TRANSITIONAL JUSTICE:
ASSESSMENT SURVEY OF CONDITIONS
IN THE FORMER YUGOSLAVIA*

*The scope of this report is limited to Bosnia and Herzegovina, Croatia, Serbia and Montenegro and the UN Administered Territory of Kosovo and does not include FYR Macedonia and Slovenia.
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Team Leader, Judicial Reform/Rule of Law Department
Olivera PURIĆ

Lead Editor and Editors
Djordje DJORDJEVIĆ, Mato MEYER, Olivera PURIĆ

Programme Specialist
Mato MEYER

Programme Adviser
Djordje DJORDJEVIĆ

Authors
Prof. Louis AUCOIN, Prof. Eileen BABBITT

Researchers
Dragana LUKIĆ, Tena ERCEG, Donika KAČINARI, Massimo MORATTI

The following have participated
Maja KOVAČ, Jovan NICIĆ, Igor BANDOVIĆ, Saša MADACKI, Mirsad BIBOVIĆ, Alma DEDIĆ, Dušan IGNJATOVIĆ, Mladen IVANOVIĆ, Virgjina DUMNICA, Aleksandar PAVIĆ, Siniša MILATOVIC, Jelena MACURA, Biljana LEDENIČAN, Joanna BROOKS, Slobodan GEORGIJEV, Olga BELOSAVIĆ, Tijana JANIĆ, Milica MUDRIĆ, Ivana, Ramadanoić-VAINOMAA, Jelena ĐONOVIĆ, Aleksandra MILETIĆ-ŠANTIĆ

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Tatjana KUBUROVIĆ

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DISCLAIMER

“The views expressed in this publication are those of the authors and do not necessarily represent those of the United Nations, including UNDP, or their Member States”
The regional scope and designation of study areas in the report were dictated by research objectives and methodological constraints and do not reflect the existing state, political or other community distinctions or those of the conflicts of 1991-1999 in the region. Rather, the research areas were determined on the basis of the existing legislative frameworks, and policy decision-making and implementation authorities. Therefore, the study centers on five designated areas, the Federation of Bosnia and Herzegovina, Croatia, Kosovo and Serbia and Montenegro, while distinctions were further made between conditions in Montenegro and Serbia, and Bosnia and Herzegovina and the Republic of Srpska whenever such need emerged. With the primary goal to focus on the legacy of large-scale past abuses, the survey does not consider two countries formerly part of the SFR Yugoslavia, FYR Macedonia and Slovenia, due to different levels of violence sustained and varying need for transitional justice responses in these countries.
I. EXECUTIVE SUMMARY
The violent dissolution of Yugoslavia, which occurred most dramatically from 1991-1995 and continued in Kosovo in 1999, has left its legacy in every state in the region. The places that have come to embody the war are reflected in the titles of the most well-known legal cases: “Ovčara”, the “Vukovar Three”, “Gospic,” “Srebrenica.” Each one evokes images of atrocities that remain imprinted upon the minds and hearts of the local populations, as emblematic of wounds that can never be forgotten but must be addressed, and hopefully healed, if the region is to move forward and prosper.

To this end, the United Nations Development Program in Serbia and Montenegro launched a new program in Transitional Justice in January 2005. The study results provided in this Assessment Survey complete the first phase of the new initiative. It describes the existing programs and processes in transitional justice in each of four designated research areas: Bosnia and Herzegovina, Croatia, Kosovo, and Serbia and Montenegro. The research for UNDP Serbia and Montenegro was conducted by two professors from the Fletcher School of Law and Diplomacy in the United States, Louis Aucoin and Eileen Babbitt, with the assistance of three local focal points/researchers: Dragana Lukic in Belgrade, Tena Erceg in Split/Zagreb, and Donika Kacinari in Pristina. Two research assistants at Fletcher, Kristen de Remer and Marina Travayaikis, assisted Profs. Aucoin and Babbitt. In putting together the regional report UNDP Serbia and Montenegro was assisted by UNDP Bosnia and Herzegovina, whose recent report on transitional justice conditions in Bosnia was used for analytical coverage of this part of the region. The data from Bosnia and Herzegovina was compiled by the UNDP office in Sarajevo in collaboration with independent researchers and the International Center for Transitional Justice, and then integrated into this final report. Massimo Moratti, who was a part of the team working on the UNDP Bosnia and Herzegovina report, provided additional research for Bosnia section of this report. UNDP offices in Podgorica, Pristina and Zagreb also provided additional expert and logistical support. This study was made possible through funding pro-
vided by UNDP’s Thematic Trust Fund for Crisis Prevention and Recovery (CPRTTF).

In conducting this study, we drew principally upon the definition of transitional justice provided by the UN Secretary General in his August 2004 Report to the UN Security Council on the Rule of Law and Transitional Justice: “The notion of transitional justice comprises […] the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation.” Based on the UNSG’s definition and on the developing common framing of transitional justice, we have concentrated our data collection and analysis in four areas: prosecutions, vetting, truth-seeking mechanisms, and reparations. Each of these elements is discussed in a separate section of the report, with analysis by designated area and then comparative analysis across the region under each heading. We then identify several important cross-cutting themes that are crucial in developing approaches to transitional justice in the region. Finally, we offer recommendations on future directions for transitional justice programming.

In brief, our primary findings and recommendations include the following:
PROSECUTIONS

The survey provides an overview of prosecutions of crimes committed in the former Yugoslavia throughout the 1990’s. It covers prosecutions before the ICTY as well as domestic prosecutions, the latter in considerable detail since our interviewees consistently cited this mechanism as a transitional justice priority.

The ICTY

The ICTY was created by the United Nations in 1993 and represents the international community’s belated response to the atrocities committed during the war. While it is beyond question that the tribunal is a milestone in the pursuit of international justice, it has been criticized for its failure to bring justice to victims in the region. Nevertheless, over 3500 witnesses have told their stories while testifying in court. The tribunal has also been criticized for its cost; the current budget for the biennium 2005-2006 is $311 million. Residents in the former Yugoslavia lament the cost and the fact that these resources have not been applied to strengthen the impoverished judiciaries in the region.

In recent years, the Tribunal has created an outreach program aimed in part to improve its public image and build the capacity of local judiciaries and has established a completion strategy that provides for transfer of cases and termination of the Tribunal by 2010. As the ICTY executes this strategy, cooperation/non-cooperation by local actors with the Tribunal has emerged as a significant issue associated with future EU accession.

Domestic Prosecutions

Local prosecutions have been structured differently in each local setting; likewise, different problems have been encountered in each, although some challenges such as those associated with witness protection and extradition are common to all. In Bosnia, where the largest number of war crimes occurred during the war, a hybrid international/local tribunal has been created in the form of the War Crimes Chamber (WCC) of the Bosnia and Herzegovina State Court in Sarajevo. This court has begun handling the most serious cases, while the vast majority of cases will be handled by cantonal and district courts. In Croatia, all war crimes were initially handled by local courts, but as part of a reform in 2003, four district courts were established as “special courts” for the prosecution and trial of these cases.
Kosovo, ad hoc panels are composed on a case-by-case basis for the trial of these crimes. The composition of the panels has evolved over time. Initially they were hybrid panels with a majority of local judges, then their composition changed to majority international, and currently they are panels composed exclusively of international judges with international lawyers serving in the prosecutorial role. In Serbia in 2003, special police and prosecutorial units were established by law for the prosecution of war crimes along with the Special War Crimes Panel within the Belgrade District Court. In Montenegro, the one war crimes prosecution which has been undertaken to date has taken place in the ordinary criminal courts.

A variety of problems have been encountered in the pursuit of war crimes prosecutions throughout the region. These include ethnic bias, impunity for high-ranking officials (including a failure to apply the international doctrine of command responsibility), lack of police cooperation, trials in absentia, unsubstantiated charges, and failure to respect norms of due process. The problems, which are particular to each one of the settings, are analyzed in our report. In 2003, largely driven by the incentive of future EU accession, Croatia and Serbia introduced significant reforms in this area.

Witness intimidation has been a constant impediment to successful prosecution and has required continued refinement of witness protection measures. Since alleged perpetrators have frequently fled the jurisdictions where the crimes were committed, the issue of extradition/transfer has also become significant. Since extradition of nationals is forbidden in every state we reviewed, and the perpetrators frequently benefit from dual citizenship, the only hope for prosecution of alleged perpetrators who have fled prosecution is to try them where they are found. This would require transfer of the case from the place where the crime was committed. Although multi-lateral agreements on exchange of documentation and access to witnesses have been established, mechanisms in transfer of cases have thus far occurred on an ad hoc rather than a systematic basis.

**VETTING AND LUSTRATION**

The lack of progress with respect to the issue of vetting in the region has been described eloquently by the Center for Democracy and Reconciliation in Southeast Europe (CDRSEE) in their October 2005 report, “Disclosing Hidden History: Lustration in the Western Balkans.” It documents the abortive and unsuccessful
attempts to address the issue through legislative reform throughout the region. It summarizes the situation quite emphatically and succinctly as follows:

In short, lustration did not take place in the Western Balkans. Even in the cases where appropriate lustration laws were passed, the public authorities failed to implement them [...] . The interest of the general public has been focused on other issues, and civil society was not strong enough to bring this issue to the fore. The mainstream information media did not place the issue on the public agenda in a way and to an extent that would have been appropriate and necessary. Most international actors involved in democracy building in the Western Balkans paid little or no attention to contested issues surrounding the dealing with the past. All of this had negative repercussion on democracy and the rule of law.

It calls for immediate adoption of lustration laws and for the immediate vetting of incumbents and future candidates for public office.

In Bosnia, some progress has been made; police forces, candidates for ministerial positions, army generals, and judicial personnel were vetted by the international administration for their moral integrity, technical skills and qualifications, property and financial status, and war crimes record. At the same time the Office of the High Representative had the authority to dismiss officials who were seen as obstructing the peace implementation process. In addition, the Srebrenica Commission has compiled a list of names of people who were allegedly involved in the massacre there. Although the list has been turned over to the government of Republic of Srpska there is as yet no indication that it is being used.

The efforts in Croatia and Serbia have been more minimal. In Serbia, a lustration law was adopted in 2003, which provides for the vetting of those who seek or hold public office. It purports to vet those in this category for their individual responsibility for human rights violations starting in 1976, the year in which Serbia ratified the ICCPR. So far no actions have been taken under this law. In Croatia, there have only been two legislative proposals limited to vetting for abuses committed during the Communist era, and neither of these has passed.

Vetting and lustration are challenging to implement because of several inherent complications. These include the determination of the criteria by which individuals will be prevented from assuming public posts or removed from their jobs, and the decision on who will have authority to apply such criteria. There is a danger that criteria could be set in a way that exacts revenge, or that innocent people could be penalized without due process.
Therefore, lustration and vetting must be approached very carefully. Although the lack of lustration laws in the region is an admitted gap, parliaments should not rush to fill the gap without studying what has worked in other contexts and consulting with experts who have experience with such practices. At the same time, the need for government action in this domain is unquestionable because civil society in some parts of the region has already begun to gather names for vetting with obvious implications for those whose reputations and careers are at stake. In light of this fact, government action is imperative so as to ensure that justice is meted out fairly and effectively.

TRUTH-SEEKING

Our analysis focused on four categories of truth-seeking activities: truth commissions, documentation efforts, media reporting, and the search for missing persons.

Truth Commissions

Only the governments of Serbia and Bosnia and Herzegovina have explored the possibility of setting up national truth commissions. Serbia created a truth commission in 2001, but it has been widely criticized as an ill conceived initiative. It has become clear since its demise that populations throughout the region are highly suspect of any government initiative that purports to uncover the truth about the war. Discussions about a Bosnian truth commission are currently ongoing, although the idea has met with considerable local opposition.

There are currently two regional efforts that could lead to the creation of a truth commission. One is the proposal for an “International Victims Commission for the former Yugoslavia.” It is being proposed by the International Center for Transitional Justice in collaboration with the Regional NGO Network (HLC Belgrade, RDC Sarajevo and Dokumenta Zagreb). The other regional effort is the Igman Initiative based in Novi Sad, Serbia in collaboration with NGOs in Croatia and Bosnia and Herzegovina. It more generally proposes the creation of “a model for reconciliation on the regional level”.

Any future effort to create a truth commission or something resembling it in the region will have to overcome entrenched local attitudes on all sides that reflect
a deep seated denial of any war-related responsibilities. In addition, the failure of the commission in Serbia makes it clear that any future commission would have to guarantee inclusion, transparency, and impartiality if it were to have any hope for success.

Documentation

As one of our NGO interviewees so eloquently put it, documentation efforts are essential in order to establish, as much as is possible, an accurate record of what happened during the war years in this region in order to prevent future leaders from manipulating the memory of these events to ignite inter-group fears and retribution. They rightly point to the lingering differences of perspective on the events of World War II as evidence of how the past can be used for cynical political gains.

There has been significant documentation of war crimes and human rights violations concerning the war years in the region, undertaken by governmental agencies, international and local NGOs, and international institutions. However, some of these efforts are undertaken to prove that “we are right and they are wrong” rather than to produce evidence that attempts to approach “objective” truth—i.e., documentation to justify rather than to clarify. This can be especially the case when the documentation is done by government offices. That is why NGO efforts and the work of international institutions are necessary as well, as a check on the political agendas that may drive governments to engage in documentation of abuses.

Different methodologies have been used in the pursuit of these efforts. These methodologies have included the collection of video and photographic evidence, interviews with major actors and political analysts, the creation of documentary films, the collection of testimonies from victims and perpetrators, the promotion of public dialogue, the establishment of public policy initiatives, court monitoring and judicial reform, education, the support and protection of war crimes witnesses, the search for missing persons, and the provision of assistance in the establishment of reparations claims.

However, even the biased slices of truth-seeking could be extremely valuable if there were a way to see them as part of a whole mosaic; in fact, one of the most important elements in truth-seeking is to recognize that in such complex environments as the former Yugoslavia, there are multiple truths rather than one objective account of events. But seeing this whole picture is hampered by the fact that
there is no one repository for these documentation efforts. And in fact, some of them are not publicly available at all.

The challenge in the region is to find both a physical location and the appropriate sponsorship for a regional archive, one that can be embraced by both governments and NGOs as well as by all ethnic groups in the region. At the moment, it is hard to imagine one location that everyone from all of the former Yugoslavia would feel comfortable visiting. Nevertheless, given the existence of conflicting national narratives about war events and resulting additional significance of the ICTY as an independent and out-of-region institution in establishing the facts on a large scale, it will be important that its archives find their final destination in a single or on multiple locations in the region. Also, in the near term, existing documents must be publicly available wherever they currently reside. Without such access, the truth-seeking agenda is severely compromised.

**Missing Persons**

Missing persons are a significant source of ongoing tensions and of unhealed wounds in all societies in the region. It is a painful reminder of the legacy of human rights abuses during the war years, and therefore the resolution of open cases should be a priority for all governments in the region. According to international agencies, in 92.5% of cases of persons still missing, there is no information at all that could lead to their identification, and in 7.5% of these cases, the missing persons have been confirmed as dead but there remains have not been identified.

Progress has been greatly impeded by the lack of cooperation of certain actors from the various ethnic groups who are unwilling to release or in some cases even pursue information which might, in their view, undermine their status as victims during the war. Nevertheless, there have been activities undertaken by governments and family associations throughout the region; the ICMP is attempting to coordinate efforts throughout the region; and the ICRC role in the sub-regional coordination between Belgrade and Pristina is also noteworthy.

Two significant gaps are apparent in the attention to missing persons. The first is in Kosovo, where the political agenda of the respective parties is hampering identification of missing persons; even with ICRC assistance, there has been little progress in finding the bodies of those who have been killed. In UNSC Resolution 1244 that set up the UN protectorate in Kosovo, there is no mention of missing persons and also no mention in the “standards” that have been set as the prerequisite for
“status” talks. Our interviewees strongly recommended that the resolution of the missing persons issue should be included as a “standards” issue, for without that push from the international community, the parties may not have the incentive to produce the truth.

The second gap is in Croatia, where questions raised about the method of reporting of missing persons is keeping government agencies from taking full responsibility for finding missing Croatian Serbs. As with prosecutions, the EU accession process may be a way to provide incentives to the governments to take minority rights seriously, not just in principle, but in practice.

Media

Print and broadcast media can be either a help or a hindrance in truth seeking. Certainly they have played both roles in the former Yugoslavia. While there are some brave efforts to bring the truth to the public, the so-called “yellow press” is more the norm: many newspapers and radio stations are used by government to present their politicized point of view as “news,” or to publicly demonize someone before removing them from office. There are only a few examples of media independence in the region, and these are notable exceptions rather than the rule. These include: the Nezavisne Novine newspaper and the SaGA film production company in Sarajevo; the Feral Tribune of Split; and the radio and television station B92 in Belgrade.

Because of the great potential of the media to reach a broad constituency, it is crucial to support those media outlets that pursue truth-seeking, while at the same time putting pressure on local governments to assist in the process. It may never be possible to eliminate the “yellow press,” but considerable efforts must be made to ensure that alternative media also survives. As our NGO colleague said of documentation work, free media is crucial to prevent people from being manipulated by distorted information.

REPARATIONS

Our study looked at the following categories of reparations: (A) material reparations between states; (B) material reparations within states, primarily the restora-
tion of property rights; and (C) symbolic reparations in the form of public apology and/or the establishing of monuments and memorials.

Reparations between states in the region are, to date, quite limited. Montenegro is the notable exception, where the state government calculated it to be in the state’s interests to repair its relationship with Croatia. In most cases, however, state-to-state reparations are being sought through court proceedings, with doubtful payment being made even if the court demands it. Symbolic reparations, discussed below, are much more likely to be made between states than actual exchanges of funds.

Although a gap currently exists in terms of the payment of state to state reparations, the pursuit of such via adjudication will not serve the interests of the region, in that it further polarizes inter-state relations. It would be much more productive to pursue the possibility of such payments in the context of a regional truth-seeking process, as has been discussed in a previous section.

The only tangible reparations projects within states in the region have been efforts to restore property to its pre-war owners or to compensate owners if their property was destroyed. To our knowledge, no country in the region is providing any other tangible form of reparations to victims, such as legal assistance or social support services. Overwhelmingly, victims of property loss or destruction are members of ethnic groups who fled a particular area out of fear for their physical safety. It is therefore not surprising that the countries/areas most involved in internal reparations projects are those whose populations were most substantially displaced: Bosnia and Herzegovina, Croatia, and Kosovo.

Bosnia and Herzegovina has made the most progress on restoration of property rights to war victims, largely due to intense pressure from the international community. Property rights are intimately connected to the return of refugees and IDPs, and return was a significant international goal expressed in Annex 7 of the Dayton Peace Agreement. It was not a goal of most political leaders representing majority groups in any part of the country, and if the process had been left in their hands, neither return nor restitution of property would have occurred.

Although the international community also has a substantial presence in Kosovo, they have not exerted the same kind of pressure as in Bosnia. The system set up for processing claims does not seem to be working effectively. As with all other issues in Kosovo, it is hard to imagine property rights being completely sorted out until negotiations on status are concluded. It is likely that the Albanians in Kosovo will be asking for compensation of various kinds from the Serbian government in the context of status talks. And undoubtedly, the Serbs in Kosovo as well as those
who have fled to Serbia will be seeking reparations as well – from the Albanians who now dominate the interim and any future government.

Despite progress, Croatia’s record is the most mixed. While attending fairly well to the legal aspects of property rights, the government has done less well in providing financial compensation to property owners or the materials needed to rebuild damaged homes. In addition, there is ongoing discrimination in favor of Croat refugees and IDPs who were housed in Serb homes during the war, and against the Serbs who are returning. Serbs from the Krajina who fled to Serbia and Bosnia and Herzegovina during Operation Storm are no longer considered legal citizens of Croatia, and their property rights if they return to Croatia are precarious because of this. The most egregious outcome is that virtually all Croatian Serbs who lost tenancy rights have been prevented from reoccupying their pre-war homes and have not received substitute housing.

The biggest gap, therefore, in material reparations within states is the huge discrepancy between the legal reforms adopted in most states that provide for property rights and the actual implementation of those laws. Minorities in all states are still the victims of extensive discrimination in many forms, including access to housing. Only in Bosnia, with substantial international pressure, has progress been made.

Some government officials from Croatia and Serbia have made public apologies for atrocities committed during the war years; this is notable, for it is actually quite unusual for public apologies to be given so soon after the conclusion of a war. This can be taken as a constructive sign that the governments of the region have at the very least accepted the fact that individuals are culpable for war crimes and human rights abuses. However, no government has yet admitted state-level responsibility for atrocities. For example, the Republic of Srpska statement in response to the Srebrenica Commission’s report, while apologizing for the pain caused by the massacre, stops short of accepting any responsibility for the crime. Given that, it is likely that the impact of these statements on reconciliation between countries and ethnic groups will be minimal. Also, without more specific reparations on an individual level, families who lost loved ones will not be placated only by government statements. On the positive side, public apologies can signal a government’s willingness to participate in individual-level prosecutions, which is certainly a step forward for the region.

The use of memorials has been universally divisive and ethnically focused. It is not surprising that, only a decade after the violence, there are no joint commemorations...
tions of those killed in the war. It will certainly take longer for a larger sense of shared identity to emerge that enables such joint projects.

CROSS-CUTTING ISSUES

The final section of the report considers three cross-cutting issues which might otherwise escape scrutiny. The first is the relationship between transitional justice and the disenfranchised. Here we focus on minority groups in the region whose needs are not being addressed through the four primary mechanisms of transitional justice, even though they were also victims during the war; refugees and IDPs in Serbia and Montenegro are a prime example. The second cross-cutting issue is the relationship between transitional justice and reconciliation. Here, we underscore once again the importance of documentation and the identification of missing persons to the transitional justice goal of reconciliation. We also note alternative the high school curriculum developed by the Center for Democracy and Reconciliation in Southeastern Europe for the teaching of history in a non-nationalistic way, to promote tolerance and the acceptance of differences. In addition, we assert the necessity of addressing Serbia’s pariah status in the region if sustainable reconciliation is to occur.

Finally, we consider when there is a comparative advantage in pursuing these transitional justice approaches at the regional or international level rather than at the national level. Similarly, we explore if there are benefits to having them undertaken by civil society rather than governments. In this context, we emphasize the importance of regional cooperation in prosecutions and documentation, the need for international intervention in the same areas, and identify a role for civil society in prosecutions (witness support and protection and war crimes investigation) and in the promotion of reconciliation through truth-seeking.
RECOMMENDATIONS

Primary Importance

- Support for NGOs, various forms of outreach programmes and media outlets pursuing truth-seeking, through coordination and consolidation, and in the form of expert, financial and technical assistance on local, national and regional level
- Resolution of open cases of missing persons through increased coordination of agencies working in the field and cooperation with local authorities and actors
- Adopt common witness protection standards, including legal protection and counseling of witnesses
- Set up a regional archive for documentation gathering, and secure regional ownership of the materials from the ICTY when it disbands, as a basis for future regional and/or national research and documentation centers.
- Promote/provide training and capacity building for conducting prosecutions, at both the regional and national levels, especially in parts of the region expecting an influx of cases in the near future and undergoing structural reform of prosecutions.
Secondary Importance

- Refine the structural arrangements for prosecutions, to include the increased recruitment of specialized police and a more systematic transfer of cases to the specialized or specially designated war crimes panels/chambers.

- Establish public information and outreach programmes of domestic courts, and increase cooperation of domestic courts with NGOs in providing access to witnesses from other parts of the region and victims support programmes.

- Encourage the commitment of local governments to truth-seeking.

- Increase donor coordination between the EU and other international actors in the promotion of reform of domestic prosecutions.

- Support the CDRSEE initiative on lustration, to pave the way for future action.

- End discrimination in the way that property rights are administered; provide funding and staff assistance to agencies focusing on this issue.

- Fund the building/renovating of housing for those whose homes were destroyed or confiscated.

- Discourage overtly nationalist memorials that insult other groups, while encouraging creation of ethnically and socially inclusive national public policy on all form of commemoration of the 1990’s conflicts in the region.
II. OVERVIEW OF THE STUDY
The violent dissolution of Yugoslavia, which occurred most dramatically from 1991-1995 and continued in Kosovo in 1999, has left its legacy in every state in the region. The towns that have come to embody the war are found in the titles of the most well-known legal cases such as “Ovcara” (a farm near the town of Vukovar), the “Vukovar Three”, “Gospic,” and “Srebrenica.” Each one evokes images of atrocities that remain imprinted upon the minds and hearts of the local populations, as emblematic of wounds that can never be forgotten.

In January 2005, the United Nations Development Program in Serbia and Montenegro launched a new program in Transitional Justice. The rationale for this project, is the belief that a “consolidated effort [on transitional justice] with governmental support will potentially ensure an effective reconstruction of the tattered social fabric and ease development initiatives in general.” The study results in this document, part of Phase I of the Transitional Justice Initiative, provide an Assessment Survey of existing conflict-related legacies and transitional justice responses in the region. The survey describes the existing programs and processes in transitional justice occurring in each of four designated research areas, Bosnia and Herzegovina, Croatia, Kosovo, and Serbia and Montenegro, and then provides a comparative analysis of successes and failures and recommendations for further action. The report is a result of cooperation between the UNDP Country Offices in Serbia and Montenegro and Bosnia and Herzegovina, with UNDP Bosnia and Herzegovina providing the core assessment of conditions in Bosnia and Herzegovina. Thus, the final survey integrates the findings of a separate study in Bosnia and Herzegovina, done by a group of external consultants in collaboration with the UNDP office in Sarajevo.

Overall, we found that even though many people in the region expressed a deep sense of pessimism about the extent to which transitional justice is being taken seriously, in fact there is substantial progress and many notable examples of creative initiatives. These include the recent arrest of General Gotovina of Croatia, one of the key war crimes
suspects indicted by the ICTY, and the recent convictions in the “Ovcara” case in Serbia. Also, there is increasing regional cooperation on the documentation of war crimes and the identification of missing persons. However, more work is needed in all of these areas, as the report will discuss. In particular, we would highlight the unwillingness of all states to implement effective vetting procedures; the lack of government support for truth-seeking mechanisms, including continued undermining of media reporting on war crimes; and insufficient attention and funding of reparations for war-related losses of property and status.
III. DEFINING TRANSITIONAL JUSTICE
In conducting this study, we drew principally upon the definition of transitional justice provided by the UN Secretary General in his August 2004 Report to the UN Security Council on the Rule of Law and Transitional Justice: “The notion of transitional justice comprises... the full range of processes and mechanisms associated with a society’s attempts to come to terms with a legacy of large-scale past abuses, in order to ensure accountability, serve justice, and achieve reconciliation. These may include judicial and non-judicial mechanisms with differing levels of international involvement (or none at all) and individual prosecutions, reparations, truth-seeking, institutional reform, vetting and dismissals, or a combination thereof.”

To continue quoting from the UN Secretary General’s report:

Justice, peace and democracy are not mutually exclusive objectives, but rather mutually reinforcing imperatives. Advancing all three in fragile post-conflict settings requires strategic planning, careful integration and sensible sequencing of activities.

International or mixed [...] tribunals have helped bring justice and hope to victims, combat the impunity of perpetrators and enrich the jurisprudence of international criminal law. They have, however, been expensive and have contributed little to sustainable national capacities for justice administration.

But while tribunals are important, our experience with truth commissions also shows them to be a potentially valuable complementary tool in the quest for justice and reconciliation, taking as they do a victim-centred approach and helping to establish a historical record and recommend remedial action. Similarly, our support for vetting processes has shown them to be a vital element of transitional justice and, where they respect the rights of both victims and the accused, key to restoring public trust in national institutions of governance. Victims also benefit from well-conceived reparations programmes, which themselves help...
ensure that justice focuses not only on perpetrators, but also on those who have suffered at their hands.⁴

We endorse the UN Secretary-General’s view that the various approaches to transitional justice are potentially complementary, and a careful consideration of when and how to implement each of these approaches increases the possibility for a sustainable recovery from violent conflict. Our study, therefore, will consider progress made in four of the five areas, both separately and in concert with each other: prosecutions, vetting, truth seeking, and reparations.
IV. METHODOLOGY OF THE STUDY
The research was conducted by two professors from the Fletcher School of Law and Diplomacy, Louis Aucoin and Eileen Babbitt, with the assistance of three local focal points/researchers: Dragana Lukic in Belgrade, Tena Erceg in Split/Zagreb, and Donika Kacinari in Pristina. Two research assistants at Fletcher, Kristen de Remer and Marina Travayakis, assisted Professors Aucoin and Babbitt. A separate study was done in Bosnia and Herzegovina, conducted by the UNDP office in Sarajevo in collaboration with independent researchers and the International Center for Transitional Justice. The relevant findings from that study have been incorporated into this report. Massimo Moratti, who was a part of the team working on the UNDP Bosnia and Herzegovina report, provided additional research for Bosnia and Herzegovina section of this report. In addition, UNDP offices in Podgorica, Pristina and Zagreb provided logistical support, while individual members of an Advisory Board of the Transitional Justice Programme reviewed the draft report and gave specific guidance for the final version. Annex A provides the names of the Advisory Board members.

The researchers relied upon documentary analysis and interviews with key individuals, both local and international, with expertise in transitional justice programs in the areas under review. Over forty interviews were conducted during a two-week initial visit to the region in August 2005 by Professors Babbitt and Aucoin, and supplemented by additional interviews done by the local researchers and by Babbitt and Aucoin during September-October 2005. Annex B lists the individuals interviewed for this report, along with their institutional affiliation and/or area of expertise.

To structure the interviews, an initial list of questions was drawn up prior to the August 2005 mission (See Annex C). These questions were later revised and expanded as more information became available. In addition, the situation on the ground continued to change, as prosecutions continued and further programmatic innovations took place in the region. We attempted to keep current with such develop-
Based on the UNSG’s definitions and on the developing common framing of transitional justice, we have concentrated our data collection and analysis in four areas: prosecutions, vetting, truth-seeking mechanisms, and reparations. Each of these elements is discussed in a separate section of the report (V-VIII), with analysis by country and then comparative analysis across the region under each heading. These sections also contain our assessment of the gaps that exist in current transitional justice efforts, in addition to noting where creative and/or effective approaches might serve as models for the region. In addition, we have drawn upon our experiences working in other regions of the world as well to indicate where the accomplishments of others might serve as useful models. Section IX presents cross-cutting issues that integrate several elements, allowing us to look at the data from a new perspective. And Section X offers an assessment of where future directions in transitional justice programming in the region might proceed.

5 We are assuming that vetting is an initial phase of institutional reform; it was decided at the outset that a full-scale analysis of institutional reform processes would not be feasible for this research, and would also take the focus off of transitional justice and into rule-of-law processes more broadly.
V. PROSECUTIONS
Most of the interviewees whom we encountered in the region in connection with this study expressed the view that they believed that the successful prosecution of war crimes was the most important aspect of transitional justice and should be given priority. Consequently, we have prioritized this issue in our report. We have provided a brief description of prosecutions occurring at the ICTY and have offered considerable details on domestic prosecutions in Croatia, Kosovo, Montenegro and Serbia. Domestic prosecutions in Bosnia have been analyzed in a separate report that we have attached as an Appendix to this report, and we have integrated the results of that aspect of the report in this section.

This report comes at what may prove to be a crucial juncture in the pursuit of retributive justice for the crimes that were committed during the war. As we will explain below, The ICTY has completed its investigations and prepared a completion strategy that includes the transfer of cases to local judiciaries in the region. As countries in the region strive toward future EU accession, there is no doubt that there is progress to be noted both in terms of the local prosecutions of these crimes and in the terms of cooperation with the ICTY. The recent capture of Ante Gotovina, one of the most wanted war crimes suspects, and the recent verdicts in Serbia in the Ovcara case are clearly indicative of that progress. Yet, as Carla Del Ponte, Chief Prosecutor of the ICTY has noted in her recent report of 15 December 2005 to the United Nations Security Council, problems relating to cooperation remain and the two most wanted war crimes suspects, Ratko Mladic and Radovan Karadzic, are still at large. Similarly, while recent reforms established in every part of the region can be associated with specific improvements in local prosecutions of war crimes, significant challenges remain in this connection as well. What follows in this chapter is a review of both the progress and problems associated with both local and international prosecution of war crimes committed in the region.
The first section of this chapter on prosecutions deals with prosecutions before the ICTY and the second section deals with the domestic prosecutions. The latter section concludes with a subsection that offers comparative analysis of various issues of importance relating to the domestic prosecutions. The issues discussed in that subsection are related to the structural arrangements in each of the countries for domestic war crimes prosecution, command responsibility, cooperation and extradition, training, witness protection, and outreach and cooperation with NGOs.

While we have given priority to our analysis of war crimes prosecutions, we nevertheless would like to point out that in other countries which have had to grapple with transitional justice, there has often been an evolution from focusing on prosecutions to increased focus on the other three aspects of transitional justice which we analyze in the subsequent chapters—reparations, truth seeking and vetting. This evolution has typically involved a diminished emphasis on the retributive justice, associated with prosecutions and placed more emphasis on the restorative justice aspects of the other transitional justice mechanisms. We offer this observation to suggest that although the emphasis is clearly on prosecutions at this stage of transitional justice in the region, increased emphasis on the other aspects of transitional justice may occur as the project evolves.
A. PROSECUTIONS BEFORE THE INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

The creation of the ICTY was a belated response to the massive and sustained violence that ravaged the Balkan landscape during the 1990s. When the international community established the ICTY in 1993, its main objectives were the deliverance of justice to the victims and communities of the region, as well as the promotion of reconciliation. The creation of the ICTY has since helped the international community to expand the boundaries of international humanitarian and criminal law, hold world leaders to higher standards of accountability, and strengthen the rule of law.

