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May, 2008

# Shrinking the Space for Denial: The Impact of the ICTY in Serbia

Diane Orentlicher



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by Diane F. Orentlicher  
Open Society Justice Initiative

May 2008



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# Author's Note

by Diane Orentlicher

Shortly after this report was released, Serbia's relationship with the International Criminal Tribunal for the former Yugoslavia (ICTY) achieved a milestone: On July 21, 2008, Serbian authorities announced that they had arrested wartime Bosnian Serb leader Radovan Karadžić, who had been living under an assumed identity in suburban Belgrade.<sup>1</sup> Along with Ratko Mladić, who is believed still to be hiding in Serbia, Karadžić was twice indicted on genocide and other grave charges in 1995<sup>2</sup>—and along with Mladić, had been a fugitive from justice for thirteen years.

The fundamental fact of Karadžić's impunity had persisted for so long that those who had tirelessly sought his arrest were "in shock" when it finally happened.<sup>3</sup> As news of the capture emerged, Bosnians told a colleague in Belgrade that "they cannot and dare not believe" what they heard.<sup>4</sup> What had long seemed unthinkable soon became historic fact: Radovan Karadžić was transferred to the Netherlands on July 30, 2008,<sup>5</sup> and made an initial court appearance before the ICTY the next day.<sup>6</sup>

It was no coincidence that Karadžić was captured less than two weeks after a new government took office in Belgrade—the leading party's commitment to Serbia's entry into



the European Union (EU) is widely believed to have provided a crucial margin of victory in parliamentary elections two months earlier—or that his arrest followed the replacement of the longtime head of Serbia’s security services with someone committed to the new government’s pro-Europe platform. Understanding that the path to EU membership requires full cooperation with the ICTY, Serbia took a major step toward fulfilling its outstanding obligations to the Tribunal.<sup>7</sup>

If Serbia’s changing political landscape provided the necessary context for Karadžić’s capture, the manner in which his arrest transpired disclosed deeper changes in Serbia’s response to the ICTY, now in existence fifteen years. Notably, upon his arrest Karadžić was brought before Serbia’s War Crimes Chamber (WCC)—which began operating less than five years ago and which, as this report chronicles, in myriad ways represents one of the most tangible legacies of the ICTY in Serbia.<sup>8</sup> The arrest was announced by Serbia’s War Crimes Prosecutor, who—as described in this report and dramatically illustrated by the Karadžić capture—has developed a professional partnership with his counterparts in The Hague. And in accordance with Serbian law, the WCC ruled that Karadžić could be transferred to the ICTY.

That a Serbian court cleared the legal path for Karadžić’s transfer to the ICTY stood in sharp contrast to the circumstances surrounding the transfer of former Serbian president Slobodan Milošević to The Hague seven years earlier. Then Prime Minister Zoran Djindjić abruptly removed Milošević from Serbia in defiance of the country’s constitutional court and in the face of then President Vojislav Koštunica’s strong opposition.<sup>9</sup> This time, the arrest of a notorious fugitive took place *through*, not in defiance of, Serbian judicial process, highlighting significant if incomplete progress in Serbia’s capacity to reckon legally with Serbian war crimes.

Announcing the arrest in The Hague, ICTY Prosecutor Serge Brammertz said: “This is a very important day for the victims who have waited for this arrest for over a decade. It is also an important day for international justice because it clearly demonstrates that nobody is beyond the reach of the law and that sooner or later all fugitives will be brought to justice.”<sup>10</sup> Notably, too, Brammertz hailed the achievement of the ICTY’s “colleagues in Belgrade,” including Serbia’s own War Crimes Prosecutor.

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# Foreword

by Aryeh Neier

In the fifteen years since the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the movement to do justice internationally after terrible crimes has made great advances. The only other period in which there were comparable advances was in the immediate aftermath of the unprecedented crimes of World War II. Those atrocities led to the formation of international criminal tribunals at Nuremberg and Tokyo, development of the concept of crimes against humanity, and adoption of the Genocide Convention of 1948 and the Geneva Conventions of 1949. In that era, however, progress soon came to a halt because of the onset of the Cold War. In our time, it seems possible that the advances of the past fifteen years will continue in the years ahead. If that happens, the first half of the twenty first century may not be so blood-drenched as the awful last half of the twentieth century.

Up to now, however, the actual information available to us on the impact of international justice has been scant. We know that more than 250 individuals from some ten countries, most of them high-ranking, have been indicted by the various international criminal tribunals. A significant majority have been apprehended and tried, and a large number have been convicted and are now serving prison sentences. We also know that national justice systems have been affected by the development of international justice, both in their incorporation of advances in international criminal law and in their readiness to hold accountable high officials

who fall within their jurisdiction and who are accused of committing heinous crimes. In many instances, former officials who long enjoyed impunity have recently been brought to justice, or are now being brought to justice, before national tribunals. This is a remarkable, though as yet little noted, consequence of the development of international justice.

What has been lacking up to now, however, is systematic information and analysis of the effects of international justice in a country that has been the focus of attempts to hold accountable those responsible for war crimes, crimes against humanity, and genocide. How is the effort to do justice seen in that country? What has changed as a consequence of that effort? What are its strengths and what are its shortcomings?

These are questions that are addressed in Diane Orentlicher's careful and penetrating study of the impact of the International Criminal Tribunal for the former Yugoslavia in Serbia. Orentlicher has been a leading scholar and practitioner in the field of international justice since the establishment of the ICTY fifteen years ago and, indeed, was one of those whose earlier thinking and writing about accountability for past abuses formed part of the background for the establishment of the ICTY. The Open Society Justice Initiative is pleased to have the opportunity to sponsor Orentlicher's research and to publish this ground-breaking study that is a product of that research.

Aryeh Neier

President, Open Society Institute

Chairman, Open Society Justice Initiative

April 28, 2008

# I. Introduction and Summary

Fifteen years ago the United Nations Security Council launched the contemporary era of war crimes tribunals by establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). At the time, ethnic violence was in full rage in Bosnia-Herzegovina and the daily media were broadcasting real-time images of what were commonly called “the worst atrocities in Europe since World War II.” In this setting, the Security Council’s action struck many as desperate, ad hoc and inadequate: Unwilling to take more assertive action to stop ethnic violence in its tracks, it seemed, the Security Council salved its conscience by creating a court.<sup>11</sup>

Yet despite its inauspicious origin, the ICTY inspired widespread hope and commitment among those who believed it could partially redeem the world’s failure to prevent ethnic carnage in Europe’s heart. If the circumstances leading to the ICTY’s creation induced some measure of skepticism, the Tribunal nonetheless seemed importantly worthwhile in its own right: Its work could answer the vicious violence euphemistically known as “ethnic cleansing” with an authoritative legal reckoning. Authors of mass atrocities would be held to account after all, the ICTY might even deter further crimes in the Balkans,<sup>12</sup> and its operation would send a message to the future that if such crimes occurred again, those responsible would be brought before the bar of justice.

Internationally, the commitment the ICTY inspired proved to be both wide and deep: What had long seemed implausible—a revival of Nuremberg-type tribunals—soon became a normal though hardly routine response to atrocious crimes. Since 1994 the United Nations

has created or jointly established international courts to address crimes committed in Rwanda, Sierra Leone, East Timor, Kosovo, Cambodia and Lebanon. In 2002, a permanent International Criminal Court (ICC) began operating; by March 2008, 105 States had become parties to its governing statute.

If these developments signify a deepening commitment to international criminal tribunals, there is also growing debate about their effectiveness. Some wonder whether international tribunals have achieved the goals their supporters thought they would achieve; others question their costs.<sup>13</sup> Yet with few exceptions,<sup>14</sup> there has been scant effort to assess their actual *impact* beyond their widely-acknowledged and considerable contribution in clarifying the contours of international criminal law.<sup>15</sup> Too often, public debate about the accomplishments of international tribunals has been driven by untested assumptions.

In this setting, the Open Society Justice Initiative believes it important that those involved in the work of international tribunals—whether as practitioners, donors, policy-makers or in other capacities—develop a greater understanding of the impact contemporary war crimes tribunals have had in the regions directly affected by their work. We hope that this report contributes useful insights in this regard and helps stimulate further inquiries into the impact of international tribunals in the countries most affected by their work.

We decided to focus initially on the ICTY for two principal reasons. First, it has operated longer than any other international criminal court and thus has a comparatively rich record of experience.<sup>16</sup> The second reason follows from our awareness that the impact of any international court is highly context-specific, making it perilous to draw broad conclusions about the impact of international criminal tribunals from the experience of any one court. In light of this and of the fact that the ICTY has jurisdiction over crimes committed in several countries (those formerly Yugoslav republics),<sup>17</sup> examining the ICTY's impact would enable us to avoid the potentially distorting effect of studying a single-country court, such as the International Criminal Tribunal for Rwanda or the Special Court for Sierra Leone.

This report sets forth our findings about the ICTY's impact in Serbia; later reports will address its impact in Bosnia-Herzegovina and Croatia.

## The ICTY and Serbia

How a society responds to the work of an international tribunal is a function of myriad variables, which include but are scarcely limited to the court's judicial performance. As one writer has noted, "[t]he way people and governments deal with the past," including past atrocities prosecuted by an international tribunal, "is highly dependent on their particular context."<sup>18</sup> Assessing an international court's impact is thus to some extent a matter of assessing how well the institution has met the challenges presented by each "particular context" in which its work is relevant.

When it comes to Serbia, the ICTY has faced the peculiar challenge presented by a country whose political culture has in recent years been profoundly influenced by nationalist leaders who are opposed to its work and who have publicly cast the court as an anti-Serb instrument of Western power. For the first seven years of the Tribunal's life, the Federal Republic of Serbia was led by a man, Slobodan Milošević, who would later face trial for his role in fomenting the violence that consumed the Balkans in the 1990s. Not surprisingly, Milošević's Serbia was unremittingly hostile to the ICTY, and Serbian citizens were served a steady diet of anti-Hague vitriol.

Milošević's immediate successor, Vojislav Koštunica,<sup>19</sup> carried forward an anti-Hague stance and has found broad support in a populace among whom nationalists remain a potent political force. This is hardly the whole picture: the post-Milošević political landscape includes reformist leaders who support ICTY cooperation and have ensured substantial progress in this regard. But full cooperation remains stymied.<sup>20</sup>

Further compounding the ICTY's challenge in Serbia, the country was largely spared direct experience of the violence giving rise to prosecutions in The Hague.<sup>21</sup> As a Serbian journalist emphasized in an interview, "What is important for understanding [Serbia's attitude toward the ICTY], we don't have victims, only refugees. Serbians don't know what it's like to be victims."<sup>22</sup>

A minority of Serbian citizens is, nonetheless, devoted to ensuring justice for those who endured atrocities during the 1990s wars. None of them believes that the ICTY bears sole or even principal responsibility for ensuring justice and none believes that the Hague Tribunal's performance has been flawless. These citizens have, however, championed Serbian cooperation with the ICTY, often at personal risk. Their reasons vary—we explore them in Chapter II—but they sift down to the principled position that Serbian citizens must acknowledge that terrible crimes were committed in their name and were not justified. Without the ICTY, they believe, Serbia would not have confronted its leaders' responsibility for the horrific crimes that engulfed the Balkans in the 1990s. With the ICTY, some measure of accountability has been assured.

## Impact: Defining and Assessing

To assess the impact of the ICTY it was of course necessary first to identify relevant types of impact that would be the subject of our inquiry. As summarized below, we identified several categories of impact that would guide our inquiry in Serbia and elsewhere in the former Yugoslavia, which reflect both the original justifications for the ICTY's creation and goals commonly assigned to the Tribunal by supporters of international justice and by the Tribunal itself.



# Impact on Victims

Public assessments of war crimes tribunals have rarely or only superficially examined the question, what impact does their operation have on victims?<sup>23</sup> Yet victims are one of the most important constituencies for international criminal courts.<sup>24</sup> Although often overlooked by others, the Security Council implicitly recognized this when it established the ICTY, reasoning that the Tribunal's work would help ensure that atrocious crimes were not only "halted" but also "effectively redressed."<sup>25</sup>

With the exception of one trial now under way in The Hague, however, none of the ICTY's cases has involved crimes occurring in Serbia proper.<sup>26</sup> Because this report examines the impact of the ICTY in Serbia, it touches only briefly and indirectly on the Tribunal's impact on victims.

Yet this should not obscure the importance of the Tribunal to those who have endured crimes most of us can hardly bear even to imagine. Our research in Bosnia, which will be the subject of a separate report, makes clear that the ICTY has mattered greatly to many Bosniaks—who endured the largest number of crimes charged by the ICTY Prosecutor—even as the Tribunal has disappointed their expectations. While many of the Tribunal's sentences have struck Bosniaks as derisively short, some judgments have provided a sense of justice not readily captured or commonly reflected in assessments of the Tribunal. For example, many Sarajevans were gratified by a November 2006 Appeals Chamber judgment imposing a sentence of life imprisonment on a defendant, Stanislav Galić, for his role in the siege of Sarajevo;<sup>27</sup> in their view, the judgment honored their suffering and helped restore a moral balance that had been frightfully put awry.

Many Bosniaks felt a similar sense of vindication by the ICTY's determination in an earlier case that the July 1995 massacre by Serbian forces of Muslim men in Srebrenica was a genocide.<sup>28</sup> As one Bosniak told us (and as many said in similar terms), the ICTY's "finding that what happened at Srebrenica was genocide is the most important achievement and without the ICTY this would not be possible."<sup>29</sup> Conversely, the Tribunal's failure to conclude that genocide occurred elsewhere in Bosnia is cause for disappointment among many victims. And while it is often noted that many victims have had a hard time letting go of their grief, the ICTY's work has also helped empower some of these same victims. One of our Bosnian interlocutors noted, for example, that "ICTY judgments created a new kind of awareness that women had been used as a means of war. They became visible, personalized, and recognized as one kind of victim. This enabled them to become more active"<sup>30</sup> in such matters as exercising their rights to obtain civil benefits.

Yet however important, the justice some victims have found in The Hague risks being overwhelmed by one monumental failure: the two men who together personify Bosniaks' suffering—Ratko Mladić and Radovan Karadžić—remain at large thirteen years after they were

twice indicted on genocide charges. One of our interlocutors in Sarajevo summed up what we heard from many in Bosnia: The ICTY has done “so many good things but they’re in the shadow of Karadžić and Mladić.” Because these two suspects have eluded justice for so long, she said, “many ordinary people [in Bosnia] can’t see the good things the ICTY has done.”<sup>31</sup>

If the impunity of Karadžić and Mladić has radically diminished the ICTY’s positive impact on victims in Bosnia, the two fugitives occupy a different role in our assessment of ICTY impact in Serbia. Serbia is known to have provided shelter to both men and is believed to be providing ongoing protection to Mladić—a continuing violation of the Convention on the Prevention and Punishment of the Crime of Genocide, in the judgment of the International Court of Justice.<sup>32</sup> As we elaborate in Chapter II, Serbia’s continuing protection of Mladić is both a barometer of its democratic maturity and an impediment to its full integration into a global community to which most Serbian citizens want to belong.

## Impact on Perpetrators: Deterrence

It is widely thought that a key measure of an international court’s effectiveness is its impact on perpetrators. This broad category of impact can take several forms, of which the most obvious is a court’s deterrent effect. As noted earlier, halting further atrocities in the former Yugoslavia was a key justifying aim behind the Security Council’s decision to create the ICTY. As the ICTY’s then president noted in the Tribunal’s first annual report to the UN Security Council,

One of the main aims of the Security Council [in establishing the ICTY] was to establish a judicial process capable of dissuading the parties to the conflict from perpetrating further crimes. It was hoped that, by bringing to justice those accused of massacres and similar egregious violations of international humanitarian law, both belligerents and civilians would be discouraged from committing further atrocities. In short, the Tribunal is intended to act as a powerful deterrent to all parties against continued participation in inhuman acts.<sup>33</sup>

Those who have championed international war crimes courts hope, more broadly, that their operation will deter future atrocities outside the particular context in which particular tribunals were established.<sup>34</sup>

Although we sought out information that might shed light on the questions of whether or to what extent the Tribunal has achieved its deterrent aims, we ultimately did not believe we could reach significant conclusions based upon the evidence available to us at this time. A number of our Serbian interlocutors as well as other sources are convinced that the ICTY has had a significant deterrent effect. But these views—typically grounded in anecdotal evi-

dence—did not provide an adequate basis for even provisional conclusions. Accordingly, with the exception of our brief observations here, this report does not address the deterrent impact of the ICTY except indirectly through its discussion of various ways in which the Tribunal's operation has contributed to strengthening Serbia's capacity to prosecute war crimes domestically and, more broadly, dispelling a culture of impunity.

While we do not believe that we can reach reliable conclusions about the ICTY's general deterrent impact, we know some things with sobering certainty: As has often been noted, the creation of the ICTY did not by itself end atrocities in the Balkans. The 1995 genocide in Srebrenica occurred two years after the ICTY was created, while atrocities in Kosovo surged during 1998–99.

By equal measure, however, we do not believe that the occurrence of atrocious crimes after the ICTY's creation closes the book, as some suggest, on the question whether international tribunals *can* exert a deterrent impact or even whether the ICTY has deterred some crimes that would have been committed but for its operation.<sup>35</sup> The July 1995 genocide in Srebrenica occurred at a time when the ICTY was in its institutional infancy—its Prosecutor had by then indicted only fourteen suspects<sup>36</sup>—and, more important, at a time when the ICTY was frustrated in its ability to secure custody of those whom its Prosecutor had indicted.<sup>37</sup> By the time the Srebrenica genocide occurred the ICTY had only one suspect, a low-level camp guard named Dušan Tadić, in its custody.<sup>38</sup> Perhaps as important, the ICTY had gained custody of Tadić from Germany—a circumstance that provided little cause for those in the former Yugoslavia to fear arrest as long as they remained in the Balkans.

The situation had improved, but not nearly enough, by the time abuses in Kosovo intensified in 1998–99. In the ICTY's annual report to the Security Council in 1997, then President Cassese noted that the Tribunal's mandate of "putting an end" to international crimes "has not yet been properly fulfilled because the vast majority of persons indicted by the Tribunal are still at liberty, ignoring their indictments with seeming impunity."<sup>39</sup> Two years later, the Tribunal's annual report, which covered the period in which abuses in Kosovo reached their zenith, noted that 35 of the Tribunal's publicly indicted suspects were still at large;<sup>40</sup> these included Ratko Mladić and Radovan Karadžić, by then twice indicted on genocide and other charges.

Those inclined to believe that the ICTY has had some deterrent impact note that the Balkans region has not seen further atrocities comparable to those committed in Kosovo since the arrest of former Yugoslav President Slobodan Milošević even though Serbia has seen further territorial defections—the context in which mass atrocities occurred in the 1990s—in that period. In recent years, Montenegro separated from Serbia peacefully, while Kosovo's February 2008 declaration of independence has not provoked massive violence despite Serbians' intense attachment to Kosovo and their leaders' strong opposition to its secession.<sup>41</sup> But while it may be tempting to conclude that this demonstrates the deterrent force of a court that finally proved its capacity to bring high-level perpetrators to book, the factors contributing to recent patterns are too complex to admit of any facile conclusions.<sup>42</sup>

## Impact on Perpetrators: Removal from Serbian Politics

If the ICTY's deterrent effect is unknown, other aspects of its impact in respect of perpetrators are clear: In the words of Serbian journalist Dejan Anastasijević, the ICTY has at the least succeeded in “physically removing some of the worst criminals”<sup>43</sup> from the region. Describing this as an important role of the Tribunal “that is usually neglected by experts,” Anastasijević observed that, when it came to Serbian leaders who were transferred to The Hague, including former President Slobodan Milošević: “It was good not to have them around, at all levels.”<sup>44</sup>

Serbians committed to democratic progress believe that the ICTY's ability to prosecute Milošević in particular was crucial in facilitating Serbia's transition to a democratically-elected government. From the vantage point of the post-Milošević government, according to a former official who served in that administration, the “removal of Milošević was something that had to be done in order to make the next step in our democratization process. He would have been an unbearable burden [if he were tried] in Serbian jurisdiction.”<sup>45</sup> Serbian journalist Filip Svarm concurs and goes further: If the country's leading war criminals had not been prosecuted, Svarm believes, “we would have had a mafia oligarchy as our leaders.”<sup>46</sup>

This is not to say that, with Milošević and other senior suspects removed from the political scene, Serbia has evolved into a vibrant democracy. Illiberal nationalists continue to play a prominent and toxic role in Serbian politics.

## Doing Justice; Dispelling Impunity

Among the various objectives mentioned in the Security Council resolution establishing the ICTY, one stands out for its stark simplicity: a key aim of the ICTY was to “bring to justice the persons who are responsible” for serious violations of international humanitarian law then under way.<sup>47</sup> Reading the 1993 resolution, it is easy to collapse this aim into the Security Council's broader objectives—halting further atrocities, providing effective redress and, most ambitiously, contributing to the restoration and maintenance of peace.<sup>48</sup> Yet for Serbian citizens who support the ICTY interviewed for this report, ensuring prosecution of those responsible for atrocities committed in the 1990s is one of the central goals the ICTY should achieve.

While their explanations vary, our interlocutors in Serbia who pressed this point tended to emphasize the broadly corrosive effects of failing to ensure justice—and have little doubt that there would have been wholesale impunity without the ICTY. In the words of Serbian journalist Filip Svarm: “It's simple. If not for the Hague Tribunal, no one would ever actually bring to trial anyone who committed these crimes.”<sup>49</sup> And, as Serbian human rights lawyer Bogdan Ivanišević observed, “the message [would have been that] one can do whatever he wants to do because he's in power and that's it. That kind of message would be disastrous. The

ICTY prevented that from happening.”<sup>50</sup> In the view of human rights advocate Andrej Nosov, by prosecuting Slobodan Milošević in particular, the Hague Tribunal demonstrated that “there is no one who can order killings and stay unpunished.”<sup>51</sup>

Yet none of our interlocutors came close to suggesting that the Tribunal has achieved an unqualified success in combating impunity in Serbia. With security forces largely unreformed, Serbia still remains stalled in the early stages of political transition.

## Educative Function: “Addressing the Past”

Many Serbians who support the ICTY believe that one of the most important benchmarks of success for the Tribunal is educating the Serbian public about atrocities—especially about crimes committed by their political leaders.<sup>52</sup> As Ana Miljanić put it, the Tribunal would achieve a significant measure of success if “people remember over time things that were brought into public knowledge by the ICTY’s work.”<sup>53</sup> Accepting the facts established in The Hague is important, Serbian supporters of the ICTY believe, because this is a first step toward acknowledging Serbian responsibility for atrocious crimes and unequivocally condemning them.

By this measure, the ICTY has not yet achieved major success, although it has laid the foundation for broader acceptance in the future of crimes committed by Serbian leaders. Public opinion polls taken in recent years indicate that a large proportion of Serbian citizens either have not yet been persuaded that Serbs committed a majority of the atrocities that accompanied the breakup of Yugoslavia in the 1990s or are unwilling to acknowledge what they know.<sup>54</sup>

We do not believe that the data currently available enable us to draw reliable conclusions about the underlying reasons for these results but note several possibilities that may play a contributing part. One is that widespread mistrust of the ICTY among Serbian citizens has undermined the Tribunal’s ability to serve an educative role in Serbia. Many Serbians see the ICTY as fundamentally “an instrument of [anti-Serb] power”<sup>55</sup> rather than as an impartial court of justice. Although many Serbians polled in recent years say they know little about the ICTY, roughly two-thirds perceive it as biased against Serbs. In this, they are following the lead of Serbian politicians who have demonized the ICTY, starting with Slobodan Milošević and continuing with the now-caretaker prime minister, Vojislav Koštunica.

Even those leaders who support Serbian cooperation with the ICTY have for the most part framed their position in pragmatic rather than principled terms: Full cooperation is the entry price for admission to the European Union, they argue. Only a small minority of political figures has advanced the case that Serbia should cooperate for moral rather than expedient reasons.

Other factors doubtless reinforce a persistent “culture of denial.”<sup>56</sup> “When you have a brother or a husband” who participated in conflicts in which atrocities occurred, “you don’t

think of him as someone who could take a knife to a child,” Jadranka Jelinčić suggested. “For very personal reasons you can’t change the framework in which you think.”<sup>57</sup>

Similar sentiments may lead some Serbian respondents who participate in opinion polls to deny or downplay their actual beliefs. Vojin Dimitrijević, whose Belgrade Centre for Human Rights co-sponsored several of the surveys we describe in this report, makes the point this way: “The question is whether you really don’t know or you refuse to know.”<sup>58</sup> In the view of Serbian attorney Ivan Janković, when it comes to crimes of great magnitude, most people cannot help but know what happened but “often deny their knowledge.”<sup>59</sup>

With others, Janković nonetheless believes that evidence adduced in The Hague has significantly “shrunk the public space”<sup>60</sup> in which political leaders can credibly deny key facts about notorious atrocities. For a long time, nationalist figures claimed that the number of people killed in Srebrenica in July 1995 was much lower than the real figure while blaming many of the killings on intra-Muslim violence. “Now,” as Bogdan Ivanišević notes, “people who say that are from the margins.... There is incomparably less distortion of the past.”<sup>61</sup>

In the view of journalist Ljiljana Smajlović, “There’s no question that the ICTY has educated the public; we’ve found out more about war crimes and the ... inner workings of the government than we would ever have found out—and about the criminal aspects of the regime.”<sup>62</sup> She believes that the “findings of the Tribunal are more accepted now” than during earlier periods; as a result of “what we’ve found out in The Hague,” she says, the public now “accepts that Serbs committed enormous crimes,” including the Srebrenica massacre. Jadranka Jelinčić makes much the same point: “It’s now very difficult to deny that certain things happened and that cultural elites were responsible.”<sup>63</sup> Still, Jelinčić notes, this knowledge “doesn’t necessarily make people regret” crimes they can no longer credibly deny.<sup>64</sup>

## Impact on the Rule of Law: Domestic War Crimes Prosecutions

A central premise behind the ICTY’s creation was that local courts in the former Yugoslavia were unable or could not be trusted to bring perpetrators of atrocities to justice—in the case of Serbia, in large part because crimes perpetrated or authored by Serbs were abetted by wholesale impunity.<sup>65</sup> And so it comes as something of a surprise that one of the ICTY’s most tangible achievements in Serbia has been its role in spurring the creation of a local war crimes court and helping empower that court to function professionally.

