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Coming to Terms with its Past— Serbia's New Court for the Prosecution of War Crimes

By
Mark S. Ellis*

INTRODUCTION

In recent years there has been a remarkable change in attitudes and approaches towards holding individuals accountable for gross violations of international law. In national courts, international law cases are often brought with little notoriety outside the country. However, the number of states that have conducted trials against persons accused of international humanitarian crimes is significant. Since 1995, domestic prosecution of international crimes has been conducted in the following countries: Austria, Belgium, Bolivia, Bosnia-Herzegovina, Brazil, Canada, Chile, Colombia, Croatia, Denmark, Ethiopia, Finland, France, Germany, Guatemala, Haiti, Indonesia, Israel, Italy, Japan, Latvia, Lithuania, the Netherlands, Romania, Russia, Rwanda, Sweden, Switzerland and the United Kingdom.¹ The experience of these and other countries in conducting war crimes trials provides valuable insight into the challenges and difficulties of pursuing a policy of accountability for the sake of obtaining justice.

Although domestic war crimes courts can operate successfully under particular conditions, they demand special attention and provide unique challenges.² In general, the investigation and prosecution of war crimes are complicated and problematic. Atrocities are often not recorded. On-site investigations are frequently infeasible, and there are limited options for gathering evidence through requests for mutual assistance. Moreover, governments may have an interest in providing biased information on their own officials. Witnesses must be found and be willing to make incriminating statements, even though many will be intimidated or threatened with reprisal. And even witnesses who want to testify may be unable to give accurate statements. Further, the lapse of time may have

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1. See Prevent Genocide International, <http://www.preventgenocide.org/punish/domestic> (last updated Jul. 21, 2003).

2. See, e.g., Citizenship and Immigration Canada, Fifth Annual Report: Crimes Against Humanity and War Crimes, 2001-2002, at <http://www.cic.gc.ca/english/pub/war2002/section04.html> (last visited Apr. 16, 2004) (containing statements made by the Dutch Government in 2002 regarding its own experience with conducting war crimes investigations and trials).

an impact on a person's recollection so that even witnesses who are willing to testify may be unable to give accurate statements.

Serbia presents an example of how the attempt to try war criminals domestically can sometimes have less than ideal results. By January 2003, only four domestic war crimes trials had taken place, although war crimes trials commenced in October 2000 after Yugoslav President Slobodan Milosevic was transferred to the International Criminal Tribunal for the former Yugoslavia (ICTY).³

Because the ICTY only has jurisdiction over crimes committed in the former Yugoslavia until 2008,⁴ the Organization for Security and Cooperation in Europe (OSCE) felt it was incumbent on Serbia to increase significantly its capacity to undertake domestic war crimes trials. Despite the difficulties associated with domestic war crimes trials, the OSCE determined that one of its main priorities in 2003 would be to assist the Serbian Government in creating the capacity for the national judiciary to conduct war crimes trials.⁵

While, initially, it appeared that Serbia lacked the political will to prosecute war crimes, this perception changed when the Serbian government announced its willingness to draft new war crimes legislation. The government's first attempt to draft a new law was hampered by its desire to complete the task in one week and its failure to incorporate insight and assistance from the international community. As a result, the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes (the "Draft Law")⁶ had significant weaknesses in areas such as the elements of the offenses, jurisdictional issues, immunity, communal responsibility, evidence, witness protection, sentencing, selection criteria for judges and prosecutors, and a host of other issues discussed in this article.

At the urging of the OSCE, the Serbian government extended the time to draft the proposed law. During the next ten days, the International Bar Association's (IBA) group of international experts⁷ ("international experts") reviewed

3. Statute of the International Criminal Tribunal for the Former Yugoslavia (ICTY), in *Report of the Secretary General Pursuant to Paragraph 2 of Security Council Resolution 808*, U.N. Doc. S/25704 (1993) [hereinafter ICTY Statute]. The Secretary General's Report containing the statute was affirmed by S.C. Res. 827, U.N. SCOR, 48th Year., Res. & Dec., at 29, U.N. Doc. S/INF/49 (adopted 1993). It is available in its current, amended form at the website of the Tribunal. See <http://www.un.org/icty/legal/doc/index.htm> (last amended Nov., 2003).

4. The ICTY has established an 'exit strategy' by which it will close its investigations by 2004 and the trials of all penalty cases by 2008-2010.

5. OSCE Mission to Serbia and Montenegro: Strategy Paper, On Support to the National Judiciary in Conducting War Crimes Trials, (Apr. 11, 2003) (on file with author).

6. (On file with author) [hereinafter Draft Law].

7. The IBA team of international experts included: Stuart Alford, Barrister in London; Professor Diane Amann, Professor of Law at the University of California-Davis School of Law; Sylvia de Bertodano, Barrister in London; Professor Bartram Brown, Professor of Law at the Chicago-Kent College of Law; Antonio Cassese, Judge (1993-2000) and President (1993-1997) of the UN International Criminal Tribunal for the former Yugoslavia; Jonathan Cedarbaum, Deputy Chef de Cabinet, Office of the President, International Criminal Tribunal for the former Yugoslavia; Mark Ellis, Executive Director of the International Bar Association (IBA); Professor Geoffrey Gilbert, Professor and Head of the Department of Law at the University of Essex; Justice Richard J Goldstone, a justice of the Constitutional Court of South Africa and the first Chief Prosecutor of the United Nations Inter-

the Draft Law, and the IBA office in London created an analysis for the Serbian government.⁸ This was followed by a two-day specialized workshop where members of the IBA team and representatives of the Serbian government, the OSCE and Serbian non-government organizations discussed all aspects of the Draft Law and the recommendations presented in the analysis by the international experts. The results of the exercise were quite extraordinary: by the end of the workshop, the Serbian government had agreed to substantial changes to the Draft Law. As a result, the Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (the "Final Law")⁹ reflected the views of the international community and established a foundation for future domestic war crimes trials in Serbia.

The failures alluded to above continue to raise some concerns with the Final Law. These concerns include serious omissions in the list of offenses, the failure to make specific reference to command responsibility, the absence of any language that denies statutory or other limitations to the prosecution and punishment of crimes, the decision not to include a provision that would prevent granting of immunity, and others. The government must resolve these issues in order for the new court to be effective.

This article provides an in-depth review of the process followed in creating Serbia's law on domestic war crimes trials. It compares and contrasts the Draft Law with the Final Law, and identifies areas that remain a concern for undertaking domestic war crimes trials in Serbia.

I. CREATING A NEW WAR CRIMES COURT

The OSCE's first step was to commission an assessment of the state of the judiciary and identify areas that needed restructuring in order for Serbia to conduct domestic war crimes trials. The assessment was conducted during April 13-18, 2003.¹⁰

national Criminal Tribunals for the former Yugoslavia and Rwanda; Natasa Kandic, Founder and Executive Director of the Humanitarian Law Centre in Belgrade; Susan Lamb, Legal Adviser in the Office of the Prosecutor at the International Criminal Tribunal for the former Yugoslavia; Justice Finn Lynghjem, Judge of the Sunmore District Court, Norway; Professor William Schabas, Director of the Irish Centre for Human Rights at the National University of Ireland; Professor Michael Scharf, Professor of Law and Director of the Frederick K. Cox International Law Center at Case Western Reserve University School of Law in Cleveland, Ohio; Sead Spahovic, Public Attorney of the Republic of Serbia; David Tolbert, Executive Director of the Central and East European Law Initiative (CEELI) for the American Bar Association, Senior Legal Adviser at the International Criminal Tribunal for the former Yugoslavia and previously Chef de Cabinet to President Gabrielle Kirk McDonald; Elizabeth Santalla Vargas, Associate Legal Officer at the Registry Advisory Section of the International Criminal Tribunal for the former Yugoslavia; Professor Paul Williams, Rebecca Grazier Professorship in Law and International Relations at the American University; Joanna Salsbury, Lawyer, IBA Human Rights Institute; Phillip Tahmindjis, Programme Lawyer, IBA.

8. See Report, International Bar Association, Analysis of the Republic of Serbia's Proposed Law on the Prosecution of War Crimes (May 2003) (on file with author).

9. (Jul. 7, 2003) (translated by OSCE Mission to FRY), at http://www.osce.org/documents/frf/2003/07/446_en.pdf [hereinafter Final Law].

10. The OSCE selected the author to conduct the assessment.

The assessment report found that the courts in Serbia did not have the capacity to carry out the large number of potential war crimes trials that would account for the atrocities committed in the former Yugoslavia during 1993-1999.¹¹ Nor could Serbia guarantee that these trials would be conducted consistent with international standards for fair trials.¹²

The assessment report concluded that domestic war crimes trials are very costly in terms of judicial time because of other special requirements such as security records, evidence management and witness protection costs. Thus, it was important not to overwhelm the already weak court system with the complications of domestic war crimes trials.

However, the report found that the most serious deterrent to undertaking domestic war crimes trials was the lack of political will. Through extensive interviews conducted during the assessment, it became clear that the political will to aggressively adjudicate alleged war criminals simply did not exist in Serbia. Individuals in Serbia do not see any reason why local citizens accused of war crimes should be held accountable because, in the eyes of many individuals, these citizens remain heroes.¹³

This sentiment was recently manifested on June 13, 2003, when former Yugoslav army colonel Veselin Sljivancanin was arrested in Belgrade for extradition to the ICTY. The colonel, one of the top war crimes suspects, was indicted by the ICTY for his role in the massacre of approximately 200 Croatian civilians during a night of battle in 1991.¹⁴ Sljivancanin was taken into custody only after a ten-hour siege during which time hundreds of Serbs violently protested the arrest.¹⁵ In scenes reminiscent of the arrest of Yugoslav President Slobodan Milosevic, the demonstrators attacked the police and set streets ablaze.¹⁶

Given these circumstances, the OSCE knew its task would be enormous. Creating a mechanism to conduct domestic war crimes trials would be extraordinarily challenging and would require a long term commitment by the Serbian government accompanied by substantial resources and unwavering political will on the part of the citizens of the country.