One of the major criticisms of the ICTY, however, is the lack of balance between servicing the law and bringing justice to the victims. Despite this criticism, the ICTY has made significant contributions to international justice that benefit, albeit indirectly, the victims of the region. First, the creation of a criminal tribunal signaled the international community’s desire to end the culture of impunity, characteristic of international relations. It empowered the international community to hold civilian and military leaders accountable for war crimes and other serious violations of international law. In doing so, the ICTY has personalized guilt. The first President of the ICTY, Antonio Cassese, repeatedly emphasized the important role of a judicial mechanism to promote reconciliation through the individualization of guilt. “If responsibility for the appalling crimes perpetuated in the former Yugoslavia is not attributed to individuals,” he maintained, “then whole ethnic and religious groups will be held accountable for these crimes and branded as criminals.”

The ICTY has brought justice directly to the victims by including them in the investigations of court proceedings. To date, over 3,500 witnesses have told their stories while testifying in court and the Office of the Prosecutor has interviewed an additional 1,400 potential witnesses. This process of truth telling has given witnesses and victims a real sense of their involvement in the work of the Tribunal, as well as offered local communities public acknowledgement and recognition of their suffering. In addition, the testimonies of witnesses and victims before an impartial tribunal have developed a historical record of the conflict in which the distortion of the truth had been an essential ingredient of the continual cycle of ethnic violence.

Not surprisingly, the ICTY requires significant resources to finance the core and developmental activities of its three bodies (Chambers, Office of the Prosecu-
tor, and Office of the Registrar). The current biennium budget for 2006-2007 is approximately $276 million. Though massive at first glance, it is quite limited given the number of activities undertaken by the Tribunal.\(^8\) In addition to ongoing trials, the ICTY established the Detention Unit, victim and witness protection program, legal aid system, law library, and training program. Clearly, no state could have afforded to take on the cost of delivering the number of programs and resources provided by the ICTY. However, critics have long argued that the money and resources devoted to the Tribunal have retarded the development of domestic jurisdictions throughout the Balkans. As a result, local authorities for years lacked the resources, legal knowledge, and facilities to prosecute war crimes suspects at home.

In order to hasten the development of the domestic judicial systems and satisfy critics, the ICTY adopted a completion strategy in 2003 that obliges the Tribunal to complete all trials by the end of 2008 and appeals by the end of 2010. At that time, ICTY authorities will transfer any remaining war crimes cases to local judiciaries. In connection with this aspect of completion strategy, the ICTY has decided to restrict its prosecutions to those involving “high level” perpetrators, thus leaving the prosecution of mid-level and low level perpetrators to the local judiciaries. Also, all indictments must be reviewed by the three-judge panel.

Despite the benefits associated with transferring the prosecution of war crimes suspects to local judicial institutions, neither the ICTY nor the domestic courts are ready for the complete transfer of ICTY cases to domestic entities. Currently, the ICTY has forty-four accused at the pre-trial stage, eleven accused on trial, ten individuals at the appeals stage, and nine outstanding arrest warrants.\(^9\) At the same time, however, domestic courts continue to lack the legal capacity, and in some cases, the political will, to deliver justice and meet victim needs. Therefore, as part of the completion strategy, the offices of Prosecutor and Registry have developed numerous aid programs to build local capacity and strengthen the rule of law.

1. Building Local Capacity and Strengthening the Rule of Law

Throughout the region, the Office of the Prosecutor, hereafter OTP, has set the groundwork for the transfer of cases to the domestic courts by encouraging legal reform in order to remove any obstacles to the use of ICTY indictments and evidence in the national systems. Moreover, the OTP has assisted local authorities with the establishment of the appropriate institutional and legal frameworks to ensure the organization and professionalism of domestic proceedings and evalu-

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ate trial readiness. The Tribunal also conducted a number of training seminars with judges and prosecutors from Croatia and Serbia. International monitors, provided by the OTP, have assisted local authorities with reforming local laws and criminal procedure codes, as well as improving witness protection programs and local detention facilities. In addition, the Investigation Division of the OTP has been reorganized and restructured to provide support for cases ready for trial, for all ongoing trials and, through the establishment of the Transition team, for the transfer of rule 11bis cases to local courts and investigation dossiers from the OTP to local prosecutors. It is important to note here that cases where the ICTY has issued a formal indictment will be transferred under the 11bis rule, but cases with no formal indictment may be transferred as well directly from the OTP to the domestic Prosecutor’s offices. The latter procedure will apply in those cases where the ICTY has determined that the accused suspects are not high-level perpetrators. The recent transfer of the “Zvornik” case to the Serbian War Crimes Prosecutor’s Office is an example of a transfer in this latter category, and it required further investigation and indictment on the local level.

Working closely with the OTP, the Office of the Registrar has also hosted numerous working groups on the interpretation and application of international humanitarian and criminal law. Specifically, the Registry assisted local authorities with the establishment of the Special War Crimes Chamber at the State Court in Bosnia-Herzegovina, and commented on the application of the new Criminal Code of Bosnia-Herzegovina. In Serbia, the Registry reviewed the draft of the Law on the organization and jurisdiction of government authorities in prosecuting persons guilty of war crimes, which was ultimately adopted in 2003.

During the biennium 2006-2007, the OTP will complete the process of transferring cases to local authorities. The number of cases to be transferred will depend on whether the Chambers referral bench agrees cases meet the conditions required for transfer to local jurisdictions. Moreover, in view of the completion strategy, the OTP will continue to undertake measures aimed at reducing the length of trials at the ICTY. One of the proposed measures is to join, wherever possible, related indictments and run trials with more than four accused.

2. The Completion Strategy

In 2003, the Security Council endorsed the Tribunal’s completion strategy in Resolution 1503, which envisaged the completion of investigations by the end of 2004, completion of all first degree trials by the end 2008, and completion of appeal
proceedings by the end of 2010. In order to achieve this, the Tribunal resolved to concentrate on the most senior leaders suspected of crimes within the jurisdiction of the Tribunal and to transfer cases involving intermediate or lower-level offenders to national jurisdictions with demonstrated capacity to conduct fair trials. The Tribunal also shifted its resources from investigations to trial and appellate work as part of the completion strategy. Moreover, the Tribunal amended procedural rules, such as Rule 98bis, which now requires oral arguments instead of written briefs. Finally, in order to increase the accessibility of information and expedite court proceedings, the Tribunal launched a pilot Court system in February 2005, which integrates all case-related documents into a central electronic database.

As part of the completion strategy, the Tribunal has begun referring cases involving intermediate and lower ranking war crimes suspects. The Prosecutor has filed 12 referral motions involving 20 accused, of which the referral bench has heard six.\(^{13}\) To date, six of these motions have been heard and one motion was withdrawn. Of the remaining five motions, the Referral Bench granted four for transfer to Bosnia and Herzegovina’s War Crimes Chamber and one for transfer to the Republic of Croatia. Four of the decisions have been appealed and the Appeal Chamber has affirmed two of the transfers.\(^{14}\)

The difficulties associated with the decision of whether or not to transfer a case have been illustrated most poignantly in the case involving the infamous “Vukovar Three.” Shortly, after Croatia declared independence in June 1991, the Serb minority living in the country mounted an armed insurrection, with the support of the Yugoslav People’s Army (JNA), against the new nationalist Croatian government. In August, the JNA surrounded the town of Vukovar, a Croatian town located near the border of Serbia. On 18 November 1991, Croatian forces within Vukovar surrendered to JNA forces. On 19 November 1991, the JNA arrived at the Vukovar Hospital, where several hundred Croats and other non-Serbs had sought refuge and were awaiting evacuation, as agreed in negotiations between the Yugoslav army and Croatian authorities. Instead, on November 20, about 300 men were loaded into buses, driven to the nearby Ovcara farm, and executed by soldiers of the Yugoslav army, members of the Serb Territorial Defense and voluntary unit „Leva Supoderica”.

On 7 November 1995, the OTP indicted Mile Mrksic, Miroslav Radic, and Veselin Slijvancanin, all former officers of the Yugoslav People’s Army, for the execution of more than 260 Croats and other non-Serbs at the Ovcara farm. Mile Mrksic was a Colonel in the JNA and Commander of the Guards Brigade, which had primary responsibility for the attack on Vukovar. Miroslav Radic was a Captain in the JNA and commanded a special infantry unit of the Guards Brigade. Veselin Slijvancanin


\(^{14}\) ICTY Homepage, “ICTY at a Glance: Key Figures of ICTY Cases”. Cases referred to Bosnia and Herzegovina: Radovan Stankovic (decision rendered May 17, 2005, appeal rendered September 1, 2005: case referred to Bosnia and Herzegovina); Savo Todovic and Mitar Rasevic (decision rendered July 8, 2005; appeal pending); Zeljko Mejač, Momcilo Gruban, Dusan Knezevic, and Dusan Fustar (decision rendered July 20, 2005, appeal pending); Gojko Jankovic (decision rendered July 22, 2005, appeal rendered November 15, 2005: case referred to Bosnia and Herzegovina);

Cases referred to Croatia: Rahim Ademi and Mirko Norac (decision rendered September 14, 2005, case referred to Croatia on November 1, 2005).
was a Major in the JNA and served as Security Officer for the Guards Brigade. He was also the Operational Commander for the JNA in the later stages of the siege of Vukovar. All three face charges of individual criminal responsibility (Article 7(1)) and superior criminal responsibility (Article 7(3)) with violations of the laws or customs of war (Article 3) and crimes against humanity (Article 5). Mrksic, Radic and Slijvancanin have pleaded “not guilty” to all counts of the indictment.

In February 2005, the Chief Prosecutor filed a motion to transfer the indictment against the “Vukovar Three” to either Croatia given it was the site of the crime, or Serbia given the ongoing trial before the War Crimes Chamber of Belgrade District Court of 17 lower level perpetrators involved in the execution of Croats and other non-Serbs from Vukovar Hospital. However, on June 9, the Chief Prosecutor filed a Motion for Withdrawal requesting the referral bench to withdraw the motion and order reinstatement of the case to the appropriate trial chamber of the Tribunal in “the interests of justice”. On June 13th, the Referral Bench granted the Chief Prosecutor’s request to withdraw her proposal given the “complexity of issues” and “intensity of the feelings generated among interested parties by the prospect of referral.”

The withdrawal of the motion to transfer the indictment of the “Vukovar Three” underscores the political complexity of transferring cases from the ICTY to national jurisdictions. In the end, the transfer of cases to domestic entities may depend not only on the compatibility of the law and readiness of the national courts to conduct a just and fair trial, but also on the political and emotional factors surrounding the case.

3. The Outreach Program

During the course of its existence, the ICTY has become acutely aware of the fact that the populations in the region have often not perceived its work positively. The problem of public perceptions is partly related to the politically and culturally sensitive nature of these prosecutions, but it is also related to the fact that the prosecutions have been occurring at a great distance from the populations whose lack of knowledge has contributed to the Tribunal’s negative image in the region. Consequently, the Tribunal decided to develop an outreach program to address its image problem and to promote an understanding of the truth of these prosecutions in the region.

As part of the Tribunal’s completion strategy, the Registry has also reorganized the ICTY’s Outreach Program in order to improve the capacity of national jurisdic-
tions to prosecute war crimes cases. The initial objective of the Outreach Program was to increase local awareness of the Tribunal’s activities through conferences, roundtables, seminars and other media events, such as live audio and video broadcast of all public Tribunal court sessions. In 2003, the Outreach Program hosted a conference in Sarajevo for victims’ associations and legal professionals, in which participants recommended to ICTY organization of local awareness campaigns to explain, at a grass-roots level, the Tribunal’s method of operations and judgments. To satisfy this need, the Outreach Program organized a series of community events to provide local leaders and victims’ associations with a comprehensive and candid review of the investigation processes and subsequent indictments and prosecutions of persons tried at The Hague. ICTY staff members, including investigators and prosecutors, have participated in these community events in order to meet with community leaders and the public.

When the ICTY adopted its completion strategy in 2003, it decided to make building the local capacity of the domestic courts to prosecute war crimes the focus of the Outreach Program. Since then, the Outreach Program has concentrated on transferring knowledge and best practices to the local judiciaries, including the training and education of local legal professionals throughout the region, and it has continued to track developments and reforms in domestic criminal justice systems, especially in war crimes cases.

The transfer of the Zvornik case to the War Crimes Chamber of the Belgrade District Court in May of 2004 served as an occasion for this kind of capacity building. At that time the office of the UNDP in Serbia and Montenegro, with the assistance of the ICTY, sponsored a study tour at the ICTY for the War Crimes Chamber of the Belgrade District Court. This training included relevant aspects of international humanitarian and criminal law and served also to build avenues of communication and modalities for the transfer of future cases from the ICTY to that War Crimes Chamber.

The Outreach Program has continued to ensure that the activities of the Tribunal are transparent and accessible to the different communities in the former Yugoslavia. In February 2005, the Outreach Program merged with the Tribunal’s Press and Information Services Section to help raise public awareness. Moreover, from October 2004 to June 2005, the Outreach Program in concert with the Helsinki Committee for Human Rights in Republic of Srpska implemented a series of events intended to promote better local visibility of justice served and prevent historical revisionism.
4. Cooperation

No analysis of the work of the ICTY would be complete, however, without a review of the issues and problems associated with the cooperation of authorities in the former Yugoslavia with the Tribunal. The best and most up to date review of this subject was provided by ICTY Prosecutor, Carla Del Ponte, in her recent report of 15 December 2005 to the Security Council of the United Nations. In those remarks, she underscored the necessity for cooperation and co-ordination noting that “the Office of the Prosecutor has no explicit mandate to arrest indictees” and she further insists that the indictees can only come before the Tribunal through “arrest or voluntary surrender.” After making those key observations, she provides a historical review of cooperation by local authorities, including an assessment of its current status.

In providing that review her central lament is the failure to apprehend Mladic and Karadzic who remain at large. With reference to history she states: “It is obvious to all informed observers that, in the first years after the indictments were issued, there was no political will, either from the local authorities in Republic of Srpska or in Serbia, or from the international forces in Bosnia and Herzegovina, to arrest Karadzic or Mladic. She then goes on to describe the evolution of cooperation noting that “Experience shows that the political pressure from the European Union and the United States is the most significant factor encouraging the States of the former Yugoslavia to transfer indictees to the Hague.”

In assessing the effect of that influence, she states:

At the rhetorical level at least, this [referring to the problem of political will] has changed now, and there are numerous statements by Serb and Bosnian Serb politicians and even religious leaders saying that Karadzic and Mladic must be brought to the Hague. These intentions at the top have, however, not necessarily filtered through all the layers of the institutions involved.

To Sum up this most crucial issue, my main partners in the hunt for Karadzic and Mladic are now the Governments of Serbia and Montenegro and the relevant authorities of Bosnia and Herzegovina.

Nevertheless, her assessment of the current status of the cooperation in Serbia and Montenegro is sobering:

Serbia and Montenegro’s cooperation has, unfortunately, deteriorated in the past months. There is no serious, well-articulated action plan on the fugitives. Moreover, there is a lack of coordination between the State
Union authorities and the two Republic’s Governments, and the rivalry between the involved agencies is palpable. The information passed to my Office is scarce and unconvincing. The Army of Serbia and Montenegro continues to hamper, both actively and passively, the co-operation of Serbia and Montenegro with the ICTY. Serbian civilian authorities admit today that the Army as an institution was protecting Ratko Mladic until as late as at least May 2002. They contend it is not the case anymore. However, on other issues like the access to military documents, for instance Mladic’s military and medical files, the assurances given to me by the civilian authorities [...] However, in view of the authorities’ unwillingness thus far to provide me with these materials, I have requested the Chamber to issue binding orders. The irony is that some of these materials are sometimes being produced by Defense witnesses in the Milosevic case. From whom did they obtain them, if not from those who refuse to provide them to us?

She also cited the failure of UNMIK in Kosovo to adequately cooperate in prosecutions, taking particular note of UNMIK’s failure to consistently provide witness protection and elaborated on the extent and effect of witness intimidation there:

Indeed, [...] the intimidation of witnesses is a grave problem in Kosovo. It is widespread, systematic, and it has a very serious impact on court proceedings at the ICTY. In the Limaj et al. case, several witnesses eventually refused to appear and testify in front of the court, or withdrew or changed their testimony because they were intimidated or afraid. This may have influenced the outcome of the first instance judgment.

On the other hand, she expressly commends the Government of Croatia for its cooperation with the ICTY in connection with the recent arrest of Ante Gotovina on 7 December 2005, and she clearly associates the role of the European Union in that cooperation. As she notes in these remarks she reported to the European Union Task Force on October 3, that Croatia was fully cooperating with the ICTY, and the Croatian Weekly Feral Tribune reported that “Brussels opened membership talks with Croatia on 3 October [the same day], after a seven-month delay over what it deemed Zagreb’s lack of cooperation on the Gotovina case.” This sequence of events speaks volumes to the effect of conditionality in connection with war crimes prosecutions in the region and of the incentive of future EU accession in particular.
5. Public Perceptions

There has been a great deal of study and literature dealing with the public perceptions of the work of the ICTY, and for this reason we will not provide significant details on this topic in this report except to note that ICTY’s generally negative image was the primary impetus for its outreach program, described above and to note further that the perceptions of the ICTY have sometimes actually served to heighten tensions and provoked rivalry between the different ethnic groups in the region.

In connection with this latter point, it is significant to note that one of the main problems relating to the public perceptions of the ICTY’s work is that a large portion of the population of Serbia has viewed the Tribunal as being anti-Serb. According to an opinion poll conducted on behalf of the Belgrade Center for Human Rights in April, 2005, over two thirds of the Serbian population believes that the ICTY trials of indicted Serbs are biased, and those polled consistently cite the greater number of indictments against Serbs in support of their view. This fact has certainly not helped relations in the region.

The recent acquittals in the Limaj case referenced in Prosecutor Del Ponte’s remarks cited above are illustrative of this point. This case involved an indictment against three former members of the KLA for their alleged role in the torture and inhumane treatment of Serbs and Albanian collaborators in the Albanian run prison camp Lapusnik in Kosovo in 1998. They were also accused for the murder of several prisoners. The three were the first Kosovo Albanians ever to be indicted by the OTP. Fatmir Limaj and Isak Musliu were acquitted of all charges, and Haradin Bala was found guilty of torture, cruel treatment and murder.

The acquittals in this case were heralded in Kosovo, where in Pristina, according to a Reuters report, crowds celebrated the verdict with gunfire and the tooting of horns. According to that report, the President of Kosovo, Ibrahim Rugova commented on the acquittals stating: “The verdict proves that our war was against the Serb occupation and for independence for our country, and our hopes placed in international justice, were justified.” Prime Minister of Kosovo, Bajram Kosumi, said that the verdict “proves that Limaj and his compatriots had just one goal in their lives—the freedom of Kosovo.” In Serbia, on the other hand, the opposite reaction was reported. According to the same Reuters report, Presidential Adviser, Jovan Simic told Serb TV that the court decision sent out “a very bad message.”

The negative reactions towards the ICTY are often fueled by the local media. For example, the day after Milosevic died, many of the local Serbian newspapers...
published the “information” that he was murdered in Scheveningen (the Belgrade daily “Kurir” published the front page with the Milosevic photo and the title MURDERED – Kurir of 12 March 2006). A few days after he died, when the forensic examination was done, it was clear he died of a heart attack.

B. DOMESTIC PROSECUTIONS

In the following paragraphs, we will describe the history of war crimes prosecutions in each of the study-areas of the region, in an effort to provide some analysis and comparison of that history and the current status. At the outset, we note that in those parts of the region that are not under international administration, significant reforms related to the prosecution of war crimes were introduced in 2003 and 2004. There is no doubt that the perceptions of the outside world insofar as they relate to future EU accession have clearly been a major factor fueling the reforms in each case. In this section, we will explain how those reforms have been implemented in each of the countries that have adopted them, and we will, to the extent that such analysis is possible so recently after their enactment, assess their impact on current and future prosecutions. In addition, once we have provided this baseline information, we will provide comparative analysis of the strengths and weaknesses of these efforts throughout the region in order to identify those areas where continued assistance is necessary.

1. Prosecutions in Bosnia and Herzegovina

During the conflict in the former Yugoslavia between 1991 and 1999, in Bosnia and Herzegovina the largest number of atrocities took place. For this reason, the war crimes prosecutions and the implementation of plans for transitional justice in general, are perhaps more challenging there than in any other part of the former Yugoslavia. Nevertheless, those who are faced with the daunting task of pursuing war crimes prosecutions in Bosnia and Herzegovina face related problems that are common throughout the region. In this section, we will provide an overview of the current status of prosecutions in Bosnia and Herzegovina. It should be noted here, as it has been above, that a separate report on the current status of transitional justice in Bosnia and Herzegovina has already been prepared and has been attached to this report as Appendix D. This section will therefore
simply review the findings of that report as they relate to prosecutions, in order to provide comparative analysis.

Although the international actors, currently administering Bosnia and Herzegovina, undertook in 2002 efforts to establish judicial reform, activities related specifically to the war crimes prosecutions are relatively recent. Perhaps the most significant of these activities to date has been the establishment of the War Crimes Chamber (WCC) within the State Court of Bosnia and Herzegovina in 2004. The first trial before this chamber began in September 2005.

The WCC deals with three types of cases: 1) those which will be transferred from the ICTY where indictments have already been raised, 2) those which will be transferred without indictments, and 3) those which were initiated before the local courts. It should be noted that in February 1996, the “Rules of the Road” approach was established as an instrument whereby the ICTY could supervise war crimes proceedings in Bosnia and Herzegovina. The ICTY, has screened some 3,300 cases dividing them into three categories—Category A being those which are ready for trial, Category B being those for which there is insufficient evidence, and Category C cases being those which will require further investigation. After establishment, the WCC selected the most sensitive cases from the Category A and transferred those remaining to the local courts. The WCC thus will handle the most sensitive cases, and it is estimated that it will likely not prosecute more than a few hundred cases. As of the March 2006 there are ten cases before the WCC.23

Consequently, it is clear that the vast majority of the war crimes cases in Bosnia and Herzegovina will be handled by the sixteen cantonal and district courts, as well as by the Basic Court in Brcko District. It is expected that they will thus handle several thousand war crimes cases in the coming years. The attached report notes that the local courts have traditionally been poorly funded and poorly equipped. It thus characterizes the local courts as the “weakest link” in the plans for war crimes prosecutions. However, there has been a marked increase in the number of war crimes prosecutions in the past year and as of August 2005, there were 26 trials under way although only one case was reported in Republic of Srpska.24

According to the observers, judges and prosecutors have shown a high degree of professionalism. However, given the critical lack of resources, it is clear that the local courts will need significant material support in the future. In addition, although the OSCE report does not address the need for training, the experience of several other post conflict countries in dealing with local prosecution of war crimes makes it clear that the local courts will have significant needs for specialized training as well.
2. Prosecutions in Croatia

The war crimes prosecutions in Croatia have consistently been problematic. The proceedings to date have been plagued by a number of deficiencies that have been well documented in international and regional reports. In the last few years, Croatia has engaged in significant law reform efforts in this area, but it is not yet clear whether these reforms have resulted in palpable changes in the proceedings. In this section, we will analyze the problems that have been reported generally in these cases in Croatia. We will then review the reforms recently adopted and conclude with a few observations on the impact of the recent reforms and on their implications for the future of war crimes prosecutions.

Prior to 2003, jurisdiction in these cases was shared by all of the county courts throughout the country. Consequently, in the vast majority, proceedings have been initiated in those localities where the crimes were committed. This state of affairs has frequently been criticized by international and regional observers who have cited the difficulty of insuring fair and reliable trials in localities where the emotions relating to the often horrific events remain fresh and raw. Nevertheless, even in the aftermath of the recent reforms, the fact remains that the vast majority of these proceedings are still being handled locally. This is probably the most significant factor underlying the deficiencies of these proceedings as described below.

The proceedings have most frequently been criticized for being tainted by ethnic bias, and there is evidence to support the criticism. A report by Human Rights Watch in 2004 succinctly summarized the empirical evidence (gathered mostly by OSCE's monitoring mission) as follows:

War crimes trials monitoring in Croatia by the OSCE during 2002-2003 demonstrates a significantly different rate of conviction and acquittal depending upon the ethnicity of the defendants. While 83% of Serbs were found guilty in 2002, only 18 percent of Croats were convicted during that period. Conversely, 17 percent of Serb defendants were acquitted or the prosecution was dropped while 82 percent of Croats were found not guilty or the charges were dropped. In cases monitored by the OSCE during the first eleven months of 2003, nearly 85 percent of Serbs were convicted, whereas 57 percent of Croats were convicted. During the same period, 15 percent of Serbs were either acquitted, had the charges against them dropped, or were amnestied, while 43 percent of Croats were acquitted or had charges dropped.25
The allegation has been supported by anecdotal evidence from the trials where members of the trial chambers have indiscreetly revealed their bias in the language they used. In the case against Svetozar Karan, a Serb who was sentenced to thirteen years imprisonment for his participation in the torture of Croat prisoners of war, the Gospić County Court chastised him ‘and his ancestors’ for having been a ‘burden to Croatia over the past 80 years.’\(^\text{26}\) In the trial of Mihajlo Hrastov, a Croat who was accused of illegal killing and wounding of the enemy, the presiding judge referred to the Serbs who were killed as “chetniks”\(^\text{27}\) and failed to intervene when the defendants’ supporters intimidated prosecution witnesses.\(^\text{28}\)

Many of the other alleged failings cited in these proceedings are linked to this factor. For example, the reports have noted that there is a discernable tendency in the Croatian courts to overcharge the Serb defendants and limit the seriousness of the charges levied against Croat defendants. In general, Serbs are prosecuted for a wider range of conduct than Croats who have typically only been charged with murder. Also, the Croatian courts apply a broader definition of genocide against Serbs than it has generally been found in international humanitarian law.\(^\text{29}\) A similar discrepancy has been noted in the sentences. The monitoring report of the OSCE Mission for 2005, for example, cited the following example:

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Milos Loncar, Serb, was sentenced to 10 years by the Osijek County Court for conveying the order to shell the town of Osijek. In contrast, Zarko Tkalcevic, Croat, was sentenced to 3 years by the Vukovar County Court for conveying the order to shell the town of Vukovar.\(^\text{30}\)
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Finally, it is important to note that over the course of the 1990’s and prior to the year 2000, the vast majority of indictments and convictions, primarily of ethnic Serbs, were in proceedings that were conducted in absentia.

However, beginning in the year 2000, a series of reforms were undertaken. According to official reports, trials *in absentia* were stopped in that year. In addition, prosecutors began a systematic review of outstanding indictments in order to weed out those cases which were “unsubstantiated.” By 2004, the number of outstanding cases had been reduced to somewhere between 1800 and 2000, and as of August 2005, the number had been further reduced to 900 outstanding cases. Pursuant to this process, many of those who had been previously held on suspicion of war crimes on thin or non-existing evidence were released.

In addition, significant legal reforms were also undertaken in the past few years. Perhaps, the most important of these was the enactment of the Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts Against the International Law on War and Humanitarian Law of...
on the Prosecution of Criminal Acts Against the International Law on War and Humanitarian Law, Article 12 (3) reads as: President of the Supreme Court could approve criminal proceedings to be transferred to other competent court if he/she has the proposal from the Chief Attorney to do so, and if that is appropriate to the circumstances under which crime was committed and if it is appropriate to the needs of the concrete procedure.” See also April 2005 OSCE, p. 31

34 Ibid, p. 7.

35 US Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2005, Croatia - During the year the Supreme Court decided 18 appeals of war crimes convictions that were filed by 13 Serbs, 3 Croats, 1 Bosniak, and 1 Hungarian, confirming 6 of the convictions and reversing 12, for a 67 percent reversal rate. The number of domestic war crimes trials fell compared with past years due to the elimination of most in absentia cases. Despite the decreased caseload, observers questioned the criminal justice system’s ability to conduct fair and transparent trials in complex and emotionally charged cases where witness intimidation was a problem.

36 The regional monitoring team made by the representatives of

November 17 2003. This law established the county courts in Zagreb, Osijek, Rijeka, and Split as “special courts” with extraterritorial jurisdiction over war crimes. The motivation in adopting the law is to correct some of the problems that have been associated with trials in the county courts which are discussed above. As a result, Article 12 (2) of the law provides that the Chief Attorney can request to the President of the Supreme Court to transfer a case from one of the “ordinary” county courts to these “special courts”. The law provides that all war crimes cases shall be tried by panels of three professional judges as opposed to panels of two professional and three lay judges that are otherwise used in criminal proceedings. The law also provides the admissibility of evidence introduced before the ICTY.

In July 2004 the Criminal Code was amended to include “crimes against humanity” and “command responsibility,” although there continues to be debate on whether that law can be applied retroactively. It also introduced a measure criminalizing the revelation of the identity of a protected witness. In December 2004, the Croatian Parliament adopted the Law on International Legal Assistance in Criminal Matters, which came into force on 1 July 2005. The law provides “various forms of legal assistance between Croatian and foreign judicial bodies in criminal matters, including sharing information, extradition, interstate transfer of prosecution of less serious offenses, and execution of foreign court verdicts.”

Assessments of war crimes prosecutions in Croatia since the adoption of these reforms offer a rather mixed review. One of the most important remaining problems is the intimidation of witnesses. However, a sign of progress lies in the fact that the Croatian Supreme Court and prosecutors have remained vigilant in their attempts to improve justice in this context. The prosecutors have been responsible for the review of outstanding cases, noted above, resulting in the release of many of the accused who had been held in unsubstantiated cases, and the Supreme Court has increasingly refused trials in absentia and reversed convictions in proceedings which were so conducted. In fact, in the first seven months of 2005, the Supreme Court reversed 60% of all war crimes verdicts.

In addition, after eight Croatian defendants were acquitted in the 2002 trial in the Lora case involving the killing and torture of Serb civilians in a military prison in Split in 1992, the Supreme Court reversed the decision and recently ordered a new trial. The retrial was finished on 2 March 2006 and the defendants were found guilty and sentenced to fifty-three years of imprisonment in total. The trial was evaluated by NGO monitors and held to be in accordance with the directions given by the Supreme Court of Croatia.
Perhaps more importantly, on 1 November 2005, the ICTY decided to transfer the Mirko Norac and Rahim Ademi case to Croatia. These defendants were both commanders in the Croatian army in 1993. They are accused of crimes against humanity and violations of the laws or customs of war committed against the Serbian population in the Medak Pocket area of Croatia during that year. The transfer is significant, since under the Rule 11bis of the ICTY’s Rules of Procedure and Evidence, a decision to refer a case can only be made if the Trial Chamber decides that “the accused would be tried in accordance with international standards and that neither the level of responsibility of the accused nor the gravity of the crimes alleged in the indictment were factors that would make the referral to the national authorities inappropriate.”

However, problems remain in the prosecution of these cases in Croatia. Although the creation of the four specialized courts appears to be a step in the right direction, according to an April 2005 report of the OSCE Mission, 80% of outstanding war crimes cases remain in the other county courts. The OSCE also reports that “some arrests of Serbs based on unsubstantiated charges continue.”37 In addition, in spite of the 2004 law, witness protection continues to be a problem as well. It is important to note that there have been reports that the media handling of witness identity in these cases is problematic, and in at least one case the media has been accused of releasing the identity of a protected witness.38 The Witness Protection Act39 came into force in early 2004.

In conclusion, there is no doubt that significant legal reforms have been introduced to improve justice in war crimes cases in Croatia. These reforms have undoubtedly been related to the progress that has been noted above. Nevertheless, the fact that the vast majority of these cases remain in the county courts where the events underlying these prosecutions have occurred, raises significant concerns relating to impartiality. While it is surely not fair to assume that all cases handled outside of the four specialized courts will be dealt with unfairly, it seems clear that the success of justice in these cases in the future will depend in large part on the effective implementation of the transfer provision of the 2003 law.

Assessment

In light of the problems of ethnic bias which have plagued the war crimes trials in Croatia prior to the 2003 reforms, it is important to assess the attitudes of the local population to the prosecution of war crimes and the potential impact that its attitude might have on war crimes prosecution in the future. The public reaction

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38 Ibid, p. 5.
39 Official Gazete of the Republic of Croatia no.163/2003
to the arrest of General Ante Gotovina on 7 December 2005 in the Canary Islands is perhaps a gauge of those attitudes. As the TV stations in Croatia broadcast the news of his arrest, some 500 protesters gathered in the main square in Zagreb to express their displeasure. Subsequently, the crowd moved on to a government building, hurling bottles and stones in protest against the Croatian government’s complicity in Gotovina’s apprehension. On 11 December 2005, 50,000 people gathered in Split to protest against the government’s complicity as well. In an opinion poll conducted shortly after the arrest, 61% of those polled expressed the view that Gotovina’s arrest was bad for the country.40 Josip Jovic, a Split-based journalist who faces ICTY charges of contempt of court for revealing the identity of a protected witness, reflected this view, commenting that “Handcuffs on Gotovina’s hands are handcuffs on the Croatian people.”41

However, editor, Drago Hedl of the Split-based Feral Tribune expressed the view that the negative response of the population was already losing steam and analyst Davor Gjenero, commented that “There is no real danger of unrest, since there is no respectable political force that would gain anything by causing instability, including the HSP,” (referring to the Croatian right wing political party.) Hedl went on to take note of a significant change in the views of the population toward war crimes prosecution, commenting that “To write in today’s Croatia about war crimes committed by Croats no longer earns one the label of a traitor as it did in the time of President Franjo Tudjman”. He nevertheless took the view that the attitude of the local population continued to be a hindering force, taking note of the persistent impunity that continues to be associated with these prosecutions.