In July 2003 the Serbian parliament enacted legislation establishing the War Crimes Chamber (WCC), a specialized component of the Belgrade District Court with jurisdiction over several international offenses, including those committed to the jurisdiction of the ICTY. Everyone we interviewed in Serbia believes that such a court could not have functioned in

Serbia until the political transition following the fall of Milošević—and most believe that the WCC would not exist but for the ICTY, “at least not at this point.”<sup>66</sup>

Although the ICTY did not play a direct role in creating the Serbian WCC, the reformist wing of the first post-Milošević government saw the Hague Tribunal, in the words of a member of that government, as “very useful” in helping create the political space for Serbia to deal with “the burden of war crimes in all its dimensions.”<sup>67</sup> A spokesman for the Serbian War Crimes Prosecutor likewise believes that the ICTY paved the way for the WCC. In his words, “the Hague Tribunal was the necessity of the moment” during the Milošević era, because there was no will to prosecute war crimes in Serbian courts. “I do believe,” he continued, “it was exactly through the Hague Tribunal that the process of facing the past was initiated in the states of the former Yugoslavia.”<sup>68</sup>

In other, less obvious, ways the ICTY provided further incentives for Serbia to establish a credible war crimes court. In late August 2003 the UN Security Council endorsed a “completion strategy” proposed by the ICTY President in 2002, pursuant to which the Tribunal would gradually wind down its operations so that it could complete its work in 2010.<sup>69</sup> To meet this deadline, the ICTY would have to transfer cases involving comparatively low-level perpetrators to national courts. National courts, in turn, would have to meet basic standards of fair process to be eligible to receive cases transferred from The Hague. In this setting, the Serbian government—which had long argued that Serbian suspects should be tried in Serbia—had a strong incentive to establish a credible war crimes court.

Once the WCC began operating, the ICTY provided further incentive for the Serbian court to operate in a professional fashion. While genuinely troubled by many Serbians’ treatment of Serbian war criminals as national heroes, the Serbian War Crimes Prosecutor, Vladimir Vukčević, also wanted “to show that local courts can handle these cases.”<sup>70</sup> In his view, the fact that Serbian defendants were being tried before an international court represented a harsh judgment of Serbian justice. For Vukčević and other Serbian officials, demonstrating local competence was a matter of professional and national pride.

Since its creation, the WCC has been bolstered by the ICTY in various ways. Crucially, when the ICTY transfers cases to Serbia it provides what one informed observer described as “a wealth of evidence,” and this proved crucial to the WCC’s early progress.<sup>71</sup> ICTY officials have, moreover, helped train war crimes prosecutors, judges and staff and have in various ways transferred “know how,” in the words of WCC President Siniša Važić.<sup>72</sup>

Beyond the direct transfer of expertise and evidence from The Hague to Belgrade, several of our Serbian interlocutors believe that the ICTY has provided Serbian courts an inspirational model of fair process. Although critical of the ICTY in many respects, journalist Ljiljana Smajlović believes that the Tribunal has “taught the public what defendants are entitled to [and] this is a positive impact.”<sup>73</sup>

None of this is to say that the ICTY helped launch a court that embodies an institutional triumph over entrenched impunity. From its inception, the WCC has been unable to tackle

high-level suspects—a significant shortcoming that its officials acknowledge. Moreover an April 2007 trial judgment in a closely-watched case evinced a judicial determination to obscure Serbian responsibility for an execution near Srebrenica in 1995, shattering the confidence that local human rights organizations had until then placed in the court’s judges.<sup>74</sup> Even judgments that appear on the whole to be fair must run the gauntlet of review by a Supreme Court chamber dominated by Milošević-era judges, which routinely finds fault with lower-level verdicts. Like other dimensions of the ICTY’s impact in Serbia, then, the country’s process of providing justice for 1990s-era atrocities is incomplete—yet nonetheless notable for the progress achieved in recent years.

## Reconciliation

Among the most contested issues in the field of transitional justice<sup>75</sup> are whether prosecutions should aspire to or can foster societal reconciliation in the aftermath of horrific crimes<sup>76</sup>—and what reconciliation even means in this context. A variation on this theme has had some relevance for the ICTY, whose creation was justified in part on the premise that, “in the particular circumstances of the former Yugoslavia,” the creation and operation of the Tribunal would not only help “put an end” to the inter-ethnic crimes then under way but would also “contribute to the restoration and maintenance of peace.”<sup>77</sup>

Going into this study, we did not expect our interlocutors in the Balkans to place much store in this justification. Yet we found in both Serbia and Bosnia that some individuals who support the ICTY place considerable weight on the role they believe an impartial legal reckoning can play in fostering long-term reconciliation, a term they appear to use principally to connote an absence of future violence between national groups in the Balkans. Recalling how former President Milošević and other nationalist leaders manipulated the past to foment inter-ethnic violence in the 1990s, our Serbian interlocutors who pressed this point explain, in the words of one analyst, that “if you don’t have justice, you can always manipulate the past.... A lot of space is left for manipulation, [as happened] after the Second World War. You have different historiographies.” But “once you have a sentence by a legal authority, you have firm ground [for discussion].”<sup>78</sup>

By its nature, the claim that ICTY prosecutions will serve the interests of long-term reconciliation cannot be tested now.<sup>79</sup> But twentieth century Yugoslav history provides some basis for this claim: Although Yugoslavia’s distinct ethnic groups committed mass atrocities against each other during World War II, the country’s leader, Josip Broz Tito, “largely dispens[ed] with war crimes trials like those the Allies convened at Nuremberg.”<sup>80</sup> Against this background, nationalist leaders in the former Yugoslavia were able to tap a deep reservoir of latent inter-ethnic fear to foment violence during the 1990s.



## Performance-Related Factors

The ICTY's ability to have a positive impact in Serbia has been profoundly constrained by factors beyond the court's control, notably including the entrenched and vocal opposition of key Serbian leaders and the enduring influence in Serbia of security forces implicated in 1990s-era atrocities and of their political allies.<sup>81</sup> But if the ICTY did not create these conditions, it is necessary to ask whether it has done all that it could to minimize their harmful impact.

In the final chapter of this report we identify several factors within the control of the ICTY and the states that support it that may have needlessly limited the Tribunal's positive achievements. To begin, the Tribunal as a whole has never placed adequate store in the importance of communicating effectively with the communities most affected by its work. A common challenge for the Tribunal throughout the Balkans is to ensure that its work is understood in countries that are some 2,000 kilometers away from its seat in The Hague. Remarkably, the ICTY did not even translate its judgments into the languages spoken in the former Yugoslavia until 1999, and did not issue its first press release in Serbian until 2000. This left the field of interpretative meaning to Slobodan Milošević and other anti-Hague nationalists for the first crucial period of the Tribunal's work.

The Tribunal belatedly established an outreach program in 1999 but, as a former outreach officer noted, "It is much more difficult to dismantle already established misperceptions and propaganda than it would have been to start from the outset with updated and accurate information about the Tribunal."<sup>82</sup> It is of course highly doubtful that the ICTY could have overcome the distortions of its work put forth by the Milošević government in particular—but it might have blunted their force, and a robust outreach effort may have been particularly effective during the post-Milošević political transition.

The positive impact of the Tribunal has also been diminished by missteps in its performance as a judicial institution, some of which were especially pronounced in its earlier years. Alongside factors that lie *beyond* the Tribunal's control, poor case management and perhaps overly ambitious indictments have contributed to lengthy delays between arrest and trial and to unnecessarily protracted trials. (In recent years, however, the ICTY has made progress in addressing some of these issues.) Moreover the failure of key ICTY staff and officials to educate themselves adequately about the Balkans has often been evident and deleterious.

That the ICTY's famously long trial of former Yugoslav President Slobodan Milošević ended without judgment due to the defendant's death came as a particularly harsh blow to Serbian supporters of the tribunal, who had hoped that judgment in this case would play a pivotal role in illuminating Serbian leaders' and state institutions' role in sponsoring 1990s-era atrocities. With expectations high, the death of Milošević struck Serbian supporters of the ICTY as "disastrous for the tribunal. Absolutely disastrous: It didn't finish the job."<sup>83</sup>

Even so, some evidence introduced in the Milošević case had a galvanizing impact on Serbian opinion. In particular, a video of an execution near Srebrenica in 1995, which was

shown during the Milošević trial and broadcast repeatedly on Serbian television, “ripped away the veil of secrecy and denial of Serbian military operations in Bosnia during the 1992–95 war,” as the *Washington Post* reported.<sup>84</sup> With the passage of time, other evidence introduced into evidence during the marathon trial may find its way into the public space of acknowledgment and reckoning.

## The Work of Generations

Fifteen years after the Security Council created the ICTY, there is a rich record for assessing the Tribunal’s impact in the countries most affected by its work—and for identifying performance-related factors that appear to have advanced the Tribunal’s goals or diminished its ability to achieve them. And yet it is still too early to know the Tribunal’s long-term impact. This report provides a snapshot of the ICTY’s impact to date, but it provides just that: As Germany’s experience after Nuremberg attests, the impact of an international criminal tribunal is the work of generations, changing over time and in light of myriad mediating factors.

Indeed, even over the period covered by this report, the ICTY’s challenges, achievements and disappointments in Serbia have evolved significantly. This, itself, points to an important “lesson learned” from the experience of the ICTY during its first fifteen years: Recognizing that the circumstances giving rise to the creation of an international criminal court inevitably change with the passage of time, those who bear principal responsibility for developing tribunals’ policies would do well periodically to assess whether changing conditions call for new strategies, such as pursuing greater engagement with local authorities aimed at strengthening domestic capacity to prosecute war crimes.

By equal measure, on this fifteenth anniversary of the ICTY’s creation, it is useful to keep sight of what has already been accomplished. Not least in the eyes of its supporters in Serbia—“The Hague Tribunal demonstrated that not everything can be legalized.”<sup>85</sup>



## II. Serbia's Relationship with the ICTY

### A. Introduction

Although two-thirds of the suspects indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY) have been ethnic Serbs,<sup>86</sup> citizens of Serbia<sup>87</sup> constitute a small fraction—only 13 percent—of the Tribunal's indictees.<sup>88</sup> Of those, all but one have faced charges relating solely to crimes committed in Bosnia-Herzegovina, Croatia, Macedonia and/or Kosovo.<sup>89</sup> Thus, describing how many Serbians experienced the atrocities that have been prosecuted in The Hague, one Serbian observer said: "It was all somehow out of Serbia."<sup>90</sup> (Like most of our interlocutors in Serbia, this source did not include Kosovo when referring to Serbia.<sup>91</sup>)

Yet Serbian leaders played a central role in the violence that led to the ICTY's creation, and Serbia has been profoundly affected by the ICTY and the legacy of violence underlying its prosecutions. At the time of his death in March 2006, the country's former leader, Slobodan Milošević, was on trial in The Hague on charges stemming from atrocities committed in Kosovo, Bosnia-Herzegovina and Croatia. The Prosecutor's case against Milošević in effect placed the former Serbian leader at the epicenter of the violence that ravaged the former Yugoslavia through much of the 1990s. While the Prosecutor sought to establish the criminal responsibility of the defendant in the dock, evidence introduced during Milošević's trial disclosed the broad structures of Belgrade's support for Bosnian and Croatian Serb forces that

committed atrocities during the conflicts in Bosnia-Herzegovina and Croatia, respectively, as well as institutional responsibility for atrocities committed by Serbian forces in Kosovo.<sup>92</sup> Thus while Serbia was not on trial before the ICTY,<sup>93</sup> the prosecution of Milošević illuminated facts implicating the country's political responsibility for the crimes charged against its former leader. Cases now under way in The Hague are likely to bring the relationship between Belgrade and Serb forces in Bosnia and Croatia into even greater focus.<sup>94</sup>

Serbia's relationship with other countries has, moreover, been defined in significant part by its cooperation with the ICTY. Most important in recent years, the European Union (EU) has linked Serbian membership in the Union to the transfer to The Hague of Ratko Mladić,<sup>95</sup> a Bosnian Serb general who has been sought on genocide and other charges since 1995.<sup>96</sup> Mladić is known to have lived in Serbia during much of the period since his indictment<sup>97</sup> and drew a pension from the Yugoslav Army—approved in 2002 by then President (later Prime Minister) Vojislav Koštunica—until December 2005.<sup>98</sup> At least until recently, negotiations between the ICTY and Belgrade over the transfer of other Serbian suspects, including Milošević, have been contentious even when they have ultimately led to the transfer or surrender of indictees to The Hague. So, too, have negotiations relating to documents sought by the ICTY. While Serbia's failure to meet its obligations to cooperate fully with the ICTY is hardly the only impediment to its full acceptance in the international community, its importance in Serbia's relationship with Western countries inevitably shapes and complicates many Serbs' attitudes toward the Tribunal and its work.

To the extent possible, we have tried to understand how this linkage has affected the broader question of ICTY impact in Serbia. As we explain more fully below, in several respects the linkage has had a direct and significant effect: It has provided crucial incentive for Serbia to ensure that individuals indicted by the ICTY are transferred to its custody. Indeed, this linkage has been the principal factor behind Serbian compliance with the ICTY. In the view of Serbian citizens who support the ICTY, the transfer of indicted suspects to The Hague has had broader salutary effects, among them removing dangerous individuals from Serbia's political scene and reaffirming core values that had been deformed under Milošević's government. Others, however, worry whether Western countries' seemingly endless demands for cooperation with the Hague Tribunal have at times been counterproductive, providing a rallying issue for ultra-nationalists<sup>99</sup> and consuming too many of Serbia's democratic energies.<sup>100</sup> (Many Serbian citizens, as we note later, do not blame the ICTY but instead government leaders for stoking the anti-Hague sentiments of ultra-nationalists in the hope of securing their votes and, more generally, for keeping Serbia mired in unproductive battles rather than advancing its progress.)

In this setting, a background question shaping our understanding of what "ICTY impact" means in the context of post-Milošević Serbia is: "How has Serbia's relationship with the ICTY affected the broader process of democratization in Serbia?" This is not to suggest that promoting democracy is or should be a goal of international criminal tribunals except in the important sense that promoting the rule of law is a cornerstone of democratic governance.

But in the particular context of Serbia we thought it important to be attuned to the interaction between the ICTY and Serbia's process of democratization and stabilization. In particular, we have sought to understand how developments in The Hague and in relation to the ICTY affect the relative strength of ultra-nationalist sectors whose members support indicted and convicted war criminals on the one hand and Serbia's pro-reform sectors on the other hand. Our analysis in this chapter reflects this concern when relevant, but is not driven by it.

As a foundation for our analysis of the ICTY's impact in Serbia, we first provide a brief overview of the Tribunal's relationship with the country.

## B. Overview of Serbia's Relationship with the ICTY

Serbia's relationship with the ICTY is considerably more complex than a casual consumer of the daily media might guess, in large part because the country itself has gone through profound changes—not least including a radical diminution of its territory and population—since the Tribunal was established. For present purposes, it is useful to divide that relationship into two principal phases.

The first comprises the first seven years of the ICTY's existence, when Slobodan Milošević served as president of his ever-shrinking country or of its dominant republic.<sup>101</sup> By the time the UN Security Council resolved to establish the Tribunal in May 1993,<sup>102</sup> the Yugoslav army and paramilitary forces had been involved in substantial wars in the former Yugoslav republics of Croatia and Bosnia-Herzegovina, both of which were recognized as independent states in 1992. The Security Council's action in establishing the Tribunal was denounced by Belgrade, which portrayed the ICTY as yet another anti-Serb measure by a world that had taken the side of Serbia's enemies in the conflicts of the early 1990s. Rejecting the ICTY's legitimacy, Milošević refused to cooperate with it.<sup>103</sup>

From the outset of the Tribunal's existence and for the next seven years, Serbian citizens were served a steady diet of anti-ICTY propaganda by their government. As journalist Mirko Klarin has observed,

... one should not forget the fact that in Serbia, Croatia and Bosnia up to 2000 the power was held by individuals and political elites under investigation—and in the case of Serbia under indictment—of The Hague prosecution. It is clear that it was not in the least [in] their interest that the public in their countries gets the real picture of the mission and functioning of the Tribunal. It should also not be forgotten that all the time until 2000 the most influential media were under full control of editorial groups which in the previous decade had been “outstanding” in the preparation of the ground for war and war crimes, and afterwards in their justification or covering up in the name of “higher” interests.<sup>104</sup>

This period has had an enduring impact on Serbia's relationship with the ICTY and on Serbian citizens' attitudes concerning accountability for atrocities committed by or with the criminal participation of Serbian leaders and citizens.<sup>105</sup> As many of our Serbian interlocutors emphasized, to the extent the ICTY's work is meant to serve an educative function,<sup>106</sup> its ability to do so is profoundly affected by the enduring effects of Milošević-era propaganda casting Serbs as a threatened national group fighting for survival in the wars of the 1990s<sup>107</sup> and, during the last seven years of his rule, as victims of what Milošević called the Tribunal's campaign of "genocide" against Serbs.<sup>108</sup>

The timing of the ICTY Prosecutor's May 1999 indictment of Slobodan Milošević on charges relating to Kosovo—issued when the war over Kosovo between the North Atlantic Treaty Organization (NATO) and FRY was in full sway—made it easy for many Serbians to believe what Milošević relentlessly claimed: that the ICTY was a tool of anti-Serb Western powers or, as one observer put it, "an instrument of power."<sup>109</sup> (In fact, the principal factor driving the immediate timing of the first Milošević indictment was then Prosecutor Louise Arbour's desire to help end Kosovo atrocities in "real time" and her concern that Milošević would escape prosecution if she did not act quickly.)<sup>110</sup> It was not until late 2001—substantially after Milošević was indicted in 1999 on charges relating to events in Kosovo occurring that same year—that the ICTY Prosecutor brought additional charges against Milošević relating to crimes committed years earlier in Bosnia-Herzegovina and Croatia.<sup>111</sup>

Even Serbians who support the Tribunal point out that this sequence reinforces many Serbians' view that the ICTY is essentially a political institution. Why, after all, if the ICTY Prosecutor had indictable evidence that Milošević bore criminal responsibility for atrocities committed in Bosnia-Herzegovina and Croatia in the early to mid-1990s, was he not indicted for those crimes until *after* his indictment for later crimes in Kosovo? As we elaborate later, during his trial Milošević exploited the anti-Hague suspicions raised by this sequencing.

The second period dates from October 5, 2000, when Milošević stepped down from the presidency in the face of massive protests after he challenged the results of a presidential election held on September 24, 2000, which Milošević lost. The democratically-elected 18-party coalition government that succeeded Milošević, the Democratic Opposition of Serbia (DOS), was led by a strained alliance between Yugoslav president (later prime minister) Vojislav Koštunica, a nationalist who has long seen the ICTY as an anti-Serb institution and an infringement on Serbian sovereignty,<sup>112</sup> and pro-Western Zoran Djindjić, who served as prime minister of Serbia, the dominant republic of what then remained of Yugoslavia, from January 25, 2001 until his assassination in March 2003.<sup>113</sup> As has often been noted, DOS's unity in seeking Milošević's ouster masked vast differences within the coalition, including profoundly different views concerning prosecution of war crimes. These differences became apparent soon after DOS began governing.<sup>114</sup>

Although Djindjić will forever be remembered as the Serbian leader who transferred Milošević to the ICTY in 2001, at first both leaders of the coalition government opposed doing

so,<sup>115</sup> instead preferring to try Milošević in local courts.<sup>116</sup> But while Koštunica remained hostile to the Tribunal, Djindjić became an advocate of surrendering Milošević.<sup>117</sup> Faced with the prospect of losing U.S. direct aid as well as U.S. support for financing from international financial institutions if Serbia did not surrender Milošević,<sup>118</sup> even Koštunica reluctantly acquiesced in certain government measures aimed at legalizing Milošević's surrender on the ground that this move would be a "lesser evil than what would happen to the country if we did not do it."<sup>119</sup> But Koštunica insisted that any transfer be undertaken in accordance with local law.<sup>120</sup>

In the lead-up to a conference of Western donors convened to help rebuild the former Yugoslavia—and confronting a potential U.S. boycott of that conference<sup>121</sup>—the Yugoslav government began to lay the legal groundwork for transferring Milošević. In the meantime, the former leader was arrested and charged under local law with corruption and abuse of power on April 1, 2001. Not coincidentally, his arrest came one day after the congressionally-mandated deadline for certification by then-U.S. President Bill Clinton, as a pre-condition to the release of funds appropriated for FRY, that FRY was cooperating with the ICTY and that it had met several other criteria.<sup>122</sup> Then, in late June 2001, as judges appointed by Milošević to Yugoslavia's Constitutional Court blocked a government decree authorizing Milošević's transfer to The Hague, Djindjić repudiated the court's action<sup>123</sup> and arranged for Milošević's transfer to The Hague without informing Koštunica.<sup>124</sup> Immediately after the transfer, Serbia was rewarded with a pledge of \$1.28 billion at the conference of Western donors.<sup>125</sup>

In the prevailing political environment Djindjić apparently did not believe it prudent to justify his action by appealing to principles of justice.<sup>126</sup> Instead, he sought to rally public support on pragmatic grounds—surrendering Milošević was the key to Serbia's economic prosperity and integration in the West. "Our country's place is in the international community," Djindjić said following Milošević's transfer to The Hague. The government's action, he explained, was taken "not because of us or our parents but because of our children."<sup>127</sup>

Years later, Serbian citizens and others who support the work of the ICTY frequently mention Djindjić's reliance on pragmatic rather than moral arguments for transferring Milošević to The Hague to illustrate the barriers that must be surmounted in securing Serbian support for the process of reckoning under way in The Hague. In the view of many Serbians who support prosecutions (and who for that reason support cooperation with the ICTY), Djindjić went as far as was politically possible in the way he chose to justify his already controversial step. In their opinion, the fact that even Djindjić did not make a moral case for cooperation with the Tribunal reflects the enduring culture of impunity that became entrenched during the Milošević era. Others wish that Djindjić had gone farther, arguing that "leaders need to lead. They need to grasp the moment."<sup>128</sup> Whether or not Djindjić could have successfully advanced moral as well as pragmatic grounds for Hague cooperation, the fact that he and other Serbian leaders have largely failed to do so has compounded the ICTY's challenges in Serbia.

Serbian political leaders who oppose the Tribunal have not been so reticent. Denouncing the transfer of Milošević to The Hague, then-President Koštunica compared Djindjić's



action to the “lawless and hasty acts” of the Milošević regime and warned: “Those measures endanger our country, its citizens, and also the damaged peace in our region.”<sup>129</sup> But while Milošević’s transfer to The Hague provoked a crisis within the governing coalition,<sup>130</sup> it did not produce the consequences of which Koštunica warned. As one observer noted, “Koštunica wasn’t happy, but at that moment Djindjić had the political power to transfer Milošević.”<sup>131</sup> In fact, many Serbians across a wide political spectrum experienced the transfer of Milošević with a sense of relief.<sup>132</sup>

The response of the Serbian public to Milošević’s transfer—demonstrations against the action were relatively small and scarcely destabilizing—marked a turning point in Serbia’s willingness to accept if not yet embrace the process of accountability under way in The Hague. In the view of one member of Djindjić’s government, “Before the Milošević transfer, there may have been reluctance in some parts of the government to deal with this. After the transfer, we realized one can do that and can do much more in the eyes of the public.”<sup>133</sup>

It took almost a year, however, before Serbia saw further notable progress in its cooperation with the ICTY. In April 2002, the federal Yugoslav parliament enacted a law on cooperation with the Tribunal establishing a national council for cooperation with responsibility for coordinating the government’s responses to ICTY requests.<sup>134</sup> Soon after, six indictees surrendered to the ICTY.<sup>135</sup> Many of these transfers and surrenders were spurred by annual deadlines linking U.S. aid appropriated for Serbia for that year to Serbia’s satisfaction of criteria that included cooperation with the ICTY. A Congressional Research Service (CRS) report summarized the impact of annual U.S. aid conditions on Serbian cooperation during 2001–05 this way:

Since the coming to power of Serbian democrats in late 2000, Serbian cooperation with the ICTY has followed a similar pattern each year: Serbia delivers several indictees to the Tribunal just before or, at most, a few weeks after the certification deadline. The Administration makes the certification as required by the legislation, and urges Serbia to do more. However, Serbian cooperation then slows, with Serbian leaders claiming that political and legal obstacles preclude greater efforts. Nevertheless, more indictees are delivered as the next deadline for certification approaches, and so on.<sup>136</sup>

As the CRS study suggests, significant manifestations of Serbian cooperation with the ICTY remained grudging even while Djindjić was prime minister of Serbia. While several factors account for this, some are particularly relevant to our analysis. First, a substantial proportion of the Serbian electorate comprises hard-line nationalists who are strongly opposed to war crimes prosecutions of Serbian leaders and citizens.<sup>137</sup> With no political party commanding an absolute majority of the Serbian population during the post-Milošević period, each elected government has worried about antagonizing a significant sector of the public. Thus, even dur-

ing periods when Prime Minister Koštunica has been comparatively cooperative with the ICTY, he has framed his cooperation in terms that resonate with Serbian nationalists.

Second, “a good part” of many Serbians’ continued resistance to ICTY surrenders “comes from the popularity of the indicted war criminals themselves.”<sup>138</sup> A third consideration has compounded Serbian authorities’ reluctance to cooperate fully with the ICTY—their concern that evidence adduced in criminal trials in The Hague could increase Serbia’s vulnerability in a genocide case filed against Serbia and Montenegro in 1993 at another international court in The Hague, the International Court of Justice (ICJ), which did not reach judgment until February 2007.<sup>139</sup>

A fourth and crucial factor behind Serbia’s failure fully to cooperate with the ICTY is opposition on the part of the country’s security services.<sup>140</sup> Although some progress was made in reforming these forces during the Djindjić government,<sup>141</sup> they remained largely unreformed and outside democratic control—a pattern that has persisted.<sup>142</sup> These forces have been strongly motivated to oppose ICTY cooperation.<sup>143</sup> Corrupt security forces and police have worked in tandem with criminal gangs whose members figured prominently in atrocities committed during the 1990s conflicts.<sup>144</sup>

For a time, even the reformist Djindjić opted “to live in an uneasy coexistence with the security forces,”<sup>145</sup> which the new government believed it did not yet have the power to dismantle. Djindjić had other reasons to abide one of the more notorious underworld criminals, Milorad (“Legija”) Ulemek,<sup>146</sup> a former special police commander whose notorious Special Operations Unit of Serbia’s Secret Police, known as the Red Berets,<sup>147</sup> figured prominently in war crimes committed in Bosnia and later Kosovo.<sup>148</sup> Djindjić thought that, by switching his allegiance from Milošević to Djindjić in 2000, Legija had played a key role in enabling a peaceful transfer of power to take place.<sup>149</sup> Moreover Legija reportedly “played the lead role in arresting Milošević in March 2001 ... on Djindjić’s instructions.”<sup>150</sup> Besides, with Koštunica commanding the support of the army, Djindjić reportedly relied on the former secret police as a counterpoint to Koštunica’s military power base.<sup>151</sup>

By 2003, however, Djindjić moved to crack down on Legija and the organized crime gang with which he was associated, the Zemun gang.<sup>152</sup> On March 12, 2003 Djindjić’s cabinet planned to sign warrants for the arrests of Legija and other leaders of his gang.<sup>153</sup> On that day Djindjić was assassinated. Suspicion immediately centered on Legija and the Zemun gang. A three and one-half year long trial of Legija and other suspects in Djindjić’s assassination resulted in a conviction of twelve co-defendants, including Legija, on May 23, 2007.<sup>154</sup> Serbian prosecutors claimed that the defendants wanted to prevent Djindjić from advancing in his anti-organized crime campaign, ensure that no more war criminals were sent to The Hague,<sup>155</sup> and bring hard-line nationalists back to power.<sup>156</sup>

The assassination provoked some debate about whether Western countries had pressed Djindjić too hard to transfer indicted war criminals to The Hague.<sup>157</sup> (Just before his assassination, a Belgrade paper reported that the ICTY was about to indict Legija,<sup>158</sup> who in fact

was not indicted by the Hague Tribunal by the time it reached its deadline for completing all investigations by the end of 2004.<sup>159</sup>) But while Serbian citizens disagree on this point,<sup>160</sup> there is no dispute about the short-term impact of Djindjić's assassination: public shock triggered a period of significant political reform, which included a crackdown on organized crime and renewed cooperation with the ICTY. Summarizing developments in this period, the International Crisis Group wrote:

In the immediate aftermath of the [Djindjić] shooting, public commitments to cooperate with The Hague Tribunal were made; the army began to be put under civilian control; the highest-profile organised crime gang and parts of the Milošević-era parallel security structures were dismantled; several dozen prominent murders, many dating back to the old dictator's time, were solved; and the new union of Serbia and Montenegro was admitted to the Council of Europe. All this should have happened quickly after Milošević's fall in October 2000, but the reform agenda had been blocked by nationalist forces around former Yugoslav President Vojislav Koštunica until February 2003.<sup>161</sup>

Government leaders who had previously hesitated to press for cooperation with the ICTY now pledged to support it. As one commentator explained, "Zoran Djindjić's tragic death gave the post-Milošević authorities a kind of a social consensus to face and deal with war crimes."<sup>162</sup> During this period, the ruling coalition used its temporary emergency powers<sup>163</sup> to amend the 2002 Law on Cooperation with the Hague Tribunal, which had previously prevented Serbia from transferring nationals indicted by ICTY after its enactment.<sup>164</sup> In the four months following Djindjić's assassination, four indictees in Serbia surrendered to the ICTY; a fifth was arrested by the authorities of Serbia and Montenegro and transferred to The Hague.<sup>165</sup>

These surrenders and arrests represented a convergence of interests between The Hague and Belgrade: Many of those sought by Serbian authorities for their role in organized crime "were found to have participated in all sorts of paramilitary formations, war crimes, and crimes against humanity. Some turned out to be the actual perpetrators of unbelievably heinous crimes."<sup>166</sup>

Public opinion polls showed that, for the first time since the ICTY was established, a majority of the Serbian public favored cooperation with the Tribunal.<sup>167</sup> It was also during this period that the Serbian parliament adopted legislation, which had originated in the Djindjić government, establishing specialized courts to deal with organized crime and war crimes, respectively—a subject we explore in Chapter IV.

