for the remaining fugitives, or delaying the end of the Tribunal's mandate with the risk of creating further impediments to their overall strategy of accelerated EU and NATO integration of the Western Balkans. For the moment, the EU and the international community have to contend with diminished leverage on the region and weakened credibility for failing to convince Serbia to comply with their requirements by handing over the most wanted fugitive, Ratko Mladic, who at the time of writing is still at liberty. While this is a stain on the Tribunal's work, as Carla Del Ponte stated before her departure, it may be even more a stain on the international community's post-conflict management record in the Former Yugoslavia.

Domestic war crimes trials in Serbia, Bosnia-Herzegovina and Croatia

Vojin Dimitrijevic

War crimes, conditionality and EU integration in the Western Balkans

5

Introduction: attitudes towards the ICTY

The developments on the territory of the former Yugoslavia in the 1990s can explain the reluctance of many political figures, including the leaders of the newly created or reorganised states, to deal with the perpetrators of alleged crimes committed during this period. There has been a general tendency, very familiar to all students of nationalism, to regard one's own ethnic group as the victim and those who fought on its side as heroes who had to resort to all means at their disposal to defend their ethnic nation, which they believed was in grave peril. In view of this, initially there were no attempts to bring to justice the alleged war criminals fighting on the 'just side', although the relevant national criminal legislation, including the provisions dealing with violations of the customs and laws of war, was already in force and was included in the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY).

Faced with this situation, the UN Security Council decided in 1993 to establish by its Resolution 827 an *ad hoc* international criminal court under the name of the International Criminal Tribunal for the former Yugoslavia (ICTY) to try persons responsible for serious violations of international humanitarian law committed on the territory of the former SFRY since 1991. The ICTY has been active since then and entered its final phase in 2003 (UNSC Resolution 1503).¹ The ICTY has undoubtedly developed an impressive body of jurisprudence which has to a great extent influenced the Statute of the permanent International Criminal Court, established in 1998. However, the very existence and the activity of the ICTY have never been favourably regarded in the countries where its deterrent effects should have been most pronounced. It has been met with great suspicion by the public and by some legal professionals, especially in Serbia and Croatia.

It appears that in Serbia, where a series of public opinion surveys have been conducted in recent years, efforts to publicise the

1. The ICTY is to complete its work by 2010 and the Prosecutor to terminate all investigations and not issue any new indictments after the end of 2004. After that date, the ICTY will try only the most senior perpetrators; other cases may be referred to national courts.

work of the ICTY have failed to convince its citizens that the ICTY is a just institution and that it serves the general interest. There has been a widespread belief that the ICTY is an institution representing 'the greatest danger to security in Serbia', much greater than the European Union, the Organisation for Security and Co-operation in Europe (OSCE), the UN Security Council, and even NATO which conducted active military operations against Serbia in 1999.² There has been a consistent level of lack of confidence in the ICTY which has steadfastly remained close to 70 %.

The percentage of those who have unconditionally rejected the cooperation of Serbia and Montenegro with the ICTY has remained low, never higher than 19%. On the other hand, most of those who support some sort of cooperation with the Tribunal are not motivated by the interests of justice, truth or reconciliation – but by pragmatic reasons (see also chapter four in this volume). Those who cite non-idealistic and practical motives have probably been inspired by the attitude of the predominantly nationalist government of Serbia, headed by Vojislav Kostunica, elected in early 2004 (and composed of many politicians who had formerly been very much against the ICTY), who insisted that non-cooperation would have adverse effects. They have feared that refusal to cooperate would invite possible countermeasures by the international community, which has repeatedly warned Serbian authorities that without full cooperation with the ICTY the reintegration of Serbia into international organisations and the international community would be impossible. The most recent example of this is related to Serbia's attempts to join the European Union in stages, with the initial steps of signing and ratifying the Stabilisation and Association Agreement (SAA) with the EU on 29 April and 9 September 2008, respectively. Due to the insistence of some EU members, especially of the Netherlands, this agreement will not become effective until Serbia has fulfilled all her obligations towards the ICTY (c.f. chapter four).

The public in Serbia has consistently perceived the ICTY as biased against the Serbs. This opinion has been based on the impression that a greater number of Serbs was indicted (between 48 and 55 percent) and that they were of more senior rank than the indictees coming from other nations (between 12 and 16 percent) and that the trials of Serbs have been less impartial (between 8 and 12 percent). It is believed in Serbia that Serbs receive the least favourable treatment from the ICTY (82 percent), compared to

2. The ICTY was perceived as dangerous for the security of Serbia by 64 % of the interviewees in 2000, by 63 % in 2001, by 57 % in January 2003 and by 40 % in May 2003, whereas NATO was considered dangerous by 73 % in 2000, 55 % in 2001, 51 % in January 2003 and 39 % in May 2003. All data on attitudes towards the ICTY in Serbia referred to in this chapter derive from surveys conducted by the Belgrade Centre for Human Rights on samples exceeding 2000 persons in Serbia and Montenegro (except Kosovo) in 2003, 2004 and 2005. See: <http://www.bgcentar.org.rs/index.php?p=236>.