These observations underscore both the progress that have been made in this area and the challenges which remain. The climate of the local population is the backdrop against which progress will need to be made, taking into consideration the existing problems of ethnic bias and witness intimidation and the role of the media in witness protection. These factors will need to be clearly addressed by the four special courts handling war crimes prosecutions, and significant attention will need to be devoted to the issue of transfer, which emerges as increasingly important in light of the continuing danger that the views of local populations can have on the integrity of war crimes proceedings.

3. Prosecutions in Kosovo

The story of war crimes prosecutions in Kosovo is quite different from the accounts of prosecutions in Bosnia and Herzegovina and Croatia as described

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40 A telephone survey by the Puls agency said that 61 per cent of the 500 polled considered Gotovina’s arrest ‘bad news’. The same number considered the indictment ‘unfounded’. Deutsche Presse-Agentur, 9 December 2005, at: http://news.monstersandcritics.com/europe/article_1067846.php

41 See more on this in the Coalition for International Justice report “Croatian Contempt Cases: Issues and Analysis”, www.cij.org
above. The uniqueness of the subject in Kosovo relates directly to the fact that Kosovo was brought under one of the broadest UN mandates in the history of the United Nations. That mandate was established by the UN Security Council Resolution 1244, which was adopted on 10 June 1999.\(^{42}\) Pursuant to that mandate the UN Mission in Kosovo (UNMIK) became fully responsible for the administration of justice, including the judiciary.

The story of the events that unfolded as part of UNMIK’s administration of the courts in the territory is well documented and has been the subject of numerous commentaries. This section will therefore briefly summarize that history and then describe the current state of prosecutions.

The first thing to note is that UNMIK initially decided that it would proceed with its mandate, using an entirely local judiciary. UNMIK made its decision on the belief that it would be more efficient to have the judiciary be administered by the locals who know the language and law of the former Yugoslavia. However, while the decision was clearly motivated by good intentions, it was clearly flawed and many have expressed surprise at the failure to understand or consider critical local cultural data. In fact, the local judiciary was overwhelmingly Serb and very few Kosovo Albanians had been allowed to serve in the judicial role. This state of affairs resulted in the administration of a very ethnically biased judicial system that was also known to be plagued by incompetence, corruption, lack of judicial independence and cronyism. In addition, UNMIK adopted a regulation that provided that the law that was in effect immediately prior to the establishment of its mandate would remain in effect. This decision turned out to provoke tremendous controversy, because ethnically Albanian judges refused to apply the law, considering it to be the symbol of the post 1989 oppression inflicted by Serbian President Slobodan Milosevic.

In this ethnically charged environment, not only was the judiciary called upon to prosecute war crimes, but new ethnic violence was occurring on a daily basis, and the UNMIK administration soon became keenly aware of the fact that justice in some cases was clearly being undermined by ethnic prejudice. According to the report of one international prosecutor working at mission at the time:

> When former KLA [Kosovo Liberation Army] members were arrested by KFOR or UNMIK police for attacks on Serbs, they would often be proposed for release by the prosecutor, and then released by the investigating judge, while Serbs would often be detained in custody for the same crimes.\(^{43}\)

\(^{42}\) UN S/RES/1244 (1999) 10 June 1999

However, it should be noted in this connection that it has been argued that the detention of not only Serbs but also of Roma during this period was not motivated by ethnic prejudice but was justified by the fact that they posed a flight risk.

In any event, very soon after the mission started, significant changes were adopted to respond to this situation. First, very early on, UNMIK changed the regulation relating to the applicable law so as to provide that the law that was in effect prior to 1989 would be in effect in the territory. Through the adoption of this regulation, UNMIK recognized that it made more sense in the cultural context to apply the law that was in effect before President Milosevic revoked Kosovo’s autonomous status.

Then, in the year 2000, UNMIK further amended its regulations to allow the appointment of international judicial personnel to the Kosovo judiciary. This was the first time in practice that internationals were deployed to serve in a domestic system. Pursuant to the regulation, Trial Chambers were mixed international/local, including one international judge. These chambers, except two professional judges, also included three lay judges as provided by the law in the former Socialist Federative Republic of Yugoslavia.

According to the USIP report, the scenario still proved ineffective:

1. The international judges were being outvoted by the lay and professional Kosovo judges, resulting in unsubstantiated verdicts of guilt against some Serbian defendants and questionable verdicts of acquittal against some Kosovo Albanian defendants.

2. The Kosovo prosecutors “overcharged” Serbs; they would initiate criminal investigations and proposed detentions based on insufficient evidence, while abandoning cases and refusing to conduct investigations against ethnic Albanians.

3. Unlimited IJP subject matter jurisdiction (due to unlimited case selection under regulation 34) resulted in increased case volume beyond the capacity of the IJP, which negatively affected their ability to spend appropriate time for case and verdict preparation, research, and drafting.44

By the end of the year, UNMIK was also dissatisfied by the performance of these chambers and amended the regulations once again through regulation 2000/64 which provided for the use of chambers which would be composed of a majority of international judges. The adoption of the so-called “64” panels has brought about a sea change in the war crimes prosecution in Kosovo. According to Regulation 64, chambers are composed only of three professional judges.45

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44 Ibid
45 While the law provides that a panel of two professional and three lay judges tries serious cases, an UNMIK regulation authorizes international prosecutors to try cases of a sensitive ethnic or political nature, including before a panel of three international judges. Of the 250 active cases handled by international prosecutors through September, international judges tried approximately 75 with a conviction rate of over 90 percent. US Department of State, Bureau of Democracy, Human Rights, and Labor, Country Reports on Human Rights Practices - 2005, Serbia and Montenegro, p. 33.
adoption of this regulation, there are now international judges and prosecutors operating in every province of Kosovo. According to the UNMIK Regulation 2000/64, any of the parties would be able to request that an international panel take over the case. This regulation was enacted both to secure the objectivity of the criminal procedure and also to reduce the danger of threats and revenge towards local judges and prosecutors.

Although the regulation allows for this procedure to be used in any criminal case, as a matter of practice the procedure has been used exclusively for cases involving, inter-ethnic violence, international crimes, drug trafficking, organized crime, and human trafficking.

There is very little literature available assessing the effectiveness of the use of these chambers, and there isn’t much data relating to the number and nature of the cases that the chambers are handing. Without commenting at all on the effectiveness of the chambers, UNMIK released a report in June of 2004, including some relevant data:

- The current number of international judges and prosecutors has increased to twenty-four, including twelve judges and twelve prosecutors, as against number of eleven in August 2001.
- As of June 2004, international judges are involved in ninety-two cases, of which six are appeals of judgments, one is a request for protection of legality pending before the Supreme Court, twenty-five are appeals of judgments pending in the Office of the Public Prosecutor of Kosovo and one appeal of judgment pending before the District Court of Prizren. There are nineteen ongoing or pending trials/retrials before the District Courts. Three of the five cases, which are at the trial stage, have chambers composed pursuant to UNMIK Regulation No. 2000/64. There are fourteen cases being investigated by international prosecutors under the provisions of the new criminal legislation, which have been referred to an international pre-trial judge for decisions on detention on remand.
- Since its establishment in March 2003, the Criminal Division has logged 305 Case Initiation Reports ranging from pre-judicial investigation stage through to a final verdict; 230 of those cases remain active, with several cases pending appeal. Seventy-five cases have been closed following either a final verdict, a withdrawal due to lack of evidence, or a determination to hand the case over to local prosecutors for further criminal proceedings. The active criminal proceedings being handled by International Prosecutors fall into the following major categories:
Figures from the Criminal Division database, dating from March 2003, indicate that there have been forty – eight verdicts with 43 convictions, which represents an 89.58% conviction rate.\(^{46}\)

Nevertheless, some pertinent information concerning the use of the chambers were gathered by the assessment team in interviews that they conducted in Kosovo in August 2005. In many of the interviews, several locals expressed their displeasure with the chambers. Their criticisms relate to several issues. There is a strong feeling that the judiciary should now, after five years of UNMIK’s presence in the territory, be once again in local hands. The local perception of the judicial process is that international judges and prosecutors lack knowledge of Kosovo legislative dispositions, and as a result, have limited ability to initiate procedures in accordance with the applicable law, stemming from the fact that they come from different judicial systems. In addition, locals point out that delays are often related to the protracted process of translation of documents. In addition, virtually all of the ethnically Albanian residents of Kosovo that we interviewed expressed the view that the special chambers were biased against Albanians. In addition, one international judge was interviewed, and he informed us that the chambers, which are currently handling cases, are exclusively international. He also stated that he did not believe that the allegation of prejudice against Albanians in the handling of these cases could be established empirically.

Be that as it may, perhaps the most striking aspect of the current state of affairs concerning these prosecutions is that there has been no discernable plan to build the capacity of the local judiciary to handle these cases. This observation begs the question of how the capacity of the local judiciary will be addressed by UNMIK as part of its exit strategy. In retrospect, several authorities have decried
the events described above in that instead of starting with an exclusively local judiciary and moving to a majority international one, it would have been preferable from a capacity-building standpoint to do it exactly the other way around. This is particularly worrying in light of the report by the international judge, who in August told us that war crimes cases are now handled exclusively by internationals. In this connection, it is important to note that it was also reported to the authors in August 2005 that UNMIK had planned to transfer the administration of the judiciary to local authorities in September (virtually all of the other ministries of government have now been transferred to local authority.) However, as of the writing of this report, the transfer has still not occurred.

Finally, there are some information available on the quality of the war crimes proceedings by the “64” chambers. The Humanitarian Law Centre of Belgrade has been monitoring these trials and has recently released a report.\textsuperscript{47}

The observations, made as part of HLC’s monitoring of war crimes and international crimes in Kosovo, offer a rare view into the effectiveness of the trials conducted by the “64” chambers. They would suggest that in spite of the majority international composition of these chambers, they are not a paradigm of judicial excellence in the trial of these kinds of cases. It is also interesting to note that the observation of the latest trial reported here in 2003 would seem to confirm that the “64” chambers are now exclusively international since that was the case in the Lap group trial.\textsuperscript{48} These observations also indicate that even the “64” chambers are not entirely free from ethnic prejudice, although the ethnic prejudice noted by HLC seemed directed at Serbs rather than against Albanians in contradiction of the view widely held by the Kosovo Albanian population as noted above. In addition, several errors were made in the prosecution of these crimes, including the failure to introduce evidence to establish intent and in some cases, the failure generally to introduce sufficient evidence. Otherwise, HLC’s observing would tend to create the impression that the chambers are observing international due process standards generally.

Assessment

The fact that even these chambers, established specifically, so that internationals can bring expertise and impartiality, fail to achieve the desired level of professionalism underscores the dire need for very specialized training in this area of law, which is discussed below in the section on training.
Moreover, it is clear from the recent comments of the ICTY prosecutor and reports on prosecutions in Kosovo that witness intimidation is particularly a problem there. This is so in spite of an UNMIK regulation on the subject that is generally adequate. Consequently, practical measures designed to insure witness protection will need to be undertaken.

Finally, it is also very clear that UNMIK now will be forced to work with others in the region in coordinating an unprecedented program of capacity building that should be designed so as to ensure that locals will succeed in the exercise of this very important judicial authority which has been held from them for so long.

4. Prosecutions in Montenegro

To date, in Montenegro only one war crimes case has occurred there. In that case, a Montenegrin national named Nebojsa Ranisavljevic was charged and tried in the High court in Bijelo Polje, Montenegro in connection with his role in the abduction and murder of nineteen Muslim civilians. He was sentenced to fifteen years of imprisonment.

Recently, representatives from the Montenegrin Ministry of Justice have reported to us that another prosecution – investigation - has been initiated in connection with a forced deportation from the Montenegrin town of Herzeg Novi. However, details are not yet available. According to the Ministry of Justice, two courts of the first instance have been designated for the prosecution of war crimes cases.

In our interviews in Montenegro in August 2005, we learned that the Government of Montenegro had decided that their strategy for war recovery did not prioritize domestic prosecutions. The government takes the view that Montenegro was only tangentially involved in the war and the vast majority of the war’s atrocities occurred outside of the country. Instead, the government believes that the problems relating to the thousands of refugees and IDPs who have fled to Montenegro during the war must be given priority.

Assessment

This view of the domestic prosecutions in Montenegro is probably justified, and the assignment of these prosecutions to two first instance courts is also probably an appropriate structural arrangement for the war crimes prosecutions in this country.
5. Prosecutions in Serbia

Any review of war crimes prosecutions that have taken or are taking place in Serbia should probably begin with the observation that significant legal reform was undertaken in Serbia starting in 2001. In that year and in 2002, the Parliament of the Federal Republic of Yugoslavia adopted several laws designed to enhance the independence of judges and prosecutors and to insure domestic compliance with international standards in the area of criminal justice generally. Some of these latter reforms have had an impact on war crimes prosecutions.

More importantly, a significant reform, directly related to the prosecution of these crimes, was introduced with the adoption of the “Law on the Organization and Jurisdiction of Government Authorities Prosecuting Perpetrators of War Crimes” on 1 July 2003. This law established the War Crimes Investigation Unit within the Ministry of Interior Affairs, the Office of War Crimes Prosecutor, and the War Crimes Chamber of the Belgrade District Court. The War Crimes Chamber has eight judges, the Investigation Unit has eight inspectors, and the Office of the War Crimes Prosecutor has Chief Prosecutor and five Deputies. In addition, the Serbian Assembly adopted amendments of the law on 14 December 2004, which officially recognized the admissibility of the ICTY evidence before War Crimes Chamber and established the immunity of witnesses in war crimes cases along with other witness protection measures.

In light of the impact of future EU accession, which we referred to in our introduction to this section on domestic prosecutions, it is significant to note that these reforms were undertaken in Serbia in the immediate aftermath of the assassination of Prime Minister Zoran Djindjic when it became clear that the prosecution of organized crime and of war crimes by necessity had to become a priority.

In response to this new impetus for reform, the government of Serbia has recently embarked on the establishment of several agreements and memoranda of understanding with the ICTY and other governments of the region for cooperation in the field of war crimes prosecution. Although cooperation in the war crimes prosecution between Serbia and Croatia had already been established under the European Convention on Mutual Legal Assistance in Criminal Matters, ratified by the FRY Assembly in 2001, both countries recognized the need for a more efficient and professional cooperation in this domain, and accordingly on 5 February 2005, Croatian and Serbian Prosecutor’s Office signed the Memorandum on Agreement on Realization and Promotion of Cooperation in Fighting All Forms of Grave Crime. The agreement has already been key in Serbia’s cooperation in the Lora
case in Croatia, described below. The same Memorandum was signed on 1 April 2005 between the Serbian and Bosnian Prosecutor’s Office.

There has been a good deal of analysis of prosecution in Serbia prior to the enactment of these reforms, but it is perhaps too early to tell how much of an impact these reforms have had. It is clear, however, that from 1995 to 2003, very little progress had been made in domestic prosecutions, and the general state of the judiciary was deplored by many domestic and international observers who saw the judiciary and police as incompetent and corrupt. In addition, observers noted a lack of political will on the part of the police and the judiciary to prosecute these crimes and cited a lack of independence of the judiciary generally. Indeed, it remains a fact that between 1995 and 2003 only five domestic war crimes prosecutions had been completed, this record lending credence to these observations. (See the discussion, below.)

This section provides a review of the state of prosecutions up until the most recent reforms in Serbia in 2003, followed by an analysis of domestic prosecutions in Serbia after the establishment of the War Crimes Investigation Unit within the Ministry of Interior Affairs, the Office of War Crimes Prosecutor, and the War Crimes Chamber of the Belgrade District Court. Although it is too early to adequately assess whether the reforms have made a significant change in the general climate surrounding these prosecutions, the latter analysis will include some observations relating to discernable improvements and identify those areas that remain problematic, calling for continued domestic and international attention.

The status of prosecutions prior to 2003

None of the documentation provides information on how many war crimes cases were actually pending in Serbia prior to 2003. There is a very comprehensive report published by the OSCE Mission in 2003 that provides an in-depth analysis of completed cases and offers as much information on pending cases as it was able to gather. At that time cases of this nature were being handled by various district courts throughout Serbia, and some cases were being tried before military courts. That report provided some information on cases that were originally handled by the military courts and later transferred to the civil courts. Commenting on the status of cases at that time, the report states:

The Military Prosecutor and the Military Police initiated criminal proceedings against 304 persons for criminal offences committed in Kosovo between 1 March 1998 and 26 June 1999, that included elements of
humanitarian law violations. Of those 304 persons, proceedings for property-related criminal offences were instituted against 267 persons, and criminal offences against humanity and international law, life and body integrity and morals against 38 persons. Thirty-eight were placed under investigation for criminal offences against humanity and international law. Twenty-six were investigated over murder, and eight for rape. Investigation was suspended in two cases, while 12 investigations were transferred to civil courts. Investigation of three persons is in progress, and 21 persons have been indicted.\textsuperscript{51}

In a footnote to this passage, the report further states:

The trial monitors [the report summarizes the research gathered by trial monitors] sent letters to the presidents of civil (district) courts that took over these military cases in order to trace these cases, to obtain information regarding the trials, and the possibility of monitoring. Eight District Courts were contacted and so far five have responded. In only two cases were the charges for committed war crimes, and the others for murder or rape. Two persons were relinquished, one was sentenced to eight years of imprisonment, one person was acquitted and against the others trials are on going.\textsuperscript{52}

In the report of October 2004, which summarizes the results of completed trials prior to the adoption of the 2003 reforms, the International Center for Transitional Justice stated:

The 1994 -1998 trial of Dusan Vukovic, a soldier, resulted in a conviction and sentence of ten years of imprisonment for the war crime against civilian population and the rape of Bosnian Muslim (Bosniak) civilians in 1992. Ivan Nikolic, a former Yugoslav army soldier, was convicted in 2002 and sentenced to eight years of imprisonment for murder of two ethnic Albanian civilians in Kosovo in 1999. In a retrial ordered by the Supreme Court, police reservist Boban Petkovic was sentenced to five years for war crimes committed in Kosovo in 1999, while coaccused Djordje Simic was acquitted.\textsuperscript{53}

Simple observation of this data reveals that in the early stages of war crimes prosecutions, there wasn’t a clear line of demarcation between ordinary crimes and war crimes, and prosecutions were not based upon international law. The OSCE Mission report, however, provides considerable additional analysis based upon its monitoring of the conduct of these cases. In the conclusions and recommendations section, the report states:
The Serbian judiciary has only tried a few members of the security forces, usually ordinary soldiers or lower-ranking officers, for serious crimes such as murder or war crime. Top-ranking officials, on the other hand, were often bountifully awarded and promoted after the war.\footnote{OSCE Report, 2003, p. 47.}

It must also be noted that although this fact can be attributed to a large degree to a lack of political will, the lack of prosecution of high-ranking officials is also related to the unclear status of command responsibility in Serbian law (see the discussion below.) The problem in this area of law has been underscored by many authorities reporting on war crimes prosecutions in Serbia. It should also be noted that the failure to prosecute top-ranking officials is also related to the debate within Serbia as to whether top-ranking individuals should be tried there or before the ICTY.\footnote{See Richard Dicker and Rachel Denber, \textit{Trials of Key Serbian Generals Should be Held at International Tribunal} (Belgrade: Human Rights Watch 12 August 2004.)}

A related problem is the fact that prosecutions in Serbia have clearly been hampered by a lack of cooperation by the police. This is related to the fact that many of the police officers who are suspected of having been involved in war crimes are still serving currently, and this fact was reported to us in several of the interviews conducted in that country. This fact has not only hampered investigation of high-ranking officials but it has served to promote a general atmosphere of impunity for the police officers suspected of these crimes. The Serbian Ministry of Interior Affairs is primarily responsible for investigations, and as of 2003, the OSCE monitoring team, which was monitoring war crimes trials in Serbia at that time, reported that

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\text{[T]he Ministry of Interior has largely investigated crimes committed by KLA soldiers and only a few cases where potential perpetrators were Serbian police and security forces.}\footnote{OSCE Report, 2003, p. 42.}
\]

This latter observation would also suggest a disproportion in treating alleged perpetrators from Albanian and Serbian communities. Members of the KLA have also been charged with crimes of Terrorism (Article 125 of the FRY Penal Code) and Association to commit enemy activity (Article 136 of the FRY Penal Code)\footnote{26 March 2003. “Situation of Human Rights in parts of Southeastern Europe.” Report by José Cutiliero. Special Representative of the Commission on Human Rights to examine the situation of Human Rights in Bosnia and Herzegovina and the Former Republic of Yugoslavia in accordance with Commission Resolution 2003/13.} as opposed to relevant provisions of existing humanitarian law. In the period prior to 2003, trials were conducted before the district courts by five member panels, including two professional judges and three lay judges. The OSCE monitoring team noted several problems relating to the competence of judicial personnel conducting the trials and problems relating to a failure to respect internationally recognized guarantees of due process. In general, the investigations and war crimes trials were conducted by judges and prosecutors severely lacking in experience in this specialized area of prosecution.\footnote{See, for example the OSCE Monitors’ description in the “Podujevo” case, OSCE Report, 2003, p. 42.} As a result, crime scenes were investigated neglectfully and there was a significant lack of witnesses for the
This latter problem was not only the result of the lack of preparation, but clearly the result of inadequate witness protection as well. The cases were also impeded by the fact that extradition of important suspects was prevented by the fact that these suspects were located in neighboring countries, which do not allow extradition of their own nationals.

The status of prosecutions post 2003

Subsequent to the adoption of the Law on the Organization and Jurisdiction of Government Authorities Prosecuting Perpetrators of War Crimes on 1 July 2003, war crimes trials are conducted in front of the three judge chambers composed exclusively by professional judges who have been selected on the basis of their experience in trying these kinds of cases.

There were indications that progress had been made in 2003 even before the adoption of the new law when, on 20 January 2003, the Belgrade District court (still operating as a panel of five) began its first war crimes trial in the Sjeverin case. That case was brought against four Serbs for the kidnapping, torturing and murder of sixteen Muslim citizens of Serbia from the village of Sjeverin in 1992, in the Bosnia and Herzegovina, near the Serbian border. The defendants were charged with war crimes against civilian population under the article 142 of the FRY Criminal Code. In a report of March 2003, Human Rights Watch noted a few important positive developments in the handling of this case. As the report explained, there had been some concerns that the case was chosen in order to continue the impunity of the police and military as explained above. The report indicates that the outcome proved to be more positive:

Some observers had expressed concern that in pursuing the Sjeverin case, the Serb authorities have an ulterior political aim to limit responsibility for the October 1992 crime to a small number of marginal individuals, instead of on the political and military leadership in Serbia and the Bosnian Serb entity in Bosnia Herzegovina. This concern was heightened by the prosecutor’s characterization of the perpetrators in the indictment as a “paramilitary group,” suggesting that they were operating independently. While it is too early for a final assessment of the prosecution case, the early proceedings suggest that these concerns are unwarranted. In fact, during the first four days of the trial, the president of the trial chamber asked a number of questions aimed at clarifying whether the perpetrators were not “paramilitaries,” but members of the Bosnian Serb army.
The report went on to state:

Another positive development from previous trials is that the state prosecutor has apparently gathered substantial evidence, including detailed witness testimonies and photographic evidence of the crime. This more comprehensive investigative effort would appear to reflect a welcome level of cooperation on the part of the Serbian police.  

In September 2003, the Sjeverin case was completed and four Serbs were convicted and sentenced to 20 years of imprisonment. In addition, in March 2004, Sasa Cvjetan was also sentenced to 20 years of imprisonment in the Podujevo case. He had been also charged with war crime against civilian population under the article 142 of the FRY Criminal Code. This was the first war crimes trial in Serbia in which ethnic Albanians testified in a Serbian Court. It is nevertheless important to note that it has been reported to us that both of these convictions have subsequently been reversed by the Serbian Supreme Court. The cases have since been retried, and the Supreme Court has upheld the lower court’s guilty verdicts.

These cases showed some early signs of progress as indicated in comparison with the pre-2003 period. Perhaps the first thing to be noted is that the sentences issued by the Belgrade District Court are much stiffer than the sentences which had been issued against ethnic Serbs by the district courts in the previous period. Perhaps this was an indication that a tougher stance against war crimes can be anticipated with the transfer of jurisdiction to the Belgrade District Court. Second, the Sjeverin case suggests somewhat enhanced cooperation on the part of the police.

Currently there are four cases before the War Crimes Chamber. One of these is the Zvornik case, of particular importance in that this is the first case that has been transferred to Serbia from the OTP of the ICTY. Also, this is the first case in which some of the defendants are indicted on the basis of command responsibility. The defendants are charged with the violation of Protocol II of the Geneva Convention and with war crimes against civilians under section 142 of the SFRY Criminal Code. The charges stem from the murder of nineteen Muslims at the Celopek Cultural Center in Zvornik and with the expulsion of 1,822 civilians from Kozluk (village near Zvornik) to Hungary. The second case of considerable significance is the trial against five members of the “Scorpions” unit, who were identified in the film released earlier this year as participants of the Srebrenica massacre in 1995 in Bosnia.

These more recent developments may offer some suggestion that there may be a willingness to prosecute more highly ranking individuals alleged to have been
involved in war crimes. However, some recent developments indicate that several of the problems associated with cases handled prior to 2003 persist.

Witness protection continues to be a problem in these cases and was cited as a continuing problem in a recent report by Human Rights Watch in October, 2004. This was a significant problem, for example, in the Sjeverin case. In that case the court, as required under the Code of Criminal Procedure was required to read the addresses of the witnesses in open court. This served to significantly intimidate the witnesses who were testifying in that case. In addition, Serbian law does not allow proceedings to be closed on the grounds of the security of witnesses. The court in the Sjeverin case circumvented the law at one point in the proceedings by ordering their closure on the grounds of “public order,” a justification, recognized under the law. In addition, twenty-four hour police protection was ordered for the witness, but this was an ad hoc measure which is not readily available. Both of these issues have been raised by observers who have called for appropriate reform of Serbian law in this area. As the result of this, on 29 September 2005 the Serbian Parliament adopted Act on the Program of Protection of the Participants of the Criminal Procedure. This act went into effect on 1 January 2006.

The issue of command responsibility remains a considerable obstacle in prosecutions. Although some in Serbia question whether defendants can be prosecuted pursuant to this theory under Serbian law, several international and local experts have expressed the view that they can. These observers argue that Serbian courts can apply the doctrine because of FRY’s adherence prior to the war to international conventions that recognized the doctrine. The first and only indictment that was raised by the Serbian Prosecutor’s Office for the War Crimes on the basis of command responsibility is the indictment in Zvornik case.

Serbia has recently adopted the new Criminal Code, which provides application of the doctrine, but it is widely believed that that particular law cannot be applied retroactively. (See the discussion of command responsibility in the Comparative Analysis section, below.)

However, the verdict that has been handed down in the Ovcar case by the War Crimes Chamber of the Belgrade District Court in December, 2005 is perhaps the most solid sign of progress in the prosecution of war crimes in Serbia. This case arose from the same facts described above in the section on prosecutions before the ICTY in connection with the prosecution of the Vukovar Three. The case in Serbia involved 16 defendants who were accused of committing war crimes in the Vukovar region of Croatia while acting in their capacity as members of the Vukovar Territorial Defence and the volunteer unit, “Leva Supoderica”, both part

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64 The SFRY signed and ratified the Geneva Conventions (Four Geneva Conventions were published in the Official Gazette no.24/50 – Sluzbeni list FNRJ br.24/50), and both additional protocols to the conventions (Both Protocols were published in the Official Gazette-International Agreements no.16/78 – Sluzbeni list SFRJ-Medjunarodni ugovori br.16/78), but the command responsibility doctrine was never incorporated in the Penal Code (Criminal Code).
of the former Yugoslavia People’s Army (JNA). As in the case before the ICTY, they were accused of murdering more than 200 Croats in an incident which occurred on the Ovcara farm on 20 November 1991. In this case fourteen of the defendants were convicted of these crimes, and eight received the maximum sentence of twenty years in prison.

The result in this case would appear to confirm the impression that the transfer of war crimes prosecutions to the War Crimes Panel of the Belgrade District Court signals a tougher stance against these crimes as compared to that associated with the decentralized prosecutions which were taking place prior to the 2003 reforms. It is also significant to note that Natasa Kandic of the Humanitarian Law Center, which monitored the trial commented that “the judge showed that he cared about the evidence, the law and nothing more.” According to a report released by the Serbian media, she also expressed the view that the rights of the accused were adequately protected as were the interests of the victims.\(^6\) The prosecution has indicated that it will appeal the two acquittals in the case, and the defense counsel has indicated that they will appeal the convictions as well. This, of course, raises the issue of how the higher courts in Serbia will handle this case, especially in light of the fact that the Sjeverin convictions were initially overturned by the Serbian Supreme Court.

Assessment

The long history of impunity of individuals at the command level must not be forgotten. Since the reluctance to apply the theory of command responsibility only serves to support this impunity, it is clear that the problems associated with the application of that doctrine will need to be resolved. Moreover, it is clear that the recently adopted law incorporating the theory will not provide an immediate solution to the problem. This observation suggests that the problem is not one of the judicial actor’s technical ability to deal with the concept. It suggests that the problem should rather be addressed as an issue of judicial independence since the prosecution of high-ranking officials with or without the theory of command responsibility will require fortitude and independence on the part of judicial actors who will be required to take actions which are likely to engender a negative reaction on the part of certain sectors of the Serbian government and Serbian population.

In addition, the Serbian judiciary will need to find an effective strategy for the prosecution of those potential defendants who are at large outside of the coun-
try. Since extradition is a non-starter in this connection, this will obviously require continued focus on the issue of transfer. Police cooperation will also need to be an essential element of any strategy focusing on the past record of failure to prosecute high-ranking officials. As noted, the creation of the War Crimes Investigation Unit in 2003 has clearly been a step in the right direction. However, it is unlikely that a staff of eight inspectors in this unit will be sufficient for this purpose. Consequently, an increased focus on the staffing and powers of this unit will be necessary in the future.

Witness protection is a continuing problem that affects all war crimes prosecutions in the country, and it is clear that the problem needs to be addressed not only from a technical/legal perspective but from a practical perspective as well. This is an area in which the adoption of common standards and practices throughout the region may serve as a positive influence not only in the prosecution of those cases, where cooperation between the countries is required, but also in those purely domestic cases where witness intimidation is a problem. As has been mentioned, on 29 September 2005, the Serbian Parliament adopted the Act on the Program of Protection of the Participants of the Criminal Procedure. This statute provides that suspects, accused persons, witnesses, victims, and their relatives could be included into the program of protection, before, during and after the criminal procedure for the crimes against state constitution and security, crimes against humanity and against other rights and property protected by international law, and crimes of organized crime. Commission for the implementation of the Program of protection is established by this Act and is consisted of three members – one of the judges of the Supreme Court of Serbia, one of the Office of the State Prosecutor, and the commander of the unit for protection. The Witness Protection Unit is also established by this Act. The scope of the protection contains the following: 1) physical protection of the persons and the property; 2) change of the residence or transfer to the other prison; 3) protection of the identity and data of ownership; 4) change of identity.

6. COMPARATIVE ANALYSIS

Structural Arrangements

The sections above dealing with prosecutions in Bosnia and Herzegovina, Croatia, Kosovo, Montenegro, and Serbia have described how each one of the judicial
systems provides structurally for the investigation and prosecution of war crimes. In Bosnia, jurisdiction is shared between the WCC of the State Court of Bosnia and Herzegovina and the sixteen cantonal and district courts throughout the country. The WCC is a hybrid tribunal composed of local and international judges. Croatia has assigned jurisdiction in these cases to four special county courts that are expected to develop expertise in the handling of these cases. Kosovo uses hybrid chambers consisted of the local and international judges. Montenegro has assigned two first instance courts with jurisdiction in these cases, and Serbia has the War Crimes Chamber of the Belgrade District Court that operates in conjunction with the War Crimes Investigation Unit and War Crimes Prosecutor’s Office. Thus, each country has a structural arrangement for the handling of war crimes cases that is specifically tailored to the needs of each system. This section of this report will offer comment and comparative analysis on each of these structural arrangements.

It is certainly too early to comment extensively on the success or failure of the structural arrangements currently existing in Bosnia and Herzegovina, since the reforms there are more recent than those established in the other parts of the region. We would only note that arrangement places a great deal of responsibility on the local courts which will be expected to handle several thousand war crimes cases, and this fact will certainly need to be taken into consideration in connection with the strategies for capacity building which are discussed below.