The critical element of political will came in an unexpected announcement by the government during the assessment visit. The breakthrough came when the Minister of Justice stated that he would support the drafting of a new law creating a special War Crimes Court. This was a significant reversal of an ear-

11. See Mission Report on Proposed Domestic War Crimes Trials for Serbia and Montenegro, Memorandum from Mark Ellis, Executive Director, IBA, to Ljiljana Hellman, National Legal Advisor, OSCE (Apr. 25, 2003) (on file with the author) [hereinafter Mission Report].

12. *Id.*

13. Opinion expressed to the author by a number of interviewees during the assessment visit to Belgrade in April 2003. See *id.*

14. The Prosecutor v. Mrksic, Radic, Sljivancanin, and Dokmanovic, Amended Indictment, Case No.: IT-95-13a-I (Dec. 2, 1997), available at <http://www.un.org/icty/indictment/english/mrk-2ai1971202e.pdf>.

15. Dejan Anastasijevic, *World Watch: Riot Acts*, TIME EUROPE, Jun. 15, 2003, available at <http://www.time.com/time/europe/magazine/article/0,13005,901030623-458735,00.html>.

16. *Id.*

lier decision to “fold” war crimes atrocities into the Law on the Suppression of Organised Crime.¹⁷ The existing law had drastically weakened the government’s commitment to conduct domestic war crimes trials. It failed to provide sufficient independence for both the prosecutor and the investigative unit for war crimes. For instance, under this Law, the prosecutor for the War Crimes Court would have to gain written approval from the Republic Public Prosecutor prior to pursuing a case.¹⁸

Despite the positive development of drafting a new law, a major problem arose during the assessment visit. The Minister of Justice announced that he was going to draft the new law and submit it to Parliament within the following week. He further explained that there was a “window of opportunity” to draft a separate law on domestic war crimes prosecution.¹⁹ However, the OSCE was concerned that there was a major risk in rushing through the promulgation of such an important law. Therefore, the assessment report recommended that the drafting process be extended by at least two weeks and that the Minister of Justice incorporate the views of international experts.

This proposed delay did not receive universal support. The U.S. Embassy, which was playing a major role in supporting domestic war crimes trials,²⁰ was concerned that if the international community did not move immediately, the opportunity to create an independent war crimes court for Serbia would be lost.²¹ The U.S. Embassy believed that there were “political enemies” who were against the creation of the new court.²²

After a series of urgent meetings between the U.S. Embassy, the OSCE and the author, it was agreed that the IBA would assemble a team of experts who would quickly review and provide the Serbian government with an assessment of the Draft Law.²³

II. DEFINITION OF CRIMES

The initial step in evaluating the Draft Law was to examine the list of substantive crimes and determine what changes needed to be made. The Draft Law set out specific criminal offences that would be prosecuted by the new War Crimes Court, including the following:

- genocide

17. See Law on Organisation and Jurisdiction of Government Authorities in the Suppression of Organised Crime, Official Gazette of the Republic of Serbia, No. 42/02, (July 22, 2002) (translated by OSCE Mission to FR Yugoslavia, available at http://www.osce.org/documents/fry/2002/07/127_en.pdf).

18. *Id.*, art. 6.

19. Interview with Dr. Valdin Batic, Serbian Minister of Justice in Belgrade (April 15, 2003).

20. The U.S. Embassy had already funded two large assessment missions to Serbia with the purpose of designing a multi-million dollar assistance program for domestic war crimes trials. See Draft of the U.S. Embassy War Crimes Capacity Development Strategy (Feb. 14, 2003) (on file with author).

21. These comments were expressed by U.S. Ambassador William Montgomery in discussions with the author on April 15, 2003.

22. *Id.*

23. See Draft Law, *supra* note 6.

- war crimes against the civilian population
- war crimes against the wounded and sick
- war crimes against prisoners of war
- organising a group and instigating the commission of genocide and war crimes
- unlawful killing or wounding of the enemy
- employing forbidden means of warfare
- injury to persons bearing a flag of truce
- cruel treatment of the wounded, sick and prisoners of war
- unjustified delay of repatriation of prisoners of war
- destruction of cultural and historic monuments
- instigating a war of aggression
- making improper use of international emblems.²⁴

These crimes are stipulated in Articles 141-153 of the Criminal Code of the former Yugoslavia (the “Criminal Code”).²⁵ However, with the exception of a few amendments in 1990, the Criminal Code does not incorporate the major developments in international criminal law from the last 25 years.²⁶

For example, it does not fully incorporate the “other acts” provision included in Article 3 of the 1948 Genocide Convention or Article 4 of the ICTY Statute prohibiting genocide.²⁷ Nor is there a specific provision in the Criminal Code regarding crimes against humanity.²⁸ Without jurisdiction over crimes against humanity, it is doubtful that a War Crimes Court can be successful in bringing about convictions. Also absent from the Criminal Code is language that would clarify individual criminal responsibility such as prohibiting acts that would aid, abet or otherwise assist in the commission of a crime.²⁹

24. Draft Law, *supra* note 6, art. 2.

25. Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), Official Gazette No. 36 (1977), available at http://pbosnia.kentlaw.edu/resources/legal/bosnia/criminalcode_fry.htm [hereinafter Criminal Code].

26. These Articles were formulated in 1951, incorporating what was at that time groundbreaking advances in international criminal law—the Geneva Conventions and the 1948 Genocide Convention. See Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, Aug. 12, 1949, 6 U.S.T. 3114, 75 U.N.T.S. 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea, Aug. 12, 1949, 6 U.S.T. 3217, 75 U.N.T.S. 85; Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287; Geneva Conventions, Aug. 12, 1949, Protocol I, Dec. 12, 1977, 1125 U.N.T.S. 3; Geneva Conventions, Aug. 12, 1949, Protocol I, Dec. 12, 1977, 1125 U.N.T.S. 609; Convention on the Prevention and Punishment of the Crime of Genocide, Dec. 9, 1948, 78 U.N.T.S. 277 [hereinafter Genocide Convention].

27. See Criminal Code, *supra* note 25; see also ICTY Statute, *supra* note 3, art. 4; Genocide Convention, *supra* note 26, arts. 3-4.

28. See Criminal Code, *supra* note 25.

29. For instance, Article 25 of the International Criminal Court Statute reads, in part: in accordance with this Statute, a person shall be criminally responsible and liable for punishment for a crime within the jurisdiction of the Court if that person:

- (a) Commits such a crime, whether as an individual, jointly with another or through another person, regardless of whether that other person is criminally responsible;
- (b) Orders, solicits or induces the commission of such a crime which in fact occurs or is attempted;

In order to compensate for these deficiencies, the international experts wanted the Draft Law to make specific reference to the relevant conventions and the statutes and decisions of the ICTY, the International Criminal Tribunal for Rwanda (ICTR)³⁰ and the International Criminal Court (ICC).³¹ This would “internationalize” the Criminal Code and the new War Crimes Court. The international experts also suggested that the entire chapter of the Criminal Code dealing with “Criminal Acts against Humanity and International Law” should be included in the Draft Law.³² The inclusion of the additional crimes under Chapter 16 of the Criminal Code would capture *any* violation of basic human rights and freedoms based on race, color, nationality or ethnicity.³³ This, in turn, could help to establish a specific reference to elements of crimes that could be viewed as “crimes against humanity.”³⁴

(c) For the purpose of facilitating the commission of such a crime, aids, abets or otherwise assists in its commission or its attempted commission, including providing the means for its commission;

(d) In any other way contributes to the commission or attempted commission of such a crime by a group of persons acting with a common purpose. Such contribution shall be intentional and shall either:

(i) Be made with the aim of furthering the criminal activity or criminal purpose of the group, where such activity or purpose involves the commission of a crime within the jurisdiction of the Court; or

(ii) Be made in the knowledge of the intention of the group to commit the crime;

(e) In respect of the crime of genocide, directly and publicly incites others to commit genocide.

United Nations Diplomatic Conference of Plenipotentiaries on the Establishment of an International Criminal Court, Rome Statute of the International Criminal Court, July 17, 1998, UN Doc. A/CONF.183/9, *corrected* Nov. 10, 1998, and July 12, 1999, *available at* <http://www.un.org/law/icc/index.html>, *reprinted in* 37 ILM 999 (1998) (uncorrected version) (entered into force Jul. 1, 2002) [hereinafter ICC Statute].

30. Statute of the International Criminal Tribunal for Rwanda, S.C. Res. 955: Annex art. 1, U.N. SCOR, 49th Year, Res. and Dec. at 15, U.N. Doc. S/INF/50 (*adopted* 1994), *available at* <http://www.ictt.org/ENGLISH/basicdocs/statute.html> [hereinafter ICTR Statute].

31. ICC Statute, *supra* note 29.

32. Chapter 16 of the Criminal Code, *supra* note 25, covers the following crimes: genocide, war crimes against the civilian population, war crimes against the wounded and sick, war crimes against prisoners of war, organising a group and instigating the commission of genocide and war crimes, unlawful killing or wounding of the enemy, marauding, making use of forbidden means of warfare, violating the protection granted to bearers of flags of truce, cruel treatment of the wounded, sick and prisoners of war, destruction of cultural and historical monuments, instigating an aggressive war, misuse of international emblems, racial and other discrimination, establishing slavery relations and transporting people in slavery relation, and imposing the punishment of confiscation of property.

33. Article 154 of the Criminal Code, *supra* note 25, reads:

(1) Whoever on the basis of distinction of race, colour, nationality or ethnic background violates basic human rights and freedoms recognized by the international community, shall be punished by imprisonment for a term exceeding six months but not exceeding five years.

(2) The sentence set forth in paragraph 1 of this article shall be imposed on those who persecute organizations or individuals for their advocating equality among the people.

(3) Whoever spreads ideas on the superiority of one race over another, or advocates racial hatred, or instigates racial discrimination, shall be punished by imprisonment for a term exceeding three months but not exceeding three years.

34. The international experts suggested the following language: “where a crime under the basic Criminal Code forms part of a widespread or systematic attack on a civilian population in a time of peace or armed conflict, it will be dealt with under the procedures of the Statute.”