This burst of reformist zeal was short-lived,<sup>168</sup> however, and the anti-Hague Serbian Radical Party won the most seats in December 2003 parliamentary elections.<sup>169</sup> The Serbian government's cooperation with the ICTY stalled, leading to a temporary suspension of U.S. aid.<sup>170</sup> Beginning in late 2004, however, the government once again reinvigorated its efforts to secure transfers of indictees to the Hague Tribunal in the form of voluntary surrenders.

By then, the reformist candidate of the Democratic Party, Boris Tadić, had been elected president of Serbia in an election held on June 27, 2004. But while Tadić has from the outset of his presidency supported cooperation with the ICTY,<sup>171</sup> he became “the president of a highly dysfunctional state run by a minority government based on a shaky coalition,”<sup>172</sup> with the anti-Hague Koštunica holding the more powerful position of prime minister and controlling key security sectors.<sup>173</sup> Thus more important factors behind the late 2004–early 2005 surge in cooperation may have been Serbian authorities’ desire to secure a resumption of U.S. aid and potential benefits associated with the accession process promised by the European Union.

In a report to the UN Security Council on June 13, 2005, then ICTY Prosecutor Carla del Ponte described a “major change” in Serbian cooperation. Access to witnesses and documents had been “continuously improving,” and Serbia had transferred fourteen indictees to the Tribunal since December 2004.<sup>174</sup> But the government’s cooperation came on controversial terms: Serbian authorities have provided financial rewards to those who surrender “voluntarily” as well as “considerable material compensation for the[ir] families,” while publicly praising those who surrender as patriots and heroes.<sup>175</sup> (As one observer notes, however, “there were ‘voluntary surrenders’ where people showed up in their pajamas and with duct tape.”<sup>176</sup>) Critics of this approach say that, even as the government has cooperated with the Tribunal by inducing indictees to surrender, it has “strengthen[ed] the public’s notion of an ‘unjust’ tribunal.”<sup>177</sup>

Serbia has, moreover, failed to arrest and transfer the ICTY’s two most wanted indictees, both of whom were twice indicted on genocide charges in 1995. As noted earlier, one—Ratko Mladić—is known to have been sheltered in Serbia for much of the period since then, drawing a pension until December 2005. Because Mladić is widely reported still to be hiding in Serbia, efforts to secure full Serbian cooperation with the ICTY have focused on his arrest.

Recent reports suggest, however, that the other most wanted ICTY fugitive, former Bosnian Serb leader Radovan Karadžić, may also be in Serbia<sup>178</sup> and has almost certainly been in Serbia since his 1995 indictments.<sup>179</sup> In an interview on Bosnia’s national television in mid-December 2007, the Principal Deputy High Representative of Bosnia-Herzegovina, Raffi Gregorian, said that both Karadžić and Mladić “are in Serbia, and Serbian Prime Minister Vojislav Koštunica can solve the issue of their arrest by one telephone call.”<sup>180</sup>

Koštunica’s practice of securing “voluntary surrenders” of other indictees is part of a broader policy of what he has called “two-way cooperation” between The Hague and Belgrade.<sup>181</sup> Calling for this approach when he was sworn in as Prime Minister of Serbia in March 2004, Koštunica indicated that other elements of the “two-way” relationship he sought would include the ICTY’s willingness to grant provisional release to Serbian indictees, with the Serbian government providing guarantees that they would appear in court when their trials began,<sup>182</sup> and the transfer of cases from the ICTY to local courts in Serbia.<sup>183</sup> In practice, as we discuss below, another key element of the “two-way” relationship that has evolved between The Hague and Belgrade entails ICTY sharing of information with Serbian war crimes prosecutors.<sup>184</sup>

Serbia was rewarded for its late-2004-early 2005 cooperation with the ICTY: In May 2005, the European Union opened Stabilisation and Association Agreement (SAA) talks with Belgrade as a precursor to EU accession.<sup>185</sup> But this round of cooperation, like others before it, was short-lived. “[O]nce the talks were underway, Serbia halted all cooperation with the Tribunal,” wrote Gareth Evans and James Lyon.<sup>186</sup> And so on May 3, 2006, the EU suspended SAA negotiations with Serbia over its failure to cooperate with the ICTY.<sup>187</sup>

Another year went by before Serbia took significant steps to renew its cooperation with the ICTY. Then, soon after a new government was formed following months of difficult negotiations, the relationship between Belgrade and The Hague improved.<sup>188</sup> In early June 2007, ICTY Prosecutor Carla del Ponte visited Belgrade. For the first time, her visit came at the invitation of the government. Less than a week before her visit, authorities in Belgrade and Republika Srpska (the Serb entity in Bosnia-Herzegovina) launched a successful joint operation to arrest the third-most wanted ICTY fugitive, Zdravko Tolimir<sup>189</sup> (though Serbian authorities reportedly obscured the full extent of their role in Tolimir’s apprehension.<sup>190</sup>) Soon after, the EU resumed SAA negotiations with Serbia.<sup>191</sup>

Del Ponte proclaimed her June 2007 visit to Serbia “the best” she had “had in eight years” as ICTY prosecutor, in part because she thought the government would at last arrest Ratko Mladić “within months.”<sup>192</sup> Within weeks of her visit Serbian authorities, reportedly acting on intelligence provided by ICTY staff, played a major part in securing the arrest of another ICTY indictee, Vlastimir Djordjević, who was found in Montenegro.<sup>193</sup> In October 2007, Serbia offered a reward of one million euros (approximately \$1.4 million) for information leading to Mladić’s arrest.<sup>194</sup> But as 2007 drew to an end—along with Del Ponte’s term as ICTY Prosecutor—Serbia had not yet made good on its pledge to arrest Mladić.

Even so, the EU initialed an SAA agreement with Serbia on November 7, 2007. In the following months, there was speculation that the EU might even offer to sign the agreement with Serbia in late January 2008, potentially putting Serbia on a fast track toward membership<sup>195</sup> (a prospect that concerned other countries in the region whose progress through the SAA process had been or was being conditioned on their meeting criteria that now seemed more flexible when it came to Serbia). By January 2008, the Netherlands and Belgium were the only EU Member States still willing to state openly that they would not support signing an SAA with Serbia until Mladić was arrested. Under pressure from other Member States that wanted to move quickly to signing an SAA with Serbia, the two holdouts agreed to support a compromise: On February 7, 2008, the EU would offer Serbia a package of benefits to demonstrate the EU’s good will and signal its intention to move toward signing the SAA in the future.<sup>196</sup>

While the calculations behind these developments were complex, a key factor was many European governments’ desire to offer an inducement to Serbia to accept the inevitable independence of Kosovo at a time when long-protracted negotiations over the territory’s status were exhausted without an agreed solution.<sup>197</sup> (In a move vehemently opposed by Serbia, Kosovo declared independence on February 17, 2008.<sup>198</sup>) A more immediate factor was the EU’s desire

to bolster the more moderate presidential candidate, Boris Tadić, in the lead-up to an early February 2008 run-off election after a strongly nationalist candidate had achieved a plurality in an earlier vote.<sup>199</sup> Although Tadić was re-elected president,<sup>200</sup> Prime Minister Koštunica immediately made clear that Serbia would not sign the agreement the EU had offered, which Koštunica saw as a ploy to induce Serbian acquiescence in Kosovo's independence.<sup>201</sup> Deeply divided, the Serbian government collapsed in March 2008 and scheduled parliamentary elections for May 11, 2008.<sup>202</sup>

In the lead-up to the vote, EU Member States struck another compromise that allowed Serbia's president to sign the SAA on April 29, 2008, with the caveat that implementation would not take place until after the upcoming elections and only after the European Council determines that Serbia has fully complied with its obligation to cooperate with the ICTY.<sup>203</sup> The EU's strategy may have contributed to election results that favored the pro-reformist party of President Tadić.<sup>204</sup> But, journalist Dejan Anastasijević, wrote, "this is not the only fix that Serbia now needs; too many ghosts from the past still haunt the country. Fugitive Ratko Mladić, indicted for the genocide of Bosnian Muslims in Srebrenica, needs to be apprehended and delivered to The Hague."<sup>205</sup>

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Although Serbia's relationship with the ICTY has changed markedly since the Milošević era and has gone through several phases since then, two patterns have remained constant: First, Serbian cooperation with the ICTY, through arrests and provision of documents, has come only in response to intense pressure from Western governments. Second, while cooperation with The Hague is supported by Serbians who occupy the pro-reformist end of the country's political spectrum, there remains a vacuum of political leadership in support of cooperation on moral grounds rather than as a precondition to ending Serbia's continued estrangement from the West. As Serbian human rights lawyer Biljana Kovačić-Vučo observed, "there's no clear message" about the principles underlying ICTY cooperation even among those who support cooperation.<sup>206</sup> Despite overall improvement in Serbian cooperation when measured against the Tribunal's earlier years, a 2004 assessment is equally relevant today: Serbia has yet to "reach a national consensus about interpreting and addressing the consequences of its past"<sup>207</sup>—and, as part of this, about cooperating with the Hague Tribunal.<sup>208</sup>



### III. Benchmarks for Successful Impact in Serbia

The impact of any international criminal court is mediated by local actors, and this factor has been crucially important in Serbia. The preceding overview of Serbia's relationship with the ICTY highlights the views of one manifestly important category of local actors—public officials—whose attitudes toward the Tribunal have been complex and varied but never enthusiastically supportive and, on the part of some, implacably hostile. As noted earlier, at times the government's resistance to cooperation has been partly attributable to some elected officials' desire not to antagonize the segment of Serbian society that is strongly opposed to war crimes prosecutions of Serbian suspects and whose support has at times been thought necessary to form a government. Later we consider how these actors' attitudes and actions have challenged the ICTY's ability to achieve its goals in Serbia and assess how well the ICTY has met this challenge.

In contrast to those actors who have been hostile or at best ambivalent toward the ICTY, a minority of Serbian citizens has championed the court and pressed the government to meet its obligations toward the Hague Tribunal.<sup>209</sup> This segment of Serbian society is no more monolithic in its support for the ICTY than other Serbians are in their ambivalence or opposition. Some enthusiastically embrace the Tribunal even as they recognize flaws in its performance; for many others, the flaws loom large but they nonetheless support the ICTY's



core mission.<sup>210</sup> While our understanding of what would constitute positive “ICTY impact” (or, put differently, Tribunal successes) in Serbia was informed by our interviews with a range of Serbians, the views of those who fundamentally support the Tribunal were especially instructive in this regard.<sup>211</sup>

As will be apparent, in some instances benchmarks of positive impact were identified in terms that also convey a judgment of how well the ICTY has achieved its goals. Thus several sections of this chapter (specifically, Sections A, C, and D) reflect some measure of assessment by our interlocutors as well as their identification of benchmarks of ICTY successful impact. In respect of other benchmarks, such as the ICTY’s impact on domestic war crimes prosecutions and on Serbian society’s acknowledgement of political responsibility for past crimes, we defer until later our assessment of how well the ICTY has achieved these objectives.<sup>212</sup>

## A. Ensuring Prosecution of Atrocious Crimes; Dispelling Impunity

For many of our Serbian interlocutors who support the ICTY, a key purpose advanced by the Tribunal is, quite simply, to ensure that those who are responsible for atrocious crimes are punished—something they do not believe would have happened without the ICTY.<sup>213</sup> In the words of one of our interlocutors in Serbia (and in the view of many), “if The Hague didn’t exist, there would be no trials, no war crimes.”<sup>214</sup>

Several judges at the ICTY expressed a similar sentiment, expressing the view that punishing perpetrators—especially those who bear major responsibility for crimes committed during the conflicts of the 1990s—is one of the principal objectives if not the sole task of the court. When asked to articulate his understanding of the objectives of the ICTY, Judge Fausto Pocar, the current president of the Tribunal, replied: “I would take it that the ICTY was entrusted with prosecuting and holding trials for the main perpetrators ... and that’s the only task.”<sup>215</sup> Although the Security Council may have had other goals, such as fostering “peace, stability and reconciliation,” he continued, the Tribunal itself cannot act as though it has a “political mandate.”<sup>216</sup> His colleague at the ICTY, Judge Theodor Meron, expressed a similar sentiment. In his view, “the primary goal of an international tribunal is to do justice and punish atrocities.”<sup>217</sup>

For some of our Serbian interlocutors who pressed this point, what is important about the ICTY’s work is that it sends a message to the future that atrocious crimes have consequences. Journalist Filip Svarm put the point this way: “The Hague Tribunal demonstrated that not everything can be legalized.”<sup>218</sup> Several ICTY judges whom we interviewed in The Hague made similar points. In the view of Judge Meron, “Ending impunity for the terrible crimes [committed in the former Yugoslavia] was always a primary goal.” And, he added,

“That goal is largely being achieved.”<sup>219</sup> In the view of Judge Wolfgang Schomburg, “By the very existence of the Tribunal, the culture of impunity has found an end.”<sup>220</sup> Judge Schomburg elaborated: The ICTY is “fulfilling for the first time in history in the area of our responsibility the promise enshrined in Article 14 of the International Covenant on Civil and Political Rights ... that ‘All persons shall be equal before the courts and tribunals.’ There are no longer untouchables!”<sup>221</sup>

Serbian human rights lawyer Bogdan Ivanišević likewise believes that the ICTY has helped dispel impunity in Serbia, and emphasized what he believes would have happened if the ICTY had not been created. Convinced that there would have been no prosecutions of war criminals in Serbia were it not for the ICTY, he insisted that its work “is important for its own sake, because of justice. Because the message otherwise will be one can do whatever he wants to do because he’s in power and that’s it. That kind of message would be disastrous. The ICTY prevented that from happening.”<sup>222</sup> Another human rights professional, Andrej Nosov, emphasized the importance of prosecuting former Yugoslav leader Slobodan Milošević in particular. By doing so, he said, the Hague Tribunal helped the Serbian public understand that “there is no one who can order killings and stay unpunished.”<sup>223</sup>

Goran Svilanović, who served as Foreign Minister under the Djindjić government and headed the government’s state council for coordination with the ICTY, believes that Milošević “would never be prosecuted here”—i.e., in Serbia, if he had not been transferred to The Hague. But Svilanović cautioned against an approach that becomes so focused on trying individuals that the broader aims of prosecution are lost. “Basically, I thought [the ICTY] was there not only to bring several tens of people to jail, but there was an idea behind it,” he told us.<sup>224</sup> In his view, the idea behind the Tribunal is that prosecutions would help inspire Serbian society “to discuss the crimes” and affirm that “this should never happen again.”<sup>225</sup>

Journalist Dejan Anastasijević emphasizes the broadly corrosive impact of failing to punish war crimes: “When a crime occurs and it’s unpunished,” he said,

a hole is opened in the fabric of society, like a hole in your stocking. If it’s left unattended, it tends to spread all over.... Because if it’s OK to kill or rape a human being because the victim is a member of a community which we tend to see as our enemy, where do we draw the line?<sup>226</sup>

Anastasijević recalled a case in which a drug dealer had defended himself on the ground that he was trafficking heroine to “get even” with North Atlantic Treaty Organization countries that bombed Serbia in 1999. Anastasijević summarized the dealer’s claim—“They gave us bombs, we gave drugs to their children”—and observed: “Once a crime is justified for patriotic reasons, you can put that label on anything. Not processing war crimes right away creates an atmosphere of impunity that tends to spread to the whole society.”<sup>227</sup>

## B. Addressing the Past

Many of the Serbian citizens we interviewed who support the ICTY are deeply devoted to the principle that Serbian society as a whole must acknowledge that atrocities were committed in its name and that they were not justified. These Serbians believe that the ICTY plays a crucial and necessary role in this process. (None, however, believes that the Tribunal bears sole or even principal responsibility for advancing processes of national reckoning.)

A first step toward the kind of broad acknowledgment these citizens seek is public knowledge. Thus one of our interlocutors, Ana Miljanić, suggested that a key measure of ICTY success would be that “people remember over time things that were brought into public knowledge by the ICTY’s work.”<sup>228</sup> In her view, a closely related objective is “to promote the ethical message, however difficult.... What people thought boring is becoming crucial, and it’s basic principles of international justice—questions of impunity [and] command responsibility.”<sup>229</sup>

Explaining why they believe it important for their compatriots to accept the facts established in The Hague, some Serbian citizens who support the ICTY link this type of acknowledgment to Serbia’s democratic transition. The Humanitarian Law Center, a leading non-governmental human rights organization in Serbia, believes that “Serbia’s political system ... can invigorate its democratic culture only in so far as it has created room for memory of ‘that past’” and believes that cooperation with The Hague is a key component of this process.<sup>230</sup>

This is not to say that Serbians who believe it is important to confront the past invariably support the ICTY for that reason. Twenty-nine percent of respondents in a public opinion survey taken in December 2006 said they thought it was important to “face the truth and accept our share of responsibility”<sup>231</sup> for war crimes, while only 15 percent said that Serbia should cooperate with the ICTY “to achieve justice.”<sup>232</sup> Still, in our own interviews Serbians who support ICTY cooperation for principled rather than pragmatic reasons often cited as their reasons the contribution of ICTY prosecutions to Serbia’s process of reckoning with past atrocities.

Ivan Janković, an attorney who characterized the ICTY’s role in educating Serbians about crimes committed by their leaders as “extremely important,” explained why in terms that emphasize Serbia’s capacity to function as a mature democracy: “If they’re not informed, the public will not be aware of crimes [which is necessary] in order to make correct choices” as citizens.<sup>233</sup> Still, as we note later, some of our interlocutors believe that ICTY prosecutors and judges have at times veered too far into the province of historians.<sup>234</sup>

To the extent that, in the view of many Serbian supporters of the ICTY, one of the Tribunal’s most important functions is to advance public acknowledgment and condemnation of Milošević-era crimes, the Tribunal’s greatest challenges are presented by those sectors of Serbian society that still need to be convinced. In later chapters we address the Tribunal’s effectiveness in meeting these challenges, and assess the degree to which Serbian society has acknowledged that indefensible crimes were committed in its name.<sup>235</sup>

## C. Reconciliation

A significant number of interviewees who support the ICTY believe that its work is essential to long-term reconciliation<sup>236</sup> and stability, even if in the short term it “can have negative effects on stabilization.”<sup>237</sup> Recalling how former President Milošević and other nationalist leaders manipulated the past to foment ethnic violence in the 1990s, they believe that “if you don’t have justice, you can always manipulate the past ... A lot of space is left for manipulation, [as happened] after the Second World War. You have different historiographies.” But “once you have a sentence by a legal authority, you have firm ground [for discussion].”<sup>238</sup>

But, we asked, why should the ICTY play this role? Human rights activist Andrej Nosov responded succinctly: “There is no better.”<sup>239</sup> As already noted, many of our interlocutors in Serbia believe that, if the ICTY had not been established, a legal reckoning for atrocities committed in the 1990s would not have occurred in Serbia, at least not “for a long time to come.”<sup>240</sup> And, Nosov insists, without justice there can be no lasting peace.<sup>241</sup>

By its nature, the claim that ICTY prosecutions will serve the interests of long-term reconciliation cannot be tested now.<sup>242</sup> But twentieth century Yugoslav history provides a basis for this claim: Although Yugoslavia’s distinct ethnic groups committed mass atrocities against each other during World War II, the country’s leader, Josip Broz Tito, “largely dispens[ed] with war crimes trials like those the Allies convened at Nuremberg.”<sup>243</sup> The few trials carried out in post-war Yugoslavia were controversial; critics believed that Tito’s real motive in prosecuting the two most prominent post-war defendants was to silence opponents of the Communist government.<sup>244</sup> Against this background, nationalist leaders in the former Yugoslavia were able to tap a deep reservoir of latent inter-ethnic fear and foment violence during the 1990s.

## D. Removing Criminals from the Region

As many of our interlocutors noted, it is still too early for anything like a final assessment of the ICTY’s impact. But some noted that the Tribunal has already been at least partially successful in one respect—“physically removing some of the worst criminals”<sup>245</sup> from the region. Describing this as an important role of the Tribunal “that is usually neglected by experts,” journalist Dejan Anastasijević observed: “It was good not to have them around, at all levels.”<sup>246</sup> In fact, Anastasijević says, Milošević’s indictment in 1999 helped bring about Serbia’s transition to a democratically-elected government the following year.<sup>247</sup> Another Serbian journalist, Filip Svarm, believes that if the country’s leading war criminals had not been prosecuted, “we would have had a mafia oligarchy as our leaders.”<sup>248</sup>

From the vantage point of the post-Milošević government, according to a former official in the Djindjić administration, Dušan Protić, the “removal of Milošević was something that had to be done in order to make the next step in our democratization process. He would have been an unbearable burden [if he were tried] in Serbian jurisdiction. The government probably felt, ... they can handle him [in The Hague]; we cannot.”<sup>249</sup> As noted earlier, former Foreign Minister Goran Svilanović, who handled the Serbian government’s negotiations with the Hague Tribunal during the period of the Djindjić government, believes that “if Milošević had not been extradited, he would never be prosecuted here.”<sup>250</sup>

Not everyone agrees. Radmila Nakarada believes that, “If Milošević had remained, he would have likely been prosecuted here. There was a widespread feeling that what he did was very painful for his citizens—that was in the air.”<sup>251</sup> Others, however, emphasize the risks to which Protić alluded. For example, noting that “some say [Milošević] should have been tried in Belgrade,” journalist Antonela Riha commented: “If that happened, there would be thousands outside [the courthouse]. That would be a mess. He’d be even more of a hero if he were tried here.”<sup>252</sup> Describing Djindjić’s decision to transfer Milošević to the ICTY as “maybe the most important decision” made by the late prime minister, Riha added: “He [i.e., Milošević] may be in a cave, but you never know when he’ll come out.”<sup>253</sup>

While many Serbians believe their country still cannot handle the most controversial war crimes cases, there is some divergence of views among these individuals about which cases belong in The Hague. Ana Miljanić wonders whether the ICTY’s current prosecution of one high-profile Serbian defendant, Serbian Radical Party leader Vojislav Šešelj, may have boosted his stature. “Being prosecuted in The Hague means you’re special,” Miljanić says, and “this helped mystify [Šešelj].”<sup>254</sup> Asserting that the “Šešelj case so belonged in Belgrade,” Miljanić nonetheless noted that the local “War Crimes Chamber didn’t want him prosecuted here.”<sup>255</sup> (Indeed, the Serbian War Crimes Prosecutor told us that he believed it would be destabilizing to try Šešelj in Belgrade.<sup>256</sup>)

## E. Strengthening the Rule of Law by Enhancing Local Justice in War Crimes Cases

As we elaborate more fully below, our interlocutors in Serbia credit the ICTY with mixed success so far in meeting some of these goals. But when it comes to another dimension of impact—enhancing Serbia’s domestic capacity to prosecute war crimes cases—virtually all of our Serbian interlocutors, including those who have otherwise been at best ambivalent about the Tribunal, consider the ICTY’s contributions to be significant.

Almost everyone we interviewed in Serbia praised the ICTY’s role in the establishment in 2003 of a War Crimes Chamber in the District Court of Belgrade and in strengthening its

capacity to investigate and prosecute war crimes. Notably, people who were otherwise largely critical of the ICTY believe that it deserves substantial credit for this development; some said that if this were the ICTY's only accomplishment, it would be a major contribution.<sup>257</sup>

Important in its own right, this development has affected other aspects of ICTY impact considered in this report. Accordingly, we address this subject first in the section that follows.



## IV. Strengthening the Rule of Law by Enhancing Local Justice in War Crimes Cases

Among the justifications cited by the Security Council when it established the ICTY, advancing the capacity of local courts to dispense justice did not even merit consideration.<sup>258</sup> Indeed, the Tribunal was established in large part because local courts could not be trusted to prosecute war crimes impartially, if at all. And so it comes as something of a surprise that one of the ICTY's most widely-acknowledged, if nonetheless limited, achievements in Serbia has been its role in spurring the creation of a local war crimes court and helping to empower that court to function professionally.

### A. Establishment of the War Crimes Chamber

Along with a separate chamber that deals with organized crime, the War Crimes Chamber (WCC) was established as a specialized component of the Belgrade District Court. The WCC was established pursuant to legislation enacted on July 1, 2003,<sup>259</sup> which also established the position of Prosecutor for War Crimes<sup>260</sup> and a special War Crimes Investigation Service in Serbia's Ministry of the Interior.<sup>261</sup> This law gave the WCC exclusive responsibility for



prosecutions involving war crimes, crimes against humanity and genocide instituted after the law was enacted; other Serbian courts that had begun such trials would complete the cases they had initiated.<sup>262</sup> Pursuant to this law, in July 2003 the National Assembly elected<sup>263</sup> Vladimir Vukčević, at that time the Deputy Public Prosecutor of the Republic of Serbia, as Prosecutor for War Crimes. The WCC began operating in October 2003<sup>264</sup> and started its first trial in March 2004.