Bosnians, Croats and Albanians (all of them running only a 1% risk of extremely unfavourable treatment). A similarly sceptical attitude has been expressed towards the reliability of the witnesses who have testified before the ICTY. The majority of the population would be very reluctant to testify before the ICTY. The prevailing attitude has been that the purpose of the ICTY is not to show that war crimes cannot go unpunished and thus promote the idea of peace and tolerance among nations (only 22%), whereas 74% interpret the purpose of the ICTY according to their various versions of conspiracy theory.

Similar attitudes have prevailed in Croatia. Dr. Zvonimir Separovic, professor of law and former minister of foreign affairs and justice in the government of Croatia, opposed the surrender of indicted Croats from Herzegovina (which is not a part of Croatia) to the ICTY, saying that this would be tantamount to relinquishing the sovereignty of Croatia. According to him, ICTY Deputy Prosecutor Graham Blewitt was 'one of the Croat devourers (*hrvatozder*) in the Hague' and the ICTY was 'a massive wound on Croatia's body.'³

As in Serbia, prominent opponents of the ICTY in Croatia come from the upper echelons of the academic community. As Josip Pecaric, member of the Croatian Academy of Science and Arts (HAZU) and author of *The Shameful Court in the Hague (Sramni sud u Haagu)*, has declared: 'We should always bear in mind that our best people are in The Hague'.⁴

Many members of the Croatian cultural elite who view their role as protecting the sublime interests of the nation have been strongly represented among the opponents of the ICTY. An appeal to the government of Croatia, dated Christmas of 2002, not to surrender General Ante Gotovina, one of the principal Croatian military leaders accused before the Tribunal, was signed by fourteen members of HAZU and by 44 university professors.⁵

Overcoming the resistance of 'patriotic' intellectuals and their institutions in Croatia has been, since the death of President Tudjman, easier than the comparable process in Serbia. Basically, everyone politically and intellectually relevant in Croatia, including the opponents of the ICTY, have declared themselves as being pro-Western and anti-communist, a reflection perhaps of the fact that Croat nationalism has often been associated with Catholicism. (Croat responses to the ICTY are considered in depth in chapter four). In Serbia, however, anti-Western sentiments have remained

3. Quoted in Vojin Dimitrijevic, 'The "Public Relations" Problems of International Criminal Courts. Some lessons to be drawn from the reception of the ICTY in Serbia and Croatia', *Justice in Transition*, Belgrade, Special Edition, September 2006, p. 73.

4. Quoted in *ibid*, p. 74.

5. See: <http://www.antegotovina.com/default.aspx?clanak=5>.

strong, the influence of the Serbian Orthodox Church (which regards the ICTY as a shameful offence to 'Serbdom') is considerable, and orthodox Russia has been regarded by many, including the ruling Democratic Party of Serbia (DSS) of the Prime Minister Kostunica, as the principal ally of Serbia. The attitude of official Russia towards the ICTY has been – to say the least – lukewarm, and that of the Russian cultural elite intensely hostile.

Trials before national courts

After an unimpressive beginning and a great deal of obstruction, trials of alleged war criminals before national courts have only recently started in earnest. Some initial attempts to try ethnic Serbs indicted for war crimes in BiH and Croatia were generally regarded as a mockery of justice.

Serbia

In Serbia, serious measures were taken only in 2003, with the creation of the War Crimes Chamber of the Belgrade District Court,⁶ popularly known in Serbia as the 'special court for war crimes.' This was by no means an easy operation. Even the then Minister of Justice was adamantly against the existence of a special chamber, claiming that its members enjoy undue privileges and that the idea of a special court was contrary to the right to a 'natural' judge. The alleged 'privileges' were higher salaries and better police protection in the premises of the Chamber and of the judges attached to the latter. The objection relating to the assignment of judges was linked to the exclusion of all other judges in Serbia of the same rank who are entitled to try cases based on a random selection. Members of the War Crimes Chamber are appointed from the judges of the Belgrade District Court. The reasons for the establishment of an elite court were probably twofold: one was lack of expertise – most senior judges in Serbia (in fact anyone who graduated in law before 1990) were not familiar with matters related to international criminal law and human rights. The other reason was possible prejudice: no lustration took place in the judiciary after the democratic changes in 2000 so that many judges of higher rank were selected by the government and appointed by a parliament loyal to Milosevic.

The War Crimes Chamber is a court of first instance – convicted persons and the War Crimes Prosecution Office (created at

6. Act on the Organisation and Jurisdiction of State Bodies in War Crimes Proceedings, *Sl. glasnik RS*, 67/03, 135/04, 61/05 and 101/07.

the same time) can appeal to the Supreme Court of Serbia. The War Chamber operates without juries, to which some objections have been raised. However, there have never been separate juries in Yugoslav and Serbian courts. In these, chambers of first instance have been composed of professional judges and lay judges, who were theoretically in a majority (three in chambers of five, two in chambers of three). However, jurors, recruited mostly from elderly retirees, have never been taken seriously and have never influenced decisions. District courts, acting in the second instance, have never included lay judges. Owing to the importance of the War Crimes Chamber, the inclusion of lay judges has never been considered.

The War Crimes Chamber acts under national criminal law. Depending on the time of the commission of the crime cited in the indictment, the Criminal Code of Yugoslavia and actual versions of the criminal legislation of Serbia have been applied. To be fair, all included lengthy chapters on criminal offences against international law.

At the time of writing only three cases have been finally settled by a decision in the second instance.⁷ The cases are significant and resonate as reference points in discussions about Serbia and war crimes.