While the Serbian government did not include any reference to the ICTY, the ICTR, or the ICC for the retroactive application of crimes, the Serbian government fortunately chose to incorporate *all* the crimes under Chapter 16 of the Criminal Code into the Final Law. By incorporating these crimes into the Final Law, the government believes that it will be able to try an individual retroactively for any and all crimes that fall under the statutes of the ICTY and the ICC, including crimes against humanity. The Serbian government's position is that its current Criminal Code incorporates all the necessary elements of international humanitarian law and that any reference to the ICTY, ICTR, or ICC is unnecessary even though the language in the Criminal Code seems ambiguous.

Despite the broad reference to provisions in the Criminal Code, the Final Law is still flawed. For example, Articles 142, 143, 144 and 146³⁵ of the Criminal Code refer to "war or armed conflict" or "prisoners of war." However, the nexus to a war or armed conflict no longer applies for international crimes considered under customary international law, such as crimes against humanity.³⁶ For example, under Article 7 of the ICC Statute, "crimes against humanity" means one of several enumerated attacks "committed as part of a widespread or systematic attack directed against any civilian population."³⁷ Thus, the definition of crimes against humanity includes acts both during wartime and peacetime. Although the new War Crimes Court will address crimes committed during armed conflict in the former Yugoslavia, the Court may still be more constrained in interpreting the Criminal Code as addressing past acts than it would have been under either customary international law or the definitions of Article 7 of the ICC Statute.

These same concerns will not pertain to prospective cases. The Serbian government added substantial language in the Final Law to ensure that crimes against humanity will be clearly embedded in Serbian law. Article 1 of the Final Law reads:

This Law shall also apply in detecting and prosecuting perpetrators of criminal offences stipulated in Article 5 of the Statute of the International Criminal Tribunal for the former Yugoslavia.³⁸

35. See Criminal Code, *supra* note 25.

36. See *The Prosecutor v. Tadic*, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction 1995 ICTY (Appeals Chamber), para. 141 (Oct. 2, 1995) available at <http://www.un.org/icty/tadic/appeal/decision-e/51002.htm>.

37. ICC Statute, *supra* note 29.

38. Article 5 of the ICTY Statute, *supra* note 3, reads:

The International Tribunal shall have the power to prosecute persons responsible for the following crimes when committed in armed conflict, whether international or internal in character, and directed against any civilian population:

- (a) murder;
- (b) extermination;
- (c) enslavement;
- (d) deportation;
- (e) imprisonment;
- (f) torture;
- (g) rape;
- (h) persecutions on political, racial and religious grounds;
- (i) other inhumane acts.

Another important omission in the Criminal Code, and thus in the Final Law, is any reference to the prevention of births within a particular group. The Genocide Convention, as well as the ICTY, ICTR and ICC Statutes include under the definition of genocide any act “with intent to destroy, in whole or in part, a national, ethnical, racial or religious group” including “imposing measures intended to prevent births within the group.”³⁹ In the ICTR, the trial court ruled that rape could be interpreted as “imposing conditions intended to prevent births.”⁴⁰ The court concluded that measures intended to prevent births can be physical as well as mental. A woman, who is raped and subsequently refuses to procreate, suffers in a similar way to a woman who is physically prevented from giving birth according to the court.⁴¹ In an important case before the ICTY, the court ruled that the systematic rape of women, intended to transmit a new ethnic identity to the child, could constitute genocide.⁴² Reference to the ICTR/ICTY case law or ICC Statute in the Final Law could have easily solved this omission.

Serbia also chose to go against the consensus of the international experts when it decided to include the crime of aggression in its Final Law. Both the ICTY and ICTR exclude the crime of aggression from their respective statutes and, during the consultation, the international experts suggested that war crimes trials for the crime of aggression can be unfair because there is currently no accepted definition of the crime of aggression under international law. Consequently, its definition is more political than legal. Nevertheless, the Final Law refers to all the “main” crimes in the Serbia Criminal Code, which include the crime of aggression.⁴³

While the Final Law is flawed, the provisions contained in it are adequate to prosecute and punish past violators of international law, particularly humanitarian law. However, in order for this to be done, the stakeholders in the new legislation (judges, prosecutors and defense lawyers) must be thoroughly trained to interpret Serbia’s Criminal Code and Constitution “aggressively,” incorporating existing international standards and humanitarian law into domestic law.⁴⁴ Time will tell whether the Serbian government’s belief is correct that, despite important omissions, the Final Law will be effective.

39. See ICC Statute, *supra* note 29, art. 6; ICTY Statute, *supra* note 3, art. 4; ICTR Statute *supra* note 30, art. 2; Genocide Convention, *supra* note 26, art. II.

40. See *The Prosecutor v. Kayishema and Ruzindana*, Sentencing Decision Case No. ICTR 95-1-T (May 21, 1999); *The Prosecutor v. Akayesu*, Sentencing Decision, Case No. ICTR 96-4-T (Oct. 2, 1998).

41. *The Prosecutor v. Akayesu*, Judgment, Case No. ICTR 96-4-T, para. 508 (Oct. 2, 1998).

42. See *The Prosecutor v. Karadzic and Mlalic*, Indictment, Case No. IT-95-18-I (Nov. 16, 1995) available at <http://www.un.org/icty/indictment/english/kar-ii951116e.htm>; *The Prosecutor v. Karadzic and Mladic*, Decisions of the Appeal and Trial Chambers, Case No. IT-95-5-D, (May 16, 1995), available at <http://www.un.org/icty/karadzic&mladic/trialc/decision-e/50516DF1.htm>.

43. See Criminal Code, *supra* note 25.

44. Article 2 of the Final Law, *supra* note 9, now reads: “This Law shall apply in detecting and prosecuting perpetrators of criminal offences stipulated in Chapter XVI of the Basic Criminal Code (Criminal offences against humanity and international law.)”

III. COMMAND RESPONSIBILITY

One of the most contentious issues debated during the process of creating the new War Crimes Court was whether there should be express recognition in the Draft Law of the applicability of command responsibility.

Command responsibility incorporates two separate concepts of criminal responsibility: direct responsibility and imputed responsibility. Under the concept of direct responsibility, the commander or superior officer takes responsibility only for those unlawful acts that he committed or ordered.⁴⁵ The ICTY Statute codifies direct responsibility in the following way: "A person who planned, instigated, ordered, committed or otherwise aided and abetted in the planning, preparation or execution of a crime."⁴⁶ Imputed responsibility is where the commander or superior *failed* to act.⁴⁷ The ICC Statute recognizes imputed command responsibility in the following way:

1. A military commander or person effectively acting as a military commander shall be criminally responsible for crimes within the jurisdiction of the Court committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

(a) That military commander or person either knew or, owing to the circumstance at the time, should have known that the forces were committing or about to commit such crimes; and

(b) That military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.

2. With respect to superior and subordinate relationships not described in paragraph (a), a superior shall be criminally responsible for crimes within the jurisdiction of the Court committed by subordinates under his or her effective authority and control, as a result of his or her failure to exercise control properly over such subordinates, where:

(a) The superior either knew, or consciously disregarded information which clearly indicated, that the subordinates were committing or about to commit such crimes;

(b) The crimes concerned activities that were within the effective responsibility and control of the superior; and

(c) The superior failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁴⁸

45. See *The Prosecutor v. Delalic*, Transcript, Case No. IT-96-21, at 789 (Feb. 20, 2001), available at <http://www.un.org/icty/transe21/010220it.htm> ("The Appeals Chamber has also confirmed that the Prosecution does not have to establish that a person is in a position of superior authority before he can be found guilty of direct responsibility for this offence under Article 7.1 of the Statute"); ICTY Statute, *supra* note 3, art. 7(1).

46. ICTY Statute, *supra* note 3, art. 7(1).

47. See *The Prosecutor v. Kordic and Cerkez*, Decision On The Joint Defence Motion To Dismiss For Lack Of Jurisdiction Portions Of The Amended Indictment Alleging "Failure To Punish" Liability, Case No. IT-95-14/2, (Mar. 2, 1999), available at <http://www.un.org/icty/kordic/trialc/decision-e/90302DC56321.htm>.

48. ICC Statute, *supra* note 29, art. 28.

The international experts wanted to include a specific reference to command responsibility in the Draft Law. They suggested the following language:

In addition to other grounds of criminal responsibility under the Criminal Code: A military commander or person effectively acting as a military commander shall be criminally responsible for crimes enumerated under Article 2 of the Serbian War Crimes Law committed by forces under his or her effective command and control, or effective authority and control as the case may be, as a result of his or her failure to exercise control properly over such forces, where:

- (1) that military commander or person either knew, or owing to the circumstances at the time, should have known that the forces were committing or about to commit such crimes; and
- (2) that military commander or person failed to take all necessary and reasonable measures within his or her power to prevent or repress their commission or to submit the matter to the competent authorities for investigation and prosecution.⁴⁹

The Serbian government resisted this suggestion. Government officials argued that Article 14 of the existing Criminal Code regarding negligence already incorporated the concept of command responsibility into Serbian law. Article 14 reads as follows:

A criminal act is committed negligently when the offender is conscious that a prohibited consequence may occur but carelessly assumes that it will not occur or that he will be able to avert it; or when he was unaware of the possibility that a prohibited consequence might occur although, under the circumstances and by his personal characteristics, he should and could have been aware of this possibility.⁵⁰

The main fear expressed by the Serbian government officials was that by including a specific reference to command responsibility in the Draft Law, one could argue that this particular provision was retroactive and, therefore, illegal under the principle of *nullum crimen sine lege* (no crime without law).⁵¹ The principle counsels against prosecuting individuals for crimes that were not prohibited at the time of their occurrence. This concept is fundamental to the principle of legality. Since the Criminal Code prohibits the retroactive application of criminal law, the Serbian officials wanted to be certain that they were not legislating *ex post facto* the concept of command responsibility.⁵² The solution, according to the Serbian side of the "debate," was to train the judges and prosecutors to actively apply and interpret the existing Criminal Code as if it already incorporated the concept of command responsibility. Ultimately, the Final Law did not incorporate specific language regarding command responsibility, which will test the viability of the new War Crimes Court. If the Court is unable to prosecute individuals under the concept of command responsibility, it is doubtful that it will be effective.