## 1. The ICTY's Role in the Establishment of the WCC

In contrast to the War Crimes Chamber of Bosnia, which was created with the direct involvement of the ICTY,<sup>265</sup> the ICTY did not play a formal role in establishing the Serbian WCC or the office of the War Crimes Prosecutor.<sup>266</sup> Nor does the War Crimes Prosecutor “think the Hague Tribunal had anything to do with the establishment of [his] office.”<sup>267</sup> Instead, he told us, “after the democratic changes in our country the new democratic authorities wanted to do away with both organized crime and war crimes.”<sup>268</sup>

Everyone we interviewed about this question shares Vukčević's belief that the change in government following the fall of Milošević was crucial to the WCC's creation. But almost everyone else insisted that the WCC “wouldn't exist but for the ICTY,”<sup>269</sup> “at least not at this point.”<sup>270</sup> As indicated earlier, many of our interlocutors believe that if the ICTY had not been created, “no one would ever actually bring to trial anyone who committed [war] crimes.”<sup>271</sup> In this view, the ICTY's operation provided the context in which it became possible for Serbia to assume a serious role in prosecuting 1990s-era atrocities.

Dušan Protić, who served as Deputy Minister of Justice in the Djindjić government, explained his government's approach to war crimes prosecutions and its understanding of how the ICTY advanced its aims in this regard. With respect to the first point, Protić described two principal concerns motivating his government to address Serbian war crimes: “We really thought that this was a shame, something we have to bring to the surface.”<sup>272</sup> In addition, the Djindjić government believed that “addressing this problem” was important to its goal of advancing Serbia's “integration in the West.”<sup>273</sup>

But when the government entered office, Protić continued, “we were all aware that our judicial system is fragile and not capable of dealing with these issues” and believed it necessary to create “specialized judicial institutions to deal with these crimes, ... to focus the capacity we had toward one point.”<sup>274</sup> During that period, Serbia and Montenegro's minister of justice, Vladan Batić, initiated plans to establish specialized courts to deal with both organized crimes and war crimes.<sup>275</sup> In this setting, according to Protić, the government saw the ICTY as “very useful” in helping to create a political space for Serbia to deal with “the burden of war crimes in all its dimensions.”<sup>276</sup>

In the view of Ivan Jovanović, National Legal Advisor to the Organization for Security and Co-operation in Europe (OSCE), the Djindjić government's initiative reflected “good-faith

plans for laying down the foundation for a better society not based on lies” about Serbian crimes. There was, he believes, “a genuine willingness to establish the truth, to bring Serbian perpetrators to justice before Serbian courts, to reach a higher level of self responsibility and self-criticism through war crimes prosecutions.”<sup>277</sup> But there was not a “sufficient shift of political elites” to enable the government to implement plans for local war crimes prosecutions during Djindjić’s lifetime.<sup>278</sup>

A confluence of other interests and developments eventually made it possible to establish the WCC even in the face of continuing opposition from extreme nationalists. To begin, the assassination of Zoran Djindjić in mid-March 2003 provided crucial impetus for adopting the law establishing the WCC.<sup>279</sup> That law was adopted during the period of reformist advances that followed Djindjić’s assassination.<sup>280</sup> Even in this comparatively supportive environment, strong encouragement from other governments and international organizations apparently was needed to bring the law establishing the WCC over the legislative finish line.<sup>281</sup>

But the WCC still faced opposition from some sectors of government and the Serbian public.<sup>282</sup> Batić’s successor as Minister of Justice, Zoran Stojković, openly opposed its creation and at one point sought the Prosecutor’s ouster.<sup>283</sup> Describing the political environment in which he took office, Vukčević told a reporter:

At that time there was no political will and consensus for the prosecution of war crimes, that is for sure; the contrary was the case: there was resistance, the public opinion was still thinking that the Serbs were attacked, that we led a defensive war and that all those who took part in it were patriots.<sup>284</sup>

Recalling this period, Vukčević told us that what he needed at the time he began functioning as War Crimes Prosecutor was “international support, because here I encountered a great deal of resistance by the Executive Branch.”<sup>285</sup>

In this environment, some sectors of the government of Serbia and Montenegro as well as the public came to support local prosecutions for reasons that relate directly to the ICTY. At a time when the ICTY had begun to implement its completion strategy, a key component of which was transferring some of its pending cases to local courts, Serbia and Montenegro hoped that the Tribunal would transfer cases against Serbian defendants to its courts. But the Tribunal would do so only if it had confidence in the fairness of those courts.<sup>286</sup> Prime Minister Koštunica also sought to convince the Tribunal that Serbia could handle prosecutions of certain indictees who had not yet been transferred to The Hague.

Similar sentiments may have paved the way for public acceptance of domestic war crimes prosecutions. A public opinion survey taken in late 2004 disclosed that, while only 57 percent of Serbians polled believed that national courts were ready to prosecute war crimes cases,<sup>287</sup> 71 percent believed that it would be better to institute such prosecutions in local courts than in The Hague.<sup>288</sup> Thus anti-Hague sentiment may have helped foster a more receptive

attitude toward domestic war crimes prosecutions than would have been possible without the ICTY.

Once the WCC began operating, the ICTY provided another incentive for the new court to provide a credible process of prosecutions: As a matter of “professional pride,” some parts of the government “wanted to show that they could” prosecute war criminals proficiently.<sup>289</sup> By his own account, this was a key (but not the only) motivating factor behind Vukčević’s decision to accept the job of War Crimes Prosecutor despite the deficit of political support he confronted early in his tenure.<sup>290</sup> The fact that Serbian war crimes are prosecuted before an international court, in Vukčević’s view, places Serbia on the same level as war-ravaged countries whose legal systems he believes are far less developed.<sup>291</sup> Thus, while genuinely troubled by his compatriots’ treatment of war criminals as heroes,<sup>292</sup> Vukčević also accepted the position of War Crimes Prosecutor “to show that local courts can handle these cases”<sup>293</sup> and “because of the fact that the only alternative ... is The Hague Tribunal.”<sup>294</sup>

Beyond the particular ways in which the ICTY provided an incentive for Serbian courts to take up war crimes prosecutions, perhaps the Tribunal’s most important contribution was that of beginning the process of legal reckoning at a time when local trials were not possible in Serbia. Bruno Vekarić, the War Crimes Prosecutor’s spokesman and a former member of the Djindjić government, summarized the ICTY’s role vis-à-vis local prosecutions this way:

The Hague Tribunal was the necessity of the moment during Milošević [because there was no will to prosecute crimes in Serbian courts]. I do believe it was exactly through the Hague Tribunal that the process of facing the past was initiated in the states of the former Yugoslavia.<sup>295</sup>

Judge Siniša Važić, the President of the WCC, describes the ICTY as “the embryo” for his court. He explains: “Everyone learned from [the ICTY both] as an idea and as know how.”<sup>296</sup>

## **2. The ICTY’s Impact on the Operation of the WCC**

If the Tribunal was the “embryo” from which the WCC evolved, its transfer of “know how” and other resources has had a significant impact on the chamber’s actual operation.<sup>297</sup> While these contributions take myriad forms, the most important are training and transfer of evidence.

### ***a) Transfer of Evidence***

Under Rule 11bis of the ICTY’s Rules of Procedure and Evidence, the Tribunal can refer to state courts cases involving mid- and lower-level suspects whose indictments have already

been confirmed but whose trials have not yet begun in The Hague. The ICTY has transferred to Serbia only one *11bis* case, which involved an indictee who had previously been granted provisional release in Serbia on mental health grounds.<sup>298</sup> The Tribunal's failure to transfer other *11bis* cases to Serbia reflects, among other considerations, the ICTY's general preference for transferring cases to the state in whose territory the crimes charged by the Hague Prosecutor were committed<sup>299</sup>—a policy that has in practice led the ICTY to transfer *11bis* cases to Bosnia and Herzegovina in particular and, in one instance, to Croatia.

But, as one observer noted, this should not detract from “what has happened: the transfer of a wealth of information from non-indicted cases.”<sup>300</sup> The ICTY has referred to Serbia at least two major cases that had been under investigation but had not yet resulted in an indictment in The Hague; in doing so, then ICTY Prosecutor Carla del Ponte provided to her Belgrade counterpart evidence that her office had gathered in its own investigations.<sup>301</sup> The War Crimes Prosecutor's office also has access to the ICTY Prosecutor's data base, which, according to Vukčević, “has facilitated our work.”<sup>302</sup> (The transfer of information may now be occurring in two directions: In a May 2008 report to the UN Security Council, ICTY Prosecutor Serge Brammertz noted that the Serbian War Crimes Prosecutor has provided his own office “evidentiary material from ongoing trials before the War Crimes Chambers in Belgrade.”<sup>303</sup>)

Pursuant to an amendment to the law establishing the WCC enacted in December 2004, evidence collected by the ICTY can “upon its transfer be used as evidence in the criminal proceedings before the” WCC.<sup>304</sup> In the view of OSCE legal advisor Ivan Jovanović, “this was one of the main advances in the Serbian legal system.” The rationale for this amendment, Jovanović explains, is that Serbian prosecutors “won't waste time if there's good evidence” already available thanks to ICTY investigative efforts.<sup>305</sup>

Although it is not yet clear “to what extent ICTY evidence [can] be used in court in non *11bis* cases,”<sup>306</sup> well-informed observers believe that evidence provided by the Hague prosecutor's office was crucial to the early investigations of the Office of the War Crimes Prosecutor, particularly in light of Serbian police investigators' reluctance to assist the prosecutor.<sup>307</sup> And while Vukčević understandably emphasizes his office's ability to take investigative work well beyond that undertaken by the ICTY,<sup>308</sup> he noted in an interview in November 2006 that until recently, Serbian authorities did not have access to evidence in neighboring countries where crimes occurred, and thus the ICTY had been able to gather evidence Serbian prosecutors could not have obtained directly.<sup>309</sup> In short, the ICTY provided hard evidence that the War Crimes Prosecutor's office was able to “own” and build upon in its earliest cases.

Nataša Kandić, who has worked closely with both the ICTY and the WCC, believes that case files provided by the former not only provided crucial evidence for local cases but also bolstered the resolve of local prosecutors. In her view, local prosecutors “were afraid, but faced with documentation, they said [to themselves] ‘it's horrible what Serbs did to others’” and were motivated to overcome their fear and pursue investigations.<sup>310</sup>

Along with other forms of collaboration, this type of information-sharing has fostered what Kandić (and others) call “a partnership” between the two war crimes courts.<sup>311</sup> The Prosecutor, President, other officials at the WCC and informed observers extolled the “great cooperation” between the WCC and the ICTY. Against the background of over a decade of highly public antagonism between The Hague and Belgrade, this is itself a striking development.

#### *b) Transfer of “Know How”*

In the view of many interviewees, the ICTY has made just as important a contribution to the WCC through its transfer of expertise and the model of fair process it has provided. The ICTY has participated in training programs for Serbian war crimes prosecutors and judges, many of which have been organized by other institutions and governments<sup>312</sup> and some of which have taken place at the ICTY.

According to WCC President Siniša Važić, every judge in the chamber had visited the ICTY two or three times by November 2006.<sup>313</sup> Programs have included training in substantive areas of international criminal law, such as the law of the 1949 Geneva Conventions, principles of command responsibility and other forms of criminal responsibility.<sup>314</sup> Both Važić and another judge we interviewed described these trainings as very useful. (A report by the International Center for Transitional Justice notes, however, that in the two written opinions the WCC had issued by August 2007, it had “made no use of ICTY jurisprudence concerning issues of substantive law.”)<sup>315</sup>

In contrast, however, the War Crimes Prosecutor spoke of training programs in which ICTY personnel participated as well as other encounters with ICTY prosecutors for the most part disdainfully. Proud of what he considers his and his staff’s superior expertise, Vukčević said that his first experience with Hague prosecutors was “shocking, because they had no idea of the extent of our professional knowledge.”<sup>316</sup> In his view, “their discussions indicated that they didn’t believe we knew anything about different legal doctrines, such as command responsibility.”<sup>317</sup> But Vukčević conceded that some of the training seminars he and his staff attended “have been relatively successful and useful.”<sup>318</sup>

Alexandra Milenov, who represented the ICTY Registry in Belgrade for four years, has a different impression. Noting that some of the Belgrade prosecutors had not traveled abroad before they visited The Hague to participate in ICTY training programs, she observes that their professional interaction with ICTY judges “did wonders for local prosecutors’ self-confidence.”<sup>319</sup>

Perhaps the most tangible manifestation of the ICTY’s transfer of “know how” has come in the form of procedural innovations adopted in Serbia that were inspired by the ICTY. Describing the influence of Hague procedures on local war crimes law, Judge Važić said, “We took a lot of provisions” from the ICTY, such as those authorizing the use of video links

that enable witnesses living in other countries who are afraid or unable to testify in Serbia to provide testimony from afar<sup>320</sup> and preparing both audio recordings and transcripts of trial proceedings.<sup>321</sup>

Other contributions, Judge Vazić said, include the transfer of “skills, knowledge and technical gadgets”—the last category principally entailing computerization of WCC facilities.<sup>322</sup> Another judge on the Belgrade District Court cited as particularly valuable ICTY training geared at improving investigative skills and at introducing judges to “judicial techniques” in such areas as handling proof and “how to treat the victims.”<sup>323</sup>

Others also singled out for special praise the model and training that the ICTY has provided for dealing with witnesses in war crimes cases. Ivana Ramić, spokeswoman for the Belgrade District Court and the WCC, told us that her court “got the idea to establish” its own victim and witness support unit from a conference in Sarajevo organized by the ICTY’s Victim and Witness Support Unit (VWSU)<sup>324</sup> and reported that “we have very good cooperation with the VWSU of the ICTY.”<sup>325</sup> Members of the Serbian unit have received training at the ICTY.<sup>326</sup>

Beyond the direct transfer of “know how” from The Hague to Belgrade, several of our interlocutors believe that the ICTY has provided Serbian courts an inspirational model of fair process. Nataša Kandić, who organized some judicial training programs for WCC judges in The Hague, believes that Serbian judges took home a lesson in judicial independence. “Before,” she said, “it was usual to see judges and prosecutors discussing cases. Now you don’t see that”—a change she attributes to Serbian judges observing “how far judges are from prosecutors” during their visits to the ICTY.<sup>327</sup>

Although critical of the ICTY in many respects, Ljiljana Smajlović, a Serbian journalist who has covered the ICTY, believes the Tribunal has “taught the public what defendants are entitled to [and] this is a positive impact.”<sup>328</sup> Having grown accustomed to procedural guarantees she observed while covering the Milošević trial in particular, Smajlović told us she was “flabbergasted by the different quality” of Serbian courts when she observed a high-profile case back home. Describing this aspect of the ICTY proceedings as “a civic education,” Smajlović noted: “Now it seems intolerable not to have words recorded” in local trials and describes the WCC’s emulation of the ICTY practice of audiotaping court proceedings as “marvelous.”<sup>329</sup> In larger perspective, Smajlović said, “Our wits were sharpened by watching those proceedings [in The Hague]—and we were educated.”<sup>330</sup>

Ivan Janković, an attorney, foresees “another beneficial effect” of the ICTY on Serbian legal proceedings. Noting that a significant number of Serbian lawyers have now defended clients in The Hague, Janković believes that many of them

learned a lot from the Tribunal (and of course many didn’t), and that effect is very long term. We will see it in domestic cases that have nothing to do with war crimes. It’s a critical spillover effect.<sup>331</sup>

Others note a broader spillover effect. Sonja Prostan, who serves as a judge in the Second Municipal Court of Belgrade, notes that procedural innovations inspired by the ICTY, ranging from witness protection measures to status conferences aimed at improving the efficiency of trial proceedings, have not only been followed in WCC proceedings but also have been “implemented in the new criminal procedure code” of Serbia.<sup>332</sup>

## B. Assessing the WCC

This is not the place for an in-depth evaluation of the WCC<sup>333</sup> but a preliminary review is necessary to assess the nature of the ICTY’s impact on local war crimes prosecutions. Although, as we explain below, the WCC’s record to date is mixed, it represents a continuation of progress that began after the change of government in 2000 and significant progress compared to the period before 2000. Until the WCC began operating, FRY courts had prosecuted only a handful of war crimes cases stemming from the 1990s conflicts<sup>334</sup> and these typically involved “ordinary soldiers or lower-ranking officers.”<sup>335</sup> Those convicted of war crimes generally were punished with low sentences.<sup>336</sup> Describing prosecutions during the Milošević era, the Belgrade-based Humanitarian Law Center writes that “crimes committed against [non-Serbs] could not be tried in a professional and an impartial manner in Serbia.”<sup>337</sup> Dušan Protić, who served as Deputy Minister of Justice in the Djindjić government, summarized the Milošević-era cases this way: “[T]hese were not success stories, they didn’t meet the expectations of anyone involved.”<sup>338</sup>

This pattern began to change during the Djindjić-Koštunica government. Two trials before the Belgrade District Court that were instituted after the fall of Milošević, both of which resulted in convictions and imposition of the maximum prison term, reflected some progress in the capacity of Serbia and Montenegro (SaM) to conduct credible war crimes prosecutions.<sup>339</sup> But these cases also demonstrated continuing limits on SaM’s political will to prosecute those bearing superior responsibility for war crimes.<sup>340</sup> Moreover the Supreme Court quashed the verdicts in both cases, though it affirmed the same sentences in both cases following retrial.

Similar limits persist in prosecutions before the WCC, which have not yet targeted anyone in a senior position. Many of our Serbian interlocutors noted that the War Crimes Prosecutor operates within a limited political space,<sup>341</sup> which has prevented him from going “all the way up the food chain.”<sup>342</sup>

Non-governmental organizations have criticized the War Crimes Prosecutor not only for limiting indictments to lower-level perpetrators, but also for obscuring links between the acts of these defendants and policies instituted by state institutions in his framing of indictments and presentation of evidence at trial.<sup>343</sup> As we note below, a verdict rendered in April 2007 in the *Scorpions* case elicited similar concerns, this time directed at the presiding judge. Public opinion surveys are consistent with the views expressed by our Serbian interlocutors.

In a survey undertaken in December 2006, only a quarter of those polled said they thought the War Crimes Prosecutor would act independent of political pressures.<sup>344</sup>

In the view of Bruno Vekarić, the spokesman for the War Crimes Prosecutor, the “strongest pressures” come from “the political zone, particularly the Serbian Radical Party” (SRS), whose past or current members figure prominently among those accused of war crimes. Vekarić described frequent verbal attacks by SRS members of the Serbian Parliament.<sup>345</sup> Moreover, because of the “delicate nature of this issue,” Vekarić told us in November 2006, many other politicians avoid supporting [the War Crimes Prosecutor] publicly.”<sup>346</sup> In a separate interview, Vekarić acknowledged that objections relating to the prosecutor’s failure so far to indict people in a superior position were “well grounded,”<sup>347</sup> while nonetheless insisting that some of those who have been brought to justice occupied relatively senior positions and promising higher-level indictments in the future.<sup>348</sup>

The War Crimes Prosecutor, Vladimir Vukčević, told us he believes there is a “kind of obstacle we would meet if we made cases against the most senior officials—we would be exposed to great pressures by the public.”<sup>349</sup> Vukčević speculated that “we would probably have 5,000 people demonstrating” if SRS leader Vojislav Šešelj, who is on trial in The Hague, were prosecuted before the WCC. But, Vukčević said, with the possible exceptions of what he believes would be a strong public backlash if his office sought to prosecute ICTY suspects Šešelj and Ratko Mladić, his office does not face insurmountable political pressures and obstacles today.<sup>350</sup>

Also troubling is the relatively small number of cases prosecuted to date by the War Crimes Prosecutor. While the advent of the WCC has seen more prosecutions in Serbia of Serbian suspects for war crimes committed against non-Serbs compared to previous years, the number of prosecutions mounted to date is not particularly impressive for a court that is dedicated solely to prosecuting crimes of this nature.<sup>351</sup>

Some observers have noted that cases tried before the WCC have been initiated primarily on the basis of evidence provided by other sources, including the ICTY, the Humanitarian Law Center, prosecutors from Bosnia and Croatia<sup>352</sup> and, in a case involving war crimes allegedly committed by Serbian police officers against three brothers who possessed U.S. citizenship, the U.S. Embassy in Belgrade. Relying—at least initially—on evidence already developed to initiate cases that are inherently complex is not itself problematic. As noted earlier, receiving compelling evidence from the ICTY may have helped bolster the resolve of Serbian war crimes prosecutors to pursue their first cases seriously. Still, to the extent this pattern were to remain characteristic of Serbian war crimes prosecutions, it may reflect a more systemic problem—the WCC’s dearth of resources relative to the nature of its mandate.<sup>353</sup>

Another significant impediment has come from police investigators. As noted earlier, the law establishing the WCC provides for a War Crimes Investigation Service within the Ministry of Interior that “shall act on requests of the Prosecutor for War Crimes.”<sup>354</sup> According to several sources interviewed in late 2006, this unit had not been willing to take initiative



in investigating war crimes, instead responding to specific requests from the War Crimes Prosecutor without going any farther than the literal confines of those requests.<sup>355</sup> For awhile, a key reason for its reticence may have been that the first two heads of this unit were themselves implicated in war crimes or closely linked to individuals responsible for such crimes.<sup>356</sup> Ivan Jovanović, whose organization (the OSCE) monitors trials before the WCC, explained the underlying dynamic this way:

Since war crimes committed in Kosovo were committed mainly by regular police forces or paramilitary attached to the police, [this arrangement] means that police are investigating their colleagues, which leads to blockades.... There's a tendency to focus on courts, but they're just at the end of a chain of responsibility which starts with the police. The police are a weak if not the weakest link in the chain.<sup>357</sup>

But, Jovanović added in late 2006, this situation may be “changing for the better.”<sup>358</sup> When interviewed in June 2007, Jovanović said he believed that the Prosecutor now has “better control” over the investigation unit than during the initial stage of his mandate.<sup>359</sup> At the same time, the unit was showing more initiative.<sup>360</sup> According to a deputy war crimes prosecutor interviewed by the International Center for Transitional Justice in April 2007, the unit “provided solid assistance in amassing evidence on a major war crime in Kosovo.”<sup>361</sup>

At the other end of the chain of responsibility, the Supreme Court of Serbia has quashed a majority of war crimes convictions rendered in recent years that it has had the opportunity to review.<sup>362</sup> In contrast to the trial judges of the WCC, whom the Humanitarian Law Center has praised for “their clear impartiality, professionalism, and commitment to the law”<sup>363</sup> (though, as noted below, this assessment predated the WCC’s controversial judgment in the *Scorpions* case), the Supreme Court has been criticized by local and international non-governmental organizations and others. Nataša Kandić describes the Supreme Court’s approach to war crimes trials as “political” and believes that its judges want “to show the new judges [on the War Crimes Chamber] that it won’t be easy to hold war crimes trials.”<sup>364</sup> With others, Biljana Kovačević-Vučo, Director of the Lawyers Committee for Human Rights in Belgrade, faults the reasoning of the Supreme Court in decisions overturning war crimes verdicts as poorly reasoned and ill-founded.<sup>365</sup>

Some believe that the Supreme Court’s propensity to overturn war crimes verdicts (as well as verdicts rendered by the special chamber for organized crime) is partly attributable to the fact that many of its members were Milošević-era appointees;<sup>366</sup> several observers speculate that another contributing factor might be that the Supreme Court was not included in initial discussions concerning establishment of the specialized chamber.<sup>367</sup> Some, however, believe that differences between judges serving on the Supreme Court and those on the WCC have been overstated.<sup>368</sup> Even so, they believe, the Supreme Court may be overly cautious when it comes to highly complex cases or cases in which the maximum penalty was imposed, pre-

ferring to send these cases back to the trial level in case of doubt about some aspects of the original trial verdict.<sup>369</sup>

These limitations are substantial and troubling. Even so, the record of the WCC contrasts positively with Milošević-era war crimes prosecutions. Between 1996 and 2002, only six war crimes cases were instituted in FRY/Serbia and Montenegro.<sup>370</sup> In the first three years of its operations, the WCC instituted the same number of prosecutions<sup>371</sup> and significantly more investigations are under way. By the end of 2007, all but one of its cases involved Serbian perpetrators accused of crimes against non-Serb victims and substantial sentences have been passed against those convicted. And while the Supreme Court is prone to quash war crimes verdicts, verdicts invalidated by the Supreme Court have typically been reinstated upon retrial and then sustained on appeal before the Supreme Court—though the damage done by its reversal of the first-instance verdicts in the eyes of victims may be hard to undo.<sup>372</sup>

In late 2006, and despite her previously-noted concerns, Nataša Kandić described trials before the Belgrade WCC as “probably the best in the region.”<sup>373</sup> In a preliminary assessment, the Humanitarian Law Center (HLC) that Kandić leads found that WCC “judges have so far manifested a high level of professionalism and considerably improved the quality of war crimes prosecutions compared with the previous period.”<sup>374</sup> In December 2006, HLC wrote that judges in the WCC

are loyal to the law and show utmost respect for both victims’ rights and rights of the accused. In the course of all war crimes trials to date as well as the current trials known to the public ... the judges were guided by facts and evidence trying to shed light on the context behind the events and thus complete the picture of the responsibility or innocence of the accused.<sup>375</sup>

But Kandić and others strongly criticized a verdict issued on April 10, 2007 in a case that was instituted following the release of a video showing Serbs shooting Muslim victims near Srebrenica at the time of the genocidal massacre there. Two of the four defendants received the maximum sentence of 20 years but two others received sentences of 13 and five years, respectively; a fifth was acquitted.<sup>376</sup> Although relatives had testified that the victims were in Srebrenica until the July 1995 genocide, when they were bussed to a nearby town to be executed,<sup>377</sup> the presiding judge said it was not clear they had come from Srebrenica<sup>378</sup> or were victims of the genocide there.<sup>379</sup> Writing that “the most disappointing thing about the verdict was the efforts of the judge ... to absolve the Serbian government,” journalist Dejan Anastasijević reported that the judge “described the Scorpions as an ‘irregular volunteer unit’ and insisted that they had no relationship with any branch of government in Serbia, despite ample evidence that they had been an integral part of Milošević’s security forces.”<sup>380</sup>

The Humanitarian Law Center condemned the verdict as “not based on law and facts,” and said: “There is an impression that the court was led by political rather than legal reasons

in an effort to adjust its stances to those of the Serbian authorities regarding the responsibility for genocide committed in Srebrenica....”<sup>381</sup> Kandić further faulted the judge’s approach in the case “as minimalist, prosecuting only those who could be directly linked on the video to the shootings, but refusing to push any further.”<sup>382</sup>

While this verdict has tempered their earlier, largely positive, assessment of WCC judges, Kandić and others have credited the chamber with achievements that transcend specific judgments. In the words of Belgrade Court Judge Radmila Dragičević-Dičić, the WCC “brings [justice] closer to the people” and enables Serbs to “see victims from Bosnia here.”<sup>383</sup> This, she believes, has not been possible in cases tried in The Hague, in part because the public sees high-profile cases as “connected to politics.... People don’t see victims, they see politics in The Hague.”<sup>384</sup>

In interviews that preceded two especially disappointing developments—the WCC’s verdict in the *Scorpions* case and the Supreme Court’s reversal of its verdict in another case, *Ovčara*—Kandić, too, emphasized the importance of victims’ participation in WCC trials. Kandić, who has played a leading role in encouraging victims from Bosnia and Croatia to testify and has formally represented them before the WCC,<sup>385</sup> believes it is “important that our society face the victims, the ‘others’, because we’re only talking here about Serbs as victims. Through the trials, it’s an opportunity to show what we did to others.”<sup>386</sup>

If victims’ participation in WCC trials can help advance Serbia’s process of coming to terms with past atrocities, Kandić believes it can serve another goal that is just as important—“recognition of victims and their dignity.”<sup>387</sup> Invoking the Srebrenica massacre in an interview conducted before the aforementioned verdict in the *Scorpions* case, she explained: “All Bosniaks know what happened but if you want to show them that the families of victims are important, it means that Serbian society—the state and its institutions—should invite the victims [to testify in Serbian courts], to restore their dignity.”<sup>388</sup> Others emphasize the regional repercussions of the phenomenon Kandić has helped support. When Croatian or Bosniak victims testify in Serbian courts and find a semblance of justice, this “contributes to reconciliation.”<sup>389</sup> Conversely, when victims’ hopes are thwarted—as happened following the Supreme Court’s decision to invalidate the *Ovčara* verdict—“this [affects] the credibility of the entire [WCC] structure.”<sup>390</sup>

Several of our interlocutors noted that the prosecution of war crimes before Belgrade’s own courts has helped to “normalize” prosecution of war crimes.<sup>391</sup> Although cases before the WCC have elicited verbal attacks and threats from hard-line nationalists, the local prosecutions have generally been “far less controversial and provocative” than those in The Hague.<sup>392</sup> The Serbian public seems “more open to the War Crimes Chamber”<sup>393</sup>—more ready, that is, to accept the legitimacy of its prosecutions even when the defendants are people who would be considered “patriots” or “heroes” if they were prosecuted in The Hague.<sup>394</sup> Even so, almost all of our interlocutors, notably including War Crimes Prosecutor Vukčević, believe that the Belgrade court could not handle the prosecution of high-profile cases, such as that of Ratko

Mladić.<sup>395</sup> And, as the verdict in the *Scorpions* case suggests, there are significant limits to how far the WCC is able or willing to go even when the perpetrators are lower-level perpetrators.