The first was a by-product of the Ovčara case, which dealt with the fate of a number of Croat prisoners of war, who in 1991 were taken out of a hospital in Vukovar (then under the siege of the Yugoslav People's Army (JNA) and paramilitary Serb forces) brought to a farm and summarily executed. The original case is still under consideration before the Supreme Court of Serbia, which had declined to confirm the judgement of the Special Chamber. However, the case of one of the defendants was treated as procedurally separate. He was sentenced to eight years in prison for his participation in the massacre, on the basis of Article 144 of the then applicable Criminal Code of SFRY (war crimes against prisoners of war). Because of his poor health, the Supreme Court of Serbia reduced his sentence to 2 years. On 18 September 2006 the Special Chamber convicted Anton Lekaj, an ethnic Albanian from Kosovo, to 13 years in prison for a war crime against the civilian population in 1999 (Article 142 of the then applicable General Criminal Code). The third finally decided case concerned Vladimir 'Rambo' Kovacevic, a JNA captain who had been indicted before the ICTY for the shelling of the old city in Dubrovnik in

7. The following section is mostly based on *Monitoring i izveštavanje o aktivnostima pravnih institucija u Srbiji u oblastima organizovanog kriminala, ratnih zlocina, diskriminacije i nasilja u porodici* (Belgrade: Belgrade Centre for Human Rights, 2008).

1991. The ICTY decided on 28 March 2007 to transfer the case to the Serbian judiciary. Psychiatrists found that the defendant was unable to stand trial so the proceedings were discontinued. Officers of higher rank, General Pavle Strugar and Vice-Admiral Miodrag Jokic, were sentenced by the ICTY for their part in the same operation to 8 and 7 years imprisonment respectively.

Two cases are still under consideration by the Special Chamber. One of those, the 'Scorpions' case, is quite infamous as it originated under very dramatic circumstances. During the ICTY trial of Slobodan Milosevic, a videotape was presented: it depicted a group of members of the unit known under the name of Skorpioni (Scorpions), who in July 1995 had executed in a forest clearing near Trnovo in Bosnia six young civilians, presumably refugees from Srebrenica, where parts of the Bosniak population had been killed in an operation of the Bosnian Serb Army later classified by the ICTY and by the International Court of Justice as genocide. The Special Chamber condemned four indicted persons to prison sentences, whereas one was acquitted. This judgement was heavily criticised as extremely lenient by professional commentators and by NGOs. They found the reasoning of the presiding judge, Gordana Bozilovic-Petrovic, particularly offensive: she justified mild sentences for the two accused by their being 'young persons who were caught up in the tempest of war' and 'family men who had previously not had criminal convictions.'⁸

The President of the Belgrade District Court quietly removed Bozilovic-Petrovic from the Chamber and reassigned her to an ordinary chamber of his court, citing only her 'inefficiency' in this regard. She thereupon went on to bring charges against Natasa Kandic, Director of the non-governmental organisation the Humanitarian Law Fund, and a journalist who reported on Kandic's criticisms of the Serb government, both for 'slander' and 'collusion with Western embassies', a familiar accusation among nationalist followers of Milosevic.⁹

Members of the Scorpions were not from the area where the massacre had been committed, not even from Bosnia; they had come from afar to do what they did. Furthermore, the status of the Scorpions was determined by the Special Chamber as being that of a paramilitary unit, whereas the same unit in its operations in Kosovo was undoubtedly under the orders of the Serbian Ministry of Interior. One member of the Scorpions unit was convicted in 2005 by an ordinary court to 20 years imprisonment for his partic-

8. Ibid.

9. See 'Smenjeni sudija – neefikasan', *Glas javnosti*, Belgrade, 17 October 2007; 'Sudija tuzila Natasu Kandic', *Kurir*, Belgrade, 28 January 2008.

ipation in war crimes against ethnic Albanians in Podujevo in 1999. The Prosecution Unit indicted on 21 April 2008 four more members of the Scorpions for crimes in the same town in the same year. At that time, Scorpions had been a part of the Special Anti-Terrorist Unit (*Specijalna antiteroristička jedinica* – SAJ) of the Serbian Police and had subsequently joined the regular force of the Serbian Ministry of the Interior. Their commander was already convicted for his participation in the Trnovo massacre.¹⁰

Commentators detected in this case, as in some others, a tendency of the prosecution to avoid indicting members of the JNA and Serbian police forces. Declaring a unit to be paramilitary indicated that its members were patriotic volunteers, not controlled by the government and not subject to military discipline, which revealed a tendency to exonerate the regime of Milosevic and to exclude the command responsibility of his lieutenants.

Another pending case is that of Sinan Morina, who was acquitted on 20 December 2007. He had been indicted for his participation, on 21 July 1998, in attacks on the civilian population of non-Albanian ethnicity in villages in the vicinity of Orahovac, in Kosovo. The Chamber found no evidence that Morina, an ethnic Albanian, had perpetrated the criminal offence cited in the indictment. The presiding judge went as far as to state that raising indictments of such a nature without proper evidence had been ‘scandalous.’ This judgement is under appeal before the Supreme Court of Serbia. Commentators from non-governmental organisations praised the impartiality of the Court and the speed of the trial.