49. See Mission Report, *supra* note 11.
 50. Criminal Code, *supra* note 25, art. 14.
 51. For general discussion, see M. CHERIF BASSIOUNI AND PETER MANIKAS, THE LAW OF THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA 265 (1996).
 52. Criminal Code, *supra* note 25, art. 3.

IV.
SUPERIOR ORDERS DEFENSE

The statutes of both the ICTY and ICTR explicitly exclude the defense of “superior orders” from the litigation part of the trial.⁵³ This defense, under which a subordinate who committed a crime can escape responsibility because he was following the orders of his superior, has been rejected since the Nuremberg trials.⁵⁴ In contrast to the ICTR and ICTY, the ICC does permit the use of the defense, in a diluted form, at trial. Article 33 of the ICC Statute reads:

- (1) The fact that a crime within the jurisdiction of the court has been committed by a person pursuant to an order of a Government or of a superior, whether military or civilian, shall not relieve that person of criminal responsibility unless:
 - (a) The person was under a legal obligation to obey orders of the Government or the superior in question;
 - (b) The person did not know that the order was unlawful; and
 - (c) The order was not manifestly unlawful.
- (2) For the purposes of this article, orders to commit genocide or crimes against humanity are manifestly unlawful.⁵⁵

The international experts were concerned that the Draft Law made no clear reference to the concept of superior orders because they felt that the ambiguities in the Criminal Code could not control the issue. As is, the Criminal Code recognizes the standard defenses in criminal cases, such as temporary insanity, intoxication and other common defenses.⁵⁶ These standard defenses mirror those in the ICC Statute.⁵⁷ The Criminal Code also exonerates a person’s con-

53. See ICTY Statute, *supra* note 3, art. 7(4); ICTR Statute, *supra* note 30, art. 6(4). As with the Nuremberg trials, the courts in Yugoslavia and Rwanda consider the “superior orders defense” only as a mitigating factor in the sentencing stage.

54. Article 8 of the Nuremberg Charter reads: “The fact that the defendant acted pursuant to orders of his Government or of a superior shall not free him from responsibility, but may be considered in mitigation of punishment, if the Tribunal determines that justice so requires.” Charter of the International Military Tribunal, *in* Agreement for the Prosecution and Punishment of the Major War Criminals of the European Axis (London Agreement), August 8, 1945, art. 8, 58 Stat. 1544, E.A.S. No. 472, 82 U.N.T.S. 280.

55. See ICC Statute, *supra* note 29, art. 33.

56. Article 12 of the Criminal Code, *supra* note 25, reads:

(1) A person who committed a criminal act is not considered responsible if at the time of the commission of a criminal act he was incapable of understanding the significance of his act or control his conduct due to a lasting or temporary mental disease, temporary mental disturbance, or mental retardation. (no responsibility).

(2) If due to one of the states referred to in paragraph 1 of this article, the capacity of the offender to understand the significance of his act or his ability to control his conduct was substantially reduced, the court may impose a reduced punishment on him. (Materially reduced responsibility).

(3) The offender shall be criminally liable if, by indulgence in alcohol, drugs or in some other way, he has placed himself in a state in which he has not been capable of understanding the importance of his actions or controlling his conduct, and if prior to his placing himself in such a state, the act was premeditated or if he was negligent in relation to the criminal act, insofar, as the act in question is punishable by law if committed negligently.

57. Article 31 of the ICC Statute, *supra* note 29, reads, in part:

“1. In addition to other grounds for excluding criminal responsibility provided for in this Statute, a person shall not be criminally responsible if, at the time of that person’s conduct:

duct if, at the time of committing the criminal act, he was not aware of some statutory element of the act or he mistakenly believed that circumstances existed that would render such an act permissible.⁵⁸ In addition, a Serbian court can also reduce the punishment of a defendant who had “justifiable cause for not knowing that his conduct was prohibited.”⁵⁹ The international experts were adamant that the Criminal Code could still be construed to permit a superior orders defense, which, in their view, was an undesirable possibility.

The international experts felt strongly that the Draft Law should be amended to add language that was consistent with the language of the ICTY and the ICTR Statutes rather than the “watered down” language of the ICC Statute. The experts suggested the following language during the drafting workshop:

The fact that an accused person acted pursuant to an order of a Government or of a superior shall not relieve him or her of criminal responsibility, but may be considered in mitigation of punishment if the Court determines that justice so requires.⁶⁰

In the end, the Serbian government representatives did not include any specific language regarding superior orders in the Final Law. Therefore, the Serbian Criminal Code governs on this point and, thus, it is uncertain whether the War Crimes Court will interpret Serbia’s new Criminal Code to prohibit such defenses without specific language regarding superior orders in the Final Law. As for future cases, it would be advisable for Serbia to amend its laws clearly to prohibit a superior orders defense.

V. STATUTE OF LIMITATIONS

During the drafting workshop the parties discussed the issue of statute of limitations. Although it is difficult to argue that customary international law prohibits statutory limitations for all international crimes, it does prohibit their application in cases of gross violation of international humanitarian law.⁶¹ The

(a) The person suffers from a mental disease or defect that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law;

(b) The person is in a state of intoxication that destroys that person’s capacity to appreciate the unlawfulness or nature of his or her conduct, or capacity to control his or her conduct to conform to the requirements of law, unless the person has become voluntarily intoxicated under such circumstances that the person knew, or disregarded the risk, that, as a result of the intoxication, he or she was likely to engage in conduct constituting a crime within the jurisdiction of the Court.”

58. See Criminal Code, *supra* note 25, art. 16(1).

59. *Id.* art. 17.

60. Mission Report, *supra* note 11.

61. See Convention on the Non-applicability of Statutory Limitations to War Crimes Against Humanity, G.A. Res. 2391 (XXIII), Annex, U.N. GAOR, 23rd Sess., Supp. No. 18, at 40, U.N. Doc. A/7218 (1968); European Convention on the Non-applicability of Statutory Limitations to Crimes Against Humanity and War Crimes, Jan. 25, 1974, Europ. T.S. No. 82; *Extradition and Punishment of War Criminals*, G.A. Res. 3 (I), U.N. GAOR, 1st Sess., at 9, U.N. Doc. A/64 (1946); *Surrender of War Criminals and Traitors*, G.A. Res. 170 (III), U.N. GAOR, 2d Sess., at 102, U.N. Doc. A/519 (1948); *Affirmation of the Principles of International Law recognized by the Charter of the Nuremberg Tribunal*, G.A. Res. 95 (I), U.N. GAOR, 1st Sess., pt 2, at 188, U.N. Doc. A/64/Add. 1 (1947);

international experts suggested that the Draft Law be amended to include language that “no statutory or other limitations shall apply to the prosecution and punishment of the crimes referred to in Article 2 of the Law.”⁶² This is similar to the language found in the ICC Statute.⁶³

The Serbian government representatives rejected the suggested language. Their main argument was that its applicability, irrespective of the date of the crime, would violate the principle of non-retroactivity. However, considering that customary international law prohibited statutory limitations for serious war crimes⁶⁴ long before the conflict in Yugoslavia, Serbia should not be concerned about the issue of non-retroactivity.

VI. IMMUNITY

The international experts were also concerned because the Draft Law was silent on the issue of immunity. In particular, it failed to specify that there should be no immunity for war crimes based on an individual’s official position. As a member of the ICC, the international experts felt that the omission would be inconsistent with Serbia’s international obligations. Also, by explicitly prohibiting such a defense in the Final Law, Serbia would prevent similar crimes from being repeated.⁶⁵

Under the ICC Statute, blanket amnesties may not be granted. Article 27 of the ICC Statute states that the official capacity of an individual cannot shield that person from criminal responsibility and cannot be considered as a ground for mitigating the sentence. Article 27 reads:

The statute shall apply equally to all persons without any distinction based on official capacity. In particular, official capacity as a Head of State or Government, a member of a Government or parliament, an elected representative or a government official shall in no case exempt a person from criminal responsibility under this Statute, nor shall it, in and of itself, constitute a ground for reduction of sentence.⁶⁶

However, the opportunity to grant pardons after the issuance of a state court conviction is still an open question.⁶⁷ State officials may enjoy immunity under their own national laws, which can often be *ratione materiae* or *ratione per-*

Question of Territories under Portuguese Administration, G.A. Res. 2184 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 70, U.N. Doc. A/6316 (1967); *The Policies of Apartheid of the Government of the Republic of South Africa*, G.A. Res. 2202 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, at 20, U.N. Doc. A/6316 (1967).

62. Mission Report, *supra* note 11.

63. Article 29 of the ICC Statute, *supra* note 29, states: “The crimes within the jurisdiction of the Court shall not be subject to any statute of limitations.”

64. See, THE ROME STATUTE FOR AN INTERNATIONAL CRIMINAL COURT: A COMMENTARY 882 (Antonio Cassese et al. eds., 2002).

65. See ICC Statute, *supra* note 29, pmbl.

66. ICC Statute, *supra* note 29, art. 27.

67. In addition to Article 27 of the ICC Statute, the ICTY Statute similarly reads: “The official position of any accused person, whether as Head of State of Government or as a responsible Government official, shall not relieve such person of criminal responsibility nor mitigate punishment.” See ICTY Statute, *supra* note 3, art. 7(2); ICC Statute, *supra* note 29, art. 27(1).

sonae.⁶⁸ However, Article 27 of the ICC Statute clearly refers to immunities *ratione materiae*.⁶⁹ Thus, the statute empowers the ICC to obtain jurisdiction over any official who was provided immunity by a national court. This right comes under Article 27(2) which reads:

Immunities or special procedural rules which may attach to the official capacity of a person, whether under national or international law, shall not bar the Court from exercising its jurisdiction over such a person.⁷⁰

It is likely that the ICC would view the state-granted immunity as a way of shielding the person concerned from criminal responsibility for crimes within the jurisdiction of the ICC.⁷¹

The international experts were clear that the Final Law should include language mirroring that of the ICC Statute, and thereby put an end to impunity for the perpetrators of gross violations of international humanitarian law. As a State Party to the ICC, Serbia must alter its legislation and constitution to eliminate immunities attached to state officials. Serbia is duty-bound to ensure that its national law allows for full co-operation with the ICC.⁷²

The Final Law, however, did not include a provision dealing with immunity. Failure to do so could place Serbia in direct confrontation with the ICC Statute. In addition, any action by Serbia or the new court that would give immunity to an official for past acts would immediately destroy any credibility associated with the new court.