Finally, a salutary byproduct of the work of the Belgrade WCC—along with that of an internationalized War Crimes Chamber in Bosnia-Herzegovina and specialized war crimes chambers in Croatia—has been increased cooperation between war crimes prosecutors of these three countries. Although this cooperation has been limited by each country's inability under current domestic law to extradite its nationals,<sup>396</sup> it has entailed the exchange of evidence and other forms of trans-border cooperation in the prosecution of war crimes. While helping improve the quality of war crimes prosecutions in countries that receive crucial evidence from other jurisdictions, the fact that war crimes prosecutors in Serbia, Croatia and Bosnia are cooperating is itself a meaningful marker of progress in a region recently racked by nationalist violence.

In sum, virtually all of our Serbian interlocutors believe that the WCC would not have been established but for the ICTY and that the ICTY has helped ensure that the Belgrade court operates as effectively as possible within a still-cramped political stage. Notably, many Serbians, including the country's War Crimes Prosecutor, believe that the WCC does not yet have the political space to prosecute those at the highest level of responsibility for war crimes. These cases, they insist, belong in The Hague.



## V. Addressing the Past

As noted earlier, Serbian citizens who support the ICTY often emphasize its potential to foster a societal process of “addressing the past.”<sup>397</sup> For these citizens, “addressing the past” connotes broad acknowledgment by their society that Serbian leaders and other ethnic Serbs supported by Serbian institutions committed terrible atrocities during the 1990s conflicts in Bosnia-Herzegovina, Croatia and Kosovo and that these crimes were not justified on such grounds as self-defense.

Perhaps more than any other dimension of impact addressed in this chapter, the questions of whether and to what extent the ICTY has contributed to a broad social process of addressing the past can be answered only in partial and provisional terms.<sup>398</sup> For one thing, the ICTY is only one of many actors that have had an impact on Serbia’s process of addressing past crimes. Local non-governmental organizations (NGOs) have played a more prominent role in pressing Serbian society to confront those crimes and, as noted earlier, the ICTY’s record is inevitably interpreted by a host of domestic actors, ranging from hostile political leaders to supportive NGOs. Just as important, Serbia’s process of addressing past crimes is likely to be the work of generations.<sup>399</sup> Serbia remains very much a country in the early stages of political transition, and the enduring influence of illiberal nationalist actors continues to constrain the country’s ability and will to confront crimes committed in the recent past. In this setting, we can only provide tentative observations about the ICTY’s impact *so far* in advancing a process of reckoning with past crimes as well as its effectiveness in surmounting the formidable challenges presented by Serbia’s political landscape.

## A. Acknowledging—and Denying—Crimes Committed by Serbs

Although a substantial majority of cases prosecuted before the ICTY have involved crimes perpetrated by ethnic Serbs against non-Serb victims, public opinion polls undertaken in recent years suggest that most Serbian citizens either have not yet been persuaded that Serbs committed a majority of war crimes<sup>400</sup> during the 1990s conflicts or are unwilling to acknowledge what they know.

In a public opinion survey undertaken in August 2004, 84 percent of Serbian respondents said that they believe Serbs had the largest number of victims during the wars in the former Yugoslavia from 1991 through 1995; 71 percent said they believed that Serbs committed fewer crimes than Croats, Albanians and Muslims, while only 8 percent responded that Serbs committed the greatest number of war crimes in that period.<sup>401</sup> In April 2005, 81 percent of the respondents said that the largest number of victims of these conflicts were Serbs and 5 percent responded that Serbs committed the largest number of crimes.<sup>402</sup> Consistent with these findings, surveys undertaken in recent years show that a significant number of Serbian respondents question the truth behind most reports they have heard concerning war crimes perpetrated by Serbs. Conversely, Serbian respondents have in general been more likely to believe reports they have heard about war crimes perpetrated by Croats, Bosniaks and Kosovo Albanians against Serb victims<sup>403</sup> or to believe that crimes committed against Serbs are war crimes rather than inevitable acts of war.<sup>404</sup>

If, as many of the ICTY's Serbian supporters believe, a key indicator of positive ICTY impact is broad public acceptance of the proposition that Serb perpetrators were responsible for atrocities committed during the 1990s, these survey results suggest that the Tribunal has thus far had limited success in this regard. Yet recent trends suggest that there has been a modest increase in self-reported acceptance of the facts underlying key episodes of mass violence committed by Serb perpetrators.<sup>405</sup> These include the shelling of Sarajevo by Serbian armed forces and the July 1995 massacre of some 7,000–8,000 Bosniaks in Srebrenica, which has been judged by both the ICTY<sup>406</sup> and the International Court of Justice (ICJ)<sup>407</sup> to constitute genocide. In both 2004 and 2006, 68 percent of survey respondents said they had heard that many civilians were killed by snipers in Sarajevo. While only 57 percent reported that they believed these reports in 2004 (an increase since 2001, when only 50 percent reported that they believed these reports<sup>408</sup>), in 2006, 60 percent reported that they believed the reports.<sup>409</sup>

Seventy-one percent of the respondents in a survey taken in December 2006 (before the ICJ issued its February 2007 judgment finding that the Srebrenica massacre was a genocide) reported that they had heard that a large number of Muslims had been massacred in Srebrenica; only half reported that they believed these reports.<sup>410</sup> While this high level of reported disbelief is troubling, it represents a modest increase in public acknowledgment of

the core facts underlying the Srebrenica genocide since 2004.<sup>411</sup> Notably, too, while polling results show a modest increase in recent years in Serbian respondents' belief in the truth of reports of atrocities committed *by* Serbs, the same period shows a decline in their belief in the truth of reports of key episodes of violence committed *against* Serbs by the Kosovo Liberation Army and Croatian forces.<sup>412</sup>

## B. Factors that May Partially Explain Survey Results

We do not believe that data currently available provide a basis for drawing reliable conclusions about the reasons underlying many Serbians' reported lack of knowledge or doubts about atrocities committed by Serbs.<sup>413</sup> We note, however, several possibilities that may play a contributing part.

One possibility is that Serbian citizens' mistrust of the ICTY undermines the Tribunal's ability to serve an educative function in Serbia. In surveys undertaken in 2003, 2004, and 2005, 69 percent of Serbian respondents said they did not believe the ICTY tries Serb defendants impartially;<sup>414</sup> in 2006, 63 percent responded this way.<sup>415</sup> Yet a majority of Serbians say they know little about the ICTY: 72 percent of those who responded in 2005 said they know either "little" or "very little" about the organization and operation of the Tribunal (this percentage decreased to 57 percent in 2006).<sup>416</sup> Svetlana Logar, Deputy Director of one of the organizations that conducted these surveys, Strategic Marketing Research, believes that Serbians' attitudes would be different if the public were better informed about ICTY trials. But, she says, "we just have interpretations, not facts."<sup>417</sup>

Echoing a theme that emerged repeatedly in our interviews, Logar noted that within Serbia, "the political elite were the ones primarily making the image of the [ICTY]."<sup>418</sup> "People don't have faith in our politicians," Logar observed, "yet they're receptive to their message that the ICTY is anti-Serb."<sup>419</sup>

The most virulently anti-Hague message has come from the Serbian Radical Party (SRS) and the Socialist Party of Serbia, a smaller party formerly led by Slobodan Milošević.<sup>420</sup> Against their hostile rhetoric and their treatment of indicted war criminals as national heroes,<sup>421</sup> few politicians have publicly supported the ICTY on grounds that readily translate into broad public condemnation of Serbian defendants' responsibility for war crimes. In view of the relative strength of the SRS,<sup>422</sup> Strategic Marketing Research Director Srđjan Bogosavljević asserted that even Serbian politicians who are supportive of the ICTY dare not contradict the Radicals' anti-Hague rhetoric with an alternative story lest they lose votes.<sup>423</sup>

Instead, Serbian leaders have typically justified cooperation with the ICTY on pragmatic rather than principled grounds; some have treated ICTY indictees as patriots and heroes. There are exceptions: edomir Jovanović, leader of the opposition Liberal Democratic Party, has called for Serbia to "face our historical heritage" on moral, not expedient, grounds.<sup>424</sup> Soon



after a new government was formed in Serbia in 2007, the government's Foreign Minister, Vuk Jeremić, said that his country was committed to extraditing ICTY fugitives Ratko Mladić and Radovan Karadžić not only because it is "our international obligation, but also our moral duty toward neighbors."<sup>425</sup> Serbian President Boris Tadić has apologized to citizens of Bosnia and Croatia for crimes committed in Serbia's name during the 1990s and has supported Serbian cooperation with the ICTY.<sup>426</sup> But political leaders have rarely confronted Serbian society with "unequivocally clear condemnations of what happened"<sup>427</sup> or linked such condemnations to their cooperation with the ICTY.

Addressing what he called the "very entrenched denial" of Serb war crimes by many Serbian citizens, human rights lawyer Bogdan Ivanišević notes that it is impossible to know if their attitudes would be different if Serbia's political elite had taken a different approach. "But," he says, "common sense suggests it would have an impact. Beliefs are affected by those one believes."<sup>428</sup> Public opinion surveys are consistent with Ivanišević's intuition. A survey conducted in December 2006 showed that only 15 percent of those polled—the same percentage as in 2003 and 2004—support cooperation with the ICTY in order to achieve justice while a majority support cooperation on the pragmatic grounds often cited by political leaders.<sup>429</sup>

These results do not necessarily mean that the 54 percent of respondents who reported in December 2006 that they support cooperation with the ICTY on pragmatic rather than moral grounds are unable to accept the Tribunal's judgments of guilt as well-founded. Anti-Hague attitudes, as Radmila Nakarada notes, do not necessarily correlate with "total denial."<sup>430</sup> But these survey results are consistent with the proposition that Serbian citizens' views are in general more likely to be shaped by local leaders' attitudes than by judgments of the ICTY.

Several other factors reinforce many Serbians' continuing reluctance to acknowledge that Serbs were responsible for atrocities committed in the 1990s and to condemn them unequivocally. To begin, almost all of the crimes charged before the ICTY occurred outside of Serbia proper (i.e., the part of Serbia that does not include Kosovo). While many Croatian Serb victims of crimes committed by Croatian forces now live in Serbia, they do not represent a significant political constituency there.<sup>431</sup> Thus there is no major victim community in Serbia whose political voice and experience offset the rhetoric of nationalist leaders. As one of our interlocutors emphasized, "What is important for understanding, we don't have victims [in Serbia], only refugees. Serbians don't know what it's like to be victims."<sup>432</sup>

Moreover Serbians who have been prosecuted in The Hague, including Slobodan Milošević, "were not in the battlefield. So the perception is that they're in The Hague for political reasons."<sup>433</sup> Refik Hodžić, who at the time of our interview was Acting Head of the Media Outreach and Web offices of the ICTY,<sup>434</sup> makes a similar point. Because "there were no crimes committed in Serbia, the people have no day-to-day connection" to the crimes prosecuted in The Hague.<sup>435</sup> Hodžić contrasts this situation with that in Bosnia, where there are many Serbs who also "don't want to acknowledge" past crimes but are "constantly reminded" of mass atrocities committed in their country.<sup>436</sup>

In the short term, moreover, the passage of time may be working against many Serbians' ability to remember much of what they have learned about Serb atrocities. Public opinion survey questions aimed at ascertaining whether respondents have heard about major war crimes committed during the 1990s indicate that memories of these events faded between 2001 and 2005 (as noted above, this general trend applies to crimes committed by Croats and Muslims as well as those attributed to Serb perpetrators).<sup>437</sup> Explaining this trend during an interview in November 2006, Srđjan Bogosavljević, whose organization Strategic Marketing Research conducted these surveys in partnership with the Belgrade Centre for Human Rights, noted: "These things happened thirteen, fourteen years ago. Over time, people are forgetting."<sup>438</sup>

Psychological dynamics are also at play. As Bogosavljević observes, "People like to forget about this" part of their history.<sup>439</sup> Vojin Dimitrijević, whose Belgrade Centre for Human Rights co-sponsored the surveys noted above, sounds a similar theme: "The question is whether you really don't know or you refuse to know."<sup>440</sup> Attorney Ivan Janković believes that, when it comes to crimes of great magnitude, most people cannot help but know what happened but "often deny their knowledge."<sup>441</sup>

Several of our interlocutors believe that deeply personal as well as political factors contribute to "a culture of denial."<sup>442</sup> "When you have a brother or a husband" who participated in the conflicts, for example, "you don't think of him as someone who could take a knife to a child," Jadranka Jelinčić suggested. "For very personal reasons you can't change the framework in which you think."<sup>443</sup>

Many nonetheless believe that evidence adduced in The Hague has significantly "shrunk the public space"<sup>444</sup> in which political leaders can credibly deny the truth about notorious atrocities. For a long time, nationalist figures claimed that the number of people killed in Srebrenica in July 1995 was much lower than the real figure while blaming many of the killings on intra-Muslim violence. "Now," Bogdan Ivanišević notes, "people who say that are from the margins.... There is incomparably less distortion of the past."<sup>445</sup> Jadranka Jelinčić makes much the same point: "It's now very difficult to deny that certain things happened and that cultural elites were responsible."<sup>446</sup> Thus, if the ICTY has had only limited impact in shaping public knowledge and attitudes, its verdicts and the evidence introduced in the courtroom have at least diminished the space for outright denial. Still, Jelinčić notes, this knowledge "doesn't necessarily make people regret" crimes they can no longer credibly deny.<sup>447</sup>

Of course, there have been other sources of information about 1990s-era war crimes and these have doubtless played a part in shrinking the public space for denial.<sup>448</sup> Many of our interlocutors are convinced, however, that the ICTY has played an important role in this regard. As journalist Ljiljana Smajlović put it, "There's no question that the ICTY has educated the public; we've found out more about war crimes and the ... inner workings of the government than we would ever have found out—and about the criminal aspects of the regime."<sup>449</sup> She believes that the "findings of the Tribunal are more accepted now" than during earlier periods; as a result of "what we've found out in The Hague," the public now "accepts that

Serbs committed enormous crimes,” including the Srebrenica massacre. Still, Smajlović notes, “after fifteen years” of propaganda it is difficult to change people’s minds. “You can only say this person committed this crime. People can accept that, but not that they’re responsible for failing to go on the streets”<sup>450</sup>—i.e., that they bear political responsibility for failing to protest crimes committed by their leaders.

Smajlović and others believe, however, that the ICTY has laid an enduring factual foundation that local organizations, such as “lawyers’ groups,” can build upon in a broader educative project.<sup>451</sup> Sonja Stojanović, Executive Director of the Belgrade-based Center for Civil-Military Relations, believes that the ICTY “managed to compile information and archives that will prevent future mythologies. For any researcher in the future, ICTY evidence will be crucial for all sides.”<sup>452</sup> But, she said, “unfortunately” Serbian society—which Stojanović described as “very frustrated”—is “not yet ready to handle” this information.<sup>453</sup>

## VI. Performance-Related Factors

As the previous chapter emphasized, constraints inherent in Serbia's political landscape have limited the ICTY's ability to contribute to Serbian society's reckoning with crimes committed in its name. We now shift focus and consider whether factors within the control of the ICTY have either enhanced or detracted from the Tribunal's ability to have a positive impact in Serbia.

### A. Outreach

If Serbia's political elite and media have played the leading role in shaping public attitudes toward the ICTY, the question arises whether the Tribunal has done enough to counter distortions of its record and to ensure that the Serbian public understands the principles that guide its prosecutions. For the first five years of its operational existence,<sup>454</sup> the answer is an unambiguous "no": Remarkably, the Tribunal did not even translate its judgments or other documents into the languages spoken in the former Yugoslavia until 1999. It did not issue its first press release in the Serbian language until 2000. Nor did it attempt to "reduce[e] the often highly complex and lengthy legal discussions [that its decisions and judgments] contained to a format more amenable to mass consumption."<sup>455</sup>

Besides these early omissions in the relatively straightforward arena of public information, the Tribunal made virtually no effort for several years to counter the anti-Hague message

of Slobodan Milošević and the Yugoslav media that largely served as his megaphone or to engage with the Yugoslav public in a more affirmative sense. The notion of engagement with the communities of the former Yugoslavia reportedly “did not sit well with some Tribunal officials, who did not regard community outreach or public relations as the responsibility of a court.”<sup>456</sup> In consequence, as then ICTY President Gabrielle Kirk McDonald reported in 1999,

The Tribunal is viewed negatively by large segments of the population of the former Yugoslavia. Its work is frequently politicized and used for propaganda purposes by its opponents, who portray the Tribunal as persecuting one or other ethnic groups [sic] and mistreating persons detained under its authority. Throughout the region, the Tribunal is often viewed as remote and disconnected from the population and ... there is little information available about it. Such views are exploited by authorities that do not recognise or co-operate with the Tribunal, thereby damaging efforts to foster reconciliation and impeding the work of the Office of the Prosecutor. This is particularly detrimental to the success of the Tribunal.<sup>457</sup>

That year, Judge McDonald established an Outreach Program that would enable the Tribunal to speak for itself in the former Yugoslavia.<sup>458</sup> The new program, she explained, would be “dedicated to explaining [the ICTY’s] work and addressing the effects of misperceptions and misinformation.”<sup>459</sup> By that time, as former Outreach officer Olga Kavran has noted, the challenge confronting the ICTY was compounded by years of leaving the field of communication about its work to nationalist leaders who opposed it. As Kavran noted, “It is much more difficult to dismantle already established misperceptions and propaganda than it would have been to start from the outset with updated and accurate information about the Tribunal.”<sup>460</sup>

Some, however, question whether earlier outreach efforts could have made a significant difference given the strength of nationalist leaders’ and local media’s hostility to the ICTY—and the fact that the Tribunal’s “interaction with the Serbian society was of necessity indirect, i.e. through the Serbia government’s and Serbian media’s (re)interpretation.”<sup>461</sup> Mirko Klarin, founder and director of a news agency that reports on ICTY proceedings from The Hague, is “certain that the results would have been the same” if the ICTY had published its press releases in local languages and established its Outreach Program “from the very first day,” because local attitudes are “primarily dictated by local political elites and the subordinated media.”<sup>462</sup> Public opinion pollster Svetlana Logar believes that “changes by the Tribunal” in the way it approached the Serbian public “could have made a difference at the margins.”<sup>463</sup>

While others agree that “change has to come from political elites,”<sup>464</sup> some of our Serbian interlocutors are convinced that “earlier and more robust outreach”<sup>465</sup> could have helped reduce hostility toward the ICTY (though probably not among the pro-Milošević segment of society that is consistently anti-Hague). Several observers and some ICTY staff singled out

for special criticism the Tribunal's failure to take greater advantage of the political opening presented during the period of the Djindjić government.<sup>466</sup>

Operating on finite resources, the ICTY's Outreach staff in The Hague and Serbia have in recent years done an impressive job within this and other constraints. In the view of one Serbian observer, "They're now doing an excellent job" of outreach in Serbia "but they're understaffed."<sup>467</sup>

The Belgrade staff of the ICTY's Outreach Program comprises one senior professional and an assistant. But the senior professional has other duties besides those associated with his outreach portfolio: He represents the ICTY Registry in Serbia, which entails a broad range of activities such as working with embassies and international organizations to assist the local War Crimes Chamber (WCC) and facilitating requests to the ICTY from the WCC.<sup>468</sup> Moreover the budgetary resources supporting the outreach officer and his assistant cover "salaries but not projects."<sup>469</sup>

Within these constraints, Alexandra Milenov, who served as Registry Liaison Officer in Serbia until September 2007, was able to respond to all media requests for comment and interviews, which meant that local media stories on ICTY cases were more likely to include the Tribunal's statement alongside those of others. Thus, she noted, "[t]here isn't silence from the Tribunal, which is the worst state of affairs."<sup>470</sup> But while Milenov ensured that the ICTY spoke for itself whenever it had the chance in the Serbian media, she found that it was "almost impossible to develop projects," to be "proactive" within the constraints of her budget and staff resources.<sup>471</sup> Yet the "outreach component [of her job] is infinite"<sup>472</sup>—that is, Milenov saw no shortage of constructive projects that her office could undertake if it had the resources to do more.

Since its inception, the Outreach Program has been extra-budgetary, meaning that its funds must be raised from external sources.<sup>473</sup> In the view of many who are familiar with the program, this both reflects a dearth of institutional commitment and presents a distracting challenge to the outreach staff.<sup>474</sup> As one former outreach officer put it, the Outreach Program "has been operating as an NGO, scraping up resources."<sup>475</sup> Concerns about the ICTY's institutional commitment to its own Outreach Program led outreach officer Refik Hodžić to quit working for the ICTY in 2004<sup>476</sup> (Hodžić later returned to the ICTY and served until recently as Acting Head of the Media Outreach and Web offices.)

Without a budget to implement projects, Alexandra Milenov welcomed opportunities during her tenure in Serbia to participate in initiatives undertaken by local NGOs to educate the public about the ICTY. For example, Milenov and ICTY officials from The Hague participated in a Belgrade conference organized by the Humanitarian Law Center concerning crimes committed by Serbs in the Bosnian town of Prijedor that were prosecuted before the ICTY; that night's television news included a story about the conference.<sup>477</sup> While serving as Registry Liaison Officer in Serbia, Milenov also participated in a range of innovative programs developed by the Youth Initiative for Human Rights (YIHR), an NGO founded in 2003 that targets

young Serbians with a view toward planting seeds of attitudinal change in the next generation of leaders. In the words of its founder, YIHR was created “as an answer to Serbians’ denial of war crimes, especially by young people.”<sup>478</sup>

Milenov has no doubt that these initiatives make a difference. Describing programs organized by YIHR in which young victims from Kosovo and Bosnia have participated, Milenov says that she could see a transformation take place over the course of three hours. At the beginning of a program, when asked what they think about the ICTY most of the youthful audience responds that it is an anti-Serb institution. After they learn more about the Tribunal, including its work on behalf of Serb victims, and after hearing victims their own age describe their experiences, the “tone changes.... [The program] challenges their understanding.... They’re no longer accusing; now they ask for information.”<sup>479</sup>

Andrej Nosov, YIHR’s founder and Executive Director, describes the impact of its educative programs in similar terms. Describing “500 young people who participated” in workshops with Milenov, Nosov says: “They’re different people now.”<sup>480</sup> At the end of one program convened in the town of Čačak, a stronghold of the extreme nationalist Serbian Radical Party (SRS), a young woman was so moved by victims’ testimony that she removed her SRS tee shirt when the program was over and apologized to the victims who had just spoken.<sup>481</sup> Nosov believes that young women like this one are likely to “persuade others”<sup>482</sup> after participating in YIHR programs about war crimes. Those who have participated in such programs, Nosov says, now visit the ICTY Web site regularly.<sup>483</sup>

As Milenov noted, there has been a beneficial side-effect to her participation in programs organized by local NGOs—it has enabled the ICTY to contribute to local capacity-building.<sup>484</sup> Her colleagues in the Outreach Program’s headquarters in The Hague likewise believe that partnering with local NGOs is important for its own sake: it helps to foster a “sense of ownership” of the ICTY’s work by local communities.<sup>485</sup> But Milenov and others, including Andrej Nosov, believe that the ICTY must amplify what it does through its participation in the type of workshop described above. “There’s a ripple effect” that extends well beyond the workshops themselves, Milenov says, but the impact could be far greater if these initiatives were multiplied.<sup>486</sup>

## B. Interaction between the ICTY Prosecutor and Serbian Authorities

Among experts in international criminal tribunals, “outreach” has become a watchword for interaction between such tribunals and the societies most affected by their work. But the ICTY’s Outreach Program represents only part of the Tribunal’s public face in Serbia. As a program of the ICTY’s Registry, it does not represent the Office of the Prosecutor (OTP). And in Serbia, the Prosecutor has had a particularly strong profile.<sup>487</sup>

From the earliest years of the ICTY, its Prosecutor (and to a lesser but important extent its President) have actively pressed Serbian authorities to surrender indicted suspects and to provide documents sought by the Tribunal. The woman who served as Prosecutor for eight years until the end of 2007, Carla del Ponte, visited Belgrade 20 times during her tenure “to push Serbia to hand over suspects and her approach won her the nickname ‘the new Gestapo.’”<sup>488</sup> Del Ponte also aggressively pressed the European Union to maintain pressure on Serbia to transfer Ratko Mladić to the ICTY—an approach she softened somewhat near the end of her tenure, when the EU’s loosening of accession-related conditions appeared inevitable. Along with local politicians’ anti-Hague rhetoric, these highly-visible efforts have gone a long way toward defining the ICTY in the eyes of many Serbians. Belgrade-based pollster Srđan Bogosavljević observes: “On the one hand, the Hague Tribunal always came here as a threat; on the other hand, political leaders [demonized it].”<sup>489</sup>

Goran Svilanović, who served as Serbia’s Foreign Minister and represented Serbia in its negotiations with the ICTY during the Djindjić government, believes that the Tribunal’s relentless insistence on surrenders came at the cost of conveying a deeper message—that “this should never happen again.”<sup>490</sup> “The idea” behind the Tribunal, he says, “should be to [help Serbians] to discuss the crimes” that were committed. Instead of this happening, he insists, “the ICTY was instrumental in bringing tens [of defendants] to jail—nothing beyond that.”<sup>491</sup>

Svilanović notes, however, that del Ponte’s relentless pressure was crucial in securing transfers. “Without her,” he estimates, “half of the [indictees] would still be at large.... Thanks to her, a lot are in jail.”<sup>492</sup> Svilanović is also quick to acknowledge that the government he served “missed the opportunity to tell people” about the importance of confronting and condemning war crimes committed under the leadership of Serbians—“absolutely.”<sup>493</sup> But he believes that, by focusing on surrenders in its dealings with the Serbian government at the expense of emphasizing the values underlying the ICTY’s work, “the Tribunal didn’t help us.... Now, the democratic partners in government only look forward to [surrendering] Mladić” so that Serbia can “overcome obstacles” to its integration with the West.<sup>494</sup>

Sonja Biserko, leader of the Helsinki Committee in Serbia, places principal blame on local leaders rather than on the ICTY for “commercializ[ing] the Tribunal”—that is, selling ICTY cooperation to the Serbian public on grounds that emphasize the attendant pay-offs, notably EU membership.<sup>495</sup> Still, she believes that the EU itself “should have made [cooperation] a moral issue at the same time” that it emphasized the linkage between ICTY cooperation and EU membership.<sup>496</sup> She added: “We need a moral minimum.”<sup>497</sup> Biljana Kovačević-Vučo, Director of the Belgrade-based Lawyers’ Committee for Human Rights, shares this concern. Describing the dynamic between the ICTY prosecutor and Belgrade as a “black market,” she worries that the overriding dynamic can seem to be that of a “political game.”<sup>498</sup>

Many supporters of the ICTY believe that relentless pressure by the Prosecutor, along with conditionality by the United States and, more recently, the EU, have been crucial to Ser-



bian surrenders (and, as noted, even Svilanović agrees). Appeals to Serbian leaders' self-interest ("If you want to enter the EU, you must cooperate with the ICTY fully") may have been more effective in securing surrenders than appeals to moral conscience. In this view, once Serbia apprehends and surrenders outstanding indictees and the ICTY is able to complete its work, trials in The Hague will provide the larger lessons in justice that are ill-suited to sound-bites during visits to Serbia—particularly in an environment where anti-Hague rhetoric is likely to receive substantially more media play.