The existence of the four “special courts” in Croatia also appears to be preferable to the status quo prior to this 2003 reform. The creation of the four special courts essentially offers two significant advantages over the previously existing structure. The first of these advantages relates to the issue of impartiality. As was noted in the section above on prosecutions in Croatia, trial of these cases in the local first instance courts throughout the country had proved to be problematic. The trials were held in those localities where the atrocities, which were the subject of these trials, had occurred, and that factor had contributed to the ethnic bias and lack of impartiality. The second advantage relates to the issue of expertise. Under the current arrangements, judges in these courts have been selected on the basis of their war crimes expertise, and they have received training and should continue to receive training specifically designed to increase and ensure their competence and impartiality in the handling of these cases. Although the section above noted that it is a bit early to assess whether the reformed structure has resulted in an improvement in the processing of these cases, one can certainly observe that the reforms appear to be highly appropriate vis à vis the problems which had been reported in war crimes trials prior to 2003.
However, as noted, there has been a flaw in the implementation of these structural arrangements. The 2003 law that created the four special courts provided the transfer procedure, which allows local courts to arrange transfer of war crimes cases to the four specialized courts. However, thus far this option has not generally been exercised, and this state of affairs has considerably undermined the effectiveness of the reforms since the vast majority of cases are still being dealt with in the localities where the crimes occurred. Croatia should reexamine the transfer issue and create either a law or policy or both, which will insure a much more systematic transfer of these cases from the local courts.

The structural arrangement in Kosovo is unique and, as noted in the above section on prosecutions in Kosovo, has proven to be problematic from the capacity building perspective. The ad hoc hybrid chamber was selected as a structural arrangement for these cases on the assumption that they would result in the capacity building of the local judges. This issue is critical to the future success of war crimes trials, since there is currently a plan to return the administration of the judiciary to the local control. The problems that have been reported to date in connection with this structure have been that the international judges and prosecutors who have been assigned to the “64” ad hoc chambers have not always had the necessary experience or expertise to ensure competent handling of war crimes trials. In addition, this experience has shown that it is not enough to put local and international judges together and simply expect that capacity building of the locals will naturally occur. These observations serve, once again, to underscore the necessity of specifically targeted, well-developed judicial training in war crimes and related areas of international humanitarian law. (See the section below on training.)

The assignment of jurisdiction to two specific first instance courts in Montenegro appears to be sufficient given the fact that there are so very few war crimes cases in that country, and similarly, the shared jurisdiction between the WCC and the first instance courts in Bosnia and Herzegovina appears to be warranted by the significant number of war crimes cases in that country. It should, however, be noted that the handling of so many war crimes cases by so many local courts with no specific expertise in war crimes, underscores the continuing necessity of well developed war crimes training of the entire judiciary in Bosnia and Herzegovina.

There appears to be no doubt, as indicated in the section above on prosecutions in Serbia, that the structural arrangements which have been introduced by the 2003 law represent an improvement over the state of investigations and prosecutions which existed before.
One aspect of these arrangements merits special comment, however. As noted, in addition to establishing the War Crimes Chamber, Serbia has also introduced the War Crimes Investigation Unit that includes eight police inspectors who have been hired specifically to conduct investigations in war crimes cases. It was widely reported in interviews conducted by the authors that the creation of the War Crimes Investigation Unit has certainly improved the status of police cooperation in these cases. On the other hand, the authors noted that interviewees reported that there are still many Serbian police who were complicit in the commission of war crimes.

Command Responsibility

There does not appear to be any problem with the application of this doctrine in those parts of the former Yugoslavia, which are under international administration. In Bosnia and Herzegovina, it is clearly applicable, since the Dayton Agreement makes European Law directly applicable, and the doctrine of command responsibility comes into European Law through the application of the Article 7 of the European Convention on Human Rights (ECHR), which incorporates “general principles of law recognized by civilized nations.” The Article 7(2) of the ECHR provides the possibility for the principle of non-retroactivity of the criminal law being overturned in the cases of the most serious violations (Article 7.2 ECHR - *This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according the general principles of law recognized by civilized nations.*). Croatia has also applied domestic law that provides for a rough equivalent of the doctrine. In Kosovo, the doctrine has actually been applied in the Lapp Group case as described below.

However, the application of the doctrine in Serbia and Croatia has generated controversy. In Serbia, one of the principal failings of war crimes prosecutions noted above is the failure to prosecute high-ranking officials for war crimes, and certainly the application of the doctrine of command responsibility would be useful in addressing this gap in the handling of these cases. In addition, this issue is raised in those cases, which have been recently transferred from the ICTY, and is likely to be an issue in cases transferred in the future. The current status of the debate in Serbia is that some judicial actors and legal experts recognize its existence in Serbian law, and others do not. One might have thought that the situation would have been clarified by the fact that Serbia has recently adopted legislation incorporating the doctrine. However, there appears to be consensus among judicial actors that this legislation cannot be applied retroactively. In sup-
port of their view they cite Article 27 of the FRY Constitution, which provides that “criminal offences and criminal sanctions may only be determined by statute”. Consequently, the debate remains. In Croatia, recent legislation has also fully incorporated the doctrine, but the issue of its retroactive application is a subject of debate there as well.

However, in spite of the debate and the continued unwillingness of judicial authorities in both countries to apply the doctrine retroactively, both international and local legal experts have put forward compelling legal arguments for its retroactive application, and that analysis is applicable to consideration of this issue in all parts of the former Yugoslavia. In an article published in October of 2004 dealing with war crimes prosecution in the region, Human Rights Watch provided a thorough analysis of the issue. It argued that “War crimes chambers [in the region] should apply the international law valid on the territory of the former Yugoslavia at the time when the war crimes took place.” It then went on to point out that Additional Protocol I to the Geneva Conventions, which had been ratified in the former Yugoslavia and accepted as binding upon them by the successor states, includes the doctrine. Furthermore, the doctrine had become a rule of customary international law prior to the war, and the ICTY has recognized that fact in the case of Prosecutor v. Hadzihasanovic et al. Finally, HRW supported these arguments noting that:

Under key international human rights instruments—in particular, the International Covenant on Civil and Political Rights and the European Convention on Human Rights—it is consistent with the principle of legality to have ‘the trial and punishment […] for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations [citing in a footnote Articles 15 and 7, respectively of those conventions] even though the act or omission did not constitute a criminal offense under national law.’

The article acknowledged that punishment for this crime was somewhat problematic in that specific punishment is not provided in local law. However, it suggested as a solution to this problem that:

Sentences by courts in Bosnia, Croatia, and Serbia in cases involving command responsibility should be subject to no more than the maximum terms of imprisonment that could have been imposed under the legislation in force for the substantive crimes at issue when the crimes were committed.
In an earlier report of 23 February 2004, legal experts at the Humanitarian Law Center in Belgrade provided identical analysis. The only additional information contained in that report is that Article 30 of the Criminal Code of the Federal Republic of Yugoslavia provides for the omission mode of liability for criminal acts including Chapter 16 “Crimes Against Humanity and International Law.” It goes on to state that “apart from the CCY article 30 provisions on omission, other modes of liability that might be invoked for establishing command responsibility are: co-perpetrating (article 22), inciting (article 23), aiding and abetting (article 24) and organizing a criminal enterprise (article 26)” thus providing some detail for the HRW article’s suggestion that punishment could be determined in accordance with substantive crimes in force at the time of their commission. The report reinforces its analysis by pointing to the decision of the District Court of Pristina in the Lapp Group case, which cited both Article 30 of the CCY and the applicability of relevant customary international law in the former Yugoslavia at the time of the commission of the offences in that case.

In light of these forceful arguments, which have been put forth by both international and local legal experts, it is troubling that courts are still not applying the concept. Although Croatia and Serbia have now incorporated the concept in recent legislation, the new legislation doesn’t solve the problem of its application to abuses, which occurred during the conflict since local authorities are adamant in their view that this legislation cannot be applied retroactively. Consequently, the adoption of this legislation will be of no use in fighting the impunity of high ranking officials for offenses committed during the war in the territory of former Yugoslavia. This fact should be taken into consideration in future negotiations relating to EU accession. To the extent that ending impunity for war crimes is part of those negotiations, it will be important to note that the new legislation will be totally ineffective in addressing that issue.

Cooperation and Extradition

An analysis of these two issues in relation to war crimes prosecutions in the region reveals a conundrum, which could prove to be a significant obstacle to ending impunity for these crimes. First of all, it must be noted that the laws or constitutions of each of the countries in the region forbid extradition of each country’s nationals. Secondly, while the international agreements relating to cooperation in these cases which have been referenced above in the sections dealing with
prosecutions in each of the countries (the European Convention on Mutual Legal Assistance in Criminal Matter and the Memorandum on Agreement on Realization and Promotion of Co-operation in Fighting All Forms of Grave Crime, e.g.) allow for transfer of prosecutions from one country to another, it is clear from the literature on war crimes prosecutions that transfer of these cases has been extremely rare.

The conundrum lies in the fact that if neither extradition nor transfer of cases is practiced, the current state of impunity for many perpetrators will continue. Assume, for example, that a Serb with dual citizenship in Bosnia and Herzegovina and Serbia has committed a war crime in Bosnia and then fled to Serbia and that Bosnia has later commenced war crimes proceedings against him. Under Serbian law, he couldn’t be extradited to Bosnia and Herzegovina, and if the current practice were to continue, in all likelihood, Bosnia would not transfer the case to Serbia. Although there has recently been one transfer under these circumstances from Bosnia to Croatia in the “Abdic” case, it has been generally recognized that this was an ad hoc arrangement and does not represent a consistent practice amongst the countries of the region. Since the reality is that many war crimes perpetrators have dual citizenship in two countries of the region and have fled the country where they have committed the crimes, this problem is both real and significant.

At this point in time, there needs to be recognition that the current multilateral agreements which provide for cooperation in criminal cases have not offered an appropriate solution to this problem even though they do provide for transfer. Consequently, strategies will need to be developed to encourage countries throughout the region to engage in bilateral agreements dealing with this subject. It would be important for each country to agree in advance to receive a transfer from another country, which requests it.

The “Palic Process.” Three expert level meetings have been held so far, hosted by missions of OSCE in Serbia, Croatia and Bosnia and Herzegovina, in what has come to be known as the “Palic Process”. Representatives of the judiciary (judges and prosecutors from the three countries in charge of the war crimes trials), police witness protection units and ministries of justice officials in charge of international legal aid attended. The process has contributed to the establishment of direct contacts and co-operation between Croatian, BH and SaM judges and prosecutors in concrete war crimes cases, information and evidence sharing. Witness protection police units from the three countries have also improved their co-operation. Such gatherings of practitioners appear to have significantly contributed to keeping the process of regional co-operation alive, serve as panels for
exchange of expertise and experience and co-ordination of concrete activities and strengthen personal relations among the stakeholders. They are also test occasions for showing progress, obstacles, lack of co-operation, and they create positive competition among the judiciaries in that they provide incentive for them to avoid being cited at the meeting for lack of co-operation. This progress is a welcome and positive sign that professionals from the countries of the region are committed to joint efforts and are dedicated to bring war crimes perpetrators to justice regardless of their nationality. If co-operation in a most sensitive and painful segment of relations among the countries of the former Yugoslavia is possible, it is an excellent example that should be followed by the state authorities building co-operation in other areas.

Training

It must be stated at the outset of this section that international donors have already provided an impressive amount of support for judicial training in the region, and some of it has specifically targeted war crimes prosecution.

Nevertheless, it is clear from the comparative analysis of continuing problems and issues relating to war crimes prosecution in the region that continued training which specifically targets all actors dealing with war crimes in the judicial sectors in each of the countries will need to continue and should be enhanced as cases are transferred from the ICTY and reforms recently introduced in each of the countries serves to increase the number of war crimes prosecutions. The need will be particularly acute in Kosovo where capacity building, as explained above, has been problematic. It will also be particularly crucial in Bosnia and Herzegovina where ordinary judges throughout the country will continue to be required to prosecute large numbers of these cases. However, it will continue to be essential in both Serbia and Croatia as well since the effectiveness of justice in these cases will depend largely on the continuing capacity of judges in the special chambers in Belgrade and in the four special courts in Croatia.

A few factors relating to the effectiveness of judicial training generally and to training in war crimes cases in particular will need to be taken into consideration. First, training should be much more practical than theoretical. In almost all cases, the judicial actors will have the substantive knowledge required to handle these cases. They will need the greatest support in the practical aspects of trying these cases. This will be true particularly in dealing with areas of the law that present significant challenges of proof. The doctrine of command responsibility is
precisely such an area. Consequently, the training will need to be conducted by international experts who have real practical knowledge of this and other difficult to prove legal claims. Another factor, which needs to be taken into consideration, is the need for training that is both practical and holistic. This means that all of the actors in the judicial sector, including judges, prosecutors, police and defense counsel should be trained together in simulated exercises including mock trials.\textsuperscript{71}

The inclusion of defense counsel in these efforts deserves special mention since it is so often neglected in other judicial capacity building exercises, and the lack of competent defense counsel has often undermined the legitimacy of trials in other countries.

Since, as noted above, the need for capacity building of the judiciary in the handling of war crimes cases is a need which is felt to varying degrees throughout the region, it would perhaps be desirable to develop some training programs on a regional level with participation of all of the various actors in the judicial sectors in each of the countries. This approach would have the added benefit of encouraging cooperation between the countries with respect to these cases. However, regional training programs should not be developed at the expense of local training. The training, which has been occurring in judicial training centers, for example, at the Judicial Training Center in Belgrade and at the Kosovo Judicial Institute in Pristina will need to be continued and enhanced in light of the recommendations, which have been made above.

It should also be noted that training must address not only the technical and practical issues related to war crimes but will need to also address the very difficult issues of impartiality and judicial independence. These ethical issues are not easy to address in training and targeted strategies will need to be developed. The use of mentoring should be considered. It is important to note that training and capacity building will need to be directed not only to the first instance jurisdictions, which handle war crimes, but to the higher courts as well. Impartiality and judicial independence are among the most urgent issues of judicial capacity building that will need to be addressed because, as noted above, progress in domestic prosecutions will undoubtedly result in decisions which are not well received by the local populations, and this is true for first instance jurisdictions and appellate jurisdictions as well.

Finally, the problems associated with the issue of command responsibility are indicative of the larger issue of the application of international law generally. In some parts of the region, and in Serbia in particular, the application of interna-
tional norms in the domestic system is rare. Consequently, all of the issues and problems relating to domestic application of international norms will need to be dealt with in judicial training. It is important to note in this connection that the adoption throughout the region of legislation providing for the admissibility of evidence introduced at the ICTY may be problematic in and of itself because it requires full knowledge of ICTY rules and procedures and of international humanitarian law generally. In addition, the procedural model of the ICTY is predominantly a common law model, and the application of those kinds of procedures in the civil law systems of the region may generate problems. For instance, the question arises as to whether witness statements can simply be admitted through documentary evidence as they would be in civil law countries or whether witnesses might be required to appear as they would be in common law countries. These and all of the problems relating to the application of international norms relating to the prosecution of war crimes in the region will need to be addressed in judicial training.

Witness Protection

Witness protection is perhaps the most urgent issue relating to the war crimes prosecutions in the region and common standards will need to be developed to address the problem. It has been consistently cited throughout the literature dealing with war crimes prosecution in the region. In general, the lack of cooperation of witnesses has been one of the major factors that has detracted from the success of these prosecutions in each of the countries. Often witnesses have refused to testify or have recanted their previous testimonies when ultimately they testify as part of a war crime trial, and it has been clear that their behavior is the direct result of threats and intimidation. There is perhaps no single measure that would act as a panacea for this problem, but consistency of witness protection measures throughout the region would certainly help reduce the frequency with which this obstacle is encountered.

In order to make recommendations for the establishment of uniform measures, this section will offer some analysis of issues relating to witness protection, which have been problematic in some of the cases in the region. First of all, in major cases where a major witness is clearly in danger, the most effective measure is to offer the witness a totally new identity in a new location. This is an extreme and costly measure. Up until recently, this measure was not generally available in the region. However, Croatia, Serbia and Montenegro have recently introduced legislation availing witnesses of this extreme measure, but this aspect of witness
protection has not been made available in Bosnia and Herzegovina or Kosovo. If the law could be reformed in the other two countries to allow for this special protection, then this feature of witness protection could serve to encourage more uniform and consistent cooperation among the countries of the region than we have seen thus far.

In addition, although courts on an ad hoc basis in specific cases have ordered twenty-four hour protection of witnesses by police guards, the laws of the countries in the region do not uniformly empower judges specifically to take this measure when it is deemed to be necessary. Similarly, judges are often not specifically empowered to order closed proceedings in the interest of witness protection. In Serbia, for example, the law allows for closed proceeding in the interest of public order but not for the purpose of witness protection. Consequently, this aspect of witness protection in each of the countries needs to be addressed as well.

Finally, we discovered in our interviews in the region that witness protection in some of the countries (Croatia, for example) involves witness support in addition to witness protection. This has taken the form of psychological counseling, the provision of transportation to and from proceedings, and in some cases legal representation. In Serbia, these services have been performed very effectively by an NGO—the Humanitarian Law Center. These services should be provided in the law of all of the countries in the region and efforts will need to be undertaken in the future to foster the provision of these kinds of services by NGOs throughout the region using the provision of services by HLC in Serbia as the model.

Outreach

One of the lessons, which ought to be learned from the prosecutions by the ICTY, is that attention needs to be paid to the issue of public perceptions. It is clear that part of the reason that the ICTY has encountered negative perceptions in the region is the fact that the prosecutions have been occurring at such a distance from the populations. Nevertheless, even when they are occurring closer to home, the populations will need to be informed about them lest misinformation begin to develop that might give local courts handling these cases a negative image and which might serve to promote revisionism about the events which form the basis of the prosecutions. These considerations have led both the ICTY and the ICTR to devote significant time and resources to outreach.\textsuperscript{72}

The problem that we noticed in the interviews which we conducted last August with prosecutors and representatives of the ministries of justice in the region is
that there didn’t seem to be an awareness of what is entailed in the kind of outreach programs which have recently been established by both the ICTY and the ICTR to counter the negative images which they have acquired in the countries where the atrocities which form the basis of the prosecutions have occurred.

There was at that time a tendency to believe that periodic briefings and open proceedings would be sufficient for this purpose. However, the international tribunals have organized conferences, roundtables, seminars and media events and have organized community events with victims’ associations where they have engaged in a candid review of the handling of cases. In addition, the ICTY has provided for live video broadcast of the proceedings. We have recently learned that many of these practices have been observed in Serbia in the past year. Some of them have been organized by NGO’s with support from the ICTY. In addition, the OSCE Mission is providing support for the outreach units, which are attached to the War Crimes Prosecutor’s Office and War Crimes Chamber of the Belgrade District Court. The WCC of the Bosnia and Herzegovina State Court also established the outreach unit. Nevertheless, local courts will need to remain mindful of what is entailed in outreach as they take on more cases.

In this connection, it is encouraging to note that Serbia is now considering a draft law that will allow for video broadcast of local prosecutions. In Serbia, this has been deemed to be necessary given the low esteem, in which significant portions of the population hold the judiciary. Nevertheless, it is clear that some of the additional measures mentioned in the previous paragraph will also need to be considered, and all of the courts in the region, which handle war crimes trials, will need to develop outreach programs that will include all of these features.

Cooperation with NGO’s

There is no doubt that one of the factors relating to the recent progress in the domestic prosecutions of war crimes in Serbia is the continued close cooperation between the War Crimes Prosecutor’s Office and the Belgrade-based Humanitarian Law Center, which we were told is a constant source of information relating to war crimes. This is a cooperative relationship, which has served to foster the effectiveness of war crimes prosecutions in other parts of the world. This was the case, for example, where the Human Rights Unit of UNTAET, working in close collaboration with local human rights NGO’s, provided essential information to the Special Investigation Unit and assisted in the investigation of those crimes. In this respect, international donors should consider funding projects, which would encourage civil society to play this role in those places where this relationship
is underdeveloped. Since the report on transitional justice in Bosnia and Herzegovina reported on the relative underdeveloped status of civil society, the link between NGOs with knowledge of war crimes and those authorities responsible for prosecution of those crimes will need to be strengthened there as well.
VI. VETTING/LUSTRATION
1. BOSNIA AND HERZEGOVINA

Given the special role of the international community in Bosnia and Herzegovina and the powers that were granted to the Office of the High Representative and to the NATO-led military mission, there were several attempts under numerous circumstances to carry out a review of the past record of public officials. Such reviews involved the police forces, candidates for ministerial positions, army generals and judicial personnel. The review was carried out on different grounds: moral integrity, technical skills and qualifications, property and financial status, and war crimes records. However, in general, such reviews lacked clear criteria and transparency and it is difficult to ascertain which were the main criteria used to block the appointment of a public official. At the same time the Office of the High Representative had the power to dismiss officials who were in fact obstructing the peace implementation process. The two processes in some cases tended to overlap and officials were removed also because of their violent past. Information shared with the public was limited to a few press releases, but there were no official documents outlining the whole vetting procedure and in fact, people who have been removed in the course of the vetting procedure are now seeking legal redress as they dispute the grounds for removal (see the case of Dzaferovic v Federation of Bosnia and Herzegovina before the Human Rights Chamber). In this section, we will briefly outline the main vetting efforts, which have taken place in the public sector. In spite of these efforts, the Bosnia and Herzegovina public frequently complains that persons currently appointed to high level positions have a questionable war time background and have thus escaped the scrutiny of the international community.

Judicial reform

In Bosnia and Herzegovina, our colleagues report: “Judicial reform was officially completed in September 2004 […] Of the 1,600 judges who passed the vetting process, some 200 are new. This mission found that most people consider the reform complete and heard no requests to revisit it.” However, they also report that the implementation process is still in progress and it is not yet clear whether public trust in the judiciary has increased because of these measures.
Police forces

Interviews conducted by the Research Team, which prepared the Bosnia and Herzegovina report also revealed that vetting of the police force had been attempted by the UN Mission in Bosnia and Herzegovina, which took into consideration the war time record of police officers in its de-certification procedure. The decertification procedure carried out by UN Mission included numerous criteria according to which police officers were deemed unfit to serve in the police; among them were unclear property status, forged diplomas, the existence of a criminal record or of current criminal proceedings against an officer, including accusations of serious violations of international humanitarian law. However, there is no evidence that these efforts were undertaken in a systematic way throughout the country and there is reason to believe that their impact is limited: only 4% of police officers were in fact decertified under these criteria. Numerous complaints were also raised by decertified police officers who filed applications with the Human Rights Chamber of Bosnia and Herzegovina, prompting an opinion by the Venice Commission on the fairness of the proceedings. In spite of the alleged procedural shortcomings, frequent reports from all over the country seem to indicate that police officers with a questionable background continue to serve. The findings of the Srebrenica Commission and Srebrenica Working Group seem to confirm this assumption. In addition, reports in the local press of the war crimes involvement of current high-level police officers are not uncommon.

Armed forces

In the context of the reform of the armed forces, the NATO-led SFOR, carried out a review process of the General Staff of the future Army of Bosnia and Herzegovina. Allegations of war crimes were one of the reasons for which SFOR banned four generals from being appointed to senior posts at the Head Quarters of the Bosnia and Herzegovina in April 2004. Around fifteen generals were vetted by SFOR and the vetting process was completed in 2004. Numerous officials, including President Tihic and human rights activists, like the President of the Helsinki Committee, Srdjan Dizdarevic, criticized SFOR for the lack of transparency of the process.
Entity and state government

The Office of the High Representative (OHR) also carried out a vetting procedure of persons to be nominated for ministerial positions in both entities, taking into account, their alleged wartime activities. Little information is available publicly, as the criteria for such vetting procedure were never stated publicly until recently when OHR handed over the whole process to the domestic authorities.

Electoral law

From 1996 to 2001, elections were conducted under a set of provisional regulations issued by the Provisional Election Commission, a mixed body comprising domestic and international actors who regulated the electoral process pending the adoption of a permanent electoral law. Under these regulations, any person who was indicted by the ICTY and did not surrender voluntarily could not run for office. Article 1.6 of the Permanent Electoral Law, which entered into force in September 2001, incorporated this principle. Political parties, which still maintain persons in this category in an official position, are also ineligible to participate in the elections.

Finally, the Srebrenica Commission\(^78\) is reported to have compiled a list of 19,000 names of individuals involved in the massacre, including 800–900 who are still working in institutions of the Republic of Srpska. These names have not yet been made public, but have been sent to state prosecutors. Since the report was transmitted to the Republic of Srpska on 4 October 2005, there haven’t been any indications in the press that the report has thus far been used for internal vetting purposes.

2. CROATIA

In Croatia, a lustration proposal was introduced in Parliament in 1998 and again in 1999 by the opposition Croatian Party of Rights (HSP). However, it was explicitly limited to communist era abuses occurring from 1945-1990. No other political party supported the legislation and the attempt was unsuccessful.
3. SERBIA

The Serbian parliament passed a lustration law in May 2003, “with great difficulty” according to one of our interviewees. The law makes provisions for an independent commission to examine individual responsibility for violations of human rights by those who hold or seek public office; party or organizational membership, or joint responsibility, are not covered in the law. Human rights are defined by the Yugoslav/Serbian constitutions and the International Convent on Civil and Political Rights, ratified by the Socialist Federative Republic of Yugoslavia in 1976. The law is explicitly retroactive to that date, although there is some discussion as to whether this will be disallowed by the Supreme Court.

The lustration law has not been implemented, and our interviews revealed that the parties connected to the previous regime have obstructed it from the outset. On 15 May 2003, the National Assembly appointed 8 out of 9 members of the Commission for Investigation of Accountability for Human Rights Violations (The Commission). Although the ninth member has not been appointed, the Commission held constitutional meeting on 20 October 2003. However, there was no vetting of candidates in the December 2003 parliamentary elections, in part because the field of 5000 - 6000 candidates was too large a number to investigate, and also no consensus was reached on investigating only the 250 who secured mandates in the election. The Commission still has not implemented the measures introduced by the law.

Our interviews also revealed that a new draft of the Constitution under discussion would, in effect, provide a vetting function for the judiciary, as it would change the process by which judges and members of the Supreme Court are appointed. But there is no progress on the draft of the Constitution and little expectation of its passing any time soon.

4. REGIONAL EFFORTS

On 24 October 2005, five NGOs in the region from Albania, Bosnia and Herzegovina, Croatia, Macedonia and Serbia announced a joint initiative to draft lustration laws in their respective countries and open police files from the Communist-era regimes. This initiative is being undertaken under the umbrella of the Center for Democracy and Reconciliation in Southeastern Europe (CDRSEE), based in Thessaloniki, Greece. Their October 2005 report, “Disclosing Hidden History:
Lustration in the Western Balkans,” analyzes the relationship between lustration and democratization efforts in the region. It is significant for our study because it calls for the adoption of lustration legislation to cover not only the Communist period but the post-1990 period as well. They thus recognize that democracy can be undermined not only by those who were informers on their fellow citizens, but also by government institutions staffed by suspected human rights abusers. This project is the only one that we have found in the region that focuses on the lustration issue and pushes to get it taken seriously by governments and by civil society.

Assessment

The lack of progress with respect to the issue of vetting in the region has been described eloquently by the Center for Democracy and Reconciliation in Southeast Europe (CDRSEE) in the Project report, referenced above. The Project was funded by the Balkan Trust for Democracy, the European Union and USAID and was implemented by the CDRSEE. It documents the abortive and unsuccessful attempts to address the issue through legislative reform throughout the region. It summarizes the situation quite emphatically and succinctly as follows:

In short, lustration did not take place in the Western Balkans. Even in the cases where appropriate lustration laws were passed, the public authorities failed to implement them […] The interest of the general public has been focused on other issues, and civil society was not strong enough to bring this issue to the fore. The mainstream information media did not place the issue on the public agenda in a way and to an extent that would have been appropriate and necessary. Most international actors involved in democracy building in the Western Balkans paid little or no attention to contested issues surrounding the dealing with the past. All of this had negative repercussion on democracy and the rule of law.

In addition to providing historical documentation on the subject, the report also makes recommendations, a few of which are particularly pertinent to our study. For example, although the bulk of the efforts, which have been undertaken, have concentrated particularly on vetting for abuses that occurred during the Communist era, the report also calls for effective lustration for abuses that occurred in the post 1990 period as well. It seeks immediate adoption of lustration laws and for the immediate vetting of incumbents and future candidates for public office. It recommends that this legislation should be the product in each case of parliamentary debate that includes public hearings in which academia, civil society and
victims’ organizations should be taken into consideration. In the interest of establishing procedures that are fair and which guarantee due process the report recommends “[…] The main criterion used in the definition of the persons affected in the screening processes should not be the prior holding of a high ranking state or party position, but the concrete involvement in human rights violations.” It also recommends that the procedure should be prescribed by law and administered by an independent commission.

Vetting and lustration are challenging to implement because of several inherent complications. These include the determination of the criteria by which individuals will be prevented from assuming public posts or removed from their jobs, and the decision on who will have authority to apply such criteria. There is a danger that criteria could be set in a way that exacts revenge, or that innocent people could be penalized without due process.

An example from another context serves to illustrate these dangers. In October 1991, the Federal Assembly of Czechoslovakia passed a law providing for the systematic screening of government officials and the dismissal of those “found to have worked either for the communist regime’s State Security (secret police) or to have been high-level communist officials.” In one assessment of the legislation, the writer notes that “The chief flaw of the new legislation is that it is partially based on a presumption of guilt rather than of innocence: that is, the burden is on people in certain government positions to prove they did not work for the secret police or were not communist officials.” In the meantime, while standing accused, people’s reputations and livelihoods could be destroyed even if they were innocent.

Therefore, lustration and vetting must be approached very carefully. Although the lack of lustration laws in the region is an admitted gap, parliaments should not rush to fill the gaps without studying what has worked in other contexts and consulting with experts who have experience with such practices. At the same time, the need for government action in this domain is unquestionable because civil society in some parts of the region has already begun to gather names for vetting with obvious implications for those whose reputations and careers are at stake. In light of this fact, government action is imperative so as to ensure that justice is meted out fairly and effectively.

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82 Ibid, p. 555

83 For an analysis of the strengths and weaknesses of lustration as an approach to transitional justice, and for suggestions on principles that should guide such approaches, see Kritz, 1995, pp. 461-488.
VII. TRUTH-SEEKING
Truth-seeking can take many forms: the most widely known is the truth commission, made famous in the 1990s by the Truth and Reconciliation Commission in South Africa but in use much earlier in Latin America and elsewhere. However, there are also other ways that the truth can be pursued. In this section, we explore efforts at establishing both national and regional truth commissions in the former Yugoslavia, plus provide information on projects to document events of the war, media efforts in ferreting out the truth about war crimes, and the quest to find the thousands of persons still reported missing.
A. TRUTH COMMISSIONS

To quote Priscilla Hayner, a world-recognized authority on this subject, truth commissions are defined by four characteristics:

- they focus on the past (i.e., as opposed to investigating current abuses);
- they investigate a pattern of abuses over a period of time, rather than a specific event;
- [they are] temporary, typically in operation for six months to two years and completing [their] work with the submission of a report; and
- [they] are officially sanctioned, authorized, or empowered by the state (and sometimes also by the armed opposition, as in a peace accord).  

In the former Yugoslavia, only the governments of Serbia and Bosnia and Herzegovina have explored the possibility of setting up national truth commissions that meet these criteria. Currently, the idea of a regional truth commission is beginning to take shape.

1. Bosnia and Herzegovina

The concept of a truth commission in Bosnia has been in discussion since 1997. From the documents we have reviewed, including the UNDP Mission Report from Bosnia and Herzegovina, there are various opinions about whether such a commission is a good idea, and how it should be structured. Quoting from the UNDP Mission Report from Bosnia and Herzegovina:

To date, the only real attempt to establish a truth and reconciliation commission has been headed by Jakob Finci, the leader of Sarajevo’s Jewish community, with the support of the US Institute of Peace (USIP). USIP was created by the US Congress in 1984 as an independent institution to promote the prevention, management and peaceful resolution of international conflicts. Neil Kritz, who directs USIP’s Rule of Law Programme, has been engaged in the debate on transitional justice in Bosnia and Herzegovina since the Dayton Peace Agreement was signed in 1995.  

[...] In 2000, Finci founded the Association of Citizens for Truth and Reconciliation, a loose group of civil society organizations and individuals. The group organized an international conference in May 2001 that discussed the establishment of a formal commission and discussed a draft law to create such a commission prepared by Finci’s Association.
The conference made the ICTY change its position. Claude Jorda, then-president of the Tribunal, said that the ICTY would support the creation of a commission as long as it helped the Tribunal’s work. The conference, however, was limited by the fact that Bosnian Serb representatives did not attend.  

More recently, USIP has been working with another initiative begun by three members of Parliament, one from each of the Bosnia and Herzegovina ethnic groups. Under their joint auspices and with the support of the governments of Norway and Sweden, a working group has been formed, composed of representatives of the eight major political parties. This working group is drafting a new piece of legislation to set up a national truth commission. In early November 2005, the USIP initiative became public knowledge; some of the feedback has been negative because there has been no public consultation on the draft legislation. USIP is attempting to rectify this problem by beginning a series of meetings with civil society leaders to get their feedback on the working draft. The intention is to come up with a consensus on the content of the draft legislation and then introduce the bill in the Parliament. The outcome will depend in large part on the extent to which the consultations, introduced rather late in the process, will provide the needed legitimacy for the Commission to be both politically acceptable and effective.