VII. THE PROSECUTOR

There is no single position in the new War Crimes Court more important than that of the prosecutor. The prosecutor must be independent, impartial, properly trained and appointed on the basis of skill and experience. In reviewing the Draft Law, Justice Richard Goldstone, the first Prosecutor of the ICTY, stated that the credibility of the Prosecutor for War Crimes is essential for the success of his or her office.⁷³ Likewise, there has to be confidence that he or she is not taking political decisions from a member of the public or the execu-

68. Immunity *ratione materiae* relates to acts carried out in the person's official capacity and such immunity from prosecution continues after the person leaves office. Immunity *ratione personae* is a procedural bar which prohibits prosecution of high state officials, for any act, during their term in office. Prosecution for those acts may occur, after the end of their official duties. See generally Steffen Wirth, *Immunity for Core Crimes? The ICJ's Judgment in the Congo v. Belgium Case*, 13 EUR. J. INT'L L. 877 (2002).

69. See THE ROME STATUTE OF THE INTERNATIONAL CRIMINAL COURT: A COMMENTARY, *supra* note 64, at 978.

70. ICC Statute, *supra* note 29, art. 27(2).

71. See ICC Statute, *supra* note 29, art. 20(3)(a).

72. Article 88 of the ICC Statute, *supra* note 29, reads: "State Parties shall ensure that there are procedures available under their national law for all of the forms of cooperation which are specified under this Part."

73. See Memorandum on the Draft Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Persons Guilty of War Crimes, Memorandum from Justice Goldstone to Mark Ellis, Executive Director of IBA (Mar. 15, 2000) (on file with author).

tive.⁷⁴ Under the Draft Law, the international experts were concerned that the National Assembly could elect a prosecutor who did not have a high standing in the legal community. There was no mention in the Draft Law about the standards and criteria by which the prosecutor may be selected and appointed. During the drafting workshop, the international experts suggested that the following language be added to the Draft Law:

In electing the Prosecutor for War Crimes and Genocide [or the Deputy Prosecutor for War Crimes and Genocide] [in assigning the Judges to the War Crimes and Genocide Panels] the National Assembly [the President of the Court] shall select persons of high moral character and recognised impartiality and integrity, with experience in criminal law. Priority shall be given to persons who, in addition, have competence or experience in international humanitarian law and human rights law.⁷⁵

To the credit of the Serbian Government, the Final Law incorporated language that emphasized the importance of selecting the highest caliber of individual for the post of prosecutor. The new language reads:

A person may be elected Prosecutor for War Crimes or appointed as his/her Deputy who meets the requirements for election as district public prosecutor and shall be of high moral character and impartiality, with considerable experience in criminal law. Priority in election and/or appointment shall be given to persons who have competence and experience in international humanitarian law and human rights law.⁷⁶

The Prosecutor for War Crimes is elected for a term of four years and may be re-elected.⁷⁷ The Deputy Prosecutor for War Crimes is appointed for a term of four years and may be re-appointed.⁷⁸

The international experts were also concerned that the Draft Law did not promote a transparent and impartial process for the new prosecutor to decide when to initiate a case so they suggested a set of guidelines to shape and constrain the prosecutor's decision-making. The international experts recommended the following amendments to the Draft Law:

The Office of the Prosecutor for War Crimes should exercise its discretion to bring only those charges which it considers to be consistent with the interests of justice. Factors which will be considered are:

- (1) The nature and seriousness of the offence, particularly with regard to the immediate harm caused by the offence;
- (2) The role of the person in the offence, particularly that he or she occupied a leadership role in the direct commission of an offence;
- (3) The strength of the case against the person;
- (4) The interests of the victims;
- (5) The age and physical and mental condition of the person; and

74. *Id.*

75. Mission Report, *supra* note 11.

76. Final Law, *supra* note 9, art. 5.

77. On July 22, 2003, the Serbian Parliament approved the appointment of Vladimir Vukcevk as the Prosecutor for the new War Crimes Court. Mr. Vukcevk was the only candidate for the post. He was Deputy Public Prosecutor of the Belgrade District Public Prosecutor's Office, before being appointed as the Serbian Republic's Deputy Public Prosecutor. See B92 News, Archive, available at <http://www.b92.net/english/news> (July 22, 2003).

78. See Final Law, *supra* note 9, art. 5.

(6) The person's willingness to cooperate in the investigation or prosecution of others.

In determining whether or not to commence a prosecution against a person, the Prosecutor should not be influenced by:

- (1) The person's national origin, ethnicity, race, religion or gender;
- (2) The person's current or past official position;
- (3) The Prosecutor's own personal feelings considering the person, the person's associates or the victim(s); or
- (4) The possible effect of the decision on the Prosecutor's own professional or personal circumstances.⁷⁹

In the end, however, the Final Law remained silent as to the prosecutor's decision-making process in filing a case.

The Office of the Prosecutor is also weak in other ways. During the workshop, the international experts noted several problematic provisions in the Law on the Public Prosecutor's Office, which applies to the prosecutor's office in the Draft Law. All of these articles refer to the office's control over the Prosecutor for War Crimes. Article 7 reads:

The public prosecutor, deputy public prosecutors and staff comprise the public prosecutor's office.

All persons in the public prosecutor's office shall be subordinate to the public prosecutor.⁸⁰

Article 9 reads:

Every public prosecutor shall be subordinate to the Republic Public Prosecutor and every public prosecutor's office to the Republic Public Prosecutor's office.⁸¹

Article 11 reads:

A complaint against the instruction of the Republic Public Prosecutor shall not be allowed.⁸²

Article 13 reads:

The Republic Public Prosecutor shall issue mandatory instructions to proceed to all public prosecutors.⁸³

Further, Article 42 of the Law on the Public Prosecutor's Office allows for the suspension of public prosecutors, which would include the new Prosecutor for the War Crimes Court.⁸⁴

The problem, of course, is that these provisions could severely restrict the independence of the new Prosecutor for the War Crimes Court and weaken his/her office. Since the Republic Public Prosecutor is a government appointee,

79. Mission Report, *supra* note 11. These guidelines were developed by Professor Allison Danner. See Alison Danner, *Legitimacy, Pragmatic Accountability and Prosecutorial Discretion at the International Criminal Court*, 97 AM. J. INT'L L. 1 (forthcoming 2004).

80. Law on the Public Prosecutor's Office, art. 7 (Nov. 23, 2001) (Translated by OSCE mission to FRY) (on file with author).

81. *Id.*, art. 9.

82. *Id.*, art. 11.

83. *Id.*, art. 13.

84. *Id.*, art. 42, which reads, in part: "the public prosecutor shall decide on mandatory suspension of a deputy, and the next higher-ranking public prosecutor shall decide on mandatory suspension of a public prosecutor. If suspension is not mandatory, it shall be decided upon by the Republic Public Prosecutor."

concern remains that the Government will be able to interfere with the Office of the Prosecutor of the War Crimes Court.

VIII.

WAR CRIMES INVESTIGATION SERVICE

Along with the Prosecutor for War Crimes, the Director of the War Crimes Investigation Service⁸⁵ serves an important role within the new War Crimes Court. The Director of the Investigation Service, acting upon the requests of the Prosecutor, will be responsible for “detect[ing] criminal offences.”⁸⁶ However, the Draft Law placed the director under the control of the Ministry of Interior, which appoints and dismisses the director.⁸⁷ This creates a dangerous mechanism.

The Investigation Service should have an identity and authority separate from the Ministry of Interior. The director must be able to conduct investigations without interference from local police or other governmental authorities. As it stands now, the Ministry of Interior houses the police. The Director of the Investigation Service should have extraordinary investigative powers similar to those of the prosecutor’s office. Prosecuting war criminals in the former Yugoslavia cannot proceed without a strong and professional investigative unit which can react independently and aggressively in pursuing war crimes cases. In addition, the new investigative unit must be comprised of exceptionally qualified individuals, who in turn must undergo extensive training.

There is still an overwhelming feeling in Serbia that the police are and will be a major impediment to conducting successful domestic war crimes trials.⁸⁸ The Ministry of Interior remains selective when providing information on war criminals because such information could easily be used to indict police officers.⁸⁹ A significant number of police officers were directly and indirectly responsible for war crimes committed during the wars in the former Yugoslavia.⁹⁰ Consequently, the police have not done enough to facilitate prosecutorial investigations to date.

85. Draft Law, *supra* note 6, art. 7.

86. *Id.*

87. *Id.*

88. These views were expressed during the assessment mission to Serbia during the week of April 14, 2003. See Memorandum from Ljiljana Hellman, National Legal Advisor to the OSCE, to Mark Ellis, Executive Director, IBA (Apr. 25, 2003) (on file with author).

89. The same can be said for the Yugoslav Army. Interviews suggest that the military has indicated to the Ministry of Interior that there are no military officers responsible for war crimes. *Id.*

90. See, e.g., *The Prosecutor v. Furundzija*, Judgment, Case No. IT-95-17/1 (Dec. 10, 1998), available at <http://www.un.org/icty/furundzija/trialc2/judgement/index.htm> (finding members of the Jokers, a special military police unit, guilty of war crimes); Human Rights Watch, *Yugoslav Military and Serbian Police Commit War Crimes in Kosovo*, Press Release, available at <http://www.hrw.org/press98/june/kosov630.htm> (June 30, 1998). This opinion was also expressed to the author during various interviews during the initial assessment visit. The current Special Prosecutor for Organized Crime, however, does not believe that the Ministry of Interior harbors war criminals within the police ranks, nor does he think that there was any involvement from the Ministry of Interior in any alleged war crimes, including evidence of communal responsibility. See Mission Report, *supra* note 11.