Some challenge the notion that the ICTY's former Prosecutor is in any way to blame for Serbia's enduring recalcitrance when it comes to cooperation, noting that she would not have had to press relentlessly for Serbian cooperation if Serbian authorities had fully met their obligations toward the ICTY. Although Croatian authorities, too, resisted the ICTY's efforts to secure custody of high-level Croatian indictees, Croatia ultimately ensured that these fugitives were transferred to The Hague.

Still, our interviews raise the question whether the long-term goals of the ICTY may be better served if public appeals for cooperation are fine-tuned somewhat with a view toward ensuring that they are framed more consistently in terms of the principles the ICTY advances and not solely in terms of the benefits that will accrue once Serbia meets its outstanding obligations. Efforts by the ICTY's outreach officers to convey a justice-oriented message can go only so far if high-profile ICTY officials do not reinforce that message when they visit Serbia. This is not to suggest, however, that the ICTY bears principal responsibility for Serbia's failure to acknowledge that crimes were committed in its name and to condemn them—or for the local media's distortion of ICTY officials' position.

## C. Other Performance-Related Factors that Affect the ICTY's Impact

With a view toward ascertaining whether and how specific aspects of the ICTY's judicial and prosecutorial performance affect its impact in Serbia, we sought to identify "breakthrough moments" in the Tribunal's work in which its goals of accountability were demonstrably advanced as well as stand-out moments in which they were retarded. In a similar vein, we have tried to identify recurring patterns in the ICTY's operation that appear significantly to affect its impact, for better or for worse, in Serbia.

As we explain below, one of the more significant "breakthrough" moments in recent ICTY history occurred in the context of the Milošević trial, when a video shown by prosecutors, which recorded the execution by members of a Serb unit of several young Muslims near Srebrenica, galvanized the Serbian public and had a notable impact in dispelling Serbian denial in relation to the 1995 Srebrenica massacre. Conversely, public broadcasts of Milošević's

trial—which ICTY supporters in Serbia had hoped would play a pivotal role in educating other Serbians about their country’s role in 1990’s atrocities—instead highlighted what many Serbians saw as Milošević’s superior “performance.” Milošević’s death soon before his marathon trial was due to end shattered hopes of a turn-around in public perceptions.

Several other patterns in ICTY practice have undermined the Tribunal’s image in Serbia and, correspondingly, its ability to serve an educative role there. These include lengthy periods of pre-trial detention, comparatively low sentences for Muslim defendants convicted of atrocities, and the Tribunal’s decision to allow a prominent Kosovo Albanian defendant to participate in political activities while awaiting trial.

### 1. Videos: “A Wall of Denial ... Began to Crack”<sup>499</sup>

Visual images have played a notable role in mediating the Serbian public’s understanding of the ICTY’s work. On the relatively positive side of the ledger, at times video images introduced during ICTY trials have seized the Serbian public’s attention and altered their perceptions in ways that advanced social acknowledgement of past crimes.<sup>500</sup> The best known example occurred in June 2005, when the ICTY prosecution showed during the trial of Slobodan Milošević<sup>501</sup> a video tape that captured an execution of six Bosnian Muslim men, two of whom were only 17 years old, by members of a Serb paramilitary unit known as the Scorpions.<sup>502</sup> The victims, who were cruelly taunted before they were shot, had been taken from Srebrenica at the time of the 1995 genocide there to a nearby town, Trnovo, where they were executed.

The day after it was shown in The Hague, the Scorpions video was broadcast on Serbian television and then was “repeatedly shown on television in countries throughout the Balkan region.”<sup>503</sup> Describing the public reaction in Serbia, the *Washington Post* reported that local broadcasts of the video “ripped away the veil of secrecy and denial of Serbian military operations in Bosnia during the 1992–95 war.... No longer was it possible to label atrocity tales as Bosnian Muslim propaganda amplified by inventive foreign correspondents, as many Serbs had done for a decade.”<sup>504</sup> Recalling the video’s impact in a later article, the *New York Times* reported that the “tape was seen as a watershed in Serbia as it confronted ordinary Serbs with first-hand evidence of the involvement of Serb security forces” in the Srebrenica killings.<sup>505</sup>

When the video was shown, Prime Minister Koštunica, who had previously treated indicted war criminals as patriots, denounced their crimes unequivocally and announced the immediate arrest of the perpetrators, who were put on trial in Belgrade.<sup>506</sup> In a country that remains starkly divided on the issue of war crimes, the atrocities shown in the Scorpions video were denounced “across the political spectrum.”<sup>507</sup>

While the impact of the Scorpions video was profound, it would be an overstatement to say that its public airing transformed Serbian attitudes. In a public opinion survey taken soon after the video’s release, one-third of the respondents said they thought the video was a fabrication.<sup>508</sup> But while nationalist figures initially challenged the video’s authenticity,

they “very soon revised” their position,<sup>509</sup> conceding the authenticity of the video but broadcasting “awful videos of Bosniaks killing Serbs” in order to show that the former, too, “are criminals.”<sup>510</sup>

Despite the public’s equivocal responses, Serbians still widely credit the Scorpions video as having profoundly altered public perceptions, particularly about the Srebrenica massacre. During a period when, as previously noted, public awareness of other 1990s-era atrocities has begun to fade, there has been an *increase* (albeit modest) in public acceptance that atrocities were committed in Srebrenica since the Scorpions video was aired.<sup>511</sup> Several of our interlocutors in Serbia also cited videos shown in other ICTY trials, as well as documentaries broadcast on B92, as having had a significant if limited impact on public opinion.

To the extent that one goal of war crimes prosecutions is to educate the public about the crimes prosecuted, these observations suggest that a particularly effective vehicle for doing may be through the use of videotaped material that is emotionally compelling—as well as legally relevant in the case of videos introduced at trial. Public opinion surveys conducted in Germany following a widely-viewed television series on the Holocaust in 1979 reinforce this inference, “demonstrat[ing] that television can have a major impact and could be one of the most powerful tools in encouraging attitude change.”<sup>512</sup> Still, surveys undertaken eight years later suggest that “the effects of broadcasts are possibly short term, especially when there is still a dominant social environment opposed to the idea of moral responsibility for past atrocities.”<sup>513</sup>

## 2. The Trial of Slobodan Milošević

No case prosecuted at the ICTY has been more closely followed in Serbia than the trial of former Yugoslav leader Slobodan Milošević, which began on February 12, 2002, and ended without a final judgment after Milošević died on March 11, 2006.<sup>514</sup> In view of the high level of public interest in the case,<sup>515</sup> the Milošević trial has played an important part in shaping many Serbians’ views of the ICTY and their attitudes toward the process of accountability underway in The Hague.

As already noted, despite the trial’s abrupt ending without final judgment, some aspects of the Milošević prosecution served important goals. Evidence produced in court, such as the now-famous Scorpions video, had a galvanizing impact on Serbian opinion, eroding collective denial about Serbian involvement in atrocities committed during the 1990s conflicts. Moreover the very fact that Slobodan Milošević faced trial countered the lesson in impunity that had taken hold during his years in office, establishing that “there is no one who can order killings and stay unpunished.”<sup>516</sup>

Overall, however, the trial proceedings thwarted the hopes of Serbians who support the ICTY. In the sections that follow we explain why, focusing on discrete aspects of the Milošević case—and on processes that mediated the trial proceedings for Serbian observers—that were especially important in shaping the trial’s impact.

### *a) Expectations*

Serbians who support the process of accountability underway in The Hague had hoped the trial would provide a critical “breakthrough moment” in the ICTY’s work, shedding light not only on Milošević’s personal involvement in international crimes committed during the 1990s conflicts but also on the involvement of state institutions.<sup>517</sup> While Belgrade’s involvement in the Kosovo war was straightforward (most of the direct perpetrators of the crimes charged in the Kosovo indictment were members of the Serbian police), evidence introduced in the Milošević trial would likely provide new insights into Belgrade’s role in supporting Serb forces in Croatia and Bosnia-Herzegovina, including its involvement in the 1995 Srebrenica genocide.<sup>518</sup> If the charges against Milošević were substantially proved, a final judgment would necessarily implicate the involvement of state institutions in atrocities committed during the 1990s Balkans conflicts, potentially laying the foundation for a broad social reckoning within Serbia.

Moreover the trial would provide opportunities for Serbian citizens to hear evidence of atrocious crimes and of their longtime leader’s personal responsibility for them.<sup>519</sup> Many Serbian citizens would, of course, remain loyal to Milošević and to the policies he pursued no matter how compelling the legal case against him. But “maybe others would change their mind”<sup>520</sup> if they were confronted with evidence showing, for example, that Milošević knew about the massacre in Srebrenica in advance.

### *b) Unanticipated Effects*

In time, evidence introduced in the Milošević case may go some way toward vindicating these hopes. Scholars and non-governmental organizations have begun what will likely be a long process of reclaiming that evidence and establishing non-judicial processes of learning from it. Moreover trials still under way in The Hague may result in judgments that achieve some of the results expected in the Milošević case, shedding light on the relationship between Belgrade and Serb forces operating in Bosnia and Croatia.<sup>521</sup>

But in the shorter-term, Serbians who support the ICTY see the Milošević trial as a profound disappointment. While many aspects of the trial contributed to this—not least, its length—the trial’s vexed beginning and its inconclusive ending loom especially large in critical assessments by Serbians.

#### *(i) The Trial Had a “Clumsy Start”<sup>522</sup>*

As has often been noted, at the outset of the Milošević trial public opinion polls in Serbia showed a surge in the former president’s popularity<sup>523</sup> (not widely reported, however, “it was just at the very beginning of Milošević’s hearing that his popularity rose”; the trial “didn’t have a lasting effect” on his popularity<sup>524</sup>). Crucial in explaining the dynamics behind this temporary boost, Milošević represented himself at trial (while nonetheless insisting that he did not recognize the ICTY). With a majority of Serbians riveted to television broadcasts of

his trial, at least during the early weeks,<sup>525</sup> this guaranteed Milošević considerable air time and afforded him an opportunity directly to address the Serbian public he knew would be watching broadcasts of his trial. Our Serbian interlocutors frequently cited several aspects of Milošević's trial that, in their view, enabled him effectively to exploit this opportunity and to undermine the educative potential of his trial.

First, in myriad ways the trial proceedings, which took on the appearance of a direct showdown between Milošević and his accusers, showcased what one journalist termed the former president's "superior knowledge"<sup>526</sup> of contextual facts and of the perspective that Serbians would likely bring to bear as they viewed the proceedings.<sup>527</sup> The former reinforced many Serbians' disdain for the ICTY and provided grounds for a dispirited society to cheer Milošević's "performance" in court. Describing the impression made by Milošević during the first few days of his trial, Serbian pollster Srđjan Bogosavljević noted, "He was really good.... Even people who hate him thought he was successful."<sup>528</sup>

An example cited by several Serbians of what they considered inadequate efforts by the ICTY prosecutors to take into account how Serbian viewers would see the trial proceedings was their decision to call Mahmut Bakalli, a Kosovo Albanian "with a lavish lifestyle,"<sup>529</sup> as their first witness.<sup>530</sup> Vojin Dimitrijević, who describes Bakalli's testimony as "a very bad beginning"<sup>531</sup> for the Milošević trial, explains why:

The first witness was a disaster: Mahmut Bakalli, a former Kosovo Albanian Communist official who is still remembered as a *bon-vivant* Tito's satrap in Kosovo. This confused man, who believes [himself] to be an intellectual, pretended now to have always been convinced that there was no life for ethnic Albanians in Yugoslavia, thus contradicting the Communist project which he had served. He was easy prey for Milošević who only had to remind him of his inconsistencies.<sup>532</sup>

Of course any witness can backfire on the stand, and some of the examples cited by our interlocutors to demonstrate ICTY officials' poor grasp of the region, such as one prosecutor's mispronunciation of names, may say as much about their own disposition to find fault than about serious flaws in the prosecutor's preparation. But there is broad consensus that the prosecution's approach in the early days of the Milošević trial—when the Serbian audience was especially large—was damaging.

More broadly, a number of our interlocutors in both Serbia and The Hague believe that ICTY trials have often suffered in the eyes of the Serbian public because prosecutors and judges have evinced a surprising level of ignorance about contemporary Serbia and recent Serbian history. The harmful effects may be especially pronounced in Serbia: As journalist Ljiljana Smajlović noted in another context, Serbia "is a very politically astute country"; as a post-communist society accustomed to reading the proverbial tea leaves, people there "invest effort" in understanding events that affect them.<sup>533</sup> As we note in the following

subsection, Milošević was often effective in capitalizing on his own keen awareness of his Serbian audience.

(ii) *Rhetoric that Resonates*

A fundamental feature of Milošević's trial was the political offense mounted by the defendant in his own defense. Lambasting the ICTY, which he repeatedly accused of being a tool of Western powers,<sup>534</sup> Milošević "transform[ed] the courtroom into his political platform."<sup>535</sup> Keenly aware of his Serbian audience,<sup>536</sup> Milošević mounted a defense calculated to reinforce widespread Serbian suspicions of the ICTY and, more generally, to resonate with Serbians.

Against the prosecutor's charges that forces under Milošević's command committed international crimes against Kosovo Albanians, the defendant insisted that the North Atlantic Treaty Organization (NATO) was responsible for civilian casualties during the 178-day war over Kosovo—and showed gruesome videos of victims of NATO air strikes to drive home his claim.<sup>537</sup> As reported by the *Economist*, in his opening statement Milošević described the trial proceedings as "'an ocean of lies' concocted by Western powers to justify the NATO bombing of Serbia during the Kosovo war."<sup>538</sup>

Although these claims seemed preposterous to many observers outside Serbia, they had strong resonance among many Serbians, who vividly recalled that Milošević was indicted for alleged crimes in Kosovo at a time when they personally endured NATO attacks in the 1999 FRY-NATO war over Kosovo.<sup>539</sup> More important, the fact that the prosecution's case began with charges relating to the Kosovo conflict enabled Milošević to tap into a large reservoir of suspicion centered on the Tribunal's failure to indict Milošević until NATO countries went to war against his country.

As noted earlier, despite the fact that crimes eventually charged against Milošević were perpetrated in Bosnia and Croatia in the early to mid-1990s, the ICTY did not issue its first indictment against him until May 1999, when his country was at war with NATO. To Serbians, the correlation is straightforward. As journalist Filip Svarm put it, "Milošević went to the Hague when he lost the war against NATO."<sup>540</sup> When the first indictment against Milošević included crimes relating solely to Kosovo and not atrocities committed years earlier in Croatia and Bosnia, Serbians saw the ICTY acting as "an instrument of power" rather than an institution of international justice.<sup>541</sup>

From the Tribunal, there are at least partial answers to the questions this sequencing of indictments has raised: Announcing the first indictment of Milošević and four co-defendants on May 27, 1999, then ICTY Prosecutor Louise Arbour recalled her "commitment to functioning as a real time law enforcement operation"—a commitment honored by her office's issuance of an indictment covering events that had occurred "since the beginning of this year."<sup>542</sup> By issuing the Kosovo indictment while continuing to investigate earlier crimes, the Prosecutor hoped to contribute to resolving a crisis that was still underway.<sup>543</sup> Moreover, while

denying “rumors that she moved quickly because she feared Western deal-cutters would offer Milošević and his top leaders immunity... in return for their signatures on a plan to end the [Kosovo] war,” Justice Arbour said that she had been prompted in part by concerns that the indictees would be “factually put outside the reach of the law—they could disappear.”<sup>544</sup>

As for the question that still looms large in Serbia—why did the Prosecutor not have enough evidence of crimes committed in the early to mid-1990s in Bosnia and Croatia until late 2001, when Milošević was finally charged with these crimes?<sup>545</sup>—Clint Williamson, who along with ICTY prosecutor Nancy Paterson led the Kosovo investigation, fills in some of the gaps. While the Office of the Prosecutor (OTP) was “certainly looking at the involvement of Milošević in Serbia and Croatia all along,”<sup>546</sup> Williamson recalled, it had to surmount a major challenge with respect to crimes committed in those countries that the OTP did not face for Kosovo—proving that Milošević was legally responsible for atrocities committed by forces he did not formally command. Until Milošević was out of power, Williamson explained, insider witnesses who could help the OTP meet this challenge were for the most part unwilling to provide evidence against him.<sup>547</sup>

It is unclear whether the OTP made substantial efforts to persuade insider witnesses to provide evidence before Milošević was in custody. According to a former prosecutor who worked on the Milošević case, efforts to investigate the former president’s responsibility for crimes committed in Bosnia and Croatia as well as Kosovo lacked focus and suffered from “bureaucratic lethargy” until around 1999-2000. Still, this source notes that “better insider witnesses” stepped forward after Milošević was in custody in The Hague.<sup>548</sup>

Beyond the timing of the first indictment, coming only when Milošević was at war with NATO, many believe that the ICTY Prosecutor erred by beginning the case against Milošević in court with the Kosovo charges.<sup>549</sup> (In fact, the Prosecutor sought to avoid trying the Kosovo case first but was required to do so by the ICTY Trial Chamber and Appeals Chamber.<sup>550</sup>) As has often been noted, in view of Serbians’ historical identification with Kosovo as the cradle of their nation, this sequencing enabled Milošević to play to Serbian nationalism while reminding his home audience of the NATO bombs they endured during the Kosovo war.<sup>551</sup> Describing the trial dynamics, former Serbian Foreign Minister Goran Svilanović said: “[The prosecutors] started with Kosovo, so Milošević could do a parallel [defense]. Every time the prosecutor said “Kosovo,” he responded “NATO bombing.”<sup>552</sup> Beyond reminding Serbians of their own suffering during the Kosovo war, beginning the trial with the Kosovo charges may have reinforced Serbian perceptions that Milošević was put on trial *because* he went to war with NATO.

### (iii) “His Ideology Was in the Indictment”<sup>553</sup>

Several of our Serbian interlocutors believe that ICTY prosecutors erred in framing their case in ways that they believe opened the door to politicization. Journalist Dejan Anastasijević believes that the Prosecutor made a “strategic error” by putting Milošević’s “ideology ... in

the indictment.”<sup>554</sup> In his view, the core error was “going into historical processes to provide a fine grain detailed picture of how and why it happened” when history should be “left to academics.”<sup>555</sup> “This mistake,” he believes, “provided a platform for Milošević to have endless arguments, often with the Prosecutor losing the arguments.”<sup>556</sup> Anastasijević draws a general conclusion from this experience. Noting that some believe that one role of the ICTY is to establish a “historical truth,”<sup>557</sup> Anastasijević believes that “no court in the world should aim to discover historical truth. They should establish facts of the guilt of the defendant.”<sup>558</sup>

Another journalist, Filip Svarm, has similar concerns. Noting that “if you have a trial against the mafia, the prosecutor won’t tell you how the mafia came to exist,” he believes the ICTY prosecution veered too far into the realm of “social/political acts,” which “undermines the legitimacy of the ICTY.”<sup>559</sup> In his view, the indictment against Milošević was framed in a way that enabled the defendant to “talk for history.” When Milošević did that, Svarm says, he was “perceived favorably. [But] what he gained [when he responded politically to historical testimony] was diminished when he encountered real victims” in court.<sup>560</sup>

We can understand why some aspects of the Prosecutor’s case might strike a Serbian audience as veering too far into the realm of political and historical judgment. In an effort to provide a historical context for the crimes charged against Milošević and to make seemingly unrelated episodes of violence comprehensible as a coherent plan, the opening statements of ICTY prosecutors at times made broad claims about Serbian nationalism. The testimony of several historians touched upon similar themes.

That said, it is in the nature of the work of major war crimes tribunals to make factual findings that may at times seem to range into the realm of historians (this may be unavoidable when the defendant is a former leader), and it is difficult to define in general terms how much historical context is too much. Other well-known examples of major war crimes judgments, including that of the International Military Tribunal (IMT) at Nuremberg and the Israeli District Court’s Judgment in the trial of Adolf Eichmann, include extensive accounts of the historical context in which the defendants’ crimes occurred. Much—though not all—of these historical accounts were framed by the charges against the defendants, some of which by their nature require a determination of facts that may seem to belong in the province of historians.

For example, the Allies’ charge of crimes against peace, which was the centerpiece of the Nuremberg trial of major Nazi war criminals, required the IMT make factual determinations relating to Germany’s preparation for aggressive war. Other portions of the IMT judgment provided historical context that was helpful in making sense of the facts that formed the basis of the Tribunal’s final judgment,<sup>561</sup> and ICTY judgments have similarly often provided a historical context for the factual determinations the Tribunal has had to make.

When asked his view about the degree to which the ICTY should address the historical context of crimes it judges, ICTY President Fausto Pocar noted that to some extent, the widespread nature of certain crimes—itsself potentially an element of crimes against humanity<sup>562</sup>—



“per se brings some element of writing the history of what happened” into a judgment. But, he added, the judge should “go into the historical context only so far as is necessary for the case at hand. We are not historians.”<sup>563</sup>

Struggling with the question of how much historical fact-finding is appropriate in a war crimes trial like that of Adolf Eichmann,<sup>564</sup> the Israeli District Court concluded that its work must be strictly limited to “investigat[ing] the truth of the prosecutor’s charges against the accused who is on trial.... Whatever requires clarification to achieve” this end, it concluded, “must be examined at the trial, and whatever is foreign to it must be excluded from the proceedings.”<sup>565</sup>

To a lawyer’s eye, there is a solid legal basis for other portions of the ICTY Prosecutor’s case that struck some Serbian observers as overly politicized. An example of the latter is the testimony of Wesley Clark, formerly Supreme Commander of NATO, in December 2003. Describing perceptions of Clark’s testimony in Serbia, journalist Filip Svarm said: “He was a political figure, so it was hard for Serbians to believe he knew anything concrete about war crimes, and he’s not perceived favorably in Serbia. So the Serbian public asked, what is he doing here?”<sup>566</sup> Yet Clark’s testimony was highly relevant to key elements of the Prosecutor’s case against Milošević.

For example, General Clark testified about conversations he had had with Milošević in which the latter clearly implied that he had foreseen the Srebrenica massacre,<sup>567</sup> other encounters in which Milošević claimed to exercise considerable control over the Bosnian Serbs who carried out that atrocity and others,<sup>568</sup> and conversations establishing that Milošević knew about other atrocities when he was in a position to stop them.<sup>569</sup> This testimony went to some of the core challenges facing the Prosecutor in respect of the charges against Milošević.

As many of our Serbian interlocutors recognize, there is an inherent, inescapably political dimension to the operation of an international court, and perceptions of politicization are inevitably compounded when the defendant is a former president. Moreover, as journalist Ljiljana Smajlović notes, “the public isn’t impartial. Everyone hears what they want to hear.”<sup>570</sup> When, as in the case of General Clark’s testimony, evidence that is legally crucial risks undermining perceptions of an international court’s legitimacy, problems in perception may be best addressed through public information strategies. The fact that even some independent Serbian observers see a problem in Clark’s testimony highlights the importance here, as in other aspects of the ICTY’s work, of keeping constantly in mind the impact of proceedings on core audiences as trial and public information strategies are developed.

#### *(iv) Mediating the Message of the Milošević Trial*

Not all of the problems associated with the Milošević trial can be attributed to decisions and actions taken in The Hague. As in other areas of the Tribunal’s work, Serbian perceptions of the Milošević trial were shaped in large measure by local actors. Those who played a particu-

larly important role were either hostile to the ICTY or unable effectively to use the trial as a vehicle for educating the public about evidence adduced in court.

During the crucial initial days of the trial, political leaders in Serbia provided a local megaphone for Milošević's anti-Hague courtroom bombast. The Prosecutor had barely concluded her opening statement in Milošević's trial before she was denounced by then President (later Prime Minister) Vojislav Koštunica. As reported by BBC, Koštunica had this to say about Del Ponte's opening statement: "By referring to historical events in the early twentieth century, she appeared to contradict her own statement that individuals and not the Serbian nation were on trial."<sup>571</sup> As for "the prosecution's claim that this trial is against one person, not all Serbs, that there is no collective guilt but only individual," Koštunica commented, this "sounds extremely stretched."<sup>572</sup>

By virtually all accounts, the independent Serbian media did not effectively counter anti-ICTY interpretations—including misinterpretations—of the Milošević trial. In the case of the independent television station B92, this represented a failure to achieve what it set out to accomplish. Believing that broadcasts of the trial of Milošević would "show what he did" and, more generally, enable Serbians "to see what happened,"<sup>573</sup> B92 broadcast the trial live, with special funding from sources that included the ICTY. "But," as a reporter for B92 recounts, "that's not what happened."<sup>574</sup> Instead, "that case started very bad"<sup>575</sup> from the viewpoint of Serbians and others who had hoped the trial would educate Serbians about crimes attributable to their former leader, and the broadcasts, particularly at the outset of the trial, "had the completely opposite effect" of what B92 had expected.<sup>576</sup>

Treating the trial as though it were a sports competition—as Filip Svarm noted, "the trial was watched as you watch two football teams"<sup>577</sup>—the Serbian media in general tended to cover it in terms of which side performed better. (Most found Milošević more impressive than the prosecution.) Even commentators who appeared on B92 reportedly tended to follow this approach—as one observer put it, "glorifying [Milošević's] skills"<sup>578</sup>—when, in the view of Serbians who support the ICTY, what was badly needed was experts who could explain the legal significance of evidence and procedures.<sup>579</sup>

### c) "Then you had this tragic ending"<sup>580</sup>

For a variety of reasons, including frequent adjournments due to the defendant's poor health and the large number of charges against him<sup>581</sup> as well as "mismanagement of the judges ... who failed to control the trial and the defendant,"<sup>582</sup> the Milošević trial stretched on for four years—twice the time initially forecast.<sup>583</sup> Along with many observers outside of Serbia, Serbians believe that the "efficiency [of the ICTY] was quite bad; the trial lasted forever."<sup>584</sup> But Serbians who support the ICTY hoped that the often vexed effort would be redeemed by the Tribunal's final judgment.