These efforts to establish a Truth and Reconciliation Commission on the state level in Bosnia and Herzegovina are also supported by the Association of Citizens for “Truth and Reconciliation” (ACTR). The Association raises awareness of the need for reconciliation efforts and has opened up a public debate on the constitution and character of the prospective Bosnia and Herzegovina commission.

2. Serbia

The Yugoslav Truth and Reconciliation Commission was established by then-President Kostunica, by decree, on 29 March 2001. However, it never achieved legitimacy in the country, nor did it issue any reports or findings, and it disbanded in 2003. In its design, mandate and composition, it was the antithesis of an effective truth-seeking mechanism.

The first major flaw was its launch without public input or parliamentary debate. The Presidential Decision announcing its creation took many by surprise, and was believed by some to have been a response to international pressure rather than motivated by any sincere desire on the part of the government to seek the truth.
In addition, the TRC was given very little funding or staffing support, and at least one of our interviewees believes that Kostunica intended for the effort to fail.

The mandate of the Commission was also problematic. It was given no investigative authority to identify war crimes or human rights abuses but instead was oriented toward academic research. The focus was on tracing the causes of the war rather than on exposing its effects. There was also a suspicion on the part of some of our interviewees that the real purpose behind the TRC was to demonstrate the victimization of the Serbs rather than a more open-ended search for responsibility for war crimes. As the October 2004 ICTJ report noted:

Had the TRC's mandate focused on Serbia's responsibility for wartime violations and their effects on victims, the reception might have been more positive. The Commission's members could have chosen this option when developing their Work Programme, as they were neither bound to focus on causes nor barred from focusing exclusively on Serb responsibility. The failure to interpret their mandate in such a manner contributed to the Commission's ultimate demise, and the TRC was perceived in many quarters as a tool of the President and a mechanism to help justify Serbian wartime atrocities.

Moreover, in 2001, Jelena Pejic, an international lawyer from Belgrade wrote an article in the Fordham International Law Journal questioning whether a national commission could effectively assess the truth about a regional war.90

Finally, the composition of the TRC undermined its legitimacy. Kostunica initially named 19 people to the Commission, three of whom immediately declined to serve. There were only two ethnic minorities named, and no one at all from Montenegro. The Serbian Orthodox Church was the only religious group represented. Efforts were made later to diversify the Commission membership, but by that time the legitimacy of the institution was already lost.

The International Center for Transitional Justice clearly summarized the lessons from this failed effort.91

- It is difficult to establish a national truth commission with external legitimacy if its mandate is to examine the causes and consequences of a region-wide conflict, unless the commission's mandate, methodology, and composition are specifically designed to build confidence among key regional actors.
- The inadequate consultation of and engagement with NGOs and victims before and during the Commission's operation severely harmed its image. Had there been an extensive and public commissioner-selection process, and

consultation on the adoption of the President’s decision to establish the TRC, its legitimacy and independence might have been greatly enhanced.

- The ideological, ethnic, and political homogeneity of the commissioners prevented it from being seen as an impartial body. The early and public resignations of two respected commissioners [...] highlighted the problematic nature of this composition. A more diverse composition would have benefited the Commission’s image and helped overcome the inevitable criticisms of its mandate.

- In the absence of political will and civil society support (especially that of leading human rights NGOs) it will be very difficult for a truth commission to succeed. The TRC’s outreach and communications efforts were slow and generally ineffective. Rather than soliciting ideas or acknowledging legitimate criticisms and concerns, commissioners tended to publish self-defense opinion pieces in the local media.

Any effort to establish a future truth commission, in Serbia or elsewhere in the region, must take seriously these failings of the Yugoslav TRC if it is to have any credibility or chances for effective impact.

One very interesting recent development in Serbia is the initiative on the part of the Belgrade Circle to bring outside experts with experience on truth commissions to Belgrade for public speaking engagements. This has included Jose Zalaquett, former member of the Truth Commission in Chile, and Alex Boraine, former member of the TRC in South Africa and former director of the International Center for Transitional Justice in New York. Presumably the testimony of such high-profile and credible experts, whose experiences with truth seeking are much more positive than that of the Yugoslav TRC, can begin to change public perceptions about the legitimacy of such efforts.

3. Regional Initiatives

On September 5, 2005, the International Center for Transitional Justice presented a proposal in Belgrade to a group of regional NGOs for an "International Victims Commission for the Former Yugoslavia." The proposal is for a two-stage process; the first stage involves NGOs in the region gathering one million signatures on a petition, to be presented to the UN Secretary General and heads of state in the region, asking for the setting up of such a Commission. The mandate would be to:

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“[…] investigate and report on the most serious violations of human rights and humanitarian laws committed during the conflicts of the 1990s; […] report on positive stories of individuals who took significant personal risks to protect vulnerable persons and prevent violations from taking place; […] undertake significant public education and outreach across the region; […] conduct statement-taking with victims, witnesses, and perpetrators; […] and it would hold televised individual public hearings, as well as thematic and institutional hearings, in each participating state/territory.”

In the second stage, the proposal envisions the setting up of a governmental Commission with the power to recommend reparations for the region, as well as measures to improve democracy, human rights, and the rule of law. It would also establish a regional victims’ registry.

Notably, the Commission proposal does not mention the word “truth.” In conversations with many people in the region, we were advised that “truth” is a suspect notion that has taken on political connotations and is considered a misleading and potentially manipulative concept. Everyone is particularly suspicious of whatever the government proclaims to be “true.” Therefore, the working title in the proposal refers to victims rather than to truth. However, the features of the Commission are identical to those of a truth commission in that it would be a governmental body, tasked with taking public testimony from victims and identifying serious human rights violations and war crimes, and issuing a final report with wide public dissemination.

Our interviews indicate that a regional truth commission could be an acceptable alternative to national level commissions. In fact, it is not the first time that such a concept has surfaced. The Igman Initiative, based in Novi Sad, brought together a group of NGOs in 2003 from several countries, to launch a working group to create “a model of reconciliation”. These include the Center for Regionalism from Novi Sad; the Citizens’ Forum of Tuzla; and the Civic Committee for Human Rights from Zagreb. As stated on the Initiative’s website:

All past efforts to initiate a process of attaining the truth and reconciliation were developed at national level only, ignoring the fact that the war had involved three sides. These three sides were obliged to come together to participate in establishing the truth on the war and in attaining reconciliation.

The Igman Initiative has not, however, progressed to the point of putting a proposal together.
We also heard several notes of caution in thinking about a regional truth seeking process. First is the worry that it will be hard to find people who would be trusted enough to serve as Commissioners. The possibility of incorporating international members who would be perceived as neutral was raised as a way to manage that problem. Also, one interviewee specifically mentioned that in Serbia, NGOs have been demonized and de-legitimized by the government, so it would be a challenge to find acceptable civil society membership.

Another interviewee stressed that in order for a regional truth commission to work, there must be effective regional cooperation and judicial capacity building – and “we’re not there yet.” In their view, time is needed for governments and NGOs in the region to work together before it will be possible to discuss and design such a process. In Kosovo, we heard that there is a need to deal with the status issue before turning to formal/official truth-seeking.

Assessment

A truth commission is, by definition, an official body, set up by governments who recognize that it is in their interest to establish a legitimate public record of what actually happened during periods of war-time violence. This can serve both as a basis for the building of trust in public institutions and for reconciliation efforts upon which a more sustainable peace can be built. National governments in the Yugoslav region have, to date, been notably unwilling to engage in truth seeking, and this creates a rather large gap in the pursuit of non-adjudicatory transitional justice in the region. National governments in the region should therefore be encouraged to explore truth seeking processes as a significant step in re-establishing public trust.

However, it is not only governments that are unwilling to face the truth; our interviews and review of local responses to indictments of war criminals in the region demonstrates that the public in many countries is also engaging in denial of war-related responsibility. Examples include the public demonstrations in support of General Ante Gotovina in Croatia, the hero’s send-off for indicted war criminals in Serbia when they leave for the ICTY in The Hague, and the outrage among Albanians in Kosovo whenever there is a prosecution of KLA members for war crimes. In each case, civilians have been unwilling to accept the truth about what their military and political leaders did during the war years. Therefore, public perceptions must also evolve in order for a truth commission to be a viable and useful tool for truth seeking.
When the time is more propitious, it is clear that a regional effort is much more promising than a series of national-level commissions. The war began within what was then one state, and even though that state no longer exists, there are too many connections between victims and perpetrators across the present state borders to make national commissions very useful. Also, individuals within each country do not yet trust the motives of their own governments acting unilaterally in such an enterprise. The current proposal by the ICTJ and local NGOs is a very promising initiative to create such a regional effort, and it deserves support as it unfolds. The proposal’s most important near-term contribution would be to fill the gap created by a lack of public awareness of the importance of truth seeking; in the drive to collect one million signatures in support of a victims’ commission, the project would provide crucial public education. These efforts should also be consolidated with those associated with the Igman Initiative. Once the petition is completed, it will be critical to continue the broad involvement of civil society in the planning process, to counteract the suspicions that abound in the region.

This is where the learning from the failed TRC in Serbia can be very valuable. In addition to the need for public awareness and participation, the development of any type of truth commission must pay particular attention to both the mandate of such a body and the composition of its members. Perhaps the biggest element lacking for effective truth-seeking in this region is trust – and the process to design any commission must overcome this inherent challenge by scrupulous attention to inclusion, transparency, and impartiality.

B. DOCUMENTATION EFFORTS

In lieu of a formal truth commission or government-sponsored truth seeking process, several government agencies have been set up since the war for documentation purposes, with very different goals and mandates. In addition, NGOs throughout the region have taken it upon themselves to begin gathering documentary evidence and personal accounts of events during the war years. As one NGO interviewee stated: “War has a complex nature and needs a complex interpretation” in order to sort out the multiple realities that are operating. Therefore, it is crucial to put together the data of names of those killed, the whereabouts and other details, in order to “make a clear picture” so that “manipulation is no longer possible.”
The following section discusses the governmental and non-governmental efforts in each country to create a record of war crimes, killings, and other human rights abuses committed during the war. It then turns to an exploration of regional networks attempting to coordinate documentation across national boundaries. In this section we are indebted to Djordje Djordjevic, author of the “Summary Report regarding Local, Regional, and International Documentation of War Crimes and Human Rights Violations in the former Yugoslavia,” which he compiled in 2002 for the International Center for Transitional Justice in New York. A good deal of the information in this section is derived from that report, and updates are provided where available, predominantly regarding new initiatives undertaken in the NGO sector.

1. Bosnia

Governmental Documentation

In Bosnia, each of the entities has its own official bodies for the investigation of war crimes. They are:

A. The State Commission for Investigation of War Crimes (SCIWC).

This body was originally created in 1992 by the Republic of Bosnia and Herzegovina. After the Dayton Peace Agreement, it became an agency of the Federation before transforming itself in 2005 into the Centre for Research and Documentation, an independent non-governmental institution. The SCIWC’s mandate was “to investigate and collect information on genocide, war crimes, and human rights violations committed against innocent civilians and other persons protected by the norms of international humanitarian law and related conventions.” Over the years it has gathered an impressive amount of documentation with a strong emphasis on crimes committed against the Bosniak community including lists of dead and missing, testimonies from detention camp inmates and other victims, a survey of cultural monuments and property destruction, and a photo and video materials library. These materials were made available to the ICTY, domestic courts, NGOs, research institutions, and the media. The process of creating a “cutting-edge,” searchable electronic database, had started before its transformation into an NGO, with financial backup provided by the US government.

B. The Documentation Center (DC)
The DC is the official body in Repubika Srpska that documents war crimes, but it only documents those crimes and abuses committed against the Serb population. In addition, its mandate is broader than that of the SCIWC in that it examines the causes of the war and estimates its material consequences for the purpose of asserting claims for reparations. Its regional cooperation has been primarily to institutions in Serbia, supplying documents to government agencies and courts, with also some documentation being provided as evidence at the ICTY proceedings.

NGO Documentation

The Association of Citizens “Women of Srebrenica” concentrates on the documentation of the fate of the victims of the Srebrenica massacre, while Medica Zenica provides medical and mental health services to women refugees in the Zenica region. A team of medical and psychological experts in this organization documents abuses committed against women and children, and some of this documentation has been used as evidence at the ICTY.\textsuperscript{96}

In Sarajevo, the Centre for Research and Documentation, mentioned above, is continuing to expand its database on victims in Bosnia and Herzegovina between 1992 and 1995. The most current list of victims killed, whose names are known, has 96,436 entries.\textsuperscript{97} Director Mirsad Tokaca estimates that the number may rise to 110,000 when the database is finished. Victims are identified by an average of 2.8 sources. Tokaca uses various means of collecting data, including newspapers and photos taken of gravestones. The Centre has 10,000 newspaper clips to scan and cross-reference with some 250,000 names. Fifteen employees and 20 volunteers are working on the project. The Centre has also gathered some 7,000 testimonies, including testimonies from perpetrators of crimes. A new office has been opened in Gorazde in September 2005, and the Centre plans to open offices in Banja Luka, Mostar and Brcko.\textsuperscript{98}

Also, the Center for Peace and Interethnic Relationships in Mostar is building a video, photo and media archive of events in the Mostar region. The tense political environment still prevailing in Mostar is reflected by the fact that a book the Centre helped publish, which shows pictures of Mostar before and after the destruction of its famous bridges, does not mention who destroyed what in 1992, when the city was attacked by the Bosnian Serbs, or in 1993, when it was under Bosnian Croat fire.\textsuperscript{99}

Another very interesting project has been undertaken by Dr. Svetlana Broz, who has collected testimonies of those who protected neighbors and friends during
the war years. She has published these in a book entitled Good People in an Evil Time. When the book was first published in 1999, one quarter of those interviewed chose not to be named. In the second edition three years later, most allowed their names to be used. Quoting from the UNDP Bosnia and Herzegovina report:

Broz wants to educate the public at large about the examples of civil courage; she has given many lectures around the country. She noted: “People are ready to hear more truth if it is not only about atrocities, if they can also hear that some of their own people behaved well. There will not be more than a few hundred trials. So we have to find other ways to deal with it.” Broz’s NGO, Garden of the Righteous Worldwide, wants to establish a park in Sarajevo as a museum in memory of what happened and a memorial to the “righteous.” Broz believes a regional perspective necessary, and worked in 2002 with a television station in Belgrade that broadcast five hours of testimony of some of the “righteous” who appeared in her book.100

2. Croatia

Governmental Documentation

The Djordjevic report provides detail on the documentation that is being gathered by four ministries of government and an office for cooperation with the ICTY:

Government information on war crimes and human rights violations in Croatia is covered by several different agencies. After the war of 1991, Croatian authorities made it their priority to estimate war damages, which resulted in a report from the Ministry of Finance.101 In addition to this report, a comprehensive picture of wartime destruction [was] gathered by the offices of the Ministries of Justice and Internal Affairs. Specific information on war crimes documentation in Croatia can be obtained from the Office for Cooperation with the International Court of Justice and International Criminal Tribunals.102

Croatia, like the agencies in Bosnia and Herzegovina is using some of its documentation efforts to prepare for potential claims for reparations.

Non-governmental Documentation

In Croatia, the Croatian Helsinki Committee (CHO) possesses comprehensive documentation of the abuses committed during the “Storm” and “Flash” operations of the Croatian Army in the “Republic of Serb Krajina”. It is coordinating its
documentation with data relating to missing persons in this area that has been compiled by the ICRC.¹⁰³

There is also a consortium of NGOs in Zagreb called Documenta- Center for Dealing with the Past, which deals with war crimes documentation. It was formed to bring together community expertise with technical expertise. It includes the Centre for Peace, Nonviolence and Human Rights Osijek; Centre for Peace Studies; Civic Council for Human Rights; and the Croatian Helsinki Committee. Interestingly, the organizations making up Documenta see their scope as extending back to 1941, where they believe the “suppression and falsification of war crimes and other war histories” began and are still affecting perceptions currently.¹⁰⁴ Their activities include the following:

a) gathering, documentation and research of materials on war incidents and their assumptions, war crimes and violations of human rights, and the establishment of a searchable data base;

b) publication of documentation, research and results of the materials analysis;

c) documentation and promotion of examples of resistance, solidarity and non-violent engagement;

d) deepening of public dialogue and initiating public policies which stimulate dealing with the past;

e) following judicial processes at a local and regional level as a contribution to the advancement of judicial standards and practice in the processing of war crimes;

f) creation of a network for the support of victims and witnesses;

g) contact with others involved in war incidents.¹⁰⁵

In addition to these explicit goals, our conversation with one of the principal members of Documenta revealed a very strong commitment to public education on the issue of war crimes, and to the raising of public awareness about why it is important to take truth-seeking seriously. An example was a project initiated in Sisak, in which Documenta invited the local prosecutor to speak about the rule of law and used the opportunity to sensitise the people in the town about dealing with the past. To quote our interviewee, the hope is to see an attitude change over time, in which “gradually, the events of the past will be seen as unacceptable.”
Documenta has also published a detailed report on the war crimes trials in Croatia in 2005 based on the results of the monitoring by the Documenta members.\(^\text{106}\) This is an in-depth analysis of the war crimes prosecution in domestic courts placed in the context of the process of dealing with the past and containing information on all relevant aspects of war crimes prosecution, including statistical data, the position of witnesses, details of criminal procedures, public presentation of the trials, as well as recommendations.

3. Kosovo

Non-Governmental Documentation

Three non-governmental initiatives are described in the Djordjevic report:

The Council for Defense of Human Rights and Freedom in Pristina (CDHRF) has been active since 1989, collecting data on human rights violations in Kosovo. Since the early days of the repressive regime in Kosovo in the 1990s, CDHRF has collected a large number of reports on human rights abuses against Albanians. It continued its work after the 1999 conflict, including issuing a limited number of reports on human rights violations committed against the non-Albanian population in the postwar period. It is reported that the CDHRF has not been actively making use of its documentation since 2002, and the filing and organizing of the database is apparently in need of serious overhaul.

Two active members of the Women’s Section of CDHRF, Vjosa Dobruna and Sevije Ahmeti, have founded the Center for Protection of Women and Children (CPWC). This organization offers support to abused women and collects documentation on their abuse. Documents collected by the CPWC have been passed on to the ICTY.\(^\text{107}\)

The Kosovo Research and Documentation Institute (KODI) focuses on the recent past of Kosovo. According to its website, “KODI is a non-partisan think tank that aims to support Kosovar society, political actors, and the international community in the transition process, from totalitarian rule to democracy, through the strengthening of democratic institutions and the rule of law, respect for human rights, and integration of Kosovo into the European Union. By closely cooperating with all political actors, society and the media, KODI seeks to identify human rights violations against the inhabitants of Kosovo before, during, and after the war; to stimulate the process of facing and overcoming the past; to analyze ethnic
relations in Kosovo and elsewhere, to promote regional cooperation; and to offer policy recommendations and solutions to different actors and stakeholders in the area of public policy. KODI’s reports and studies offer political actors and institutions in Kosovo recommendations for the promotion of interethnic and regional cooperation.

KODI first conducted an oral history project in central Kosovo, in which they compiled audio files on the experiences of hundreds of individuals. They have also been active in raising awareness of transitional justice issues more generally by convening a series of conferences in 2005 on the topic. The first of these was targeted to young people in high government positions; the second had a more explicit focus on those working in the transitional justice field. The proceedings of these meetings are being transcribed and will be made available as publications of the Institute.

4. Serbia

Governmental Documentation

The Committee for Data Collection on Crimes against Humanity and International Law (CDCCHIL) was a government institution founded in Belgrade in 1991 to gather evidence pertaining to all conflicts on the territory of the former Yugoslavia. Its principal mandate also included research of causes and material consequences of the war. Documentation collected predominantly concerns crimes against Serb population outside of Serbia. The Committee effectively seized its activities in 2002 and the uncertainty about the permanent location and accessibility of its sizeable database continues.

Non-governmental Documentation

The Humanitarian Law Center (HLC) is an NGO based in Belgrade, but there is no doubt that it is one of the most significant NGOs in the former Yugoslavia, and its director, Natasa Kandić, is one of the foremost victims’ advocates in the region and a significant voice in the documentation of war crimes. The Djordjevic report describes the work of the organization as follows:

Established in 1992 by Nataša Kandić, the HLC’s primary task is to document crimes committed in Bosnia, Croatia, and later in Kosovo. It has instigated a number of investigations, conducted a wide range of interviews with victims and witnesses, compiled information on detain-
ees, observed the exhumations of victims, and issued yearly reports on human rights abuses based on collected documentation. HLC also keeps a database of all reported abuses. Documentation is generally grouped thematically, linked to events and locations. Since August 1994, it has collaborated with the ICTY, and its findings helped direct the first ICTY investigations in Bosnia. When the Croatian Helsinki Committee conducted an investigation of abuses during the Croatian Army “Storm” offensive, HLC supplied its own materials based on interviews done with the refugees from the former Republic of Serb Krajina. HLC has offices and staff in several towns in Kosovo, and was active in collecting evidence of human rights abuses before, during, and after the conflict of 1999.\footnote{Djordjevic, 2002, p. 14.}

The Center for Collecting Documents and Information “Veritas,” is an NGO based in Serbia that focuses exclusive on human rights abuses that were committed against the Serb population in Croatia. Although it is an NGO, it works very closely with government. In addition to documenting war crimes, it also facilitates the exchange of prisoners of war, searches for missing persons, and assists with reparation claims via private lawsuits by Serbs against the state of Croatia.\footnote{Ibid, pp. 14-15.}

There is also an organization run by Radio B92 in Belgrade called “Documentation Center “Wars 1991-1999”. According to the Djordjevic report:

The Center collects media and published documentation pertaining to the wars in the Balkans. The documentation includes a library of local and international books, documentary and feature films, public speeches of former president Slobodan Milošević, and critiques of Serbian nationalism and the involvement in the war. A separate project collects oral histories from participants in the wars and from refugees, including those in Croatia, Bosnia and Kosovo.\footnote{Ibid, p.15.}

Since May 2003, the Documentation Center functions as an independent non-governmental organization and it has scaled down some of its activities due to a lack of sustained financial support.

5. Regional Initiatives

In April 2004, three NGOs from the region set up a consortium to “document the truth about the events of the 1990s, end impunity for gross violations of human rights, and bring justice to the victims” of the war years. The three NGOs are the Research and Documentation Center in Sarajevo; the Humanitarian Law Center
in Belgrade; and Documenta – Center for Dealing with the Past in Zagreb. Their main activities are:

a) development of a compatible database on war incidents, on those involved in wars, victims, survivors and possible perpetrators;

b) monitoring the court proceedings for war crimes in Bosnia and Herzegovina, Serbia and Montenegro, and Croatia;

c) support to victims and witnesses which encompasses the inclusion of the families of those killed and missing in the following of judicial processes, proposing measures for the protection of witnesses, legal aid and preparation of witnesses for testifying;

d) oral history;

e) putting together regional lists of those missing, with personal information and brief information on the circumstances of the disappearance of all persons missing in the wars from 1990;

f) putting together regional lists of those killed and murdered.¹¹²

This is the only regional collaboration on documentation, thus it is a very important initiative. By creating this consortium that extends their previous work on gathering information within each country separately, these NGOs have acknowledged the need for cross-border cooperation in truth-seeking. When/if a regional victims’ commission is established, the coordinated work of these NGOs will provide crucial input to that effort. Also, as a regional database is developed, it is possible that these NGOs will initiate the first efforts at harmonizing the existing data so that it can be effectively compared and analyzed. With the current uncertainty about where archival materials from various departments of the ICTY will end up after the closing of the Tribunal projected for 2010, this regional network should be considered as one possible repository, to insure that this valuable resource for the people of the region will be permanently housed in the region and overseen by an independent regional body.

After the completion of the Annual Report on Monitoring of War Crimes Trials in Croatia in 2005 by the Documenta, the three organizations are currently working on a report on regional monitoring of war crimes trials in Croatia, Bosnia-Herzegovina and Serbia.

¹¹² See at: http://www.documenta.hr/eng/
6. International Initiatives

According to Djordjevic,

The international community has been actively involved in the Yugoslav conflicts since the massive outbreak of violence in Croatia in 1991 and in Bosnia in the spring of 1992. In addition to diplomatic and military efforts, the international community has monitored the violence, documented and publicized crimes, and prosecuted the perpetrators as means of both prevention and remedy. The documentation resources of the international community include: comprehensive databases compiled for international trials at the ICTY and the ICJ; special and expert reports done by teams from international and transnational organizations such as the UN, OSCE and ICMP and their overseeing bodies in the region including the Office of the High Representative in Bosnia and the UNMIK and the OSCE Mission in Kosovo; a large number of NGO reports documenting particular instances of crime; video and audio material collections from media agencies; and war crimes documentation archives.

These NGOs include the International Crisis Group, Amnesty International, Human Rights Watch, Physicians for Human Rights, and the Institute for War and Peace Reporting. The Djordjevic report provides extensive details on the contributions of each of these organizations.

Also of note are two archival projects related to the region. The first is the Open Society Archive (OSA Archivum), founded by the Soros Foundation network in order to facilitate research of the former communist countries in Central and Eastern Europe and the former USSR. OSA was initially located on the premises of the Central European University and as of September 2005 it has been moved to its permanent venue in the Goldberger House in Budapest. A substantial number of documents are available online, and in recent years it is becoming a prime educational resource in the field. Materials related to the wars in the former Yugoslavia include a collection of video recordings of television newsreels from Yugoslavia, Bosnia, and Croatia during the war. Relevant documentation and audio-video recordings include records of the International Human Rights Law Institute, Human Rights Watch publications, local Helsinki Committee records, press reports, interviews with major actors and political analysts, and documentary films.

The second is the U.S.-based Balkan Archive. It was created in 1993 by the United Nations Commission of Experts out of the need to review a large quantity of film and video material on the Yugoslav wars. On their request, Linden Productions,
a documentary production company from Los Angeles developed a method to organize, synopsize, and index a massive amount of material for research purposes. This initial collection grew into the Balkan Archive and was eventually expanded into the International Monitoring Institute (IMI), which gathers video and other multimedia content about abuses around the world. Through the use of a specialized database detailing all of the videos stored, the Balkan Archive serves as a resource for the ICTY, human rights investigators, news organizations, independent journalists, documentaries, academics, and students.  

Assessment

As one of our NGO interviewees so eloquently put it, documentation efforts are essential in order to establish, as much as is possible, an accurate record of what happened during the war years in this region in order to prevent future leaders from manipulating the memory of these events to ignite inter-group fears and retribution. They rightly point to the lingering differences of perspective on the events of World War II as evidence of how the past can be used for cynical political gains.

There has been significant documentation of war crimes and human rights violations concerning the war years in the region, undertaken by governmental agencies, international and local NGOs, and international institutions. However, some of these efforts are undertaken to prove that “we are right and they are wrong” rather than to produce evidence that attempts to approach “objective” truth—i.e., documentation to justify rather than to clarify. This can be especially the case when the documentation is done by government offices. That is why NGO efforts and the work of international institutions are necessary as well, as a check on the political agendas that may drive governments to engage in documentation of abuses.

However, even these biased slices of truth-seeking could be extremely valuable if there were a way to see them as part of a whole mosaic; in fact, one of the most important elements in truth-seeking is to recognize that in such complex environments as the former Yugoslavia, there are multiple truths rather than one objective account of events. But seeing this whole picture is hampered by the fact that there is no one repository for these documentation efforts. And in fact, some of them are not publicly available at all. As Djordjevic reports:

The exchange of information is especially limited on the inter-governmental level and also between governments and NGOs. The existing collaboration is predomi-
nantely between international agencies and local NGOs and within the NGO community, locally and in the region. The methodology used in processing materials may also vary from one agency to another, making it more difficult to create an overall evaluation of all the available material.\textsuperscript{114}

The relatively recent creation of an NGO consortium in the region is an important opportunity to begin the coordination effort. However, it will be limited in its effectiveness if it cannot draw upon the array of materials that have already been collected by other institutions. They should not have to begin from scratch. As previously mentioned, one of their challenges will be to develop a systematic way of collecting and cataloguing data so that it can be usefully compared and analyzed. International resources should be made available, in the form of both money and professional expertise, so that this harmonization can take place.

More broadly, the challenge in the region is to find both a physical location and the appropriate sponsorship for a regional archive, one that can be embraced by both governments and NGOs as well as by all ethnic groups in the region. At the moment, it is hard to imagine one location that everyone from all of the former Yugoslavia would feel comfortable visiting. Therefore, it may be that in the near term, such an archive could be situated outside of the region until such time as an appropriate local location could be found.

Also in the near term, existing documents must be publicly available wherever they currently reside. Without such access, the truth-seeking agenda is severely compromised. The international community should provide incentives for institutions to create such access so that researchers, media, and others can use these resources for public education and reconciliation.

C. MISSING PERSONS

In any war, many people disappear and leave open wounds for both their family members and for the societies from which they come. The countries of the former Yugoslavia are no exception.

The International Committee of the Red Cross (ICRC) reports the following statistics on missing persons in the region:

Missing Persons from the Balkan conflicts
<table>
<thead>
<tr>
<th>Country of conflict</th>
<th>Cases reported to ICRC</th>
<th>Cases closed</th>
<th>Cases still open</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia and Herzegovina (1992-1995)</td>
<td>21,438</td>
<td>6,080</td>
<td>15,358</td>
</tr>
<tr>
<td>Kosovo (1998-2000)</td>
<td>5,878</td>
<td>3,162</td>
<td>2,716</td>
</tr>
<tr>
<td>Total</td>
<td>33,123</td>
<td>12,542</td>
<td>20,581</td>
</tr>
</tbody>
</table>

*ICRC figures from June 2005

As the chart below shows, most of those still missing (19,021 out of 20,581, or 92.5%) have no information known about them at all. Bosnia alone accounts for over 70%. The remaining 1,560 of the 20,581 open cases (7.5%) are persons who have been confirmed as dead but whose remains have not yet been found.

<table>
<thead>
<tr>
<th>Country of conflict</th>
<th>Cases still open</th>
<th>Persons whose death is known but remains are not yet found or returned</th>
<th>Persons whose fate is yet unknown</th>
</tr>
</thead>
<tbody>
<tr>
<td>Bosnia and Herzegovina (1992-1995)</td>
<td>15,358</td>
<td>914</td>
<td>14,444</td>
</tr>
<tr>
<td>Kosovo (1998-2000)</td>
<td>2,716</td>
<td>445</td>
<td>2,271</td>
</tr>
<tr>
<td>Total</td>
<td>20,581</td>
<td>1,560</td>
<td>19,021</td>
</tr>
</tbody>
</table>

*ICRC figures from June 2005

1. Bosnia and Herzegovina

The Federation’s State Commission for Search of Missing Persons (SCSMP) is well known in Bosnia and Herzegovina. SCSMP exhumed more than 12,000 victims in collaboration with a team from the ICTY following the Dayton Peace Agreement. No further information was made available on those who remain missing in BiH.
2. Croatia

The case of missing persons remains a sensitive subject within Croatia. The Government maintains two lists of missing persons which “vary in degrees of reliability”. The first lists a total of 1,160 persons, mostly ethnic Croats, reported missing in 1991-1992; the second consists of 840 persons, mostly ethnic Serbs reported missing during the 1995 Operations “Flash” and “Storm”. The former of the two numbers is typically reported as the missing persons statistic for all of Croatia.\(^\text{115}\)

An example will serve to illustrate that this is a continuing problem. Recently, a new mass grave was found in western Slavonia. It was reported to us that the Minister of Family, War Veterans and Intergenerational Solidarity announced that the bodies belonged to Croatian civilians who were victims of Serb aggression in 1991.\(^\text{116}\) However, personal identification documents written in Cyrillic script were found soon thereafter in the victims’ clothes, suggesting that they were in fact of Serb nationality. The Minister did not comment and never retracted his earlier statement.

Despite the repeated calls by Serbs and by NGOs in Croatia to create a single list for both Croats and Serbs who are missing, it has not been done. As a result, there is a big discrepancy between the government’s list and those of the ICRC and other sources. Also, the failure to include missing Serbs means that the government is not actively attempting to find or identify them.

A positive development in this sense is the recently published report by the Government Commission on Detained and Missing Persons covering the period from January 2004 to March 2006.\(^\text{117}\) This report contains both, the data on missing ethnic Croats (1140), as well as Serbs (915). Also, 332 out of 449 bodies of persons who went missing after the military operation Storm in 1995 have been identified and the remains given to their families for burial.

3. Kosovo

<table>
<thead>
<tr>
<th>Missing Persons by Ethnicity</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Albanian</td>
<td>2,384</td>
</tr>
<tr>
<td>Serbian</td>
<td>523</td>
</tr>
<tr>
<td>Other</td>
<td>201</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>3,108</strong></td>
</tr>
</tbody>
</table>

\(^{\text{UNMIK Statistics}}\)
According to the ICRC, it is hard to get information on missing persons in Kosovo because of the unresolved “status” issue. There is thus little incentive in cooperating to identify where bodies from the “other” side may be buried. While the absolute number of missing Albanians is more than four times that of Serbs, the percentage of missing in each group in relation to the ethnic pre-war population is about the same. It is also notable that there are missing persons from groups other than Albanians and Serbs, whose identities are never specified in official tallies except as “other.” From our interviews, this lack of recognition stands out as a common experience of all people in Kosovo who are neither Albanian nor Serb.