During the drafting workshop, there was intense discussion on the need to separate the Investigation Service from the government. To the credit of the Serbian delegation, the Final Law enhanced the independence of the Director of the Investigation Service by requiring that his/her appointment and dismissal must first be "proposed" by the prosecutor.⁹¹ Another improvement to the Final Law is that the Director of the Investigation Service must act in response to requests made by the prosecutor.⁹² However, the Final Law still has the Investigation Service headquartered "in the Ministry of Interior".⁹³ Unfortunately, this arrangement does not sufficiently guarantee the independence of the Director of the Investigation Service, which should be housed in the new War Crimes Court. It remains to be seen whether the Ministry of Interior ultimately will gain control over the Director and the Investigation Service or will attempt to interfere with and thus diffuse the independence of the Investigation Service. If this happens, it is doubtful that the new War Crimes Court will ever be an effective mechanism to bring war criminals to justice.

IX. WITNESS PROTECTION

One of the most significant omissions in the Draft Law was the failure to provide for a Victims and Witnesses Unit. A professional witness and victim protection and support unit facilitates effective investigation, prosecution and defense by encouraging victims and witnesses to come forward. Witnesses will simply not testify unless guaranteed adequate protection and safety.

The government viewed such a Victims and Witnesses Unit as "too complex, expensive and time consuming" to incorporate into the Draft Law.⁹⁴ In addition, the government believed that requiring such a unit would lead to significant delays in creating the new court, which in turn would give those who oppose the new court "an excuse to delay its implementation."⁹⁵

The Serbian government pointed to the current Criminal Procedure Act (CPA) as being sufficient to protect witnesses and victims in war crimes trials.⁹⁶ Specifically, the government referred to Article 504(p) of the Act, which reads: "The State Attorney may order a special protection for certain witnesses, the informant witness or to his family."⁹⁷

The international experts were adamant that this provision was insufficient to address the complex nature of protecting witnesses and victims in war crimes trials. The experts also stressed that a special unit must be fully functional on the new court's first day of operation. It must also have sufficient financial and

91. Article 8 of the Final Law, *supra* note 9, reads, in part: "[T]he Minister of Interior shall appoint and dismiss the head of the Service as proposed by the Prosecutor for War Crimes."

92. *Id.*

93. *Id.*

94. Minister Protic, Remarks at the OSCE/IBA workshop (April 14-18, 2003).

95. *Id.*

96. Criminal Procedure Act, Official Gazette (FRY) No. 70/2001, *amended by* Official Gazette No 68/2002 (2002) (on file with author).

97. Criminal Procedure Act, *supra* note 96, art. 504(p).

human resources to carry out its mission. The unit's success *cannot* be hindered by financial and personnel-related issues. Its budget should be made part of the court's overall budget supported by the government. The Draft Law already provided for a "war crimes investigation service"⁹⁸ and a "Special Detention Unit,"⁹⁹ both being technically supported by the Ministry of Justice¹⁰⁰ and financially supported by the government.¹⁰¹ The international experts agreed that, in the same way, the Final Law should also include a Victims and Witnesses Unit.

The costs of adequately running such a unit will be high and are a valid concern for the government. Staffing alone will require substantial resources.¹⁰² In addition, services provided by the unit will involve all stages of the trial process, including investigation, pre-trial, trial and post-trial proceedings.

The unit should provide protective measures to witnesses, people who are at risk because of testimony given by witnesses, and victims who appear before the new court. It is also essential that the unit provide medical and psychological assistance to victims and witnesses. In one of the most significant developments during the workshop, the Serbian government agreed to create a new department that would focus on witness and victim protection. The Final Law included a new section:

A Special Department is hereby established in the District Court in Belgrade for administrative-technical tasks, tasks related to witness and victim protection and facilitating conditions for the application of procedural provisions of this Law (hereinafter "Special Department").

The functioning of the Special Department is [to be] regulated by an act passed by the President of the District Court in Belgrade, with approval of the minister responsible for the judiciary.¹⁰³

The government will still face major challenges if it is to deal effectively with issues relating to witnesses and victims. However, the fact that the Final Law creates a special department to address the concerns of witnesses and victims is a significant sign that Serbia is serious about undertaking domestic war crimes trials.

98. See Draft Law, *supra* note 6, art. 7.

99. *Id.*, art. 11.

100. Article 15 of the Draft Law, *supra* note 6, states: "[T]he Ministry responsible for the judiciary shall provide appropriate facilities and other technical conditions needed for efficient and secure work of the War Crimes Prosecutor's Office, the War Crimes Counsel and the Special Detention Unit."

101. Article 16 of the Draft Law, *supra* note 6, states: "[F]unds for the work of the War Crimes Prosecutor's Office, the War Crimes Panel and the Special Detention Unit shall be provided in the budget of the Republic of Serbia."

102. By 1999, the ICTY had employed 23 people in its Victims and Witnesses Unit. In 2000, over 600 witnesses testified before the ICTY, and over 120 persons accompanied the witnesses. By 2000, witness-related expenses for the ICTY reached \$1.6 million a year. See THORDIS INGADOTTIR ET AL., THE INTERNATIONAL CRIMINAL COURT: THE VICTIMS AND WITNESSES UNIT (ARTICLE 43.6 OF THE ROME STATUTE), A DISCUSSION PAPER, (ICC Discussion Paper #1, March 2000) (on file with author).

103. See Final Law, *supra* note 9, art. 11.

X.
JURISDICTION AND ORGANIZATION OF COURTS

Another provision of the Draft Law that was identified as particularly troublesome was the number of courts that would have jurisdiction over war crimes. Rather than selecting one court (for example the District Court in Belgrade) to handle the new war crimes cases, the Draft Law stipulated that three district courts would have first instance for the criminal offenses—Belgrade, Novi Sad and Nis.¹⁰⁴ Furthermore, the Supreme Court of Serbia would decide which court should conduct the proceedings for each individual case.¹⁰⁵ The international experts indicated that there were several problems with these two provisions of the Draft Law.

First, attempting to create a system for adjudicating war crimes in three separate courts was exceedingly ambitious. When considering the extraordinary administrative logistics of conducting a war crimes trial involving issues such as security, training and court personnel, it is much more advisable to consolidate resources and energy in one specialized war crimes court. Second, placing the Supreme Court of Serbia in the position of having to assign individual cases is overly bureaucratic, could potentially be politicized, and is simply unnecessary. The better alternative would be a single court that is assigned jurisdiction over war crimes cases.

In a major concession to these concerns the Serbian officials made amendments to the Final Law and assigned the District Court in Belgrade jurisdiction as the only first instance court for war crimes trials.¹⁰⁶ In selecting one court the drafters also eliminated the confusion associated with having the Supreme Court determine the assignment of individual cases.

Another jurisdictional issue thoroughly debated during the workshop dealt with the selection of judges for the new War Crimes Court. The Draft Law stated that the President of the Court would appoint judges for a four-year term from a pool of judges already sitting on Serbian courts.¹⁰⁷ The concern expressed by the international experts was that there was no indication of the qualifications or experience required to qualify as a judge. Furthermore, since the judges would be selected from the current pool of sitting judges, there was no opportunity to go “outside” this group of judges to secure the services of any other judges regardless of their expertise in the field of international humanitarian law. Opening up the process to a larger pool of candidates, as well as stipulating clear selection criteria would increase the overall credibility of the new court.¹⁰⁸ Finally, the Draft Law did not mention any procedures for remov-

104. See Draft Law, *supra* note 6, art. 9.

105. *Id.*

106. Article 9 of the Final Law, *supra* note 9, states: “The District Court in Belgrade shall have first instance jurisdiction for criminal offences referred to in Article 2 hereof.”

107. See Draft Law, *supra* note 6, art. 10.

108. Article 10 of the Draft Law, *supra* note 6, contains a potential “expansion” clause for the selection of judges. It reads, in part: “[T]he President of the Court may assign to the War Crimes Panel judges from other courts seconded to this court, with their consent.” However, the Serbian officials indicated that this clause only refers to sitting judges in other district courts.

ing a judge from the court panel. Thus, it is assumed that the total discretion of the President of the Court to select the judges implied authority to dismiss the same judges.

In the end, no changes were made to the Final Law in relation to these jurisdictional issues. Whether the selection process contained in the present law is sufficiently transparent to attract the very best judges, regardless of their current position in the judiciary, will become apparent in the future.

XI.

PRESENTATION OF EVIDENCE

The Draft Law stated that the Criminal Procedure Act (CPA) would apply to the new War Crimes Court.¹⁰⁹ However, the CPA is generally inadequate when applied to prosecutions of complex cases associated with international war crimes. For instance, the rules of evidence under the CPA are inflexible in areas of admissibility of evidence, cross-examination, wire-tapping, and accurately recording witness statements.¹¹⁰ In addition, under Serbian law, evidence admitted in a criminal trial must be virtually incontrovertible. For instance, statements given to the police and statements of law enforcement officers about what defendants or witnesses said are not directly admissible.¹¹¹ More flexible rules of evidence are needed in war crimes cases because they involve complex factual scenarios, as well as hundreds of witnesses and endless exhibits.¹¹²

For example, the yet-to-be-adopted Rules of Evidence and Procedure for the new War Crimes Court should provide flexibility in securing victims' and witnesses' statements rather than requiring personal appearance at the actual trial. The Draft Law omitted any reference to special proceedings for testimony by victims and witnesses. Instead, the Draft Law incorporated the proceedings of the CPA, which are insufficient to address the special needs of victims and witnesses who testify before the court.¹¹³

The problems of requiring victimized witnesses to appear at a trial are manifold. Many witnesses do not keep their contact information current with officials, so service of process can never be properly served. Similarly, many

109. Article 12 of the Draft Law, *supra* note 6, states: "Special provisions of the Criminal Procedure Act, governing the proceedings against the organized crime criminal offences (chapter XXIXa), shall apply to the perpetrators of the criminal offences referred to in Article 2 of this Law."