As previously noted, many Serbians who believe their country must support and undertake a full reckoning for Milošević-era crimes saw the former leader's trial as a lynchpin of those efforts. By persuasively proving that state institutions were integrally involved in the carnage that raged across the Balkans in the 1990s, the Milošević trial would, they hoped, do more than any other ICTY case to dispel the culture of denial and impunity in Serbia. "This trial," Ana Miljanić notes, "was supposed to be a major pillar of the ICTY's work."<sup>585</sup>

Against these expectations, many Serbians believe that Milošević's death—coming just weeks before his marathon trial was to end<sup>586</sup>—"was disastrous for the Tribunal. Absolutely disastrous: It didn't finish the job."<sup>587</sup> Pollster Srđjan Bogosavljević captured the implications of Milošević's death this way: "Because of Milošević's death, his trial did not have a 'wow effect'. He's dead, and he was not guilty. Had he been found guilty, we'd be able to get rid of this bad stuff and move toward cooperation with the European Union."<sup>588</sup>

Filip Svarm and others described the implications of Milošević's demise before judgment as a severe blow to the ICTY itself. With Milošević dead, Svarm said, the ICTY is "without Hamlet." That is, there is "a performance but no main role."<sup>589</sup> Attorney Ivan Janković invoked another theater metaphor to make a similar point. Noting that Milošević's death came at a time when the ICTY had begun to wrap up its work, he continued: "It's how you go offstage. This is probably the wimpiest way you can imagine."<sup>590</sup>

In Svarm's opinion, Milošević's death without judgment means that in the future, "people will talk about Milošević as a politician" rather than as a convicted war criminal. Had there been a judgment, Svarm adds, that too "would have been seen politically"—that is, through a political lens. "But [Milošević] would have been convicted and with the passage of time it would have been clearer why he was tried.... Every judgment has its clarification, which would give answers to many questions.... Now we have no judgment. Lawyers won't be able to talk about Milošević but politicians will."<sup>591</sup>

Janković describes what was lost in terms of legal principles and justice. Noting correctly that Milošević was the only high-ranking Serbian official charged before the ICTY with criminal responsibility for genocide in relation to the 1995 Srebrenica massacre, Janković said that the only way to establish a legal link between the Srebrenica genocide and Serbian state institutions was through the conviction of "high [Serbian] officials."<sup>592</sup> Presciently, Janković observed that the outcome of the genocide case brought against Serbia by Bosnia-Herzegovina before the International Court of Justice—then still pending but subsequently decided—would turn upon establishing this link. Without the possibility of convicting Milošević, he noted, "this important brick in the [ICJ] genocide case is lost."<sup>593</sup> In short, a judgment in the Milošević trial provided the indispensable foundation for a full legal reckoning for the worst atrocity in Europe since World War II. His death forever cheated history of that reckoning.

That Milošević died on the ICTY's watch is seen by many Serbians as further undermining the Tribunal's credibility,<sup>594</sup> particularly since the ICTY had denied his request for medical treatment outside of The Netherlands not long before he died.<sup>595</sup> Even if the public as a whole

rejected the claims of Milošević's family and other supporters that the ICTY was responsible for his death,<sup>596</sup> "people felt that the ICTY hadn't protected him."<sup>597</sup> Perhaps more important for those who fundamentally support the process of accountability under way in The Hague, there is a pervasive sense that if the ICTY had operated more efficiently, Milošević might have lived to face judgment.<sup>598</sup>

As some of the previous observations make clear, those who feel cheated by Milošević's death implicitly place considerable confidence in the persuasive power of an ICTY judgment. Notably, they believe that a conviction would have changed the minds of many Serbians previously disposed to deny the legitimacy of the ICTY, even if others were sure to dismiss any verdict of guilt as the work of a political institution.

Of course the long-term impact of Milošević's death may prove less damaging than its short-term impact. In the view of Vojin Dimitrijević, "when things settle down, the impact of Milošević's death will be very small indeed."<sup>599</sup> Others believe that the harm caused by his death can be redeemed, but whether this happens depends on how the ICTY completes its work in the cases that lie ahead and on initiatives outside the court to redeem the Milošević case itself.

The Youth Initiative for Human Rights, the Humanitarian Law Center and other organizations have explored ways of retrieving for history the wealth of evidence—much of it uncontroverted—that was introduced into evidence during the trial of Milošević. Just as historians have mined evidence introduced at Nuremberg, they hope that the evidence introduced in the Milošević trial will become a wellspring of historical insight about war crimes committed at the instigation of the Milošević regime. Through, perhaps, an interactive exhibit that begins in Belgrade and then travels throughout the region, those planning this initiative hope to "break the continuity of ethnic interpretation" of the 1990s conflicts.<sup>600</sup>

## D. Perceived Imbalance in the ICTY's Indictments and Sentences

At the heart of the ICTY's uneasy relationship with Serbs is what sometimes seems an insolvable paradox. Convinced that the ICTY was established to punish Serbs, many Serbs find confirmation in the fact that most of the suspects indicted by the ICTY Prosecutor have been Serbs. As analyst Sonja Stojanović notes, "Here, mathematics are important: How many Serbs have been punished? What were their sentences?" (Although a majority of the Serbs indicted by the ICTY have been Bosnian Serbs, Serbian Serbs draw no distinction for purposes of assessing ICTY impartiality.)

ICTY prosecutors respond (and independent monitoring organizations agree) that the reason why a majority of indictees have been Serbs is that they committed proportionately

more serious atrocities during the 1990s conflicts in the Balkans—a position that many Serbs cite as further proof of ICTY bias. In this setting, relatively recent developments in two ICTY cases involving crimes committed against Serbs have reinforced Serbian perceptions of anti-Serb bias.

## 1. Orić Verdict; Other Sentences Imposed on Non-Serb Defendants

One is the two-year sentence rendered on June 30, 2006 against Naser Orić, one of only ten Bosniaks charged by the ICTY Prosecutor. Orić, who had commanded the Srebrenica Territorial Defense, was found guilty of failing to prevent murders and cruel treatment of Serb detainees in late 1992 and early 1993 and was acquitted of other charges.

Because Orić had already spent three years in detention—one year longer than his two-year sentence—he was released immediately, leading some inaccurately to think that he had been wholly exonerated. Regrettably, the Bosniak chairman of the Bosnian Presidency reinforced that perception, publicly welcoming the verdict as a vindication. “Now it can clearly be seen who was defending unarmed civilians and who was committing crimes,” Sulejman Tihić proclaimed.<sup>601</sup> Serbia’s President, Boris Tadić, had a different response: “Shoplifters get two years in prison,” he noted, “and it is absolutely scandalous that someone who committed a war crime should get such a lean sentence.”<sup>602</sup>

Inside the Tribunal, officials believed they could say little to mitigate this interpretation until the judicial process had run its course—that is, until Orić’s appeal is complete. In the meantime, a member of the Prosecutor’s staff told us, the moment when a controversial judgment is announced by a Trial Chamber is “exactly the point where we are stuck. We hear this as kind of the street which has no end.... We cannot argue anything before the final judgment.”<sup>603</sup> A current and former ICTY prosecutor have, however, observed that Orić’s “sentence is unlikely to combat Serb allegations that the ICTY is anti-Serb, and it is at least arguable that such a low sentence will frustrate, as much as it will assist, reconciliation between Muslims and Serbs.”<sup>604</sup>

This was not the first time the ICTY had imposed low sentences on Bosniak defendants after convicting them of war crimes.<sup>605</sup> On March 15, 2006, an ICTY Trial Chamber acquitted two Bosnian Army commanders, Enver Hadžihasanović and Amir Kubura, of most of the charges against them and imposed sentences of five years and two and one-half years respectively for failing to prevent war crimes committed against Croatian and Serb civilians in Central Bosnia. (On appeal, Hadžihasanović’s sentence was reduced to three and one-half years’ imprisonment, while Kubura’s was reduced to two years.<sup>606</sup>)

The then-recent judgment of Orić came up repeatedly in our interviews in Serbia in November 2006. Describing local reactions, Radmila Nakarada said that for those already critical of the ICTY, “this was the last straw.”<sup>607</sup> War Crimes Prosecutor Vladimir Vukčević cites the Orić sentence as an illustration of the “very poor, amateur-like ... estimations” of the ICTY.<sup>608</sup>

## 2. Haradinaj Case

It would be difficult to exaggerate Serbians' criticism of the ICTY's handling of the case against Ramush Haradinaj, who along with two other commanders of the Kosovo Liberation Army (KLA) was prosecuted on charges relating to war crimes and crimes against humanity committed against Serbs and others in Kosovo during 1999. In its verdict of April 3, 2008, the ICTY Trial Chamber acquitted Haradinaj and one of his two co-defendants of all charges; the third was convicted and sentenced to six years' imprisonment.<sup>609</sup> While the verdict drew strong protests in Serbia, the ICTY's treatment of Haradinaj before trial had already provoked deep resentment.

Haradinaj, who became the Prime Minister of Kosovo Albanians after the 1999 NATO intervention, was—like many ICTY indictees—granted provisional release until his trial began, but reportedly “is the only indicted person that the [ICTY] has released in order to return to active politics.”<sup>610</sup> Although Haradinaj was at first permitted “only limited work within his own party,”<sup>611</sup> in October 2005 an ICTY Trial Chamber lifted the initial ban on public political activities, instead authorizing the UN Mission in Kosovo (UNMIK)—which saw Haradinaj as a key partner in efforts to reconcile Serbs and Albanians in Kosovo—to allow or reject Haradinaj's proposed activities on a case-by-case basis:

... the Accused may appear in public and engage in public political activities to the extent which UNMIK finds would be important for a positive development of the political and security situation in Kosovo, subject to the prior approval by UNMIK of a request by the Accused regarding each individual activity concerned.

...the Trial Chamber requires UNMIK to assume responsibility to authorise or deny the Accused's above-referred activities on a case-by-case basis, and to include any such activity in the bi-weekly reports submitted to the Trial Chamber pursuant to the Decision on Provisional Release. UNMIK is also required to indicate any such future activity of the accused in these reports, provided that there is a pending by the accused before UNMIK.<sup>612</sup>

“The move to lift the [initial] ban on politics,” Tim Judah reports, was “spearheaded by the UN mission in Kosovo and supported by diplomats there,” who believed that Haradinaj could play a constructive role in negotiations over the future status of Kosovo.<sup>613</sup>

ICTY Prosecutor Carla del Ponte appealed the October 2005 order, arguing that “constantly seeing the accused in the media” would “have a chilling effect on victims and witnesses” and “the very real likelihood” of producing a “very intimidating effect” on them.<sup>614</sup> On March 10, 2007, the ICTY Appeals Chamber modified the Trial Chamber's order, imposing further restrictions on UNMIK<sup>615</sup> but still allowing Haradinaj to engage in public political activities while on provisional release in Kosovo.<sup>616</sup>

As Tim Judah reported following the October 2005 ruling, the decision to allow Haradinaj to participate in Kosovo politics “harmed the tribunal’s attempts to establish a reputation for impartiality. Serb leaders have said it has just confirmed their long-held belief that the court is biased against them.”<sup>617</sup> A senior spokesman for President Boris Tadić, who has supported Serbian cooperation with the ICTY, commented: “We see this as appalling. This unbalanced approach to indictees of different sides is sending a very wrong message to both Serbs and Albanians.”<sup>618</sup>

During interviews in Serbia more than one year later, the controversy had hardly subsided. Notably, it is not just anti-Hague sectors that saw the ICTY’s approach toward Haradinaj as problematic. Judge Radmila Dragičević-Dičić described the decision to allow Haradinaj to participate in politics as a “bad decision” that tarnished the reputation of the ICTY and played into the hands of “black powers.”<sup>619</sup> Nataša Kandić, who may be the ICTY’s most staunch supporter in Serbia, noted that “[i]t’s very difficult to explain why [Haradinaj] is allowed to speak in public.”<sup>620</sup> Human rights activist Andrej Nosov agrees with others that the Tribunal’s treatment of Haradinaj is “very bad” for the Tribunal and adds that it reflects a complete failure to understand the impact of its decisions in the region.<sup>621</sup>

That the decision emanated from political bodies and diplomats exacerbated many Serbians’ perception that the ICTY is politicized as well as partial. As journalist Ljiljana Smajlović noted, when Serbians saw Haradinaj giving television interviews because the Tribunal accepted arguments that he could help resolve the Kosovo situation, “this is reminiscent of the Milošević case. One year he’s a butcher. Then he’s a peacemaker. Then he’s the butcher of the Balkans.”<sup>622</sup>

Human rights lawyer Bogdan Ivanišević, too, believes that the ICTY mishandled the Haradinaj case both for reasons already noted and because of the impact of Haradinaj’s provisional release on witnesses. In his view, the Tribunal “acted irresponsibly by allowing Haradinaj to engage in political activities while on provisional release, not only because of the foreseeable reactions in Serbia, but also because such gesture of respect vis-à-vis Haradinaj could not but discourage those (potential witnesses) in Kosovo who otherwise would have dared to testify against him.”<sup>623</sup> The decision to authorize provisional release, Ivanišević believes, “should not have been made, or should have been revoked, if the Tribunal knew—as it must have known—that individuals linked to the case perished, even if it was not possible for the tribunal to obtain firm evidence that Haradinaj was behind the killings.”<sup>624</sup>

During the trial of Haradinaj and his two co-defendants, which began on March 5, 2007, the Trial Chamber (in its words) “encountered significant difficulties in securing the testimony of a large number of ... witnesses. Many cited fear as a prominent reason for not wishing ... to give evidence.”<sup>625</sup> From the outset of the trial, the prosecution had expressed concerns about the effect of witness intimidation on its ability to prove its charges against the accused.<sup>626</sup>

The acquittal of Haradinaj and one of his co-defendants on April 3, 2008—a result that may have been attributable in part to witnesses’ fear of providing testimony<sup>627</sup>—drew passion-

ate denunciations from Serbian officials.<sup>628</sup> Prime Minister Koštunica condemned the judgment as a “dark decision,” which showed that the ICTY “does not exist to mete out justice.”<sup>629</sup> Deputy Prime Minister Bozidar Djelić called the acquittal “scandalous” and a “black day for international justice,” while Serbian War Crimes Prosecutor Vladimir Vukčević said the ruling “shows that it is high time that this tribunal closes down.”<sup>630</sup>

Coming on top of the November 2005 acquittal of another KLA commander, Fatmir Limaj, and one of his co-defendants as well as the *Orić* verdict, the Trial Judgment in *Haradinaj* exacerbated Serbian perceptions of the ICTY as a Tribunal that either does not wish, or has not adequately attempted, to address crimes against ethnic Serbs effectively. Noting that “[m]ost critiques in Serbia of [the] ICTY are unwarranted,” human rights lawyer Bogdan Ivanišević nonetheless believes that this criticism “is one of the few points on which [Serbian critics] may be partially right.”<sup>631</sup> Echoing concerns voiced by several other sources who are generally sympathetic to the ICTY, Ivanišević explained:

If one takes all fifteen years [of the ICTY’s existence] in consideration, it would probably be possible to demonstrate that the Office of the Prosecutor [(OTP)] has invested more energy, and activated more able staff, in investigations concerning crimes committed by Serbs, than in investigations concerning crimes against Serbs. ([Former Croatian President Franjo] Tudjman, for example, should have been seriously investigated during his life, but he was not). I suppose this lack of equal commitment on the part of the OTP is understandable—just as it would have been understandable, after WWII, if a neutral (non-Nuremberg) prosecutor had felt greater urgency to focus on Nazi crimes than on crimes committed against Germans. But still, the (Hague) Prosecutor should have known better than that.<sup>632</sup>

## E. Lengthy Pre-Trial Detention and Trials

The ICTY’s reputation in Serbia is further tarnished by the extraordinarily long periods that some indictees have had to wait for trial, often but by no means always in detention, once the Tribunal obtains custody of them—a period often followed by long trials. Many Serbians can readily tick off how long some high-profile defendants had to await trial once the ICTY obtained custody of them: Bosnian Serb leader Momčilo Krajišnik awaited trial for almost four years after his arrest and his trial lasted over two years;<sup>633</sup> the trial of Serbian Radical Party leader Vojislav Šešelj began more than four and a half years after his surrender;<sup>634</sup> while former Serbian President Milan Milutinović waited for three and one-half years for his trial to begin after he surrendered.<sup>635</sup>

In the view of Belgrade District Court Judge Radmila Dragičević-Dičić, this not only creates the impression that the ICTY “is not so effective” and “gives the picture that they didn’t



prepare things” but is “against all international standards” and “gives ammunition to the anti-Hague” lobby.<sup>636</sup> Judge Siniša Vajić, President of the Belgrade District Court, agrees, noting that the “small efficiency of the ICTY” represented by “defendants waiting too long” for trial “allows the other guys [i.e., anti-Hague nationalists] to say yes, they were waiting four years to come to trial.”<sup>637</sup> This, he believes, is important to the Serbian public.<sup>638</sup>

Expressing a similar view, journalist Antonela Riha added: “Even peasants know it’s not good if the trial lasts so long.”<sup>639</sup> Another journalist, Filip Svarm, believes that the passage of years before even a notorious war criminal like Bosnian Serb leader Momčilo Krajišnik comes to trial undermines the ICTY’s educative role: “The public has forgotten” who he was by the time his case comes to trial.<sup>640</sup>

When the defendant is a well-known Serbian political figure, the effect may be quite the opposite—yet still harmful. Svarm believes that the fact that Serbian nationalist Vojislav Šešelj spent over four years in pre-trial detention “enabled the Serbian Radical Party to claim he’s a hero, a victim of a pro-American court.” Noting that there were other reasons why the Radical party was the largest vote-getter in then-recent elections, Svarm nonetheless believes that Šešelj’s lengthy detention without trial contributed to its popularity. “Had he been tried and convicted,” Svarm believes, “the popularity of the Serbian Radical Party would have declined.”<sup>641</sup>

ICTY officials recognize that the length of time some defendants have spent awaiting and in trial has been a problem for which the Tribunal bears at least partial responsibility (as former ICTY prosecutor Alex Whiting notes, however, “sometimes defendants also contribute to delays.”<sup>642</sup>) The Tribunal has taken various measures to address this problem, though ICTY officials have different perspectives on which factors are key. Some judges believe the problem lies in the large number of charges advanced by the Prosecutor. On several occasions beginning in 1999, the judges have amended the Tribunal’s Rules of Procedure and Evidence to establish a growing repertoire of tools to curb the length of trials, such as limiting the number of witnesses the Prosecutor can present and/or the time available for presenting evidence and inviting the Prosecutor to reduce the number of counts in indictments.<sup>643</sup>

In the view of David Tolbert, who served as Deputy Prosecutor from August 2004 through March 2008, a confluence of factors has contributed to lengthy trials. A key factor, in his opinion, has been the Tribunal’s lack of an effective pre-trial management process. “What you hope for in complex litigation,” Tolbert notes, “is to narrow the issues before trial. The parties have to be herded into agreeing on certain facts and on witness lists with the end of reducing time in court.”<sup>644</sup> This has not happened to the extent possible or desirable—in part because the defense “refuses to make any agreement to narrow the issues,” says another former ICTY prosecutor.<sup>645</sup> A second factor, he believes, is that the presiding judges have often lacked previous courtroom experience (those judges were appointed because of their expertise in international law).

The poor qualifications of many defense counsel—particularly from the Balkans and especially during the ICTY’s early years—also slowed down trial proceedings, in Tolbert’s view.

“Some didn’t know how to conduct a cross-examination,” he recalled, “or how to negotiate a guilty plea,” and in at least one early case “this delayed the whole process.”<sup>646</sup>

Poor management within the Office of the Prosecutor (OTP) has contributed to avoidable delays, and Tolbert readily acknowledges this. “Part of the problem,” he reflected, “is that lawyers tend to be poor managers.”<sup>647</sup> The OTP’s trial attorneys “weren’t hired for their managerial skills.”<sup>648</sup> For the first half of the ICTY’s life, moreover, investigations were driven by investigators rather than by senior trial attorneys, an approach that did not produce the most efficient preparation for trials. Tribunal insiders are aware, moreover, that while the ICTY has benefited from some extraordinary leadership and trial attorneys, key senior staff positions have not always been filled by well qualified individuals.

Tolbert noted another factor that contributed to Tribunal backlogs: For the first eight years of its institutional life, the ICTY “was limping along with few cases. Then, in 2001 there was a deluge.”<sup>649</sup> The ICTY was slow to adapt to the sudden explosion of indictees in custody, and the “poor management system” that had been put in place earlier was the one that absorbed indictees now being transferred to The Hague.<sup>650</sup> Former ICTY Prosecutor Alex Whiting agrees, calling this a “huge factor. When the deluge hit, the prosecution fell into emergency-room mode,” focusing on cases “that were imminently going to trial” and lacking resources to catch up with its new and mounting backlog of cases awaiting trial.<sup>651</sup>

Of course, and as other prosecutors noted,<sup>652</sup> the inherent complexity of cases brought before an international war crimes tribunal inevitably makes for a more extensive trial process than one would find in, say, a typical murder trial. To recognize this, however, is not to absolve the ICTY of responsibility for managing the resulting challenges as effectively as possible.

## F. Concluding Observations

Despite the shortcomings this chapter has touched upon, the ICTY has been widely praised and rightly so for providing fair trials under formidably challenging conditions.<sup>653</sup> At least among the intelligentsia in Serbia, even critical observers have been struck by the Tribunal’s scrupulous regard for fair process. In the future, this may enable the ICTY’s judgments to provide a solid foundation for broader public acceptance of facts that are still contested.

Yet shortcomings that flow from avoidable patterns, such as overly long pre-trial detention and trials, have needlessly compounded the ICTY’s challenges in Serbia. The Tribunal’s credibility has suffered further when its prosecutors and judges evince an unacceptably poor grasp of the region whose crimes they have judged and prosecuted for one and a half decades—a weakness reflected not only during trials, but at times also in the Prosecutor’s selection of defendants and charges. Even when it performs well, moreover, the Tribunal’s work can be and has been manipulated beyond fair recognition by nationalist leaders—a dynamic the Tribunal

thoroughly failed to address in its early years, and which the Tribunal could still address more effectively than it has to date.

To be sure, and as judges whom we interviewed in The Hague emphasized, there is an inherent tension between a court's awareness of its local audience on the one hand and its institutional imperative to focus on doing justice in the specific case before it. As ICTY President Fausto Pocar observed, when judging a particular defendant the Tribunal's imperative is to apply and be guided by "neutral principles of justice. We shouldn't have a second agenda," such as considering how or whether this judgment "may help or not help reconciliation."<sup>654</sup> By equal measure, however, even neutral justice dispensed 2000 kilometers from the scene of atrocious crimes does not speak for itself. If the Tribunal does not make adequate efforts to ensure that its work is understood, others can more readily fill the void and distort its record.

# Acknowledgments

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# Notes

## Author's Note

1. See Dan Bilefsky and Marlise Simons, "Bosnian Serb under Arrest in War Crimes," *New York Times*, July 22, 2008. Karadžić's Belgrade lawyer claims he was actually arrested several days before July 21 and held incommunicado until his arrest was announced. See "Deadline for Appeal of Bosnian's Extradition Passes," AP, July 26, 2008.
2. In April 2000, then ICTY Prosecutor Carla del Ponte streamlined and consolidated the original Karadžić indictments into one indictment.
3. Dan Bilefsky and Marlise Simons, "Bosnian Serb under Arrest in War Crimes," *New York Times*, July 22, 2008, quoting Nataša Kandić.
4. Id.
5. See Peter Finn, "Karadžić Extradited to The Hague to Face War Crimes Charges," *Washington Post*, July 30, 2008.
6. See Marlise Simons, "Karadžić Calmly Hears Tribunal's Charges of Genocide and War Crimes," *New York Times*, Aug. 1, 2008.
7. See Peter Finn, "Serbia Greets Arrest of Karadžić Calmly; E.U. Hopeful Shows Readiness to Move on," *Washington Post*, July 25, 2008. As my colleague Laura Silber wrote after Karadžić's arrest, this was "[m]ore than just the closing of a chapter of bloody history[;] it is a signal about the future. The newly formed government in Belgrade is demonstrating that it is serious about bringing Serbia into the European fold." Laura Silber, "Serbia's arresting development," *Los Angeles Times* (opinion piece), July 23, 2008.

8. Karadžić's transfer coincided with the announcement of another Balkans war crimes court whose creation owes a debt to the ICTY, this one in Bosnia-Herzegovina, that it had sentenced seven Bosnian Serbs for their roles in the Srebrenica massacre. See Dan Bilefsky, "Karadžić Sent to Hague for Trial Despite Violent Protest by Loyalists," *New York Times*, July 30, 2008.

9. See Marlise Simons and Carlotta Gall, "Milošević Is Given to U.N. for Trial in War-Crime Case," *New York Times*, June 29, 2001.

10. Press Release, "Statement of the Office of the Prosecutor on the Arrest of Radovan Karadžić," July 21, 2008, OTP/PR1274e.

## I. Introduction and Summary

11. In the ICTY's first annual report to the Security Council, its then-president, Judge Antonio Cassese, recalled the circumstances surrounding the tribunal's creation: "The total lack of progress towards peace in the region and the need to demonstrate to the international community that the United Nations was not sitting back idly while thousands were being brutally abused or massacred prompted the Security Council" to initiate plans to create the ICTY. First Annual Report of the ICTY, UN Doc. A/49/342; S/1994/1007, 7, August 29, 1994.

12. In its resolution establishing the ICTY, the Security Council expressed its belief "that the establishment of an international tribunal and the prosecution of persons responsible for ... violations of international humanitarian law will contribute to ensuring that such violations are halted and effectively redressed." SC Res. 827, preamble (1993).

13. See, for example, Ralph Zacklin, "The Failings of Ad Hoc International Tribunals," 2 *Journal of International Criminal Justice* 541, at 543 (2004); Helena Cobban, "Think Again: International Courts," *Foreign Policy*, May 8, 2006. For an informative response to the critique that international justice is too expensive, see David Wippman, "The Costs of International Justice," 100 *American Journal of International Law* 861 (2006).

14. See, for example, Patrice C. McMahon & David P. Forsyth, "The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics," 30 *Human Rights Quarterly* 412 (2008).