Some cases are still in the first instance before the Special Chamber. Among them is the main Ovcarica case, which deals with the events involving the mass execution of Croat prisoners of war in 1991. A group of accused persons was already sentenced by the War Crimes Chamber on 12 December 2005. At the time that the crime was committed they were members of the Territorial Defence¹¹ of Vukovar and of a volunteer unit believed to be under the influence of the Serbian Radical Party. Sixteen persons were sentenced to imprisonment. In December 2006, the Supreme Court quashed this judgement and returned the case to the Chamber. This decision was criticised by experts and met with emotional protests by the witnesses from Croatia – mostly members of the victims’ families. Some of the latter even declared that they would never again testify in Serbian courts; they refused to be ‘extras in a show serving the needs of Serbian politics.’¹²

10. See *Danas*, Belgrade, 22 April 2008.

11. Territorial Defence was part of the Yugoslav communist experiment of ‘Popular Defence’, a concept of military organisation which, in addition to the regular JNA, included militia units which were controlled by local authorities.

12. *Danas*, 12 March 2007.

Later, on 27 September 2007 the ICTY decided on the case of a group of JNA officers, known as the 'Vukovar Three' and indicted for the same crime: the highest ranking of them, General Mile Mrksic, was sentenced to 28 years, the then Major Veselin Sljivancanin to 5 years imprisonment,¹³ and the then Captain Miroslav Radic was acquitted. They were the only military officers tried for this offence. Persons accused in Serbian courts were not JNA officers but belonged either to the territorial defence or paramilitary units.

The interminable case known as Suva Reka, a town in Kosovo, has been before the War Crimes Chamber since early October 2006. Eight persons, three of them officials of the Ministry of Internal Affairs of Serbia, were indicted for having committed a war crime against the civilian population; they allegedly ordered and conducted on 26 March 1999 an attack on the civilian population which resulted *inter alia* in the death of 46 members of an Albanian family. The behaviour of most witnesses coming from the ranks of the Ministry revealed their unflinching solidarity with the accused and the pretence that the leadership of the police had not been aware of the crime. The Special Chamber had to rely on protected witnesses, mostly poor civilians who were forced to remove corpses and transport them to mass graves.

The case of the Bytyqi brothers deals with the assassination of three ethnic Albanians – citizens of the United States. They apparently had illegally entered the territory of Serbia (Kosovo) in 1999 and were therefore sentenced to a short term of imprisonment. After being released from the prison in Prokuplje, in Central Serbia, they were immediately re-arrested and brought to the Training Centre of the Ministry of the Internal Affairs in Petrovo Selo (Central Serbia), where they were killed by unknown members of the Special Anti-Terrorist Unit (SAJ) of the Serbian police. In this case, only two persons were accused of committing a war crime against prisoners of war. The defence claimed that the two accused persons who arrested the victims acted on the orders of General Vlastimir Dordevic, then head of the Department of Public Security and Deputy Minister of Internal Affairs.¹⁴ Investigation in this case has been fraught with difficulties, including the mysterious disappearance of Goran Radosavljevic, who in 1999 was the head of the Training Centre and after 2000 even Commander of the Serbian Gendarmerie.

The Zvornik case was transferred by the ICTY Chief Prosecutor to the Serbian judiciary in 2004. The indictment deals with a series

13. On 5 May 2009 the ICTY Appeals Chamber increased Sljivancanin's sentence to 17 years. In many Serbian newspapers and among some members of the government and Parliament this was seen as another proof of the ICTY's anti-Serb bias. See: http://www.b92.net/eng/news/crimes-article.php?yyyy=2009&mm=05&dd=06&nav_id=58960.

14. Dordevic was later apprehended in Montenegro and handed over to the ICTY, where he awaits trial.

of crimes committed against the civilian population before July 1992 on the territory of the municipality of Zvornik in Eastern Bosnia. Some indictees had been members of the paramilitary unit, known as ‘Yellow Wasps.’¹⁵

In the Tuzla column case there is only one accused, a citizen of BiH, for the war crime committed against a number of soldiers of the Yugoslav People’s Army (JNA) in Tuzla in 1992. The column of JNA soldiers was withdrawing without resistance relying on an arrangement made between BiH and the Federal Republic of Yugoslavia.

The prosecutor’s office accused one Tihomir Pasic of the assassination of Dragutin Krusic in Slunj, which at that time was in the short-lived self-styled Republic of Srpska Krajina, now in the territory of Croatia. Pasic is charged with committing a war crime against the civilian population. The victim was a medical doctor. Pasic was sentenced *in absentia* in Croatia in 2001 to 12 years in prison.

The Lovas case deals with an event during the conflict in Croatia which has attracted particular attention since late 1991, when it occurred. In an instance of rare courage and integrity a Lieutenant-Colonel of the Yugoslav People’s Army immediately reported that some military officers, together with the representatives of the newly established local Serbian administration and a paramilitary unit, caused the death of some 70 local Croats, forcing some of them to act as live mine detectors by walking through a minefield. Fourteen persons were indicted on 28 November 2007. This was the first time that four military officers were tried before a court in Serbia.

In addition to active trials, the Prosecutor’s Office is conducting investigations of 30 persons suspected of having committed crimes in various places in Croatia, Kosovo and BiH.