The ICRC office in Pristina has been chairing a working group on missing persons since October 2003, as part of the Vienna Dialogue Process between Belgrade and Pristina. They were chosen to lead this group because of their long-standing presence in the region, dating from before the violence in 1999. The first meeting of the working group took place on 9 March 2004, but the violence of 14 March essentially halted the process. In March 2005, Pristina authorities made their first official visit to Belgrade as a part of this working group process, and the two parties agreed to adopt the ICRC framework and list of the missing as a starting point for collaboration. In the second meeting, four representatives from each side met, with members of the family associations as observers.

In addition, the UNMIK Office of Missing Persons and Forensics (OMPF) undertook an important initiative. The objective of their activities was to determine the whereabouts of missing persons as a consequence of the conflict in Kosovo. The office was created late in the process (June 2002); however to date it has been able to reduce the list of reported missing persons by 50% through forensic, outreach and other activities.

Also, OMPF is engaged in several very creative projects to enhance awareness of the problems created by missing persons, at both the family and the societal levels. First, they have commissioned the writing of a play about the family of a missing person, with no reference to time or place. The family is therefore portrayed as “generic,” in order to underscore the universality of this experience. The characters enact the pain they are suffering, and the difficulties they face in trying to get information about their missing loved one. The play ends with no resolution of their plight. The audience is then asked to discuss their reactions to the play, and most importantly to reflect on the feelings that it evokes. The purpose is to address the “broader psychosocial ramifications of disappearances by demonstrating that the experience of loss is common to all ethnic groups.”

The play has been performed in high schools throughout Kosovo, with group discussions following. The focus on youth has been deliberate, not only because
of their future role as decision makers in their society, but also because of their particular vulnerability during times of war. Plans are to now take this play to adult audiences as well.

Another of their projects, the Oral Histories Project, is meant to capture people on videotape as they tell their stories about their missing loved ones. They have collected 16 such stories, from both Serbs and Albanians in Kosovo. In addition to the video version, these stories will be published in book form. According to the OMPF, the objectives of this project are to allow for victims’ self-expression so as to foster “de-victimization”; to create a tangible record as a source for remembrance of those who are lost; and to redefine the “other” by introducing the notion of shared victimhood.121

4. Regional Initiatives

The International Commission on Missing Persons (ICMP) is an inter-governmental organization created in 1996 following the G-7 summit in Lyon, France to address the missing persons problems in Bosnia and Herzegovina, Croatia, and Serbia and Montenegro. It expanded its mandate to include Kosovo and Macedonia in the aftermath of violence in those two states. Their Department of Government Relations works with all of the governments in the region to encourage cooperation “…in locating and identifying persons missing as a result of armed conflict, other hostilities or violations of human rights, and to assist them in doing so.”122 Their Forensic Sciences division focuses on exhumations and has pioneered the use of DNA for identifying human remains. And their Civil Society Initiatives encourage the joint activities of family associations throughout the region and bring former enemies together around the common interest of seeking to know the fate and the whereabouts of their missing loved ones. They also participate in an annual conference of these family associations which is attended by representatives of the governments in the region.

Assessment

Missing persons are a significant source of ongoing tensions and of unhealed wounds in all societies in the region. It is a painful reminder of the legacy of human rights abuses during the war years, and therefore the resolution of open cases should be a priority for all governments in the region. The work of the ICMP is extremely important here, as it provides the only mechanism through which

121 Ibid.
regional coordination in occurring. The ICRC role in the sub-regional coordination between Belgrade and Pristina is also significant.

Two significant gaps are apparent in the attention to missing persons. The first is in Kosovo, where the political agenda of the respective parties is hampering identification of missing persons; even with ICRC assistance, there has been little progress in finding where the bodies of those who’ve been killed are buried. In UNSC Resolution 1244 that set up the UN protectorate in Kosovo, there is no mention of missing persons and also no mention in the “standards” that have been set as the prerequisite for “status” talks. Our interviewees strongly recommended that the resolution of the missing persons issue should be included as a “standards” issue in the upcoming talks, for without that push from the international community, the parties may not have the incentive to produce the truth.

The second gap is in Croatia, where ethnically biased reporting of missing persons is keeping government agencies from taking responsibility for finding missing Croatian Serbs. As with prosecutions, the EU accession process may be a way to provide incentives to the Croatian government to take minority rights seriously, not just in principle but in practice.

D. MEDIA

Print and broadcast media can be either a help or a hindrance in truth seeking. Certainly they have played both roles in the former Yugoslavia. While there are some brave efforts to bring the truth to the public, the so-called “yellow press” is more the norm: many newspapers and radio stations are used by government to present their politicized point of view as “news”, or to publicly demonize someone before removing them from office. There are only a few examples of media independence in the region, and these are notable exceptions rather than the rule.

1. Bosnia and Herzegovina

The Bosnian media tends to split along ethnic lines, with those from one group reporting on crimes committed by the other two, i.e. Bosniak newspapers covering crimes of Serbs or Croats. Because of this, for the first few years after the war, the press contributed to tensions between ethnic groups rather than to recon-
Ciliation. The trend appears to be changing now, as war crimes issues are being discussed and debated more openly.

One of the courageous leaders in this work has been Zeljko Kopanja, Director of the Banja Luka based newspaper, Nezavisne Novine. Kopanja, a Bosnian Serb himself, started the newspaper in 1995 with two fellow journalists. In 1999, he started reporting about war crimes; shortly after the publication of stories on the execution of 200 Bosniaks by a radical group of Prijedor policemen, Kopanja lost both legs when an assailant planted a bomb in his car. The perpetrators of the attack on Kopanja were never found. Zeljko Kopanja was awarded the International Press Freedom Award in 2000 for his reporting. Today he is still the director of Nezavisne Novine and the newspaper is the only one that has offices in Sarajevo, Mostar, and Banja Luka. According to IREX, a US government program that funds media development abroad,

[...] It has been non-compromising in its journalism from its very first issue, featuring stories that tackle taboo subjects: war crimes, the mafia, political corruption, ethnicity and scandals [...]. Following a plan funded and developed in cooperation with the USAID-funded IREX/ProMedia program, Nezavisne Novine became Bosnia and Herzegovina’s only national newspaper in October of 2000.

Another notable media outlet in Bosnia is the SaGA film production company in Sarajevo. It has made more than 60 documentary films about the siege of Sarajevo and the destruction of historical and cultural monuments in Bosnia.

2. Croatia

Our interviews revealed that, in the 1990s, the great majority of the Croatian media was state-owned and/or controlled, and therefore largely served as a propaganda tool for official state policies. However, some independent media emerged to play a large role in uncovering many cases of war crimes committed by the Croatian armed forces, for which they have suffered various forms of persecution. Feral Tribune, a weekly based in Split, was the first to investigate and publish many of the most notorious war crimes cases such as those in Lora (Split), Gospić, Paulin Dvor, Sisak and most recently Osijek. Also, it was the primary source of information about the criminal events surrounding the Flash and Storm operations. The Globus weekly was the first to write about the Pakracka Poljana case, while the Novi List daily from Rijeka published stories of war crimes. Zagreb Radio 101 has also been an important and very popular opposition medium. Most
of the other media, including the remaining three dailies and the state television, have been used to deny the allegations of war crimes and attack the media who published them.

After 2000, with the change of government and the privatization of newspapers, war crimes issues were no longer completely forbidden territory for the mainstream media; however, the majority still do not investigate war crimes but only continue covering such stories when first published by other newspapers. Even in these cases, they choose which story to follow depending on the amount of controversy it might arouse. As a result, cases considered less “attractive” remain only in the independent media. This in turn lessens the pressure on the institutions with the authority to deal with war crimes cases.

Also, threats to the press continue. For example, our Advisory Board member, Drago Hedl, received a death threat in early December 2005 as a result of a series of articles that he wrote during the preceding summer about killings of Serb civilians in Osijek in 1991. As a result of these articles, a new chief of police was sent from Zagreb to Osijek to investigate the allegations, with documents and witnesses’ testimonies published in Feral. The threat suggests that there are still powerful people in Osijek who do not want the crimes to be prosecuted. While such threats to journalists happened on a regular basis in the early 1990s and are less frequent today, they are clearly not yet a thing of the past.

3. Kosovo

It is too soon to reasonably expect an independent media in Kosovo that documents war crimes in an evenhanded way; the political situation there is still too unsettled. However, we did uncover one interesting project being funded by US-IREX. According to the IREX website:

“The Association of Professional Journalists in Kosovo (APJK), in cooperation with the local production company Okan Vision Production, is producing a two-part documentary entitled “Media from 1990-2004.” The first part of the documentary focuses on the media situation during the 1990’s. The journalists interviewed for this section will talk about the difficulties of reporting that stemmed from the Serbian authorities’ control of the media during this period and the 1989 constitutional changes that dissolved Kosovo’s autonomy at the beginning of the Serbian occupation. Journalists will also speak about how the war affected journalism and post-war journalism, who was funding Kosovar media directly after
4. Serbia

In Belgrade, the radio station B92 has been active in truth seeking both during the war years and currently and provides another window on the difficulties facing media outlets who question the actions of government. From our interviews, we learned that B92 has been accused of being foreign mercenaries and traitors because of the material they cover. However, support from the public who wants to know what really happened has been growing over the years, and they feel it is their role to provide that information.

The evolution of response to their truth telling material is quite interesting. In 2002 they launched a television series called: Truth, Responsibilities, and Reconciliation. However, they have said that the series received no positive reaction from the public, only silence. B92 was also broadcasting the Hague trials; however, funding for these broadcasts is no longer available.

In 2004, they launched another new series called “The Insider.” It is reportedly the most watched show on Serbian television. So far, the series has covered the investigation into the Djinjic assassination, and a series entitled “Looking for Mladic.” In fall of 2005, their intention was to air a series on the Kosovo question. Their aim is reportedly to break the “conspiracy of silence” and to become a “thorn in the side” of all actors: judiciary, police, and state security. The impact of their broadcasts was most apparent in the Djinjic case. In 2005 after the showed aired, there were large public outpourings to commemorate Djinjic’s death, which can in large part be attributed to the public’s education by the “Insider” series about what really happened to him. While this issue is not directly related to the war, it does illustrate the power of B92’s programming to influence public opinion and perceptions.

One of the most powerful uses of the media has been the release of the private videotape of the “Scorpions”, unit of the Serbian army showing the killing of civilians in Srebenica. The film has been very powerful in confronting the public with the “truth”, although there was some mixed reaction in that some thought it was “staged.”

Assessment

Almost all media neglect to deal with transitional justice issues, and therefore truth-seeking is confined to a few courageous individuals and organizations that are willing to take on the harassment and potential threat that is involved in confronting governments with their wrongdoings. Because of the great potential of the media to reach a broad constituency, it is crucial to support those media outlets that pursue truth-seeking. It may never be possible to eliminate the “yellow press”, but considerable efforts must be made to ensure that alternative media also survives. Also, it is important to increase the capacity building of media professionals through the training of journalists who are working, investigating or covering the transitional justice issues in printed and electronic media. As our NGO colleague said of documentation work, free media is crucial to prevent people from being manipulated by distorted information.
VIII. REPARATIONS
The UN Secretary General’s definition of reparations is useful to quote here, as it lays out not only the justification for including reparations in a transitional justice agenda but also outlines the categories of reparations most often used for these purposes.

[…] In the face of widespread human rights violations, States have the obligation to act not only against perpetrators, but also on behalf of victims – including through the provision of reparations. Programmes to provide reparations to victims for harm suffered can be effective and expeditious complements to the contributions of tribunals and truth commissions, by providing concrete remedies, promoting reconciliation and restoring victims’ confidence in the State. Reparations sometimes include non-monetary elements, such as the restitution of victims’ legal rights, programmes of rehabilitation for victims and symbolic measures, such as official apologies, monuments and commemorative ceremonies. The restoration of property rights, or just compensation where this cannot be done, is another common aspect of reparations in post-conflict countries.  

Our study therefore looked at examines the following categories of reparations: (A) material reparations between states; (B) material reparations within states, including the restoration of property rights; and (C) symbolic reparations in the form of public apology and/or the establishing of monuments and memorials. Each of these forms of reparations will be discussed first for each country, and then comparatively across the region.
A. MATERIAL REPARATIONS BETWEEN STATES

1. Croatia and Bosnia and Herzegovina

Both Bosnia and Herzegovina and Croatia have filed claims with the International Court of Justice, in 1993 and 1999 respectively, for breach of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide. If this is upheld, both will most likely seek reparations from the Federal Republic of Yugoslavia for damages to persons, property, the economy, and the environment.\(^{128}\)

The lawsuit for genocide submitted by Bosnia and Herzegovina against Serbia and Montenegro was filed in 1993 by the late president, Alija Izetbegovic. This is now entering into the public hearing phase, the first of which took place on 27 February 2006 at the ICJ.\(^{129}\) The issue is rather controversial even within Bosnia and Herzegovina; one of the most debated topics in Bosnia and Herzegovina is whether the conflict was a civil war, as maintained mostly by the Serb side, or whether it was an international conflict and thus an aggression. Recently, the Serb member of the Presidency of Bosnia and Herzegovina, Borislav Paravac, filed a request for constitutional review of the lawsuit, as he claims it would in fact damage the interests of the Republic of Srpska as well.

2. Kosovo

To date, no claims for reparations have been filed by Kosovo. However, in the upcoming negotiations over Kosovo’s status, it is likely that some form of reparations will be discussed. As one interviewee stated, status issues must precede reparations, as they may be a bargaining chip in the negotiations.

3. Montenegro

In late July 2005, President of Croatia, Stjepan Mesic and President of Montenegro, Filip Vujanovic, along with their respective ministers of agriculture, signed a memorandum on Montenegro’s restitution for the plunder of cattle from a farm in Konavle near Dubrovnik during the aggression against Croatia. Montenegro is to pay Croatia between 375,000 and 385,000 euros for this damage. By mid September 2005, Montenegro had paid 120,000 euros.

\(^{128}\) Freeman, ICTJ report, p. 10.

\(^{129}\) As of June 2006 final arguments had been heard before the ICJ. More could be found at http://www.icj-cij.org/icjwww/docket/bhyy/bhyyframe.htm.
The Montenegrin government is very clearly seeing this unilateral step made by their government as a way to open up friendly relations with Croatia and create the possibility of dealing more productively with other bilateral disputes. Their claim is that their soldiers at the time of the war were operating under orders of Slobodan Milosevic, as part of the JNA. But they are nevertheless willing to initiate reparations for the benefit of good neighborly relations.

4. Serbia

The FRY has filed several claims with the ICJ for damages suffered during the 1999 NATO bombing; these are against member states of the NATO coalition, including the United States, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Portugal, Canada, and Spain. Although FRY has not yet made an official assessment of damages, a non–governmental group in Belgrade made up of economic experts has estimated the damages from the bombing at $4 billion. According to ICTJ report of October 2004, these cases have been suspended by request of the FRY government, due “[…] to ‘dramatic’ and ‘ongoing’ changes in the country, which they claimed had put the cases ‘in quite a different perspective.’” On the other hand, the ICJ declared the suits inadmissible, since the FRY was admitted in the UN in 2001, so in 1999 it was not a member state and cannot launch a lawsuit because of that.

Assessment

Reparations between states in the region are, to date, quite limited. Montenegro is the notable exception, where the state government calculated it to be in the state’s interests to repair its relationship with Croatia. In most cases, however, state-to-state reparations are being sought through court proceedings. Symbolic reparations, discussed below, are much more likely to be made between states than actual exchanges of funds.

Although a gap currently exists in terms of the payment of state-to-state reparations, the pursuit of such via adjudication will not serve the interests of the region, in that it further polarizes inter-state relations. It would be much more productive to pursue the possibility of such payments in the context of a regional truth-seeking process, as has been discussed in a previous section.
B. MATERIAL REPARATIONS WITHIN STATES

Under this heading, we investigated restitution of property and compensation to minority populations as the primary forms of reparations within states. Although previous analyses of the region have included payments to war veterans as part of a discussion of reparations, we have not included these in our analysis because we want to distinguish between reparations made to civilian victims of the region’s wars and compensation paid to its soldiers.

However, it is important to explain how compensation of veterans complicates reparations to war victims. First, there is competition for limited funds, and money paid to war veterans is money not available for reparations to victims. If victims’ groups perceive that veterans are getting more attention and compensation, they see this as unfair treatment by governments. Second, there are some veterans who also feel victimized by their governments because of coercive conscription policies, and some of these veterans are not receiving the compensation amounts that other veterans in the same country are getting. While acknowledging these complications as salient in many contexts, we have not delved into them explicitly in each country but only touched upon them where they are particularly relevant.

1. Bosnia and Herzegovina

“The measures in Bosnia and Herzegovina that so far could have amounted to a form of individual reparations were perhaps the 1998 property laws and the reconstruction effort, which a senior UN official called ‘the single most forward-looking decision ever made’ by the OHR [Office of the High Representative]. By the end of 2004, some 93 percent of the undestroyed 200,000 properties that were subject to a claim under the property laws had been returned to their pre-war owners, as compared to 21 percent in 2000. This process can therefore be considered complete. Meanwhile, tens of thousands of houses destroyed during the war have also been rebuilt.”

Annex 7 of the Dayton Peace Agreement states that displaced persons and refugees have the right to have their properties restored and to be compensated for properties that cannot be restored. Following the conflict, there were approximately 2,200,000 IDPs and refugees in Bosnia and Herzegovina who had either fled their homes or had been expelled as a result of the ethnic cleansing policies. Subsequently, their homes were either destroyed to prevent their return or
declared abandoned and allocated to other families (of a different ethnic group than the ones who had been expelled) for the purpose of both accommodating displaced persons and refugees and preventing minorities from returning.

The first two years of the peace implementation efforts brought no results in this regard and it was only in 1998 that the international community tackled the process with more determination. UNHCR declared 1998 the “year of return” and the Peace Implementation Council required that property laws be amended in order to make the implementation of Annex 7 possible. In 1998, April and December respectively, both entities of Bosnia and Herzegovina passed laws, which allowed the repossession of properties by the pre-war occupants. This, besides being an essential measure to facilitate the returns of displaced persons and refugees, was also a form of reparation for the victims, in as much as it was restitution in kind.

The process did not have an easy start: resistance by the local authorities and the huge number of claims filed (over 250,000) forced the international community to set up a new operation, with the local authorities, for monitoring and intervention. The operation was called PLIP (Property Law Implementation Plan) and it involved tight coordination and monitoring of the property laws. Statistical indexes were used to monitor progress of different municipalities. Conditionality and sanctions were applied to force compliance of politicians and authorities that were reluctant to reverse the process of ethnic cleansing. The figure of 93.34% is the final outcome of the process, i.e. the overall ratio of restitution of properties in Bosnia and Herzegovina as of August 2005 with almost 200,000 habitable properties returned over a period of six years. The process is substantially completed as for technical reasons it will not be possible to achieve 100%. In the history of peace operations, this represents the largest property restitution scheme carried out so far in such a relatively short period.

The reconstruction of destroyed homes also represented a form of restitution in kind. Local authorities often countered international efforts to reconstruct property, as this would have led to the return of minorities. Reconstruction was not just a technical process, but it involved significant pressure and conditionality by the international community, and specifically by the Office of the High Representative, to “convince” municipalities to endorse reconstructions and return processes. The Department of the Office of the High Representative that dealt with this issue was the so-called Return and Reconstruction Task Force, which was closed down at the end of 2002 and its tasks transferred to the domestic authorities.

133 Available at: http://www.unhcr.ch/cgi-bin/texis/vtx/admin/opendoc. htm?tbl=ADMIN&ind =3ae68fc3d0
134 Available at: http://www.ohr.int/pic/default.asp?content_id=7433.
135 Available at: http://www.ictj.org/downloads/CasualtyofPolitics.pdf. At page 13 Mr. Djordjevic mentions the role of the CRPC as the main body. In reality the CRPC role was over emphasized and most of the credit goes to the domestic authorities for this property restitution program which has been largely unprecedented and it contributed to setting new standards in terms of housing and property restitution (see the new principles on Housing and Property Restitution recently passed by the UN Subcommission on Promotion and Protection of Human Rights: http://domino.un.org/UNISPAL.NSF/0/577699b243f13c048525707300669e6?OpenDocument)
136 Available at: http://www.ohr.int/plip/
137 For an overview of the process and methods of coordination see: http://www.ohr.int/plip/key-doc/default.asp?content_id=5510
2. Croatia

During the Croatian offensives Flash and Storm, aimed at regaining control of Serb-held lands in Western Slavonia and Krajina, thousands of Croatian Serbs abandoned their private properties and fled to neighboring countries. In addition, approximately 30,000 households or 100,000 Croatian Serbs who lived in socially owned apartments as holders of occupancy/tenancy rights lost physical access to their homes during and after the war. In all, 300,000-350,000 Croatian Serbs fled the country.

Private Property

In September 1995, the Croatian Government adopted the Law on Temporary Takeover and Administration of Specified Property (1995 Law on Temporary Takeover), which authorized the Government to administer the abandoned property. The following year, the Government adopted the Law on Areas of Special State Concern (LASSC), which dealt with the war-affected areas previously under the control of Serb forces during the war. The new law reiterated the legal authority of the state to allocate the abandoned property to refugees. As a result, between 1995 and 1998 the Government allocated and estimated 19,000 private properties belonging to Croatian Serbs to temporary users, most of whom were Bosnian Croat refugees. The 1995 Law on Temporary Take-over, however, protected temporary occupants from eviction, until such time as the local housing commission provided adequate alternative accommodation, often referred to as housing care.

In 1997, the Constitutional Court of the Republic of Croatia found that the 1995 Law on Temporary Take-over violated the provisions of the Constitution that guaranteed the right to return. Recognizing the rights of Croatian Serb refugees to return and claim their occupied properties, the Government enacted the Program for Return and Housing Care of Expelled Persons, Refugees, and Displaced Persons (1998 Program for Return), which repealed the 1995 Law on Temporary Take-over. In 2002, the Government amended the 1996 Law on Areas of Special State Concern (LAASSC) to accelerate the repossession process, eliminate discriminatory or vague laws and practices, and secure returnees’ property rights. Unfortunately, even with these legal changes, discrimination against Serb property owners continues.

As of January 2005, about 1500 properties remained occupied by temporary users. At first glance, this figure seems remarkable given that the Government allocated an estimated 19,000 private properties to temporary users under the
1995 Law on Temporary Take-over. However, the actual physical repossession of property by lawful owners has taken place less than half the time. According to OSCE figures, up to 8,000 properties considered returned to the owners were in fact sold to the State, while still occupied and an additional 3,500-3,900 properties considered returned remain empty or uninhabitable due to looting and devastation.142

<table>
<thead>
<tr>
<th>Properties considered abandoned and allocated to temporary users between 1995 and 1998</th>
<th>19,000*</th>
</tr>
</thead>
<tbody>
<tr>
<td>Properties still occupied by temporary users as of 2005</td>
<td>1,500</td>
</tr>
<tr>
<td>Properties considered returned</td>
<td>17,500</td>
</tr>
<tr>
<td>Returned properties sold to the State</td>
<td>8,000 out of 17,500 (46%)</td>
</tr>
<tr>
<td>Returned properties empty or uninhabitable</td>
<td>3,500-3900 out of 17,500 (20-22%)</td>
</tr>
<tr>
<td>Properties where owners not found</td>
<td>4,000 out of 19,000 (21%)</td>
</tr>
<tr>
<td>Owners compensated for property taken</td>
<td>1,300-1,600 (14-17% of property returned and not sold)</td>
</tr>
</tbody>
</table>

*All numbers are approximate

As of June 2005, few owners received State assistance for repairs even though the amended Law on Areas of Special State Concern entitles property owners to building materials. The Ministry for Public Works, Construction and Reconstruction is currently designing a compensation model, either in the form of repair assistance or cash payment, for owners of looted or devastated properties.

In addition, the Ministry recorded 26,000 reconstruction applications as of June 2003.143 Individuals displaced outside of Croatia filed an additional 16,000 claims when the Government extended the application deadline for six months in 2004.144 According to OSCE figures, positive decisions rendered by local authorities on the eligibility of assistance remains low, less than 30%, and the number of appeals against negative rulings has reached over 10,000.145 The Ombudsman noted in his 2004 annual report that the duration of procedures and delay of decisions make up a significant number of complaints.146

**Tenancy Rights Holders**

In the urban areas controlled by the Government during the war, local authorities terminated occupancy/tenancy rights (OTR) in approximately 24,000 cases.
through court procedures held in absentia. In the war-affected areas (Areas of Special State Concern), additional 5,000-6,000 Serb households lost their occupancy/tenancy rights ex lege upon the expiration of a 90-day deadline established by the 1995 Law on Lease Apartments in the Liberated Areas. Since this law came into force shortly after Operations Flash and Storm, few Serbs returned to their homes and the Government therefore allocated the abandoned apartments to Croatian displaced persons.

In 1996, the Government passed the Law on Lease of Apartments, which effectively cancelled all occupancy/tenancy rights. In the areas controlled by the Government during the war, the Government allocated Serb abandoned apartments to Croatian displaced refugees. These new occupants acquired the tenancy rights over the apartments and later purchased them at below-market value. In the war-affected areas, Croatian displaced refugees moved into abandoned Serb apartments. They remain protected leaseholders and pay below-market rent. According to the amended Law on Areas of Special State Concern, these occupants can become owners of the State-owned apartments after establishing residency for a continuous ten-year period.

The Croatian Government adopted two housing schemes for the former OTR holders inside and outside the areas of special state concern (ASSC). Former OTR holders for both programs can apply for the lease of a State-owned apartment under the same financial conditions. As of July 2005, the Government had processed only 16 of the 2,598 applications received. Less than 1% of the total number of potential beneficiaries filed applications for inclusion in the housing program. The low number of applications is due primarily to the lack of public information campaigns. Although the Government announced an information campaign for the two housing schemes in December 2003, it officially launched the program in October 2004. In order to raise public awareness and encourage application filings, the OSCE and UNHCR have promoted the two housing schemes in Serbian media outlets and funded community meetings with displaced Croatian Serbs in Serbia and Montenegro and Bosnia and Herzegovina.

However, the allocation of housing for former occupancy/tenancy holders depends on the availability of housing stock or purchase and construction of new housing by the State. The physical allocation of housing has started within the ASSC, but most of the beneficiaries are neither refugees nor displaced persons. Outside the ASSC, where court proceedings terminated occupancy/tenancy rights for over 24,000 OTR holders, the process of physical allocation has not started since the allocation of alternative housing depends largely on the construction of apartments under a subsidized housing program. The State failed
to construct or purchase any of the 400 apartments envisioned in the 2004 State budget. The 2005 State budget has envisioned an additional 800 apartments for construction and purchase.

3. Kosovo

A significant example of reparations occurred in Kosovo in the aftermath of the violence of March 2004. Our interviews revealed that many of the buildings that were destroyed were fully restored. According to many sources, the notable exceptions are the Serbian Orthodox churches, which have not yet been rebuilt because Church officials have blocked the reconstruction. It was also reported that many Albanians expressed resentment over the restoration. This apparently stems from their perception of Serbian intransigence with respect to reciprocal reparations. Moreover, some of those interviewed expressed the view that the reparations were the result of heavy pressure from the international community, rather than a sincere desire on the part of the government to make amends.

Property Rights Compensation and Restitution

In 1999 the Housing and Property Directorate (HPD) and Housing and Property Claims Commission (HPCC) were established in Kosovo as administrative bodies that would “facilitate the restoration and confirmation of property rights which were lost through discrimination, force or remain unclear due to informal transactions.” The HPCC is the independent judicial body of the HPD; it meets six times per year and is staffed by international commissioners.

These institutions play a critical role in advising minorities of their rights to property and helping them process their claims. Illegal habitation of private property has been common throughout Kosovo after the war and has prevented many individuals (including minorities) from returning. The HPD and HPCC intend to make this process more accessible and understandable to the population in Kosovo and those still in refuge in neighboring states.

HPD received approximately 29,000 claims by the submission deadline of July 2003. The majority of these are “Category C” claims: individuals who lost possession of their residential properties after the 1999 NATO intervention. As of June 2005, 28,000 of that total (nearly 96%) have gone through a “first instance decision.” To date 10,127 decisions have been implemented. Slow decision making processes in the HPCC on the resolution of claims and its impact on the return
process has been criticized by many international organizations – it could take up to 46 years to complete at the current rate.

For many property owners, dealing with the HPD/HPCC is not the only source of potential difficulty during the repossession process. Other challenges include:

- Looting and destruction of property for those returning home. Often during the lag time between eviction and actual repossession a home is subject to vandalism.
- Harassment by the evicted illegal occupant towards the legal owner of the property; in some cases the property owners have demanded police protection from such individuals.
- Illegal occupants demanding cash compensation from the returning property owner for improvements made to the home, though the owner never consented to the changes.

4. Montenegro

As in Serbia, there are a significant number of refugees and IDPs in Montenegro; according to the Montenegrin government, there were 8,474 refugees and 18,047 IDPs living in the country as of September 2004. Also as in Serbia, these are Serbs displaced from Croatia, Bosnia, and Kosovo. They are therefore not included here in the discussion of reparations.

5. Serbia

Serbia is a case in which a specific category of war veterans - victims of forced conscription - are legitimate candidates for reparations. It was reported that 100,000 male Serb refugees from Croatia and Bosnia were captured by the Serbian military forces and forcibly conscripted for military training. They were terribly mistreated, and then sent to the front lines in the Republic of Srpska to fight. Most of those who survived reportedly suffered from post-traumatic stress disorder. The Serbian government has not voluntarily initiated any move to provide compensation to these men. On behalf of 709 such victims, the Humanitarian Law Center (HLC) of Belgrade filed several lawsuits in the First Municipal Court in Belgrade from 1996-2003. A few of these have resulted in compensation to the victims to the amount of 40,000-100,000 dinars (approximately 550-1,250 USD). However, the
HLC believes these amounts to be too low, given the extent of suffering caused, and they filed an appeal in 2003 to increase the compensation.¹⁵⁴

There has not been an influx of Croat or Muslim returnees to Serbia demanding the return of their property or restitution for damages. Serbia is, however, struggling with a large number of Serb and Roma refugees and IDPs, hundreds of thousands since 1991; 6,800 are still housed in collective centers and have not been provided access to permanent housing.¹⁵⁵ However, we do not consider the claims of these refugees and IDPs in our discussion of reparations from Serbia, as they were not harmed due to state action on the part of Serbia.¹⁵⁶ If these displaced persons pursue reparations, it will be from the countries/regions they are fleeing – Croatia, Bosnia and Herzegovina or Kosovo. We address this issue further in the section on cross cutting issues, as this is a problem that falls through the cracks when looking at the usual categories of concern in the region.

**Assessment**

The only tangible reparations projects within states in the region have been efforts to restore property to its pre-war owners, or to compensate owners if their property was destroyed. To our knowledge, no country in the region is providing any other tangible form of reparations to victims, such as legal assistance or social support services. Overwhelmingly, victims of property loss or destruction are members of ethnic groups who fled a particular area out of fear for their physical safety. It is therefore not surprising that the countries/areas most involved in internal reparations projects are those whose populations were most substantially displaced: Bosnia and Herzegovina, Croatia, and Kosovo.

Bosnia and Herzegovina has made the most progress on restoration of property rights to war victims, largely due to intense pressure from the international community. Property rights are intimately connected to the return of refugees and IDPs, and return was a significant international goal expressed in Annex 7 of the Dayton Peace Agreement. It was not a goal of most political leaders representing majority groups in any part of the country, and if the process had been left in their hands, neither return nor restitution of property would have occurred.

Although the international community also has a substantial presence in Kosovo, they have not exerted the same kind of pressure as in Bosnia and Herzegovina. The system set up for processing claims does not seem to be working effectively. As with all other issues in Kosovo, it is hard to imagine property rights being completely sorted out until negotiations on status are concluded. As mentioned in the section on state to state reparations, the Albanians in Kosovo will be asking...
for compensation of various kinds from the Serbian government. And undoubtedly, the Serbs in Kosovo as well as those who have fled to Serbia will be seeking reparations as well – from the Albanians who now dominate the interim and any future government.

Croatia’s progress is the most mixed. While attending fairly well to the legal aspects of property rights, some observers claim that the government has not done well in providing financial compensation to property owners or the materials needed to rebuild damaged homes. In addition, observers claim that there is ongoing discrimination in favor of Croat refugees and IDPs who were housed in Serb homes during the war, and against the Serbs who are returning. The most egregious outcome is that most Croatian Serbs who lost tenancy rights have been prevented from reoccupying their pre-war homes and have not received substitute housing.

The biggest gap, therefore, in material reparations within states is the huge discrepancy between the legal reforms adopted in most states that provide for property rights and the actual implementation of those laws. Minorities in all states are still the victims of extensive discrimination in many forms, including access to housing. Only in Bosnia and Herzegovina, with substantial international pressure, progress has been made.