110. These general concerns on evidence gathering were expressed to the author during interviews in Belgrade. Interviews with Sead Spahovic, State Public Attorney, Mr. Jovan Prijic, Special Public Prosecutor, and Others in Belgrade, Serbia (Apr. 13-18, 2003). Further, under the provisions of the CPA, testimony and statements made in court are entered into the record by a presiding judge. See Criminal Procedure Act, *supra* note 96, art. 312. During trial observations on April 14-15, 2003, the author found that, normally, the presiding judge makes his/her own interpretation of testimony and that becomes the record. Testimony is only entered verbatim on the motion of a party or at the will of the presiding judge. *Id.*, art. 312(3).

111. The statement itself may be read into the record, but questions and answer sessions conducted by the police are not admissible unless "related to the criminal trial." *Id.*, art. 93. Further the defendant may dictate the statement into the record himself if he requests. *Id.*

112. ARCHBOLD INTERNATIONAL CRIMINAL COURTS: PRACTICE, PROCEDURE AND EVIDENCE 249 (Rodney Dixon et al. eds., 2003).

113. See Draft Law, *supra* note 6, art. 12.

witnesses are fearful that their lives will be in danger if they appear in court due to threats of reprisal by those against whom they testify. Others simply refuse to appear.

The international experts thought it imperative that the Final Law contains a provision to guard against such occurrences. They argued that the new War Crimes Court should provide for an exception to the principle of personal court appearance for witnesses in order to protect victims and witnesses. This proceeding should be able to be conducted *in camera* or allow the presentation of evidence through electronic or other means. Specifically, the new court should also allow oral or recorded testimony by means of video or audio technology, as well as the introduction of documents or written transcripts. This type of testimony is particularly important in cases of sexual violence or where the victim or witness is a child. Currently, these protective measures are not possible under Serbia's CPA.

The international experts suggested that the Final Law include language similar to that now incorporated into the ICC Statute:

As an exception to the principle of public hearings [. . .] the Chambers of the Court may, to protect victims and witnesses or an accused, conduct any part of the proceedings *in camera* or allow the presentation of evidence by electronic or other special means. In particular, such measures shall be implemented in the case of a victim of sexual violence or a child who is a victim or a witness, unless otherwise ordered by the Court, having regard to all the circumstances, particularly the views of the victim or witness.¹¹⁴

In yet another significant adoption of international standards, the government added crucial changes to the Final Law that dramatically enhance the opportunity for witnesses to give evidence without appearing in court. The new provision of the Final Law now reads:

When the presence of a witness or victim at the main hearing cannot be ensured, their questioning may be conducted via video conference link. Questioning of witness or victim in the manner specified in paragraph 1 of this Article may be conducted through international legal aid.¹¹⁵ The Court may rule, following a reasoned motion of an interested party, to protect personal information of the witness or victim.¹¹⁶

Further elaboration of these new evidentiary proceedings will have to be incorporated in either the CPA or the still-to-be-adopted Rules of Procedure and Evidence for the court.

XII.

OFFICE OF THE DEFENSE COUNSEL

As already noted, adding a provision in the Final Law for a "Special Department" to deal with administrative and technical issues, including witness and victim protection, was one of the crucial changes made to the Draft Law.¹¹⁷

114. ICC Statute, *supra* note 29, art. 68(2).

115. See Final Law, *supra* note 9, art. 14.

116. *Id.*, at art. 15.

117. See *id.*, art. 11.

The operational details of this new department will be defined by the president of the new court with approval by the Minister of Justice.¹¹⁸

This new Department should also include an Office of War Crimes Defense Counsel. Experiences with the ICTY and ICC have taught as much. The ICTY established the Directive on the Assignment of Defence Counsel in 1994, which has since been amended seven times, because it recognized that providing defense counsel for defendants who are indigent is essential for creating fair and internationally accepted trials.¹¹⁹ The current form of the directive governs the procedures for the assignment of defense counsel, their conduct and the calculation and payment of their fees.¹²⁰ The fact that ninety percent of suspects and accused appearing before the ICTY require assigned counsel demonstrates the importance of supporting the defense counsel for those who are indigent.¹²¹ This undoubtedly will be the situation in Serbia. Eventually, the ICTY established the Association of Defence Counsel in December 2002.¹²²

Similarly, the ICC has already recognized the need to organize the staff of its Registry to promote the rights of the defense. This includes providing support, assistance and information to all defense counsel appearing before the Court.¹²³ The ICC is also in the process of creating an independent defense bar association, pursuant to its rules.¹²⁴ The Serbian Bar Association could support a similar specialized defense bar for the new War Crimes Court.

It is extremely important that the new War Crimes Court provide sufficient support for defense counsel, particularly those attorneys who will defend those who are indigent. The equality of arms requires that there be a fully supported office for defense counsel. In doing so, Serbia will enhance the likelihood of establishing a war crimes court that will meet international standards of due process and gain the support of the entire international community.

XIII.

INTERNATIONAL TECHNICAL ASSISTANCE OFFICE

The challenges of creating a domestic war crimes court for any country are daunting. However, creating such a court for the former Yugoslavia, and partic-

118. The operations of this Department shall be defined by an act made by the President of the District Court in Belgrade and with an approval by the Minister of Justice. *See id.*, art. 11.

119. *Directive on Assignment of Defence Counsel*, U.N. Doc. IT/73/Rev.9 (as amended July 12, 2002). The directive implements ICTY Rules 44 and 45 regarding qualification and assignment of counsel.

120. *Id.*; *see also* Stuart Beresford, *The International Criminal Tribunal for the Former Yugoslavia and the Right to Legal Aid and Assistance*, 2 INT'L J. HUM. RTS. 49 (1998).

121. *See* Report of the Expert Group to Conduct a Review of the Effective Operation and Functioning of the International Tribunal for the Former Yugoslavia, and the International Criminal Tribunal for Rwanda, U.N. GAOR, 54th Sess., Agenda Items 142 and 143, at 64, U.N. Doc. A/54/634 (1999) [hereinafter U.N. Financial Report].

122. Press Release, Registrar of the International Criminal Tribunal for the Former Yugoslavia, Association of Defence Counsel Formally Recognised by the ICTY (Dec. 19, 2002), available at <http://www.un.org/icty/latest/index.htm>.

123. *See* ICC Rules, U.N. Preparatory Commission for the ICC, U.N. Doc. PCNICC/2000/1/Add.1, at 19-20 (2000) (English version).

124. *Id.*

ularly for Serbia, could easily be described as near impossible. A consistent opinion expressed in Serbia is that the political will to adjudicate alleged war criminals simply does not exist.¹²⁵ One step that could be instituted to countermand this general perception is a formal program whereby the international community can function as an advisor to the new court.

Based primarily on pressure from the U.S. government, the new War Crimes Court for Serbia will be exclusively domestic. There will be no direct participation by the international community as there is for other ad hoc war crimes tribunals such as those in East Timor and Sierra Leone.¹²⁶ Although Serbia will receive substantial financial assistance from the international community—primarily from the United States—to establish the new court, there will be no international experts who will “co-participate” as judges, prosecutors or defense attorneys. Considering the complexities of creating and running a war crimes tribunal, the omission of international participants is a mistake.

One possible way of rectifying this omission is to create an International Technical Assistance Office, headquartered in Belgrade. The purpose of this office would be to assist in the government’s efforts to undertake domestic war crimes trials. The International Technical Assistance Office (ITAO) would comprise several full-time international experts, along with a sufficient number of domestic staff. The ITAO would be delegated authority over two important elements of conducting domestic war crimes trials: (1) providing continuing legal education to judges, prosecutors and defense attorneys; and (2) providing trial observers to review, assess and evaluate each trial on a continuous basis.

1. *Continuing Legal Education Training*

The need for a continuing legal education program for the judicial system is all too apparent. The judiciary still suffers from an inferiority complex in relation to the executive and the legislative branches of government. The previous regime left behind a judiciary that was submissive to the state, not respected by the public, and whose judicial findings were often unjust. The greatest challenge facing the new democratic Serbia is to create a truly independent judiciary.

Although judges must have formal university-level legal training, they are not required to have practiced before tribunals, nor are they required to take any specific courses before taking the bench. Similar to most civil law countries, in order to enter the judiciary, law graduates must spend at least two years working as court interns in the municipal district or commercial courts, after which they may take the Bar exam.¹²⁷ Similarly, sitting judges also do not require any

125. See Mission Report, *supra* note 11.

126. Interview with Ambassador William Montgomery, U.S. Ambassador to Serbia and Montenegro, in Belgrade (Apr., 2000).

127. After successfully passing the Bar exam, a court intern may assume the position of court assistant and, after at least two years of experience as a court assistant, a candidate is eligible for appointment as a municipal court judge. Judges at higher courts are required to have between four and 12 years of post-Bar exam legal experience to qualify for appointment. Court interns are eligible to take the Bar exams after two years, but generally may serve up to three years as an intern.

specific training or education; there are no formal training programs and no requirement of continuing legal education courses for judges.

The ITAO would support ongoing training in domestic war crimes trials for the following groups:

- special prosecutors and deputies;
- defense attorneys;
- judges;
- members of the Special Police Unit; and
- court personnel.

The training could be conducted as part of the work of the Judicial Centre for Professional Education and Advanced Training, a joint initiative of the Ministry of Justice and the Serbian Judges' Association and the Humanitarian Law Centre, which is currently conducting continuing legal education programs.¹²⁸ The training should be continuous and not short term. A team of international training experts should be supported through an international legal entity (for example, the IBA) to work directly with the ITAO to design and implement the training program.