Croatia

Initially, trials against alleged war criminals in Croatia were tainted by the fact that most indictments were brought against ethnic Serbs belonging to the forces which fought together with JNA or in opposition to the newly established government of Croatia. From 1991 until the end of 2005, 4,814 persons were investigated for allegedly having committed criminal acts against the values protected by international law (Chapter XII of the then valid Criminal Code). As a result of these investigations, 1,428 persons were

15. The now deceased commander of the ‘Yellow Wasps’ was sentenced in 1993 to ten years imprisonment but never served his full term. This is yet another example of the duplicitous prosecution of war criminals practised at that time.

indicted. In 2004 all investigation files were revised and proceedings were dropped for 448 persons. One of the reasons was lack of evidence, and the other that their deeds had been covered by an amnesty law.¹⁶ Finally, 611 individuals were sentenced and 245 acquitted. Out of the 611 sentenced persons, only 12 were members of official Croatian armed units. In many cases, trials were held *in absentia*. According to the law, persons convicted *in absentia* have the right to a retrial; but in retrials many errors were revealed, especially due to the lack of diligence of the appointed defence counsel who failed to appeal to the Supreme Court of Croatia even against very severe punishments.

In Croatia the trials for war crimes have been in the hands of ordinary courts, among them mostly the district courts in Osijek, Rijeka, Split and Zagreb. In more recent times, more than 20 trials for war crimes were held at nine municipal courts. In five of them the accused were members of Croatian military and police forces. Non-governmental organisations in Croatia dealing with these matters found some improvements in the practice of the Croatian judiciary but believed that some deficiencies still existed: according to them, indictments were still insufficiently precise, there was a high ratio of trials *in absentia* (54%), the jurisprudence relating to pre-trial detention was inconsistent and witnesses and victims had received insufficient support.¹⁷

One of the most conspicuous trials is related to Branimir Glavas, a former high official of the ruling Croatian Democratic Union (HDZ), who was the commander of defence of the city of Osijek in the critical year of 1991. Glavas is suspected of being involved in the killing of a number of civilians of Serbian ethnicity. The state attorney had great difficulties in convincing the Zagreb District Court, where the trial was to be held, to put Glavas in custody. Portraying himself as a fervent Croat patriot, Glavas with his defence counsel launched a campaign of obstruction, including the intimidation of witnesses.¹⁸ Another high-profile trial was that conducted against some members of the Croatian military police who had been in charge of the infamous Lora prison in Split, already mentioned in this chapter. The original trial in 2002, where the accused had been acquitted and the presiding judge had not bothered to conceal his sympathy for the defendants, was annulled by the Supreme Court of Croatia and a retrial was ordered, which resulted in two defendants being sentenced to 8 years in prison, one to 7 years and six to 6 years in prison.

16. The Act on Amnesty from Criminal Prosecution for Criminal Offences Committed in Armed Conflicts and War against the Republic of Croatia was modified in 1995. The Parliament in 1996 adopted the Act on Amnesty of Perpetrators of Criminal Offences Committed on the Temporarily Occupied Parts of the Vukovar-Srijem and Osijek-Baranja Counties, and the General Amnesty Act. According to the latter, amnesty refers to acts committed between 17 August 1990 and 17 August 1996. *Narodne Novine*, 58/92, 43/96 and 80/96.

17. Osijek Centre for Peace, Non-Violence and Human Rights, Documenta (Zagreb), Citizens' Committee for Human Rights (Zagreb), Croatian Helsinki Committee for Human Rights (Zagreb), *Pracenja sudjenja za ratne zlocne, izvjestaj za 2006*, Osijek, 2006, p. 9. Glavas was on 8 May 2009 sentenced to ten years in prison by the District Court in Zagreb. He then disappeared. See: http://www.b92.net/eng/news/region-article.php?yyyy=2009&mm=05&dd=08&nav_id=59018.

18. *Ibid.*, p. 20.

The Korana Bridge case follows on from the trial of a former member of the Croatian Special Police, accused of killing in 1991 13 prisoners of war belonging to JNA. The Supreme Court of Croatia twice had to annul acquittals by inferior courts in Croatia. The third trial began in September 2004. Critics objected to the indictment which was directed against only one person in a case involving the deaths of a large number of people.¹⁹

In a resolute move to prevent further impunity, the State Prosecutors' Office of Croatia issued a guidance order in September 2006 indicating that all unresolved killings in the period between 1991 and 1995 shall be presumed to be war crimes and that accordingly no statute of limitation applied.²⁰

Bosnia and Herzegovina

In recent times there has been an increase in the number of trials of accused war criminals in BiH. In 2006, the Department for War Crimes of the Prosecutor's Office and the War Crimes Chamber of BH became active so that the number of final judgements rose to 17 and the number of first instance judgements to 23.²¹ Trials in BiH have been held before two groups of courts. In addition to the State Court of the whole country, the courts of entities, the Federation of Bosnia and Herzegovina and Republika Srpska, and the District Court of Brcko were involved. The State Court established its relevant Chamber in 2005: it is supposed to deal with especially sensitive cases. Five cases were transferred to this Court by ICTY as a part of its exit strategy.