C. SYMBOLIC REPARATIONS

Symbolic reparations include public apologies or public commemorations, such as monuments or public holidays. These can assist in the development of a more tolerant kind of collective memory and social solidarity, as well as providing a critical stance for addressing the past conduct of one’s own state and deeds committed in the name of political communities. However, they may also be divisive and/or strengthen feelings of victimization. In the Balkan region, public apologies have been somewhat constructive, though without exhausting the avenues of public rapprochement between communities. Memorials and designation of holidays have moved in a more divisive direction.
Public Statements/Apologies

1. Bosnia and Herzegovina

The Srebrenica Commission was established when the Human Rights Chamber of Bosnia and Herzegovina accepted 49 lawsuit applications filed by Srebrenica victims’ families against the Republic of Srpska government for its failure to provide and disclose information about missing family members. On 7 March 2003, the Chamber ordered the Republic of Srpska to provide the necessary response. The Commission issued its report in June 2004, and in November 2004, the Republic of Srpska government published a formal apology on its official website: “The government of the Republic of Srpska commiserates with the pain of relatives of the perished people of Srebrenica, and truly regrets and apologizes for the tragedy they experienced.”

2. Croatia

In September 2003 the Croatian president, Stjepan Mesic, visited Belgrade, where he and the president of Serbia and Montenegro, Svetozar Marovic, exchanged official apologies. Marovic said: “I want to apologize for all the evils done because I don’t consider peoples guilty nor that they should apologize, but that we should reach an agreement, which we have been doing lately, that everyone who committed a war crime should be held legally accountable. Cooperation with The Hague Tribunal is one of our most important obligations, as well as of anyone who wants the cooperation between the two states and who believes that this is our future”. Mesic accepted this “symbolic apology” and also apologized to “every person who was in any time hurt or damaged by the citizens of Croatia as a result of their abuse of power or acting against the law”. Mesic also emphasized his support for the development of good neighborly relations. The reactions in Croatia from other politicians, the media and most of the public were mostly positive, except for those in the nationalist camp.

A vocal argument however continues to exist in the country that no war crimes have been committed on the Croatian side. Especially illustrative of this is the “Declaration on the Patriotic War” passed by the Parliament in October 2000. The document states that the “Republic of Croatia led a just and legitimate, defensive and liberating, and not aggressive and occupational war against anyone, in which she defended its territory from the great Serbian aggression within its internationally recognized borders.” The Flash and Storm military operations are characterized as liberating, and there is no mention of ethnic cleansing of Serb civilians.
The purpose of this document was to officially deny that the Croatian armed forces attacked Bosnia and Herzegovina (within its internationally recognized borders) in an attempt to seize parts of its territory inhabited by ethnic Croats.\textsuperscript{159} The document is still considered valid, and there have been no serious debates on its historic revisionism in political or any other circles. Our interviews revealed that the document seems to represent an overall consensus in the country.

3. Serbia

In October 2000, the newly elected president, Vojislav Kostunica, acknowledged responsibility for crimes committed during the Milosevic era. In an interview for CBS’s “60 Minutes II,” he said:

\begin{quote}
I am ready to accept the guilt for all those people who have been killed. I’m trying to […] take responsibility for what happened on my part […] for what Milosevic had done. And as a Serb I will take responsibility for many of these crimes.\textsuperscript{160}
\end{quote}

Similarly, Yugoslav Foreign Minister Goran Svilanovic, speaking in Croatia in 2001, expressed:

\begin{quote}
[…] sincere regret for all that happened on these lands. Localities, such as Vukovar or other places of suffering, will always stay remembered in the hearts of Croats. It is for historians to explain why things happened the way they happened, but it is for the politicians to make a step towards reconciliation, which will never be easy and it will take years to accomplish.\textsuperscript{161}
\end{quote}

As time has progressed, government officials have moved beyond regret and guilt to apology – but only for individual rather than state-sponsored acts. Mark Freeman, in a report written for the International Center for Transitional Justice, reports:

In November 2003, Svetozar Marovic, President of Serbia and Montenegro, apologized to Bosnia and Herzegovina for “any evil or disaster” that anyone from his country caused there during the conflict. In September 2003 he made a similar apology to Croatia, which the Croatian head of state quickly reciprocated. Both of Marovic’s apologies emphasized individual, as opposed to state, responsibility.\textsuperscript{162}
Assessment

It is actually quite unusual for public apologies to be given so soon after the conclusion of a war. This can be taken as a constructive sign, that the governments of the region have at the very least accepted the fact that individuals are culpable for war crimes and human rights abuses. However, no government has yet admitted state-level responsibility for atrocities. For example, the Republic of Srpska statement in response to the Srebrenica Commission’s report, while apologizing for the pain caused by the massacre stops short of accepting any responsibility for the crime. Given that, it is likely that the impact of these statements on reconciliation between countries and ethnic groups will be minimal. Also, without more specific reparation on an individual level, families who lost loved ones will not be placated only by government statements. On the positive side, public apologies can signal a government’s willingness to participate in individual-level prosecutions, which is certainly a step forward for the region.

Memorials and Holidays

1. Bosnia and Herzegovina

Quoting from the UNDP Country Office in Bosnia and Herzegovina report:

More and more memorials may well be built in the coming years. An International Commission for Missing Persons (ICMP) interviewee noted that victims from Prijedor, upon finally receiving permission to place a plaque at the former Trnopolje prison camp, were only allowed to put it up at some distance from the actual site. Whenever one community erects a memorial, there seems to be a tendency for the other community to quickly build its own monument to their own victims or war heroes. For example, after a memorial stone was put up at Potocari in remembrance of Bosniak victims of the 1995 genocide in Srebrenica, a monument was built at Kravica to commemorate Bosnian Serb victims of 1992-1993.

These Serb victims were those who had been killed by Bosniak forces, as they were carrying out incursions outside of Srebrenica during the siege (their war time commander, Naser Oric, is currently on trial before the ICTY). Besides the commemorations for the 11 July anniversary in Srebrenica, which were attended by a large number of international and domestic officials, Bosnian Serbs had their
own celebrations on the days before and after July 11 to commemorate Serbs killed in the area.

Memorials have therefore been more divisive than unifying. In Prijedor, a backlash occurred when Mittal, a giant steel company, recently bought iron ore facilities in Omarska, the site of a notorious detention camp for Bosniak civilians during the war. Mittal Steel was approached by camp survivors and victims who asked that a memorial be built on the site. Mittal Steel then engaged a British NGO, Soul of Europe, to mediate between the Serb, Bosniak and Croat communities so that a memorial could be built at the former camp with the support of all three sides. On 30 November 2005, the project was presented at a conference in Banja Luka. It is supported by a limited number of youth NGOs on the Serb side, while the Mayor of Prijedor so far has not given any sign of support to the initiative.

2. Croatia

The largest monument, as well as the most controversial, is the Altar of the Homeland – a concrete structure built by a Croatian sculptor on a hill near Zagreb. This was the late Franjo Tudjman’s personal project, paid for with taxpayers’ money but never quite completed. Currently, the structure seems to be decaying due to negligence. Not many people actually visit the “shrine” anymore. Along with this there are crosses all around the country commemorating soldiers who were killed, numerous individual monuments, and streets and squares in every city, town and village named after a war action or a part of the armed forces. There are also many monuments dedicated to Tudjman and streets bearing his name.

Several public holidays have been introduced since 1990 that are related to the war. Two of these are Victory and National Thanksgiving Day, and Independence Day.

Victory and National Thanksgiving Day is on 5 August. It is the day in 1995 when Croatian armed forces liberated the territories occupied by the former JNA-turned-Serbian Army and some local Serbs, effectively ending the war. On that occasion, called Operation Storm, the Croatian armed forces also expelled 150,000 Serb civilians from those territories. For the first time in 2005, this expulsion was publicly mentioned during the celebration by President Mesic, but not by other members of the government.

Independence Day commemorates 8 October 1991, when the Croatian parliament severed all legal and political relations with Yugoslavia, thus formally proclaiming Croatia as sovereign and independent.
These holidays are usually observed with official ceremonies at various locations such as churches, graveyards where soldiers are buried, and/or the grave of the late president Franjo Tudjman.

3. Kosovo

UNMIK has forbidden the erection of single-ethnicity monuments in Kosovo, and our contacts in that area report that the local population is quite resentful of this restriction.

Assessment

The use of memorials has been universally divisive and ethnically focused. It is not surprising that, only a decade after the violence, there are no joint commemorations of those killed in the war. It will certainly take longer for a larger sense of shared identity to emerge that enables such joint projects. One hopeful sign is the recent initiative of the Serb Mayor of Skender Vakuf/Knezevo, a rural municipality on the mountains of Republic of Srpska. The Serb Mayor has introduced the idea of building a memorial for Bosniaks who were killed in the area in 1992; negotiations are currently ongoing. At this point, however, such gestures are still very rare.
IX. CROSS-CUTTING ISSUES
In the previous sections, we have focused on four approaches to transitional justice that are most often used in post-conflict societies: prosecutions, vetting, truth seeking, and reparations. However, there are some issues that cut across these approaches, blurring the distinctions between the four categories and illuminating a different set of concerns and questions than can be seen by looking at the approaches one by one. In this section, we will discuss three such issues: (1) assessing whether transitional justice mechanisms are reaching the most disenfranchised members of society; (2) exploring the relationship between transitional justice and reconciliation; and (3) determining which institutions are most appropriate to provide transitional justice programming.
A. TRANSITIONAL JUSTICE AND THE DISENFRANCHISED

It is clear from the analysis in preceding sections of this report that the bulk of transitional justice efforts in the region are focused on identifying and punishing perpetrators. Thus the best-developed mechanisms are in the prosecutions arena. Much less has been done to directly address the needs of victims. While prosecutions benefit victims indirectly by punishing those who harmed them and by beginning to build trust in the protection of legal institutions, direct benefits to victims are much less in evidence. This is particularly true for the populations most in need in the region: the minority groups in each country and some members of the refugee/IDP population.

While legal reform in each country has, in principle, reduced discrimination toward minority groups, the practice we observed and identified is much different. Serbs in Croatia, non-Albanians in Kosovo, and members of local ethnic minorities in regions throughout Bosnia still face great difficulties in finding housing, jobs, and sometimes even physical security. This is exacerbated in Croatia by the slow response of the government to claims for property rights and reparations by Croatian Serbs; in Bosnia by the sluggish economy and continuing competition for employment; and in Kosovo by the lack of resolution on the status question. Ethnic discrimination in access to government support is also claimed by municipalities in Southern Serbia with large Albanian populations, such as Presevo and Medvedja, and by the predominantly Bosniak population in the area of Sandzak and multiethnic communities in Vojvodina.

As long as the minority groups are not well taken care of in each of these societies, the injustices suffered during the war will remain salient in these communities, ready to be channeled into violence by opportunistic leaders when/if the political climate allows. It is therefore critical that the governments in the region understand the costs of discrimination and the benefits to be gained by non-discriminatory practices. The EU accession process, as we have discussed, will be very useful in this regard. Other international agencies can also begin exploring the use of carrots as well as sticks to help move governments in this direction.

Other groups that are falling through the cracks of current transitional justice mechanisms are refugees/IDPs in Serbia and Montenegro, most of whom are Serbs from Croatia, Kosovo, and Bosnia and Herzegovina. These groups are owed reparations by the countries they fled, but there is no mechanism at present for them to receive such benefits nor any process underway to establish what these reparations should be. Both Serbia and Montenegro suffer under the burden of these displaced people, and it is not clear that they will be returning home any-
time soon. People we spoke with in the Montenegrin government are especially worried about how to accommodate this large influx of new people, as the IDPs are beginning to create some backlash from local community members in areas where they have settled. It is important to think more holistically about how to assist these populations, in a way that does not deepen animosities between groups but instead helps the reconciliation process.

B. TRANSITIONAL JUSTICE AND RECONCILIATION

Reconciliation is focused on rebuilding or transforming relationships between individuals or groups after violence, betrayal, or other hostile acts have torn them apart. In the context of a civil war, justice is a critical component of reconciliation, in that it can restore trust in the ability of governments and societies to establish order and security by protecting victims and punishing perpetrators. Moreover, as prosecutions unfold, they reveal the truth about the role of individuals in the perpetration of crimes and human rights abuse. If leaders and the media deal effectively with the truth thus revealed, it can foster the individualization of guilt. The individualization of guilt can, in turn, serve to abate the collectivization of guilt that is so often associated with the ethnic hatred which fuels conflict. However, retributive justice mechanisms (i.e., those that focus on punishment of perpetrators) can also create more inter-group tensions if they are perceived as biased or vengeful. In addition, justice processes that rely solely on prosecution can leave victims feeling that their personal plight is still unacknowledged.

Many of the transitional justice initiatives in the region explicitly link their work to reconciliation. The network of NGOs involved in documentation efforts described the importance of truth-seeking as a way of creating the climate at the local level for communities to be rebuilt. Relationships could then be based on justice and understanding rather than on suspicion and fear. Another example is the Youth Initiative for Human Rights based in Belgrade, which has also set up an office in Pristina. The hope is that, in addition to advocating for human rights in Serbia, the organization can also promote contact and positive relations between Serbian and Albanian youth. Finally, the organizations involved in the identification and recovery of missing persons are very clear that this is a key to reconciliation in the region; as long as thousands of people are unaccounted for, the war remains an open wound that no amount of time or money will heal. For example, the UNMIK programs described in the report are an explicit effort to humanize relationships
between groups by creating the awareness that missing persons are a shared trauma that crosses ethnic lines.

One area of reconciliation work not discussed previously in the report is the use of education, specifically history teaching, to reframe relationships and acknowledge the different perspectives on the past that are held by different ethnic groups. For example, the Center for Democracy and Reconciliation in Southeastern Europe, based in Thessaloniki, has developed alternative textbook to be used throughout the region for the teaching of history, as a supplement to existing texts. This consists of four workbooks, covering the themes of The Ottoman Empire, Nations and States in Southeastern Europe, The Balkan Wars, and The Second World War. It is ground-breaking in that its goals are to:

- Teach national history not as nationalistic history
- See the regional history of Southeastern Europe as part of European and world history, rather than as a “peculiar” and stereotyped Balkans history
- Teach students about difference and conflict

This project is important also because it is the result of a five-year effort involving sixty historians from eleven countries, working together to create a joint approach to history. The SCG government has officially accepted these textbooks for optional use in the classroom, at the discretion of individual teachers. We were not able to obtain any data about whether they are in fact being used.

On the level of local initiatives coming from the academic society, it is worth mentioning that the Croatian Center for Political Research has so far organized nine meetings of mostly regional, but also international historians, the so-called “dialogues of historians”, in which various topics from the modern regional history were discussed. As a result, the Croatian historian Igor Graovac and Serbian historian Dragan Cvetković jointly wrote a book on human losses in Croatia in the Second World War.

In terms of gaps, however, there are two reconciliation issues that need much more attention. The first was alluded to under the topic of truth-seeking: the continuing denial of responsibility for war crimes and human rights abuses on the part of the majority of the public in all parts of the region. As long as the bulk of citizens do not feel that they or their government have any responsibility for abuses to other groups, the basic elements for reconciliation are missing. Much more effort should be directed at public education, and those efforts already underway should be strengthened. This includes the outreach programs for the
In this section, we will consider when there is a comparative advantage in pursuing these transitional justice approaches at the regional or international level rather than at the national level. Similarly, we also consider the benefits of having them undertaken by civil society rather than governments.

1. Regional Interventions

The major advantage of regional level initiatives is the ability to draw upon a larger set of data than could be accessed only within the borders of one state. We have found this to be very important and effective in the documentation of war crimes trials, the oral histories project of the NGOs involved in documentation, and the truth-seeking activities of the media.

Second, there is one reconciliation issue that is largely missing from the current agenda: what to do about Serbia and its pariah status in the region. Serbia is seen to be the villain in this story, the aggressor country. As such, we heard from many sides that Serbia needs to shoulder the blame for the war and also for the bulk of reparations. While it is true that the Serbian government and military did commit more war crimes than those of other countries in the region, it is clear from a reconciliation perspective that if Serbs as a people are stigmatized because of this, the cycles of retribution will continue. The other part of this dynamic that surfaced in our research is the deep sense of Serbian victimization remaining from World War II. One example is in the mandate of the now defunct FR Yugoslav TRC; while that TRC effort has been discredited on most counts, it is notable as an indication of how deeply the Serb community needs acknowledgment of the harms they suffered in the past. This observation is not meant to excuse the actions of Serbian political and military actors during this recent war. It is rather to point out some difficult tensions between retribution and reconciliation in the region, and to suggest that taking a broader historical view may actually be a good idea in terms of truth-seeking, so as to finally stop the continuing cycles of victimization and revenge by all parties in this war. It will be challenging to devise the appropriate strategy to accomplish this, given its sensitive nature and the way in which nationalists have co-opted the victimization issue. However, it must be addressed if regional reconciliation is to be achieved.
crimes and other human rights abuses, in prosecutions, and in efforts to identify missing persons. We also note here the current proposal for the establishment of a regional “victims’ commission.” Not surprisingly, all of the current regional initiatives relate to truth-seeking (although the victims’ commission, as proposed, would also deal eventually with reparations as well). This makes sense, given that the war was conducted within the confines of what was then a single state in the process of fracturing into separate entities. Truth therefore transcends the present national boundaries, and truth seeking must move in that direction as well.

Beyond data collection, there are other issues that require regional cooperation because of the nature of the war. Above we took note of the need for cooperation in prosecuting certain war crimes. Perhaps, as noted, the clearest example of this need is the fact that many war crimes suspects have sought refuge outside of the borders of those jurisdictions which are seeking to prosecute them. This fact makes it obvious that the success of future prosecutions will depend upon the success with which cases and defendants can be transferred from one jurisdiction to another. This is so because virtually all jurisdictions in the region forbid the extradition of their nationals. As we pointed out, the incentive of future EU accession has been a significant factor in the recent legal reforms relating to prosecutions that have been adopted on a national basis throughout the region. We have recommended that strategies be considered to encourage more interaction on a regional level in this domain since that interaction seems clearly to be required in order to successfully fight impunity in the future. There have been several attempts to encourage regional cooperation mostly in the form of multilateral agreements. However, while these efforts have improved the exchange of documents and access to witnesses, the transfer of cases has thus far occurred on an ad hoc basis rather than systematically.

If one analyzes these observations in light of the incentive of future EU accession, it is hardly surprising that reform has been thus far more successful when undertaken on a national level, since each country in the region is vying individually to be recognized as meeting the requirements for accession. Regional cooperation has not been seen as furthering this national interest. This fact should be taken into consideration by international donors and by the EU in particular. Above we recommended that international donors should encourage the establishment of bilateral agreements that would provide for a systematic approach to cooperation in war crimes cases. For example, transfer could be made obligatory wherever there is a request pursuant to a bilateral agreement. In this way, each country’s fulfillment of its treaty obligations in this area could be considered as a factor relevant to future accession.
Finally, reparations will eventually have to be addressed regionally. While some people can seek reparations from the country in which they now live, others who are refugees or IDPs outside of their original home territory will have to obtain reparations from their country of origin. In addition, there are state-level claims to be settled. While adjudication is one way of pursuing these individual and state claims, it is intensely adversarial and will exacerbate tensions in the region. The best way of finding a settlement that also supports reconciliation is through negotiation or mediation. Possibly the victims’ commission, as noted above, will be a vehicle through which such a discussion could take place.

2. International Interventions

International organizations and institutions can provide resources, expertise, and legitimacy in transitional justice initiatives. For example, the international community has been and must continue to be a key player in the training and capacity building of judicial actors engaged in the prosecutions of war crimes. This is not only because the resources of the international community are sorely needed in this area, but also because the international community can supply international experts with significant experience. It is important to emphasize the need to bring internationals who have not only war crimes experience but also experience as trainers or educators. In addition, the experience of the “64” panels in Kosovo clearly illustrates that it will not be enough to simply require international and local actors to work together in the hope that capacity building will happen by osmosis. Instead, targeted training programs offered by internationals will be required.

Another example is in the identification of missing persons. While national and regional efforts are proceeding, there is also an important role for the international community to play. The ICRC role is key in this area because of its legitimacy and because of the wealth of experience that it has had in dealing with missing persons in other parts of the world. In all of the interventions on missing persons, regional and international, the ICRC’s data is often used as the working data on this subject because it is considered impartial. In Kosovo, the Office of Missing Persons of UNMIK is also doing significant work in this domain. While other relevant actors, such as the ICTY, have sometimes placed the emphasis on identifying the ethnicity of groups of discovered bodies for the purpose of proving the crime of genocide or of crimes against humanity, the UNMIK office has constantly pursued the humanitarian interest of the families in the specific identification of each one of the victims. Through this office of UNMIK the international community has
been a force in the defense of that interest where others have not considered it as important. This latter observation underscores the importance of identifying who will play that advocacy role when the international community leaves Kosovo.

One final example is drawn from the UNDP Bosnia and Herzegovina report:

> It might be helpful to note that Srebrenica and Prijedor, where some of the war’s worst atrocities took place, and where the international community has made vigorous efforts to be involved, are also towns in which this mission had meetings with members from different communities that were able to discuss the past in an atmosphere of respect and apparent trust. This is an illustration of the difference that the international community can make when it gets involved and helps provide a space conducive to dialogue.\(^{165}\)

### 3. Civil Society Interventions

As noted above in our section on prosecutions, there is a clear role for civil society in providing legal representation and counseling of victims and witnesses as they participate in war crimes prosecutions. In this connection, we underscore our recommendation that the civil society network of which the HLC in Belgrade, the Center for Research and Documentation in Sarajevo and Documenta in Zagreb should be strengthened to encourage this aspect of their advocacy mission.

We also emphasized the necessity of the linkage between civil society and government authorities in the investigation of war crimes. Experience in other parts of the world has shown that human rights NGOs are often the best repositories of information and evidence relating to the systematic human rights abuses that are so often committed in conflict.

Finally, as noted above in this section, civil society can play a significant role in the promotion of reconciliation through the documentation of the experience of the victims of war crimes. Although governments have been engaged in some documentation activities, the good faith of civil society in the pursuit of documentation across borders and across ethnic groups is particularly noteworthy. They are by definition more credible in this role than governments, who are often accused of having participated in the very atrocities that they are documenting. In this respect, civil society is much closer to the interest of the victims. We would note here that it will be critical to have civil society organizations very involved in the planning and implementation of any regional truth commission, as the proposal for the victims’ commission makes clear. In addition, it will be worthwhile...
exploring a possibility of entrusting the caretaking of the ICTY archives in the hands of a regional NGO network, potentially as a basis for a future research and documentation center/s under the auspices of a UN agency or other international organizations working in the region.
X. CONCLUSIONS
In this section we offer a broad set of recommendations which detail all of the measures we see as important in the promotion of transitional justice in the region. In putting forward these recommendations, we realize that no single donor will be capable of undertaking all of them, and our recommendations at this stage are not yet structured for the development of action plans for immediate implementation. Rather they are designed to suggest the general direction and scope of potential interventions with an eye to successful implementation based upon lessons learned regionally and internationally.

With these caveats in mind, the following are our recommendations, arranged in order of our assessment of priority for attention:
A. TOP PRIORITY

1. NGO truth-seeking

The work of courageous NGOs and media outlets should be encouraged and supported financially. For example, funding should be found to continue B92’s coverage of the Hague tribunal proceedings and for The Insider series. The regional NGO consortium established for the collection and sharing of documentation of war crimes should be supported, and its membership possibly expanded to bring others into the effort.

The personal stories that are being collected should be disseminated as widely as possible, so that the broader public is made aware of the realities of the war years. In addition, more stories should be collected, either in videotape or written form.

The international community might be able to lend support to these efforts by providing expert assistance to civil society to assist it in developing a systematic approach to the cataloging of data that will foster effective comparison and analysis.

Establishing national and/or regional documentation centers that would host all crucial original documents, including those by the ICTY, might be beneficial for the process of truth-seeking. Some steps towards establishing this kind of archives have already been taken by the three partner organizations, Humanitarian Law Fund from Belgrade, Centre for Documentation and Research from Sarajevo, and Documenta – Center for Dealing with the Past from Zagreb.

The significance of evidence and other documentation collected by the ICTY for the regional truth seeking efforts should not be underestimated, including the massive documentation gathered by the OTP and the forms of “judicial truth” established through the court’s decisions. Given the prevailing conflicting national narratives about the war in each part of the region and the international character of the institution, the archive of the ICTY may be one point of departure for creating less biased and more inclusive account of the events in 1990s based on facts, and possibly one of the most important legacies of the Tribunal. It is perhaps the only way to make up for the most criticized aspects of the Tribunal, namely that it is an international court, solely consisting of out-of-region judiciary, and located outside of the region,. These critiques might be offset by securing that the archives will be permanently stationed in the region. The archive should
be put under some form of regional ownership, possibly with local NGOs, to be initially financially, professionally and logistically supported by a UN agency or other international organization in the region.

In a similar vein, the international community could provide technical assistance to civil society in connection with their on-going efforts to develop a proposal for a regional victims’ commission. This assistance should be provided by authorities with expertise in the development of truth commissions in other countries. This assistance could also serve as an occasion for the international community to encourage the development of a proposal which would ensure that the commission would coordinate its work with the outreach programs of the national courts, the oral histories project of the NGOs involved in documentation, and the truth-seeking activities of the media. In this way, the work of the commission could serve to bring about the transformation of the climate of public perceptions of the past and foster reconciliation.

The international community should underscore the importance of taking a broad historical perspective on truth seeking in order to support reconciliation between Serbia and the rest of the region. The NGO consortium on documentation has already adopted this view; other documentation efforts should be encouraged to do this as well.

2. Attention to Missing Persons

Missing persons are a significant source of ongoing tensions and of unhealed wounds in all societies in the region. For this reason, the resolution of open cases should be a priority for all of the countries. The international community should continue to seek ways to expedite the recovery and identification of missing persons. In Kosovo, identification of missing persons should be included as a “standards” issue in the upcoming talks, for without that push from the international community, the parties may not have the incentive to provide the needed information.

In addition, strategies will need to be developed to encourage the cooperation of governments throughout the region in dealing with this issue. These strategies should be designed to expand their involvement beyond that which is currently associated with the work of the ICMP described above. These strategies will also need to encourage governments to address not only the truth seeking and prosecution interest but also the humanitarian interest in individual identification of remains. The latter interest is also essential for reconciliation in the region.
3. Witness Protection

Above, we identified witness protection as the most urgent issue relating to domestic prosecution of war crimes in the region, and we called for the adoption of common standards in this area. Witness intimidation was cited as a problem in the literature on domestic prosecutions and is frequently cited as one of the factors contributing to impunity. It was cited as a particularly serious problem in Kosovo and has been described as potentially one of the factors that led to the acquittals recently at the ICTY in the Limaj case. These observations make it clear that efforts to reduce the harmful effects of witness intimidation through the establishment of effective witness protection measures will need to be undertaken throughout the region. Moreover, it is also clear that the recent reforms of the law relating to this subject in each one of the countries as described above has not been sufficient to address the problem. This latter conclusion may be the result of the fact that the solution may not be dependent so much on law reform as it is on measures that are effective in practice.

The literature dealing with the issue of witness protection in the region has identified twenty-four hour police protection during the period a witness is testifying, the use of video link testimony, and, in special cases, the granting of a new identity and relocation of witnesses as the most effective measures to guard against the harmful effects of witness intimidation. These measures should be available not on an ad hoc basis but as part of the law which would allow courts to order these measures whenever they are deemed to be necessary. The problem is that, while some of these measures have been adopted in the laws in some parts of the region, they have not been uniformly adopted in each jurisdiction. The adoption of common standards in this area would serve not only to reduce the opportunity for witness intimidation, but they would also serve to encourage increased cooperation among the countries in this domain. In this way, authorities in each of the countries would be able more effectively to encourage and support the participation of their nationals as witnesses in proceedings taking place in other countries. Consequently, donors should encourage the harmonization of laws in this area in each of the countries so as to ensure that the most effective measures of witness protection are instituted in each one of them and should consider assisting in the provision of the additional resources that will be necessary to make these measures a reality.

Moreover, the experience of the HLC in Serbia demonstrates that legal representation and counseling of victims and witnesses in war crimes cases is a necessary component of effective witness protection. The success of this activity in Serbia
also suggests that these services are more effectively provided by an NGO than by government. It is compelling to note in this regard that there is currently a network of NGO's (of which HLC is a member) that is pledged to the provision of advocacy of victims in war crimes cases. However, the NGO members of this network outside of Serbia have not thus far been able to provide the kind of advocacy services to victims and witnesses in war crimes cases that HLC has provided in Serbia. Consequently, international donors should provide material support to this network of NGOs so as to enable them to provide this kind of advocacy in the other countries.
B. SECONDARY PRIORITY

1. Training and Capacity Building for Prosecutions

While witness protection has been identified as the most critical issue relating to the effective domestic prosecutions of war crimes in the region, there is no doubt that the continued need for training and capacity building of the local judiciaries is a top priority as well. The need for judicial training is particularly critical in Bosnia where several thousand war crimes cases will be handled by the 16 district and cantonal courts. Although provision has been made for the most important and sensitive cases there to be handled by the War Crimes Chamber by judges with experience in this area, no provision has been made to ensure the capacity of the local judges in their handling of the remaining cases in this highly specialized area of the law. In Croatia, if the current structure, which provides for war crimes to be handled by four special courts is maintained, and if war crimes prosecutions are increasingly transferred to these courts, the judges of those courts will need continued specialized training as well. In Kosovo, it is clear that the “64” panels have not served their capacity building purpose and very targeted capacity building measures, including training, will need to be undertaken so as to ensure that local judges will be prepared to handle war crimes cases when UNMIK transfers authority in these cases to them. In Serbia the experience of the judges on the Special Panel of the Belgrade District Court has been one of the factors that contributed to the progress in domestic prosecutions which was noted above. However, the need for continued specialized training was noted there nonetheless especially with respect to the difficult issue of command responsibility and with respect to the application of international norms generally.

Training should be conducted on the regional and national level. While each country will undoubtedly want to provide training to its judicial actors in this specialized area, international donors should support training on the regional level as well. Regional training will serve to ensure the uniformity of effective prosecution throughout the region and could have the additional benefit of encouraging cooperation among the countries in this area.

Training should be practical and holistic—all actors handling war crimes in the judicial sector should be trained together in simulated exercises including moot courts. Judicial training programs in other post conflict countries, such as Haiti, Cambodia, and East Timor have been faulted for their failure to include these features. The failures of these programs have underscored the need for judicial
actors to learn to function effectively as a system. Consequently, training which has, for example, focused on prosecutors and neglected judges, has failed to achieve the desired results. Moreover, the training of defense counsel in the defense of those accused of war crimes must be included as well. Similarly, if all of the relevant judicial actors are competent, but defense counsel remains weak, this state of affairs will have very negative implications in terms of the perceived legitimacy of the trials.

Higher courts must be included in these training and capacity building measures. The analysis provided above in the section of prosecutions indicates that the performance of the higher courts in their review of war crimes cases has been uneven. Although the Supreme Court in Croatia has clearly been a force in the promotion of justice in these cases, it is not clear that the same can be said of the higher courts in the other countries.

Training and capacity building should address issues of impartiality and judicial independence as well as practical skills. The use of judicial mentors should be considered in this connection since mentoring programs have been seen in other contexts as potentially effective in dealing with the aspect of judicial capacity building. Mentoring should be considered particularly in Kosovo and Croatia where ethnic bias in war crimes cases has been such a problem in the past.

The findings and recommendations of the study conducted recently in Serbia with the support the UNDP and the Judicial Training Center in Belgrade should be taken into consideration in the development of training programs for judges involved in the prosecution of war crimes. In particular, that study noted the necessity of “the development of special skills (in ICT, improvement of communication skills, social and interpersonal skills, problem solving, decision making, critical thinking and logical reasoning.)”

2. Government Commitment to Truth Seeking

Government involvement in truth seeking is notably absent. Efforts should therefore be made to encourage more official-level attention to truth seeking, both as a basis for the building of trust in public institutions and for reconciliation efforts more broadly. However, it may be too soon for a formal truth commission. When the time is more propitious, a regional effort seems much more promising than a series of national-level commissions. The current proposal by the ICTJ and local NGOs is a very useful basis on which to build support for such a regional effort.

\[\text{See "The Effects of Professional Advancement on the Judiciary: Findings and Recommendations", Belgrade, 2005.}\]
One step that the international community could take in this direction would be to encourage the consolidation of those efforts associated with the Victims’ Commission proposal discussed above and those associated with the Igman Initiative. If civil society throughout the region can be encouraged to speak with one voice on this subject, it will be more likely to create a demand to which governments will feel obliged to respond.
C. LONG TERM RECOMMENDATIONS

1. Prosecutions

Donor Coordination.