The training should focus on issues comprising the substantive and procedural law relevant to prosecuting individuals alleged to have committed gross violations of international law. Further, it should be conducted separately for each targeted group and, when appropriate, jointly on issues relevant to all groups. The international training team could coordinate with other international training programs to provide additional training assistance in domestic war crimes trials.¹²⁹

2. *Trial Observations*

As already stated, prosecuting individuals at a national level for violating international humanitarian law is both difficult and controversial. One major issue is the fairness of the proceedings. Generally, in post-conflict countries, the court system cannot guarantee a fair and politically unbiased judicial process. There is little confidence that such cases can be tried impartially, independently and free of political criminals or other influences, or without ethnic bias.¹³⁰

128. Existing training is targeted at judges, prosecutors and other legal professionals.

129. This training is already being conducted through the Swedish International Development Agency (SIDA), in cooperation with the IBA and the Humanitarian Law Centre. The goal of the program is to enable a cadre of Serbian judges, prosecutors and lawyers to conduct domestic war crimes trials. Another example of training is the ABA/CEELI program which is already involved with strengthening the capacity of the judiciary and the legal profession to deliver justice. The program supports training and technical assistance aimed at boosting the capacity of Serbia's independent Judges' Association, training judges in both civil and criminal procedure through a newly established Judicial Training Centre. See generally SIDA, *Sweden Strengthens the Serbian Judiciary*, at <http://www.sida.se/Sida/jsp/polopoly.jsp?d=107> (Jul. 3, 2001); American Bar Association, CEELI Institute, at http://www.abanet.org/ceeli/special_projects/jtc/serbia.html (last visited Apr. 17, 2004).

130. For instance, the trial of Ibrahim Djedovic in Bosnia drew extensive international criticism after he was found guilty of nationally defined war crimes charges and sentenced to ten years imprisonment despite monitors' reports that there was insufficient evidence to establish guilt beyond a reasonable doubt. He was also denied access to legal counsel during the first five months of his

The trial observer program would not have to duplicate the program created by The Office of the High Representative for Bosnia and Herzegovina ("OHR").¹³¹ The OHR program entitles trial observers to attend and observe any judicial proceeding. They can also inspect all case papers relating to proceedings and may observe any stage of a prosecution, whether pre-trial or otherwise.

The trial observer program for Serbia envisages more of a partnership between the ITAO and the domestic judicial personnel. This will require a "buy-in" from the domestic side based on the understanding that the international trial observers are there to assist the domestic players (judges, prosecutors, defense attorneys and court personnel) in improving the overall process of conducting domestic war crimes trials. The Association of Prosecutors, the Serbian Judges' Association and the Bar Association of Serbia have already indicated their support for this program.¹³²

The ITAO would include a program to review, assess and evaluate each war crime trial continuously. The independent trial observers offer a "check" on court proceedings, including their efficiency, due process, competency and appropriateness.

To gain international recognition of its domestic war crimes trials, the Serbian government will have to ensure that the trials meet international standards. Court proceedings will benefit from international and national observers, trained lawyers and judges, who can independently observe a trial and report on its process. There should be trial observers present throughout each trial, including pre-trial proceedings.

The trial observers should be given authority, notwithstanding any procedural law or regulation to the contrary, to attend and observe the trials. At the conclusion of each trial, the trial observers will hold separate meetings with the relevant judge(s), prosecutors and defense counsel to review the trial and make recommendations for improvement.

XIV. POTENTIAL WAR CRIMES TRIALS

The potential number of war crimes trials that will *actually* take place under the new War Crimes Court is difficult to predict. It will depend largely on

detention, was prevented from summoning defense witnesses and the indictment was substantially altered the day before closing arguments were heard. *See, e.g., Djedovic Says He Was Certain of His Innocence*, ONASA NEWS AGENCY, Mar. 29, 2000, LEXIS, News & Business, All News; *Bosnia: Sarajevo Court Frees War Crimes Suspect for Lack of Evidence*, BBC WORLDWIDE MONITORING, Mar. 27, 2000, LEXIS, News & Business, News, All News; *Opposition Party Says Ruling Muslims using Former Rebel as Scapegoat*, BBC, Jan. 9, 1999, LEXIS, News & Business, News, All News; Tracy Wilkinson, *Bosnian Case Pours Salt on a War Wound; Sarajevo Authorities Have Charged Legislator Who Sided with a Renegade against Fellow Muslims during Conflict*, L.A. TIMES, Oct. 25, 1997, LEXIS, News & Business, News, All News.

131. *See* Consultant's Report to the Office of the High Representative for Bosnia and Herzegovina—the Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina (May 2002) (on file with author).

132. This opinion was expressed to the author in meetings held in Belgrade during April 2003.

the ability of the prosecutor to gain the cooperation of a number of key players. Victims or their families will have to be willing to testify years after the atrocities took place. Most importantly, the government will have to be willing to turn over documents vital to linking the atrocities to government and military personnel. This, in turn, will require the Ministry of Interior and the military to hand over individuals accused of these crimes who are still working in the government or military.

However, the *potential* number of war crimes trials is enormous. This is based on the number of violations of human rights and humanitarian law that took place during the wars in the former Yugoslavia between 1998 and 1999.¹³³ According to unofficial estimates, there are over 10,000 potential suspects in the Bosnian conflict alone.¹³⁴ Over 2,500 suspects have already been reviewed by the ICTY.¹³⁵ The extent of the violations can be appreciated even more by focusing on just one relatively short period in the Kosovo conflict. Between March 24 and June 10, 1999, at the height of the war in Kosovo, the number of atrocities committed against Kosovar Albanians by Yugoslav armed forces, Serbian police and paramilitary forces was significant. Nearly one million Kosovo Albanians were forcefully displaced during this period,¹³⁶ and between 7,494 and 13,627 Kosovo Albanians were killed during the same period.¹³⁷ The vast majority of refugees reported that their property was looted or pillaged by Serbian forces, and that a significant number of civilians were deliberately targeted for cruel, inhuman or degrading treatment.¹³⁸

CONCLUSION

The importance of the Serbian government's decision to create a special court for the prosecution of war crimes cannot be overestimated. Despite the difficulties and challenges of prosecuting persons accused of international humanitarian crimes, the new court represents a milestone for a country desperately seeking normality. Serbia's past complicity in some of the worst atrocities since the Holocaust requires a long, agonizing journey towards atonement and eventual acceptance back into the international community. This can only be achieved if those responsible for the atrocities are held accountable. As long as the perpetrators of those crimes live above the law, never fearing justice, ordinary citizens will continue to deny that the actions of these individuals violated any sense of legal order.

133. These violations can be grouped into several categories: forced displacement; killings; rape/sexual assault; arbitrary detention; destruction, looting, and pillaging of civilian property; torture and inhumane treatment; and confiscation of documents.

134. See Amnesty International, <http://web.amnesty.org/web/web.nsf/print/bih-summary-eng> (last visited Apr. 12, 2004).

135. *Id.*

136. KOSOVO REPORT – INDEPENDENT INTERNATIONAL COMMISSION ON KOSOVO, Annex at 1 (2000).

137. *Id.*

138. *Id.*

The new court should act as Serbia's second stage of accepting accountability, after its recent, albeit reluctant, acceptance of the ICTY. The court's ultimate success will depend on Serbia's willingness to adjudicate alleged war criminals aggressively. Achieving this goal is possible, but only if the Serbian government makes the necessary long-term commitment, accompanied by substantial resources and unwavering political will.

The government's recent exercise to draft a new law creating a special War Crimes Court shows considerable promise for its commitment to hold individuals accountable for gross violations of humanitarian law. Had the Serbian government refused to redraft this law, or to accept assistance from the international community, the attempt to create the special War Crimes Court would have been a monumental failure. The initial Draft Law contained significant weaknesses in areas such as the elements of the offences, jurisdictional issues, immunity, communal responsibility, evidence, witness protection, sentencing, selection criteria for judges and prosecutors, and a host of other issues discussed in this article.

Instead, the government, in cooperation with the OSCE, the U.S. Embassy and the IBA, undertook a two-day workshop with international legal experts to review and improve the Draft Law, prior to its ratification by the Serbian Parliament. As a consequence, the Final Draft incorporated significant changes and improvements from the earlier draft. Some of the more important changes included the expansion of criminal offences that would be prosecuted by the new court, the strengthening of the prosecutor's independence, assurances of greater independence for the Director of the Investigation Service, the creation of a separate department for witness and victim protection, establishing only one district court (rather than three) with jurisdiction for war crimes trials, and expanding and enhancing ways for witnesses to give evidence without appearing in court.

There are, however, still some concerns with the Final Law and its failure to address or resolve several important issues. These issues include the failure to make specific reference to command responsibility, the absence of any language ensuring that no statutory or other limitations shall apply to the prosecution and punishment of crimes, and the decision not to include a provision that would prevent granting of immunity.

Furthermore, it will be imperative for the new court to involve the international community in its administration since there will be no direct participation by the international community in the functioning of the new court, as there is for *ad hoc* war crimes tribunals such as East Timor¹³⁹ and Sierra Leone.¹⁴⁰ Thus, there will be no international experts who will "co-participate" as judges, prosecutors or defense attorneys. To resolve this omission, Serbia should create an International Technical Assistance Office. This office would provide continuing legal education to judges, prosecutors and defense attorneys. It would also

139. See UN Transitional Authority for East Timor (UNTAET), S.C. Res. 1272, U.N. SCOR, 54th Year, Res. & Dec., at 130, U.N. Doc. S/INF/55 (adopted 1999).

140. See S.C. Res. 1315, U.N. SCOR, 55th Year, Res. & Dec., at 108, U.N. Doc. S/INF/56 (adopted 2000).

provide trial observers to review, assess and evaluate each trial on a continual basis.

Now that the Final Law has been promulgated, the next step of creating the court will be the most challenging. This will take time and resources. However, the international community owes it to Serbia to assist in making the Court a success. If this can be achieved, Serbia will have taken the most significant step, since the arrest and surrender of Slobodan Milosevic to the ICTY, in returning to the international community as a nation mindful of its obligations to make perpetrators of war crimes accountable and to bring justice to victims. In doing so, Serbia will have finally discovered that justice is inextricably linked to accountability.