The War Crimes Chamber is composed of 12 international judges and 6 judges from BiH. The Chamber is partly funded by foreign donations. The internationalised arrangement is supposed to last only until the end of 2009, but recently the President of the State Court stated that the mandate of the foreign judges needs extending if the Court is to retain its credibility. She also said that the Chamber had 'faced the distrust of some individuals or institutions' but feels that the Chamber has 'overcome those obstacles.... Some people still say this is a political court; it's the same truism (*sic*) that people use when they speak about the Hague Tribunal.'²² The goal of the War Crimes Chamber is that trial chambers be composed exclusively of judges from BiH. But the unstable political situation in Bosnia and complaints about biased treatment of members of one or another ethnic community has strengthened the opinion that the mandate of international

19. Osijek Centre, op. cit. in note 17, p. 12.

20. *Jutarnji list*, Zagreb, 25 September 2006.

21. Eight persons were tried before the State Court. Information obtained from the OSCE Mission in Bosnia and Herzegovina on 5 February 2007, quoted in *Transitional Justice in Post Yugoslav Countries, Report for 2006*, published by Documenta (Zagreb), Humanitarian Law Centre (Belgrade), and Research and Documentation Centre (Sarajevo), 2007, p. 11, no. 22.

22. Interview of 28 April 2008. See: <http://www.balkaninsight.com/en/main/interviews/9661>.

judges and prosecutors needs extending. In the words of the President of the State Court 'local judges are able and ready to tackle these complex cases, but international judges bring credibility and trust.' She therefore pleaded for the extension of the mandate of the international judges.²³

There have also been 8 national and 5 international prosecutors working in the corresponding department in the State Prosecutor's Office.²⁴ The specific difficulty of trying war crimes in BiH relates to the fact that many alleged perpetrators, especially those fighting on the Bosnian Serb and Bosnian Croat sides, have escaped to and obtained citizenship in neighbouring Serbia and Croatia. Bosnian courts have been seeking the assistance of the international community in that respect.

According to most recent reports, the War Crimes Chamber passed 8 judgements in the first instance. Ten trials are currently taking place and 7 indictments against 11 persons have been confirmed. Among them is the important case dealing with alleged genocide committed in the village of Kravice by 11 former members of the Army and the Ministry of Interior of Republika Srpska on 13 July 1995.

Montenegro

Before its secession from the state union with Serbia in May 2006, Montenegro had been a federal unit of the SFRY and FRY. Many members of its leadership, originally belonging to the League of Communists of Montenegro, are still active as political leaders and are now mostly in the ruling DPS (Democratic Party of Socialists), which has been the dominant party in government throughout. At the beginning of the conflict in Yugoslavia, these people were enthusiastic followers of Milosevic and encouraged the attempts of JNA to conquer adjacent parts of Croatia. They have now offered apologies to Croatia but are also trying to pretend that no crimes were committed by Montenegrins in that offensive, chiefly remembered for the bombardment of Dubrovnik. This explains why the only war criminals involved in these events were indicted before the ICTY and not before Montenegrin courts.

The most conspicuous unresolved issue that still burdens the public conscience relates to events in May 1992, when the Montenegrin police arrested a number of ethnic Muslims (some of them refugees from Bosnia, some only present by chance) and turned them over to the Army of Republika Srpska. They were sup-

23. Ibid.

24. Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber* (New York: 2007), p. 5.

posed to be exchanged for Bosnian Serbs captured by the Army of BiH but were eventually executed. After many appeals by public figures and resolute attempts by the law office representing the families of the victims, criminal investigations in this case were initiated only in October 2005; in 2006, they concentrated on six suspects. There is strong evidence that the proceedings have been obstructed and that the actions of the prosecution and of the courts have been half-hearted and perfunctory.

In late December 2008, the government of Montenegro finally concluded a court settlement in 42 lawsuits filed by the families of some 200 dead victims and several survivors of concentration camps to which they had been deported from Montenegro. The settlement was for a total amount of 4 million euro, meaning that each child of every victim was awarded 30,000 euro, parents and spouses of victims 25,000 euro each and victims' siblings 10,000 euro each. Survivors themselves were awarded some 7,000 euros per month of detention in concentration camps. The plaintiffs settled for modest amounts, noting the practice of courts in similar cases in Montenegro and the region.²⁵

Regional cooperation

Serious attempts at cooperation in the punishment of war criminals between the successor states of SFRY started only after 2000. Cooperation between Serbia and Croatia has been based on the European Convention on Mutual Assistance in Criminal Matters, ratified by FRY in 2001.²⁶ The Treaty on Legal Assistance in Civil and Criminal Matters between FRY and Croatia²⁷ was then concluded. Cooperation became effective in the cases of Ovčara, before the Special Chamber in Belgrade, and Lora, before the District Court in Split. In order to facilitate cooperation, the Memorandum on the Realisation and Promotion of Cooperation in the Combat against all Types of Serious Crime²⁸ and an Agreement on Cooperation in the Prosecution of Persons Having Committed Criminal Offences of War Crimes, Crimes against Humanity and Genocide²⁹ were concluded. Cooperation has been manifested in referral of cases, securing evidence and assistance in the acquisition of evidence in some cases before the War Crimes Chamber in Belgrade and before Croatian tribunals dealing with the war crimes committed in Osijek.

25. See Amnesty International, *Montenegro: The right to redress and reparation for the families of the Disappeared*, 2006. Several interviews of the author with Tea Gorjanc of the Prelevic Law Office in Podgorica in 2008 and early 2009.

26. *Sluzbeni list SRJ*, 10/01.

27. *Sluzbeni list SRJ*, 1/98.