The coordination with other donors and international actors of efforts and strategies for the promotion of reform as it relates to domestic prosecutions is an issue that must be considered at the outset. As noted above, and in particular by the ICTY Prosecutor Carla Del Ponte in her recent remarks to the Security Council, the progress in connection with regional cooperation with the ICTY has clearly been connected to the continuing influence of the European Union and the United States in the region, and future EU accession is undoubtedly an incentive for reform. This observation applies equally to international support of domestic prosecutions of war crimes since progress in this domain will clearly be one of the factors that the EU will be considering in its assessment of the status of the rule of law in each of the countries as EU accession is being considered. Consequently, the pursuit of the strategies mentioned below should be undertaken in coordination with these international actors so as to maximize the benefit that might be derived from this incentive.

Structural Arrangements

Above we noted that special structural arrangements have been made for the prosecution of war crimes in each one of the countries and in Kosovo. We commented on the effectiveness of those arrangements above, but a few recommendations are in order here.

In Serbia, the War Crimes Investigation Service should be expanded to include newly recruited police inspectors who, as part of the recruitment process, should be vetted for their involvement in war crimes. This measure may be called for in Bosnia where, as in Serbia, it has thus far been impossible to vet the police who participate in the investigation of war crimes. Where vetting is impossible, the establishment of a new unit of newly recruited investigators who will be vetted for their human rights record, will serve to insure the necessary police cooperation in these prosecutions.

In Croatia, measures will need to be taken to ensure that the current situation whereby local courts are handling the vast majority of war crimes cases is cor-
rected. It could be that a structure such as the one established in Serbia which has given exclusive jurisdiction to a special judicial panel for these cases may be the best solution, especially in light of the problems of ethnic bias in the local courts which have been documented in Croatia. Also, it is clear that the structure in Serbia has improved the domestic prosecution of war crimes there. However, the adoption of that model may be difficult in Croatia given the fact that four specialized courts with non exclusive jurisdiction have recently been established. This success of this latter structure will depend on a more systematic transfer of war crimes cases to the four “special courts” from the local county courts than is currently occurring. Further study will need to be conducted in Croatia in order to determine whether the single exclusive panel might be feasible there and to determine whether in the alternative what procedures should be established to ensure a much more systematic transfer of cases under the current structure.

Transfer and Extradition

Strategies should be developed to encourage the establishment of bilateral agreements on the transfer of cases from one country to the other throughout the region. The bilateral agreements should focus on enforcement and on the establishment of systemic transfer of prosecutions that are inhibited by the inability of countries in the region to extradite their nationals. Under bilateral agreements, transfer of cases could be made to be obligatory in response to a request by another party. It would be desirable if these bilateral agreements also included new procedures for the more efficient and systematic exchange of evidence and witnesses.

Outreach

Outreach programs should be developed for each of the courts or judicial panels that handle war crimes. These programs should include conferences, roundtables, seminars, media events, and community events involving victims’ associations and the provision of live video broadcast of proceedings. This latter feature will undoubtedly involve law reform in some, if not all, of the countries. As part of these efforts, the current outreach activities of the War Crimes Chamber in Bosnia should be supported and harmonized with the outreach activities in other parts of the region. The involvement of local courts in Bosnia and Herzegovina in war crimes prosecution should be taken into consideration in the support and development of the outreach program in that country.

- Cooperation with NGOs
Measures will need to be taken to establish or strengthen the linkages between the judicial actors prosecuting war crimes and the NGOs that have been tracking them. This linkage, as noted above, has been very effective and useful in Serbia but has been found to be lacking in other areas. The use of this linkage has proven to be effective in war crimes prosecution in other parts of the world.

2. Vetting

- The region does not seem ready to implement vetting or lustration policies at this time. The exception might be Kosovo, if the future status discussions lead to an interim period in which the international community is still actively involved with oversight and monitoring there. As the experience in Bosnia demonstrates, the presence of international monitors and of providing both “carrots” and “sticks” can make it possible for public institutions to initiate vetting procedures. For now, it is important to support the efforts of the CDRSEE initiative, which opens a regional dialogue on the vetting/lustration issues and paves the way for future actions when it is politically feasible.

3. Reparations

- Tangible reparations within states have concentrated on property rights and the return and restoration of houses to their pre-war owners. One of the bottlenecks in this process is the lack of availability of alternative housing for those who are still illegally occupying the homes of others, or for those whose pre-war accommodations are not longer habitable. Another is the inefficient and discriminatory processes by which claims for reparations are considered and funds are distributed to claimants. Assistance in staffing and funding should be given to the agencies that oversee this process in each country. International attention should be focused on ending discrimination in the way these processes are implemented. In addition, funds should be made available for the building of additional housing units to accommodate those whose homes were destroyed or confiscated and not returned.
ANNEXES
## ADVISORY BOARD TO THE TRANSITIONAL JUSTICE PROGRAM

<table>
<thead>
<tr>
<th>Advisor</th>
<th>Position</th>
<th>Institution</th>
</tr>
</thead>
<tbody>
<tr>
<td>Jose Pablo Baraybar</td>
<td>Head of the Office on Missing Persons and Forensics</td>
<td>UNMIK Department of Justice, Kosovo</td>
</tr>
<tr>
<td>Branislav Bjelica</td>
<td>Deputy Minister of Justice</td>
<td>The Republic of Serbia, Serbia</td>
</tr>
<tr>
<td>Slobodan Franovic</td>
<td>Director</td>
<td>Montenegrin Helsinki Committee for Human Rights, Montenegro</td>
</tr>
<tr>
<td>Mark Freeman</td>
<td>Senior Associate and Advisor for the Balkans</td>
<td>International Center for Transitional Justice, International</td>
</tr>
<tr>
<td>Drago Hedl</td>
<td>Journalist</td>
<td>Feral Tribune, Croatia</td>
</tr>
<tr>
<td>Refik Hodzic</td>
<td>Journalist</td>
<td>BiH</td>
</tr>
<tr>
<td>Natasa Kandic</td>
<td>Executive Director</td>
<td>Humanitarian Law Center, Serbia</td>
</tr>
<tr>
<td>Damir Kos</td>
<td>Justice</td>
<td>Supreme Court of Croatia - Criminal Law Chamber, Croatia</td>
</tr>
<tr>
<td>Branka Lakocevic</td>
<td>Assistant Minister of Justice</td>
<td>The Republic of Montenegro, Montenegro</td>
</tr>
<tr>
<td>Amor Masovic</td>
<td>President</td>
<td>FBiH Commission for Missing Persons, BiH</td>
</tr>
<tr>
<td>Vesna Terselic</td>
<td>President</td>
<td>Documenta, Croatia</td>
</tr>
<tr>
<td>Dardan Velija</td>
<td>Executive Director</td>
<td>KODI, Kosovo</td>
</tr>
</tbody>
</table>
# ANNEX B

## IN COUNTRY ASSESSMENT INTERVIEWS

<table>
<thead>
<tr>
<th>PERSONS INTERVIEWED</th>
<th>POSITION</th>
<th>AFFILIATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>Ms. Slavica Bajic</td>
<td>Assistant on Human Rights Protection and Freedom for Montenegro</td>
<td>Montenegrin Committee for Protection and Freedom</td>
</tr>
<tr>
<td>Mr. Mustafa Balje</td>
<td>Vice President</td>
<td>Bosnjak, NGO</td>
</tr>
<tr>
<td>Mr. Pablo Baraybar</td>
<td>Head of Office</td>
<td>Office of Missing Persons and Forensics, UNMIK</td>
</tr>
<tr>
<td>Mr. Vinod Boolell</td>
<td>International Judge</td>
<td></td>
</tr>
<tr>
<td>Mr. Josip Cule</td>
<td>Deputy State Prosecutor</td>
<td>State Prosecutor Office, Zagreb</td>
</tr>
<tr>
<td>Mr. Vojin Dimitrijevic</td>
<td>Director</td>
<td>Belgrade Center for Human Rights</td>
</tr>
<tr>
<td>Ms. Aleksandra Drecun</td>
<td>Secretary General</td>
<td>Republic of Serbia</td>
</tr>
<tr>
<td>Ms. Marita Stublla Emini</td>
<td>Legal Specialist, Democracy Governance Office</td>
<td>USAID, Kosovo</td>
</tr>
<tr>
<td>Ms. Antoinette Ferrara</td>
<td>Program Director</td>
<td>USAID, Kosovo</td>
</tr>
<tr>
<td>Mr. Slobodan Franovic</td>
<td>President of Helsinki Committee for Human Rights, Montenegro</td>
<td>Helsinki Committee for Human Rights, Montenegro</td>
</tr>
<tr>
<td>Mr. Gvozden Gagic</td>
<td>Chief of the Government Commission for Missing Persons</td>
<td>Ministry of Interior</td>
</tr>
<tr>
<td>Mr. Miroslav Ivanisevic</td>
<td>Deputy Prime Minister</td>
<td>Government, Montenegro</td>
</tr>
<tr>
<td>Mr. Vuk Jeremic</td>
<td>President Advisor</td>
<td>Republic of Serbia</td>
</tr>
<tr>
<td>Name</td>
<td>Title/Position</td>
<td>Organization/Institution</td>
</tr>
<tr>
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<td>-------------------------------------------------------</td>
</tr>
<tr>
<td>Ms. Veselinka Kastratovic</td>
<td></td>
<td>Documenta, NGO</td>
</tr>
<tr>
<td>Ms. Ana Kron</td>
<td>Public Relations with Government Institutions</td>
<td>International Commission on Missing Persons, ICMP</td>
</tr>
<tr>
<td>Ms. Katarina Kruhonja</td>
<td></td>
<td>Documenta, NGO</td>
</tr>
<tr>
<td>Ms. Branka Lakocevic</td>
<td>Deputy Minister of Justice</td>
<td>Ministry of Justice, Podgorica</td>
</tr>
<tr>
<td>Mr. Rasim Ljajic</td>
<td>Minister of Human and Minority Rights</td>
<td>Ministry of Human and Minority Rights</td>
</tr>
<tr>
<td>Mr. Ibrahim Makolli</td>
<td>Spokesperson</td>
<td>KMDLNJ, Council for Defense of Human Rights and Freedom</td>
</tr>
<tr>
<td>Ms. Snezana Malovic</td>
<td>Secretary General</td>
<td>Prosecutor's Office for War Crimes</td>
</tr>
<tr>
<td>Mr. Albin Matoshi</td>
<td>Program Manager for Kosovo</td>
<td>Youth Initiative for Human Rights</td>
</tr>
<tr>
<td>Mr. Pascale Meige</td>
<td>Head of Mission</td>
<td>ICRC</td>
</tr>
<tr>
<td>Mr. Stjepan Mesic</td>
<td>President of the Republic of Croatia</td>
<td>Government, Zagreb</td>
</tr>
<tr>
<td>Mr. Velija Muric</td>
<td>Lawyer</td>
<td>Committee for the Protection of Human Rights</td>
</tr>
<tr>
<td>Ms. Marija Nisavic</td>
<td>Assistant on Human Rights Protection and Freedom for Montenegro</td>
<td>Montenegrin Committee for Protection and Freedom</td>
</tr>
<tr>
<td>Mr. Dejan Palic</td>
<td>Deputy Ombudsman for Human Rights</td>
<td>Ministry for Human Rights, Zagreb</td>
</tr>
<tr>
<td>Name</td>
<td>Position</td>
<td>Organization</td>
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</tr>
<tr>
<td>Mr. Zarko Puhovski</td>
<td>President of Helsinki Committee for Croatia</td>
<td>Helsinki Committee, Croatia</td>
</tr>
<tr>
<td>Mr. Milorad Pupovac</td>
<td>President of Serbian National Council, President of the Independent Serbian Democratic Party, Member of Parliament</td>
<td>Zagreb</td>
</tr>
<tr>
<td>Ms. Vesna Rackovic</td>
<td>Adviser to the Minister of Justice</td>
<td>Ministry of Justice, Podgorica</td>
</tr>
<tr>
<td>Mr. Jovan Ratkovic</td>
<td>President Special Advisor</td>
<td>Government, Republic of Serbia</td>
</tr>
<tr>
<td>Ms. Jasna Sarcevic</td>
<td>Spokesperson</td>
<td>Prosecutor’s Office for War Crimes</td>
</tr>
<tr>
<td>Dr. Fatmir Sejdiu</td>
<td>Member of the Presidency</td>
<td>Assembly of Kosovo</td>
</tr>
<tr>
<td>Mr. Kushtrim Shaipi</td>
<td>Program Director</td>
<td>Kosovo Research and Documentation Institute, KODI</td>
</tr>
<tr>
<td>Mr. Zeliko Sofranac</td>
<td>Commissioner</td>
<td>Commissariat for Refugees. Podgorica</td>
</tr>
<tr>
<td>Ms. Brankica Stankovic</td>
<td>Journalist</td>
<td>B92</td>
</tr>
<tr>
<td>Ms. Vesna Terselic</td>
<td></td>
<td>Documenta, NGO</td>
</tr>
<tr>
<td>Mr. Miles Toder Ph. D</td>
<td>Democracy and Governance Office Director</td>
<td>USAID, Kosovo</td>
</tr>
<tr>
<td>Mr. Ivan Vejvoda</td>
<td></td>
<td>Balkan Trust Fund</td>
</tr>
<tr>
<td>Mr. Dardan Velija</td>
<td>Executive Director</td>
<td>Kosovo Research and Documentation Institute, KODI</td>
</tr>
<tr>
<td>Mr. Ken Yamashita</td>
<td>Mission Director</td>
<td>USAID, Kosovo</td>
</tr>
</tbody>
</table>
ANNEX C

Structure of Interviews

I. BASELINE STANDARDS
   1. Where did the standards for transitional justice in this region originate?
      a. Are they borrowed/copied from other regions? Which ones?
   2. Are there any efforts to reflect local values/interests/concerns?
   3. Is there any local involvement in their development?
   4. What would you consider to be the most important elements of transitional justice being implemented currently in each country?
   5. Was there a conscious decision made to exclude truth commissions? If so, why?

II. LOCAL PERCEPTIONS
   1. How do you define “transitional justice?”
   2. In your view, what should be the goals of transitional justice?
   3. How would YOU evaluate whether transitional justice initiatives are effective?
   4. What cultural factors do you think are relevant in determining how transitional justice should be implemented in the region?

III. LEAVING A LEGACY
   1. What has the international community contributed to transitional justice initiatives? Who are the major international actors in this regard?
   2. To what extent has this contribution increased local capacity to carry out this work?
   3. To what extent are domestic initiatives now replacing international projects?
   4. What kind of support has the international community provided for this?
   5. To what extent has the international community modeled the behavior and attitudes that they are hoping to encourage in the local population and local institutions (i.e., impartiality, transparency, accountability, fairness, inclusion, etc.)?
IV. LOCAL LEVEL PROCESSES
1. Are there any transitional justice processes going on at the local level? Of what kind (e.g., truth seeking, rituals, reconciliation, etc)?
2. Is there any connection between these local efforts and the national initiatives?

V. REPARATIONS
1. Where are reparations being offered? To whom? For what?
2. What is the relationship between reparations and truth seeking? i.e. are reparations provided in payment for truth telling? Or are the two processes being kept separate? Your thoughts on this?
3. General evaluation of the effectiveness/impact of reparations policy?
4. Has a formula been developed as to how reparations are calculated?

VI. VETTING
1. Is vetting for government/military positions occurring?
   a. At national and/or local levels?
2. Experience/evaluation of how this is going?
3. Have procedures been developed to insure fairness?

VII. COMMUNICATION WITH THE PUBLIC
1. What are the designated responsibilities of national and international bodies to communicate with the general public about transitional justice initiatives and accomplishments?
2. Has the public been consulted about designing such initiatives? How else has the public been involved?
3. What feedback has been provided to the public about prosecutions, convictions, reparations, vetting, truth seeking, etc.?
4. What concerns has the public expressed about any of these processes? What are the responses (if any) to these concerns?

VIII. EVALUATIONS TO DATE
1. Have any of these projects/initiatives been formally evaluated?
   a. When? By whom?
   b. Results?
   c. Who received this data? Reactions?
2. Have there been any efforts to determine impacts of transitional justice initiatives on reconciliation? On trust in government? On development of rule of law?
ANNEX D: CONTACT LIST

BOSNIA AND HERZEGOVINA

A. NONGOVERNMENTAL ORGANIZATIONS

Association of Citizens “Truth and Reconciliation”
Hamdije Kresevljakovica 597
1000 Sarajevo, Bosnia and Herzegovina
Tel: +387-33-663-472
Fax: +387-33-664-473
Website: http://www.angelfire.com/bc2/kip/
Email: kip@bosnia.ba
Contact:
Jakob Finci

Association of Citizens “Women of Srebrenica”
Filipa Kljajića 38
75000 Tuzla, Bosnia and Herzegovina
Tel/Fax: +387-35-251-498
Website: www.srebrenica.net

Medica Zenica – Women’s Association
Mokusnica 10
72000 Zenica, Bosnia and Herzegovina
tel: +387-32-463-512
Tel/Fax: +387-32-463-515
Website: www.medica.org.ba/
Email: medica@medica.org.ba, medica1@bih.net.ba
Research and Documentation Center – Sarajevo
Kupreška 17
71000 Sarajevo, Bosnia and Herzegovina
Tel: +387-33-725-350/351/352
Fax: +387-33-725-357
Website: http://www.idc.org.ba
Email: centar@idc.org.ba
Contact:
Mirsad Tokaca – President of RDC

SaGA Film Production Company
Hakije Kulenovića 7
71000 Sarajevo, Bosnia and Herzegovina
Tel/Fax: +387-71-666-81 1 / 471-145
Website: www.sagafilm.com
Contact:
Ismet Arnautalić – General Manager

B. INTERGOVERNMENTAL ORGANIZATIONS

Office of the High Representative and EU Special Representative
OHR Regional Office: Human Rights Office Tuzla
Solanska 3
75000 Tuzla, Bosnia and Herzegovina
Tel: +387-35-286-205 / 206 / 207 / 208
Fax: +387-35-310-021
Contact:
Orlando Fusco – Head of the OHR Regional Office

Office of the High Representative and EU Special Representative
OHR Regional Office: Human Rights Office Bijeljina
Kneginje Milice 25
76300 Bijeljina, Bosnia and Herzegovina
Tel/Fax: +387-55-401-465
Email: hro_bn@bn.rstel.net
Contact:
Pantelija Lakić
CROATIA

A. NONGOVERNMENTAL ORGANIZATIONS

Center for Protection of Women and Children (CPWC)
Dubrovniku No. 20
38000 Prishtina, Kosovo
Tel: +377-44-14-37-16, +381-38-245-787
Fax: +381-38-245-787
Website: www.cpwc-qmgf.org
Email: cpwcpriština@yahoo.com, cpwc@cpwc-qmgf.org
Contact:
Sevdie Ahmeti - Coordinator

Centre for Peace, Non-violence and Human Rights
Županijska 7
HR – 31000 Osijek, Hrvatska
Tel: +385 (0)31-206-886, +385 (0)31-206-889
Fax: +385 (0)31-214-581
Website: www.centar-za-mir.hr
Email: centar-za-mir@centar-za-mir.hr
Contact:
Katarina Kruhonja – Program Manager
Veselinka Kastratovic – Legal Advisor

Centre for Women War Victims
Kralja Drzislava 2/1
10000 Zagreb, Croatia
Tel: +385-1-45-50-313, +385-1-45-51-128
Fax: +385-1-45-51-142
Website: www.czzzr.hr
Email: cenzena@zamir.net

Center for Peace Studies
Nazorova 1
10000 Zagreb, Croatia
Tel: +385-1-482-00-944-8720
Website: www.cms.hr/
Email: cms@zamir.net
Civic Council for Human Rights
Ul. Grada Vukovara 35/IV
10000 Zagreb, Croatia
Tel/Fax: +385-1-61-71-530
Email: zpusic@zamir.net
Contact:
Zoran Pusic – President

Croatian Helsinki Committee for Human Rights
Ilica 15 / III
10000 Zagreb, Croatia
Tel: +385-1-481-23-22, +385-1-481-23-21
Fax: +385-1-481-23-24
Website: www.hho.hr/
Email: hho@hho.hr

B. INTERGOVERNMENTAL ORGANIZATIONS

United Nations Development Programme - Croatia
Resident Representative Office in Croatia
Kestercanekova 1
10000 Zagreb, Croatia
Tel: +385-1-23-61-666
Fax: +385-1-23-61-620
Website: http://avmr.users.cg.yu/index.htm
Email: avmr@cg.yu
Contact:
Tena Erceg – Researcher/Focal Point for Croatia

PAT Transitional Justice Programme
Internacionalnih Brigada 56
11000 Belgrade, Serbia and Montenegro
Tel: +381-11-2445-968, 2448-432
Fax: +381-641-17-111-29
Email: tena.erceg@undp.org, tenaer@yahoo.com
C. GOVERNMENT AGENCIES

Republic of Croatia – Ministry of Justice

R. Austrije 14
10000 Zagreb, Croatia
Contact:
Igor Mihaljevic – Assistant Minister
Tel: +385-1-37-10-720, +385-1-37-10-721
Fax: +385-1-37-10-722, +385-1-37-10-723
Email: imihaljevic@pravosudje.hr
Ljiljana Vodopija Cengic – Assistant Minister

Directorate for Mutual Legal Assistance, International Cooperation and Human Rights
Tel: +385-1-37-10-670, +385-1-37-10-671
Fax: +385-1-37-10-672
Email: ljiljana.vodopija.cengic@pravosudje.hr

Republic of Croatia - Office of the Attorney General

Gajeva 30a
10000 Zagreb, Croatia
Contact:
Josip Cule – Deputy Attorney General
Tel: +385-1-45-91-800, +385-1-45-91-968
Fax: +385-1-45-91-805
Email: josip.cule@dorh.hr

Republic of Croatia - Office of the Croatian Ombudsman

Opaticka 4
10000 Zagreb, Croatia
Contact:
Dejan Palic – Office of the Croatian Ombudsman
Tel: +385-1-48-51-853
Fax: +385-1-63-03-014
Email: ombudsman@zg.htnet.hr
KOSOVO

A. NONGOVERNMENTAL ORGANIZATIONS

Council for Defense of Human Rights and Freedoms (CDHRF)
Rr. Ylfete Humolli, No. 5
10000 Prishtinë, Kosovë
Tel: +381 (0)38-249-006
Fax: +381 (0)38-244-029
Website: http://www.cdhrf.org/
Email: office@cdhrf.org
Contact:
Ibrahim Makolli
Email: imakolli@cdhrf.org

International Committee of the Red Cross
Fehmi Agani str. No. 39
Pristina, Kosovo
Tel: +381 (0)38-241-518, +381 (0)38-249-114/5
Fax: +381 (0)38-228-599
Website: www.icrc.org
Email: pristine.pri@icrc.org
Contact:
Pascale Meige – Head of Mission

Kosovo Helsinki Committee
Taslixhe I 36a
38000 Prishtina, Kosovo
Tel/Fax: +381-38-27-293 / 535 010
Mobile: +377-44-127-539, +0676-498-1289
Website: http://www.ihf-hr.org/members/com_details.php?sec_id=2&com_id=29
Email: hels-kos@eunet.yu
Contact:
Gazmend Pulja – Executive Director
Email: pula.khc@eunet.yu and khc_pula@hotmail.com

Kosovar Research and Documentation Institute
Bulevardi Dëshmorët e Kombit
Nr. 46/4
PRISTINA, KOSOVO
Tel: +381 (0)38-545-818, +377 (0)44-249-784
Website: http://www.kodi-ks.org
Email: office@kodi-ks.org
Contact:
Dardan Velija – Executive Director
Email: dardan.velija@kodi-ks.org
Kushtrim Shaipi – Programme Director
Email: kushtrim.shaipi@kodi-ks.org

ROMA EDUCATION FUND
Váci u. 63.
H-1056 Budapest, Hungary
Tel: +36-1-235-8030
Fax: +36-1-235-8031
Website: www.romaeducationfund.org
Email: info@romaeducationfund.org
Contact:
Tünde Kovacs – Senior Program Officer
Email: tkovacs@f.bg.ac.yu

B. INTERGOVERNMENTAL ORGANIZATIONS

UNITED NATIONS DEVELOPMENT PROGRAMME – KOSOVO
Peyton Place 14
Pristina, Kosovo
Tel: +381-38-249-066, +381-38-249-067
Fax: +381-38-249-065
Website: http://www.kosovo.undp.org/index.asp
Email: registry.ks@undp.org
Contact:
Virgjina Dumnica – National Programme Analyst
Tel: +381-38-249-066, ext. 114
Email: virgjina.dumnica@undp.org
C. GOVERNMENT AGENCIES

USAID – KOSOVO
Arbëria (Dragodan)
Ismail Qemaili St., No. 1
Pristina, Kosovo
Tel: +381 (0)38-243-673
Fax: +381 (0)38-249-493
Website: www.usaid.gov/missions/kosovo
Email: kosovousaidinfo@usaid.gov
Contact:
S. Ken Yamashita, Ph.D. – Mission Director
Email: kyamashita@usaid.gov
Miles Toder, Ph.D. – Director, Democracy & Governance Office
Email: mtoder@usaid.gov
Merita Stubella Emini – Legal Specialist, Democracy & Governance Office
Email: memini@usaid.gov
Antoinette Ferrara – Program Officer
Email: aferrara@usaid.gov

SERBIA AND MONTENEGRO

A. NONGOVERNMENTAL ORGANIZATIONS

The Balkan Trust for Democracy – A Project of the German Marshall Fund
Dobračina 44
11000 Belgrade, Serbia and Montenegro
Tel: +381-11-3036-454
Fax: +381-11-3288-022
Website: www.gmfus.org/balkantrust
Email: balkantrust@gmfus.org
Contact:
Ivan Vejvoda – Executive Director
Email: ivejvoda@gmfus.org
Belgrade Centre for Human Rights
Beogradska 54
Belgrade, Serbia and Montenegro
Tel: +381-11-3085-328
Fax: +381-11-3447-121
Website: http://www.bgcentar.org.yu/
Email: bgcentar@bgcentar.org.yu
Contact:
Professor Vojin Dimitrijevic – Director
Email: vojin.bgc@isp.b92.net

Center for Collecting Documents and Information “Veritas”
Dečanska 8/4
11000 Belgrade, Serbia and Montenegro
Tel/Fax: +381-11-323-6486
Website: www.veritas.org.yu
Email: mailto:veritas@yubc.net

Documentation Center “Wars 1991-1999”
Lička 1
11000 Belgrade, Serbia and Montenegro
Tel/Fax: +381-11-36-13-318
Website: http://www.dcwmemory.org.yu/
Email: dcrip@dcwmemory.org.yu

Helsinki Committee for Human Rights in Serbia
Zmaj Jovina 7/1
11000 Belgrade, Serbia and Montenegro
Tel: +381-11-30-32-408, 26-37-116, 26-37-294, 26-37-914
Fax: +381-11-26-36-429
Website: www.helsinki.org.yu
Email: biserkos@eunet.yu
Contact:
Sonja Biserko

Humanitarian Law Center
Makenzijeva 67
11110 Belgrade, Serbia and Montenegro
Tel/Fax: +381-11-344-4348 / 3423 / 4313 / 4314
mobile: +381-63-210-536
Website: www.hlc.org.yu
Email: office@hlc.org.yu
Contact:
Nataša Kandić – Founder and Executive Director

Lawyers Committee for Human Rights (YUCOM)
Svetogorska 15/VIII
11000 Belgrade, Serbia and Montenegro
Tel: +381-11-334-51-72, 334-42-35, 334-44-25, 303-59-82
Fax: +381-11-334-51-72
Website: www.yucom.org.yu
Email: yulaw@eunet.yu

Ministry of Human Rights & Minority Rights – Serbia and Montenegro
Bulevar Mihajla Pupina 2
Tel: +381-11-311-29-16
Fax: +381-11-311-34-32
Website: http://www.humanrights.gov.yu/srpski/index.htm
Email: office@humanrights.gov.yu
Contact:
Zorica Avramovic – Commission for Humanitarian Issues & Missing Persons
Tel: +381-11-311-75-54

Montenegrin Committee of Lawyers for Protection of Human Rights
Advokat Velija Muric
M. Tita 19
84310 Rozaje
Tel: +381-87-272-922
Fax: +381-87-272-009
Website: http://avmr.users.cg.yu/index.htm
Email: avmr@cg.yu
Contact:
Velija H. Muric – Attorney
Tel: 069-041-639
B. INTERGOVERNMENTAL ORGANIZATIONS

United Nations Development Programme – Serbia and Montenegro
P.O. Box No. 3
Internacionalnih Brigada 56
11000 Belgrade, Serbia and Montenegro
Tel: +381-11-2040-400
Fax: +381-11-3444-300
Website: www.undp.org.yu
Email: registry.yu@undp.org
Contact:
Olivera Purić – Team Leader, Judicial Reform/Rule of Law Cluster
Tel: +381-11-2445-968, 2448-432
Email: olivera.puric@undp.org

United Nations Development Programme – Montenegro
Beogradska bb
81000 Podgorica
Serbia and Montenegro
Tel: +381-81-231-251
Fax: +381-81-231-644
Website: www.undp.org.yu/montenegro
Email: registry.mont@undp.org
Contact:
Mirsad Bibovic – Team Leader, Institutional and Judicial Reform
Tel: +381-81-231-251
Email: mirsad.bibovic@undp.org

C. GOVERNMENT AGENCIES

Republic of Serbia – Ministry of Interior
101 Kneza Miloša St.
Belgrade, Serbia and Montenegro
Contact:
Colonel Gvozden Gagic – Head of Department for War Crimes Investigations
Tel: +381-11-3614-211
Fax: +381-11-3620-325
Email: ubpok@mup.sr.gov.yu
Republic of Serbia – Ministry of Justice
Nemanjina 22-26
11000 Belgrade, Serbia and Montenegro
Contact:
Branislav Bjelica – Deputy Minister
Tel: +381-11-3616-309
Fax: +381-11-3616-381
Email: branislav.bjelica@mpravde.sr.gov.yu

Republic of Serbia – Office of the President
Andricev Venac 1
11000 Belgrade, Serbia and Montenegro
Contact:
Aleksandra Drecun – Secretary General
Tel: +381 (0)11-322-00-31
Fax: +381 (0)11-322-99-49
Email: adrecun@predsednik.srbija.yu
Vuk Jeremic – Senior Advisor
Tel: +381 (0)11-361-33-28, +381 (0)11-322-04-36
Fax: +381 (0)11-323-01-90
Email: vjeremic@predsednik.srbija.yu

Republic of Serbia – War Crimes Prosecutor’s Office
Ustanicka 29
11000 Belgrade, Serbia and Montenegro
Contact:
Snezana Malovic – Secretary General of War Crimes Prosecutor’s Office
Tel: +381 (0)11-308-26-50
Fax: +381 (0)11-308-27-82
Jasna Jankovic – Public Information Coordinator
Tel: +381 (0)11-308-26-73
Fax: +381 (0)11-308-27-82
Email: jasna.jankovic@osce.org

Government of the Republic of Montenegro –
Financial Systems & Public Expenditures
Jovana Tomasevica
81000 Podgorica
Website: http://www.vlada.cg.yu/
Contact:
Miroslav Ivanisevic – Deputy Prime Minister,
Financial Systems & Public Expenditures
Tel: +381-81-202-215, +381-81-202-195
Fax: +381-81-202-218

Government of the Republic of Montenegro – Ministry of Justice
Ul. Vuka Karadzica 3
81000 Podgorica
Website: www.pravda.cg.yu
Contact:
Branka Lakocevic – Deputy Minister
Tel: +381-81-248-549
Fax: +381-81-248-541
Email: brankal@cg.yu

Government of the Republic of Montenegro –
Commissariat for Refugees
P. C. Kralja Nikole 12
81000 Podgorica
Contact:
Zeljko Sofranac – Commissioner
Tel: +381-81-623-194, +381-81-623-195
Fax: +381-81-623-197
Email: mcdp@cg.yu
ADDITIONAL WEBLINKS FOR REGIONAL INFORMATION

Canadian International Development Agency
http://www.acdi-cida.gc.ca/index-e.htm

Caritas Europa

Center for Democracy and Reconciliation in Southeast Europe
http://www.cdsee.org/

Centre for Peace in the Balkans
http://www.balkanpeace.org/

Council on Foreign Relations
http://www.cfr.org/

Documenta-Centre for Dealing with the Past
http://www.documenta.hr/eng/

Human Rights Watch
http://www.hrw.org/

Igman Initiative
http://www.igman-initiative.org/

Institute for War and Peace Reporting
http://www.iwpr.net/

Internal Displacement Monitoring Centre
http://www.internal-displacement.org/

International Center for Transitional Justice
http://www.ictj.org/

International Commission on Missing Persons
http://www.ic-mp.org/home.php

International Court of Justice
http://www.icj-cij.org/

International Criminal Tribunal for the Former Yugoslavia
http://www.un.org/icty/
International Crisis Group
http://www.crisisgroup.org/home/index.cfm

International Relations and Security Network
http://www.isn.ethz.ch/

ReliefWeb
http://www.reliefweb.int/rw/dbc.nsf/doc100?OpenForm

OSCE Mission to Bosnia and Herzegovina
http://www.oscebih.org/oscebih_eng.asp

OSCE Mission to Croatia
http://www.osce.org/croatia/

OSCE Mission to Kosovo
http://www.osce.org/kosovo/

OSCE Mission to Serbia and Montenegro
http://www.osce.org/sam/

United States Institute of Peace
http://www.usip.org/
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