28. Memorandum signed by Vladimir Vukcevic, Public Prosecutor of Serbia, and Mladen Bajic, State Prosecutor of Croatia, 5 February 2005.

29. Same signatories, 13 October 2006.

The cooperation between the prosecutors and courts in Serbia and BiH is based on the Memorandum of Agreement on Realisation and Promotion of Cooperation in the Combat against all Types of Grave Crimes, concluded between the Public Prosecutor's Office of Serbia, the Prosecutor's Office for War Crimes of Serbia, and the Prosecutor's Office of BiH. The effects of cooperation have been obvious in the trial in the Zvornik case. Some witnesses were heard in Bosnia by the judges from Serbia, some testified by video link. In the case of the Tuzla column a special arrangement was made between the Prosecutor for War Crimes in Belgrade and the Cantonal Prosecutor's Office in Tuzla.

The most recent arrangements for regional cooperation were signed on 31 October 2007 by the Prosecutor for War Crimes of Serbia and the Chief Prosecutor of Montenegro. These deal with cooperation in the criminal prosecution of perpetrators of crimes against humanity and other values protected by international law.

As regards Kosovo, there has been only *de facto* cooperation with UNMIK, limited to logistical support in the examination of witnesses. It should be repeated here that at the time of writing Kosovo is still regarded by the authorities in Serbia as a part of Serbia, so that parties coming from there are not treated as aliens.

Regional cooperation has also had to face some difficulties which appear predominantly technical. Thus for example special war crimes chambers and prosecutors exist only in Serbia and Bosnia and Herzegovina, in some countries criminal investigation is mainly in the hands of investigative judges, while in others there are no such members of the judiciary and investigation is handled by prosecutors, some states do not dispose of prisons that meet the minimum standards of security,³⁰ etc.

The role of the international community

As shown in the previous pages, little advance in the prosecution and punishment of persons suspected of having committed grave international crimes in the conflicts on the territory of the former Yugoslavia would have been made without the influence of the international community. Some influence and prodding came via international organisations, universal and regional. The first category has been represented by the United Nations, which, in addition to condemnations in its General Assembly, established the

30. Radovan Stankovic, a Bosnian Serb sentenced by the War Crimes Chamber of Bosnia and Herzegovina, escaped from the prison in Foca in May 2007 and has not been found since. He had been transferred by the ICTY to the judiciary of Bosnia and Herzegovina.

ICTY through the Security Council, in the face of many legal and political objections. The conflict in Yugoslavia caused the International Court of Justice to render its first judgment based on its jurisdiction established by the 1948 Convention on the Prevention and Punishment of the Crime of Genocide.³¹ The regional approach has mainly centred on the attraction of European integration to the Balkan states, symbolised by membership in the EU, and the efforts of the Council of Europe and the OSCE.

The pressure on the successor states of Yugoslavia to combat impunity by trying suspected war criminals before national courts continued by conditioning advantages to the states, as manifested in membership of regional organisations and badly needed foreign economic assistance, on demonstrated determination to render or prosecute war criminals and to show results. In spite of sometimes being inconsistent and depending on many other 'diplomatic' considerations, this strategy has generally been successful, especially in the light of the dire initial predictions.

Neither should important technical assistance be disregarded, coming mainly from regional organisations and concerned governments. Their officials and experts retained by them have played an important role in the production of legislative drafts and amendments, building the necessary infrastructure and training of members of the legal profession. This has also been done by international non-governmental organisations and private donors through national NGOs. Unfortunately, with the passage of time interest in the Western Balkans has been waning, overshadowed by the emergence of new epicentres of dangerous conflicts elsewhere. However, it would be too dangerous to abandon the general efforts to prevent impunity and to leave this task to a small minority of brave and dedicated prosecutors and judges in post-Yugoslav countries without committing the political elite to influence the general atmosphere of the reconsideration of the past and to denounce crimes committed by persons belonging to all sides in the conflict.

Conclusion

Proceedings against alleged perpetrators of war crimes committed in the armed conflicts in the territory of the former Yugoslavia have faced many difficulties. Probably the most important one is the

31. Judgment on the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro) of 26 February 2007. See: <http://www.icj-cij.org/docket/files/91/13685.pdf>.

fact that the war, although technically and legally acquiring dimensions of an international conflict (and thereby justifying the application of the stricter criteria of the Geneva Conventions for the protection of victims of international armed conflicts), was essentially a brutal civil war. In conflicts of that nature the adversary and the persons serving in its armed forces are perceived as enemies pure and simple and not – as in international conflicts – as soldiers performing their duty towards their state. In most cases enemy fighters speak the same language, which enables direct confrontation and exchange of insults, as well as the unmediated belief that the enemies' vile intentions and nature are understood. There is also the famous 'fetishism of small differences', which makes internal conflicts additionally cruel and fanatical. In the Yugoslav case, the problem was aggravated by the circumstance that ethnic differences have often coincided with religious divisions and that sometimes, such as in the case of many Bosniaks, religion was the only difference.

After the official termination of hostilities the impression persisted, and was reinforced by nationalist propaganda, that persons of one's own ethnic group had been incapable of committing crimes or that their crimes had been justified because of the threat of extinction to their ethnic group. In such extreme situations all concerns of legality, humanity and mercy allegedly have to be set aside. This explains why the military and paramilitary leaders are still regarded as blameless heroes by large members of the population in Serbia, Croatia, Bosnia and Herzegovina, and Montenegro. This, together with the ICTY's lack of cultural understanding and the clumsiness manifested in some cases by the Prosecutor's Office, explains the general aversion towards the ICTY.³²

With the ICTY, it is easy to blame 'foreign' prosecutors and judges and for them not to be too perturbed, but in the case of national judiciaries it is hard to find persons of sufficient courage and integrity who will prosecute co-national fighters as war criminals. It therefore took some time before national trials started and where courts were not only judging combatants from the other side. The progress recorded in the last three years can be explained by several factors. One of them is the passage of time, which assuages the thirst for revenge. The second is conditionality, international pressure against impunity, offered as a precondition for joining international organisations such as the European Union, and receiving foreign aid. The third is gradual change in the dis-

32. See Vojin Dimitrijevic, *op. cit.* in note 3, pp. 67-74.

position of the ruling political elite which was manifested in the sudden removal of the Milosevic regime in FRY and the gradual moderation of the nationalist Right in Croatia after the disappearance of President Tudjman. In the case of Montenegro, its newly acquired independence is accompanied by a desire to erase all memories of previous closeness and collaboration with the regime in Serbia and will probably result in more energetic policies towards perpetrators of war crimes, although the results have so far not been encouraging. In BiH, which is now a precarious structure, dominated by nationalist elites in the entities and depending on international control, the future handling of war crimes is not easy to predict, especially because the results achieved so far have been almost entirely due to the presence of international judges and prosecutors rather than to any goodwill on the part of the BiH authorities.

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Abbreviations

BiH	Bosnia and Herzegovina
DS	Democratic Party (<i>Demokratska Stranka</i>)
DPA	Dayton Peace Agreement
DSS	Democratic Party of Serbia
EUPM	European Union Police Mission
FBiH	Federation of Bosnia and Herzegovina
FHP	Humanitarian Law Fund (<i>Fond za Humanitarno Pravo</i>)
HAZU	Croatian Academy of Science and Arts (<i>Hrvatska akademija znanosti i umjetnosti</i>)
HDZ	Croatian Democratic Union (<i>Hrvatska Demokratska Zajednica</i>)
HSLs	Croatian Social Liberal Party (<i>Hrvatska Socijalno-Liberalna Stranka</i>)
ICJ	International Court of Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDP	Internally Displaced Person
IPTF	International Police Task Force
JNA	Yugoslav People's Army (<i>Jugoslovenska Narodna Armija</i>)
JSO	Unit for Special Operations (<i>Jedinica za Specijalne Operacije</i>)
LDP	Liberal Democratic Party (<i>Liberalno Demokratska Partija</i>)
NATO	North Atlantic Treaty Organisation
NGO	Non-governmental organisation
OHR	Office of the High Representative
OSCE	Organisation for Security and Co-operation in Europe
OTP	Office of the Prosecutor
PfP	Partnership for Peace
PIC	Peace Implementation Council
PRC	Police Restructuring Commission
RDC	Research and Documentation Centre
RS	Republika Srpska
SAA	Stabilisation and Association Agreement
SAJ	Special Anti-Terrorist Unit
SB&H	Party for Bosnia and Herzegovina (<i>Stranka za Bosnu i Hercegovinu</i>)
SCG	State Union of Serbia and Montenegro (<i>Državna Zajednica Srbije i Crne Gore</i>)
SDS	Serbian Democratic Party (<i>Srpska Demokratska Stranka</i>)

SDSS	Independent Democratic Serb Party (<i>Samostalna Demokratska Srpska Stranka</i>)
SFRY	Socialist Federal Republic of Yugoslavia
SIPA	State Investigation and Protection Agency
SPO	Serbian Renewal Movement (<i>Srpski Pokret Obnove</i>)
SPS	Socialist Party of Serbia (<i>Socijalisticka Partija Srbije</i>)
SRS	Serbian Radical Party (<i>Srpska Radikalna Stranka</i>)
UN	United Nations
UNHCR	UN High Commissioner for Refugees
UNMIK	United Nations Mission in Kosovo
UNSC	United Nations Security Council

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The baleful legacy of the wars of the 1990s continues to dog the states and societies of the former Yugoslavia and has overshadowed the disappointingly slow and hesitant trajectory of the region towards the EU. At the start of the new millennium, with the removal of key wartime leaders from the political scene in both Croatia and Serbia, it was widely hoped that the region would prove able to 'leave the past behind' and rapidly move on to the hopeful new agenda of EU integration.

The Stabilisation and Association Process, launched for the countries of the Western Balkans in 1999, included both full cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY) and regional reconciliation among the political conditions set for advancing these countries on the path to EU integration. EU political conditionality was intended to support the efforts of new political leaders to redefine national goals away from the nationalist enmities of the past and focus firmly on forging a path to a better future.

This *Chaillot Paper* examines the extent to which this strategy has worked, especially in the light of the difficulties it has encountered in the face of strong resistance to cooperation among sections of the former Yugoslav population, many of whom have not yet fully acknowledged the crimes committed during the 1990s. Key chapters in the volume raise the vital questions of leadership and political will. EU political conditionality does not work unless the EU has a partner ready and willing to 'play the game', a scenario which presupposes that EU integration has become the overriding priority on the national political agenda.

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