15. With respect to the ICTY in particular, key exceptions have tended to focus on discrete aspects of the Tribunal's impact. For example an important study examined the impact on victim-witnesses of testifying at the ICTY. See Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague* (Univ. of Pennsylvania, 2005). The Berkeley Center for Human Rights has studied perceptions of the ICTY within legal communities in Bosnia-Herzegovina. See "Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors," Human Rights Center, University of California at Berkeley, May 2000. Another study undertaken by the Berkeley Center examined, among other dimensions of social reconstruction in the aftermath of mass atrocity, the role of the ICTY and its sister tribunal for Rwanda in fostering reconciliation. See Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity* (Cambridge University, 2004). See also James Meernik, "Justice and Peace? How the International Criminal Tribunal Affects Societal Peace in Bosnia," 42 *Journal of Peace Research* 271 (2005).

16. The next longest-running international court is the International Criminal Tribunal for Rwanda, which was established in November 1994.

17. The Security Council resolution vested the ICTY with jurisdiction over “persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council.” SC Res. 827, 2 (1993) (emphasis added). At the time this resolution was adopted, “the territory of the former Yugoslavia” comprised five countries which, until recently, were republics of the Socialist Federal Republic of Yugoslavia: the Federal Republic of Yugoslavia (which in turn comprised the Republics of Serbia, including the province of Kosovo, and Montenegro); Croatia, Bosnia-Herzegovina; Macedonia; and Slovenia. In June 2006, Montenegro became an independent State. In February 2008, Kosovo declared its independence from Serbia.

18. Gunnar Theissen, “Between Acknowledgement and Ignorance: How white South Africans have dealt with the apartheid past,” Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/papers/papgt2.htm>.

19. Koštunica succeeded Milošević as President of the Federal Republic of Yugoslavia and in March 2004 became Prime Minister of Serbia. The government in which Koštunica most recently has served collapsed in March 2008, and he has since presided over a caretaker government. As this report was finalized, Serbia had not yet formed a new government following parliamentary elections on May 11, 2008.

20. As noted below, Serbia has long provided shelter to a man twice indicted on charges of genocide by the ICTY, Ratko Mladić.

21. For reasons explained in Chapter II, references in this report to “Serbia” or to “Serbia proper” do not include Kosovo, where some crimes prosecuted in The Hague occurred.

22. Interview with Antonela Riha, Belgrade, November 27, 2006.

23. Exceptions include Eric Stover’s previously-noted study of the impact of the ICTY on victim-witnesses. See also Sanja Kutnjak Ivković, “Justice by the International Criminal Tribunal for the Former Yugoslavia,” 37 *Stanford Journal of International Law* 255 (2001), which examines certain victim communities’ perceptions of the ICTY.

24. Prosecutions can have myriad types of impact on victims, some of which are not obvious. Victims who have testified before the ICTY frequently say that a key motivation was their belief that they had a moral responsibility to bear witness—a need not captured in much of the literature on transitional justice. Interview with Wendy Lobwein, March 7, 2007, The Hague. (Lobwein served as acting chief of the Victims and Witnesses Section of the ICTY.) Research undertaken in a domestic U.S. context suggests that prosecutions can have a significant impact on victims’ self-esteem, as well as on attitudes toward victims in their own communities. When crimes are prosecuted, research suggests, the victims tend to have significantly higher self esteem and to be valued more highly by others than when the crimes they endured are not prosecuted. See Jennifer Kenworthy Bilz, “The Effect of Crime and Punishment on Social Standing” (Ph.D. Thesis, June 2006). It is difficult to know whether, or to what degree, these findings would be replicated in a country like Bosnia-Herzegovina, where ethnic tensions remain palpable almost thirteen years after the guns of war were silenced. In communities where different ethnic communities live in close proximity, a victim who testifies at the ICTY may in fact be and/or feel more vulnerable when she returns home, particularly if relatives of the suspect against whom she testified live nearby. See Eric Stover, *The Witnesses: War Crimes and the Promise of Justice in The Hague*, Ch. 6 (University of Pennsylvania Press, 2005).

25. SC Res. 827, preamble (1993).



26. Instead, almost 80 percent of indictments issued by the ICTY Prosecutor have involved crimes committed in Bosnia-Herzegovina, 13.7 percent have involved crimes committed in Croatia, 9.9 percent have involved crimes committed in Kosovo and 1.2 percent have involved crimes committed in Macedonia. These percentages represent the total number of individuals indicted for crimes in each place. When defendants were indicted for crimes in more than one place, we included them in our tabulation of each category.

27. In December 2003 an ICTY Trial Chamber sentenced Galić to 20 years' imprisonment. On November 30, 2006, the ICTY Appeals Chamber raised Galić's sentence to life imprisonment. A Justice Initiative researcher was in Sarajevo at the time the Appeals Chamber judgment was announced.

28. The case was that of *Prosecutor v. Radislav Krstić*. The defendant was ultimately convicted of aiding and abetting genocide in Srebrenica.

29. Interview with Dobrila Govedarica, Sarajevo, November 30, 2006.

30. Interview with Jasna Bakšić Muftić, Sarajevo, November 30, 2006.

31. *Id.*

32. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 448, 465, February 26, 2007.

33. Annual Report of the [ICTY], UN Doc. A/49/342; S/1994/1007, 13, August 29, 1994.

34. Addressing the question of general deterrence, ICTY Judge Wolfgang Schomburg is "convinced that in the future" potential perpetrators will be deterred from committing atrocities as a result of the work of contemporary international tribunals. Noting that the leaders who instigate campaigns of atrocity include "highly intelligent people," he believes that "when confronted with ... whether to commit crimes, they will see a real risk of being convicted, being brought to prison." Interview with Judge Wolfgang Schomburg, The Hague, March 5, 2007.

35. See, for example, Patrice C. McMahon & David P. Forsyth, "The ICTY's Impact on Serbia: Judicial Romanticism meets Network Politics," 30 *Human Rights Quarterly* 412, p. 417 (2008) ("the short-term impact of the ICTY on the disintegrating Yugoslav state was obvious and disappointing: it neither stopped nor deterred violence").

36. The Prosecutor issued his first indictment in November 1994, eight months before the Srebrenica genocide.

37. The ICTY does not itself have the power to arrest suspects and thus relies upon states to do so.

38. Tadić was arrested in Germany. The ICTY requested Germany to defer its prosecution of Tadić, who became the Tribunal's first defendant to face trial. Tadić was transferred to The Hague in April 1995—three months before the Srebrenica genocide.

39. Fourth Annual Report of the [ICTY], UN Doc. A/52/375; S/1997/729, 4–5 (September 18, 1997).

40. Sixth Annual Report of the [ICTY], UN Doc. A/54/187; S/1999/846, 5 (August 25, 1999).

41. Although Serbian leaders have provoked violent protests against Kosovo's independence, see Dan Bilefsky, "Dozens Hurt as Serbs Clash with Kosovo Peacekeepers," *New York Times*, March 18,

2008, Kosovo's secession has not provoked the same level of violence as that which accompanied the break-up of Yugoslavia in the 1990s.

42. For example the 1999 military intervention by the North Atlantic Treaty Organization to end Serbian repression of Kosovar Albanians may have served as a more potent deterrent to further atrocities than the work of the ICTY.

43. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.

44. *Id.*

45. Interview with Dušan Protić, Belgrade, November 23, 2006.

46. Interview with Filip Svarm, Belgrade, November 24, 2006. There is, to be sure, debate within and outside Serbia about the extent to which the ICTY—or, more particularly, Western insistence on Serbia's cooperation with the tribunal—has stalled the country's further progress toward democratization. We address this issue in Chapter II, although it does not form a principal part of our inquiry.

47. SC Res. 827, preamble (1993). This calls to mind one of the Allied governments' principal justifications for establishing the Nuremberg tribunal—to provide “just retribution for many of the most brutal acts” committed by the Nazis during World War II. Report of Robert H. Jackson to the President, August 7, 1945, quoted in David Cohen, “Transitional Justice in Divided Germany after 1945.”

48. See SC Res. 827, preamble (1993).

49. Interview with Filip Svarm, Belgrade, November 24, 2006.

50. Telephone interview with Bogdan Ivanišević, November 3, 2006.

51. Interview with Andrej Nosov, Belgrade, November 23, 2006. This view corresponds to one of the “core achievements” included in the ICTY's Web site under the heading “Spearheading the Shift from Immunity to Accountability”:

By holding individuals accountable regardless of their position, the ICTY's work has dismantled the tradition of impunity for war crimes and other serious violations of international law, particularly by individuals who held the most senior positions, but also by others who committed especially grave crimes.

<http://www.un.org/icty/glance-e/index.htm> (This Web page has the disclaimer, “Not an official document.”)

52. See Chapter III.B. This, too, evokes one of the principal justifications for postwar prosecutions of Nazi criminals. As David Cohen has written, the International Military Tribunal “aimed to educate the German people as to the crimes that had been committed in their name ...” David Cohen, “Transitional Justice in Divided Germany,” p. 3. Some Serbians who generally support this aim nonetheless believe that the ICTY's prosecutors and judges have at times strayed too far into the province of historians. See Chapter VI.

53. Interview with Ana Miljanić, Belgrade, November 22, 2006.

54. These surveys are addressed in Chapter V.

55. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

56. Interview with Jadranka Jelenčić, Belgrade, November 24, 2006.

57. *Id.*

58. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.
59. Interview with Ivan Janković, Belgrade, November 24, 2006.
60. Id.
61. Telephone interview with Bogdan Ivanišević, November 3, 2006.
62. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.
63. Interview with Jadranka Jelinčić, Belgrade, November 24, 2006.
64. Id.
65. The prevailing assumption is captured in the ICTY's 1996 annual report to the Security Council, in which then ICTY President Antonio Cassese warned:

The international community must ... remain vigilant against a particularly dangerous proposal emanating from the Federal Republic of Yugoslavia (Serbia and Montenegro) and Republika Srpska, namely to try those persons already accused by the Tribunal in those territories, and, by that token, to refuse to surrender them to the Tribunal. Such a manoeuvre, recalling the spectre of the Leipzig trials of 1920–1922, could violate the Tribunal's primacy, infringing both Security Council resolutions and the Dayton Accord. The Leipzig trials cast a long shadow of impunity over this century—an impunity that is the very antithesis of the ideal of international justice which the Tribunal has been established to promote.

Third Annual Report of the [ICTY], UN Doc. A/51/292; S/1996/665, 204, Aug. 16, 1996.
66. Interview with Nataša Kandić, Belgrade, November 27, 2006.
67. Interview with Dušan Protić, Belgrade, November 23, 2006.
68. Interview with Bruno Vekarić, Belgrade, November 21, 2006.
69. SC Res. 1503 (2003).
70. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.
71. This has happened principally in the context of cases transferred from the ICTY that the Tribunal's prosecutors had investigated but which had not led to indictments before the Tribunal stopped issuing new indictments.
72. Interview with Siniša Važić, Belgrade, November 21, 2006.
73. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.
74. The details of this case are described in Chapter IV.C.
75. For present purposes, *transitional justice* refers to a range of measures, including prosecutions, truth commissions, reparations, vetting processes and other forms of institutional reform, that may be used to address past human rights violations in the context of a country's transition—typically in the context of the end of an armed conflict and/or a political transition to democracy—following a period of systemic violations. See also Report of the Secretary-General on the rule of law and transitional justice in conflict and post-conflict societies, UN Doc. S/2004/616, 8 (defining transitional justice as “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”).
76. See, for example, Laurel E. Fletcher and Harvey Weinstein, “Violence and Societal Repair: Rethinking the Contribution of Justice to Reconciliation,” 24 *Human Rights Quarterly* 573, p. 601 (August 2002) (“The assumption that holding individuals accountable for atrocities alleviates

despair, provides closure, ... and promotes community rebuilding overstates the results that trials can achieve.”).

77. SC Res. 827, preamble (1993). It is difficult to know to what extent this justification reflected Security Council members’ genuine beliefs about the relationship between justice and peace. Under relevant UN Charter principles, the Security Council had to justify its action in creating the ICTY as a measure to maintain or restore peace. The resolution establishing the ICTY did not use the word “reconciliation” itself, in contrast to the resolution adopted in November 1994 establishing a similar tribunal for Rwanda. See SC Res. 955, preamble (1994) (expressing the Security Council’s conviction “that in the particular circumstances of Rwanda, the prosecution of persons responsible for serious violations of international humanitarian law would ... contribute to the process of national reconciliation and to the restoration and maintenance of peace”).

78. Interview with Filip Ejodus, Belgrade, November 23, 2006.

79. In any event, the premise underlying the view that prosecutions provide a foundation for reconciliation in the sense of an absence of renewed conflict presumably is that justice eliminates one key risk factor for conflict, not that it is an ironclad guarantee against it.

80. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, p. 5 (Times Books, 1998).

81. Looking beyond Serbia, the ICTY’s impact has been constrained by the inconstancy of key allies when it comes to ensuring that fugitives are brought before the bar of justice.

82. FIDH, *Victims’ Rights before the ICC*, Ch. III: Outreach, p. 8 (quoting Olga Kavran).

83. Interview with Ivan Janković, Belgrade, November 24, 2006.

84. Daniel Williams, “Srebrenica Video Vindicates Long Pursuit by Serb Activist,” *Washington Post*, June 25, 2005.

85. Interview with Filip Svarm, Belgrade, November 24, 2006.

## II. Serbia’s Relationship with the ICTY

86. One hundred and nine (67.7 percent) of the 161 defendants indicted by the ICTY have been ethnic Serbs. Forty-four of the 66 defendants convicted by the ICTY as of early May 2008 have been ethnic Serbs.

87. The country that is now Serbia was the dominant republic of an ever-shrinking country during much of the period covered in this study. At the time the ICTY was established, Serbia was a republic of the Federal Republic of Yugoslavia (FRY), a country comprising Serbia and Montenegro—the only republics that did not achieve independence during the early 1990s from what had been a six-republic state, the Socialist Federal Republic of Yugoslavia (SFRY). In February 2003, FRY became a confederal state that was renamed Serbia and Montenegro (SaM). In June 2006, Montenegro achieved independence and Serbia, too, became a state. In this chapter we generally use the designation applicable during the period under discussion. Thus when referring to events during the period of Milošević’s leadership, we generally use the designations “FRY” and “former Yugoslavia” unless we mean to refer to the republic of Serbia.

88. Twenty-one of the 161 defendants indicted by the ICTY have been from Serbia.

89. The sole exception is Vojislav Šešelj, who has been charged with offenses committed in

Croatia, Bosnia-Herzegovina, and the Vojvodina region of Serbia. Šešelj's trial began on November 7, 2007.

90. Interview with Srđan Bogosavljević, Belgrade, November 21, 2006.

91. When asked to confirm this characterization of his usage, however, Bogosavljević noted that Serbians, including himself, use "Serbia" and "Kosovo" differently depending upon the context and added: "Don't tell me that Kosovo isn't in Serbia." Interview with Srđan Bogosavljević, Belgrade, June 5, 2007. Kosovo declared its independence from Serbia on February 17, 2008. See Peter Finn, "Independence Is Proclaimed by Kosovo," *Washington Post*, February 18, 2008. Until then (and in the view of the Serbian government, still), Kosovo remained legally a province of Serbia but had been governed by the United Nations since 1999, following a military intervention by the North Atlantic Treaty Organization that sought to end Serbia's repressive response to a separatist movement comprising members of Kosovo's majority ethnic Albanians. Kosovo is expected to become fully independent after a transitional period of administration by a European Union-led mission. See Nicholas Wood, "Momentum Seems to Build for an Independent Kosovo," *New York Times*, October 2, 2007; Dan Bilefsky, "U.S. and Germany Plan to Recognize Kosovo," *New York Times*, January 11, 2008.

92. See Human Rights Watch, "Weighing the Evidence: Lessons from the Milošević Trial," December 2006.

93. The country itself was, however, the respondent in a separate legal process in The Hague. In a case before the International Court of Justice instituted in 1993, Bosnia-Herzegovina accused Yugoslavia (Serbia and Montenegro) of legal responsibility for genocide. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, February 26, 2007.

94. For example, after several delays due to one of the defendants' poor health, the trial of two men who held senior positions in Serbia's State Security Service, Jovica Stanišić and Franko Simatović, began in The Hague on April 28, 2008 on charges relating to atrocities committed in Croatia and Bosnia.

95. As noted later, however, the strength of the EU's commitment to that linkage has been diluted over time.

96. Along with Radovan Karadžić, Mladić was indicted on genocide and other charges twice during 1995.

97. See "Serbian leaders 'knew Mladić whereabouts'," *Associated Press*, November 28, 2006. Serbia's failure to arrest Mladić and transfer him to the ICTY was found to constitute a violation of the Convention on the Prevention and Punishment of the Crime of Genocide in a February 2007 judgment of the International Court of Justice. Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 448, 465, 471(6), February 26, 2007.

98. "Serbian PM Koštunica signed Mladić retirement in 2002," *Agence France-Presse*, Feb. 20, 2006. According to some reports, the other most wanted ICTY indictee, Radovan Karadžić, may also have recently been—and indeed could still be—in Belgrade. See, e.g., Christian Jennings, "Serbia's shameful past hides in capital," *The Scotsman* (Edinburgh), May 31, 2007.

99. On a related note, the ICTY Prosecutor's indictment in late 2003 of several Yugoslav generals during the lead-up to presidential elections is thought by many to have contributed to the strong

showing of an ultranationalist candidate, who received the largest number of votes. Although the balloting was invalidated by low voter turnout, the indictments are thought to have contributed to the collapse of the pro-reformist government of Zoran Živković. See Tim Judah, “The Fog of Justice,” *New York Review of Books*, January 15, 2004.

100. Describing Serbians’ cumulative frustration, Radmila Nakarada notes that Serbia’s relationship to The Hague is “consistently defined as non-cooperation of Serbia, which is very frustrating, given that 30 people in the highest echelons have been transferred; documentation has been sent; archives have been opened. Then the sum is, ‘you are not cooperating’.” Interview with Radmila Nakarada, Belgrade, November 24, 2006.

101. Milošević became president of the Presidency of Serbia, then the dominant republic of the SFRY, in late 1989 and was re-elected to this position later that same year. Following adoption of a new Constitution of Serbia, Milošević was elected Serbian president in 1990 and was re-elected 1992. In April 1992, the SFRY was reconstituted as the FRY following the declarations of independence of the former SFRY republics Slovenia, Croatia and Bosnia-Herzegovina. In July 1997, following constitutional changes that transferred many powers from the Serbian to the federal presidency, Milošević was elected president of the FRY, a position he held at the time of his indictment in 1999.

102. SC Res. 827 (May 25, 1993); UN Doc. S/RES/827 (1993).

103. This despite the fact that, as a signatory to the Dayton Peace Agreement that brought the Bosnia conflict to an end, Milošević pledged to “cooperate fully” with the ICTY. General Framework Agreement for Peace in Bosnia and Herzegovina, Annex IA, Art. X. During the Milošević era, FRY/SaM transferred to the ICTY only one indictee, Dražen Erdemović, a Bosnian Croat who had served in the Bosnian Serb army and who had described his participation in the Srebrenica massacre in an interview with ABC News before his arrest.

104. Interview with Mirko Klarin by Jasna Šarčević, “Systematic Difficulties for Denial,” in *Justice in Transition*, Special Edition Sept. 2006, p. 136.

105. See also Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005,” p. 4.

106. See Chapter I.

107. See generally Article 19 & International Centre against Censorship, *Forging War: The Media in Serbia, Croatia and Bosnia-Herzegovina*, Chapter 3 (May 1994).

108. Roger Cohen, “Milošević to Represent Himself at His Arraignment Today,” *New York Times*, July 3, 2001.

109. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

110. See Chapter VI.C.2.b.ii, below. Many Serbians are well aware of the prosecutor’s position but, as one noted, “No one believed what Arbour said.” Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

111. See Chapter VI.C.2.b.ii.

112. See R. Jeffrey Smith, “Koštunica Faces Test Over Extradition of Serbs for War Crimes,” *Washington Post*, January 21, 2001. On the day that Milošević fell from power, Koštunica described the ICTY as “a political institution” which “actually ... is not a court at all.” Noting then that many had asked about surrendering Milošević, Koštunica said, “my answer was clearly no.” RTS interview, translated by CNN, October 5, 2000.

113. Despite his indictment by the ICTY in April 1999, Milan Milutinović continued to serve as President of Serbia—a position to which he had been elected in December 1997—until his January 2003 surrender to the ICTY. Koštunica's party, The Democratic Party of Serbia, withdrew from the cabinet on August 17, 2001. Following extraordinary parliamentary elections in December 2003, Koštunica formed a new, minority, government with the support of the Socialist Part of Serbia.

114. See "Serbia at the Crossroads Again," Special Report 128, p. 7, United States Institute of Peace, November 2004.

115. See Steven Erlanger, "New Serbian Leader Vows Fast Improvements," *New York Times*, December 25, 2000.

116. See Carlotta Gall, "Milošević Facing Arrest by Serbs for a Local Trial," *New York Times*, February 9, 2001.

117. See R. Jeffrey Smith, "Serb Leaders Hand Over Milošević for Trial by War Crimes Tribunal," *Washington Post*, June 29, 2001.

118. See Steven Erlanger, "U.S. Makes Arrest of Milošević a Condition of Aid to Belgrade," *New York Times*, March 10, 2001.

119. Carlotta Gall, "Belgrade Begins Process of Sending Milošević to The Hague," *New York Times*, June 26, 2001. See also R. Jeffrey Smith, "Belgrade Files Court Papers for Milošević Extradition," *Washington Post*, June 26, 2001; R. Jeffrey Smith, "Yugoslavia Moves to Extradite Milošević," *Washington Post*, June 24, 2001.

120. See R. Jeffrey Smith, "Extradition Causes Rift in Belgrade," *Washington Post*, June 30, 2001.

121. The United States linked its participation to Yugoslavia taking concrete steps to cooperate with the Hague Tribunal. See Carlotta Gall, "Belgrade Begins Process of Sending Milošević to The Hague," *New York Times*, June 26, 2001; R. Jeffrey Smith, "Yugoslavia Moves to Extradite Milošević," *Washington Post*, June 24, 2001.

122. Foreign Operations Export Financing and Related Programs, Fiscal Year 2001, P.L. 106–249, § 594(a), (c), 114 Stat. 1900, 1900A-60 (2000).

123. Djindjić justified the legality of his action by invoking Article 135(2) of the 1990 Constitution of the Republic of Serbia, which provided: "If acts of the agencies of the Federation or acts of the agencies of another republic, in contravention of the rights and duties it has under the Constitution of the Socialist Federal Republic of Yugoslavia, violate the equality of the Republic of Serbia or in any other way threaten its interests, without providing for compensation, the republic agencies shall issue acts to protect the interest of the Republic of Serbia."

124. Marlise Simons with Carlotta Gall, "Milošević Is Given to U.N. for Trial in War-Crime Case," *New York Times*, June 29, 2001.

125. See Marlise Simons, "War Crimes Tribunal Expands Milošević Indictment," *New York Times*, June 30, 2000.

126. Djindjić did, however, try to prepare his country to support Milošević's transfer to The Hague by publicizing the discovery of mass graves, "which [the government] said contained bodies that were transported to remote sites in Serbia by security forces during the Kosovo war." R. Jeffrey Smith, "Serb Leaders Hand Over Milošević for Trial by War Crimes Tribunal," *Washington Post*, June 30, 2000.

127. Id.
128. Confidential interview.
129. Marlise Simons with Carlotta Gall, "Milošević Is Given to U.N. for Trial in War-Crime Case," *New York Times*, June 29, 2001.
130. See R. Jeffrey Smith, "Extradition Causes Rift in Belgrade," *Washington Post*, June 30, 2001.
131. Interview with Nataša Kandić, Belgrade, November 27, 2006.
132. See Ian Fisher, "Opinion Is Divided in Serbia Over Handover of Milošević," *New York Times*, January 30, 2001. The conclusion of this media report was supported by our interviews in Serbia six years later.
133. Interview with Dušan Protić, Belgrade, November 23, 2006. Ivan Janković, a Serbian attorney, believes that the transfer of Milošević "had great symbolic value because it was a clear dissociation of the government from Milošević and everything he stood for." Interview with Ivan Janković, Belgrade, November 24, 2006.
134. While establishing a framework for cooperation, this law also barred Serbia from surrendering Serbian nationals indicted by the ICTY after passage of the law. See Human Rights Watch, "Yugoslavia: Cooperation Law Inadequate," April 12, 2002. As noted later, this aspect of the April 2002 law was amended in 2003.
135. See Steven Woehrel, "Conditions on U.S. Aid to Serbia," CRS Report for Congress, Order Code RS21686, pp. 2–3, updated July 21, 2005. In his 2002 report to the UN General Assembly and Security Council, the President of the ICTY reported that during the period of August 1, 2001 to July 31, 2002 nine accused came to the Tribunal from the Federal Republic of Yugoslavia; six of these indictees came voluntarily. UN Doc. A/57/379; S/2002/985, 227. Some of the individuals surrendered by FRY were Bosnian Serbs then residing in Serbia.
136. Steven Woehrel, "Conditions on U.S. Aid to Serbia," CRS Report for Congress, Order Code RS21686, p. 2, updated July 21, 2005.
137. See "Serbia at the Crossroads Again," United States Institute for Peace, Special Report 128, November 2004.
138. Id., p. 11. Even after his trial began at the ICTY, Vojislav Šešelj led the ultra-nationalist Serbian Radical Party's list of candidates for parliamentary elections slated for May 2008. See "Leader indicted for war crimes tops Serb ultranationalists' list for parliamentary elections," *Associated Press*, March 26, 2008.
139. Controversially, the ICJ did not request Serbia to provide unredacted copies of documents sought by Bosnia. Those documents had been provided by Serbia to the ICTY on the condition that portions that Serbia believed would be harmful to its position in the ICJ genocide case would be withheld from the public record. See Marlise Simons, "Genocide Court Ruled for Serbia without Seeing Full War Archive," *New York Times*, April 9, 2007.
140. With others, Serbia's President, Boris Tadić, has attributed Serbia's failure to arrest Ratko Mladić to insufficient reform of Serbia's police and security services. See Douglas Hamilton, "Serbian president says premier blocks coalition deal," *Reuters*, May 4, 2007.
141. For example, as soon as Djindjić was confirmed as prime minister, he secured the resignation of Radomir Marković, a security service chief seen as "one of the most dreaded figures in Mr. Milošević's cadre, a man whom politicians have accused of orchestrating political killings." Carlotta



Gall, "Reformer Finally Confirmed as Serbia's Prime Minister," *New York Times*, January 26, 2001. Soon after, Marković was arrested on murder charges. See R. Jeffrey Smith, "Serb Ex-Intelligence Chief Held in Probe on Deaths," *Washington Post*, February 25, 2001; Carlotta Gall, "Serbian Prosecutors Show Signs of Closing in on Milošević," *New York Times*, March 1, 2001.

142. See Dejan Anastasijević, "Serbian Voters Spurn Nationalists," *Time Magazine* online, at <http://www.time.com/time/world/article/0,8599,1739295,00.html> (asserting that to secure the arrest of ICTY fugitive Mladić, "Serbia's security sector—the police, intelligence agencies, and the military—needs to be drastically purged of the old cadre and reformed"). During a short-lived period of reformist zeal following the March 2003 assassination of Djindjić, "[a]ll top officials in the police and state security were replaced, but no reorganization ensued." "Serbia at the Crossroads Again," United States Institute of Peace, Special Report 128, p. 13, November 2004.

143. See Tanja Nolić-Djaković, "We Are Still Hostages of Secret Services," *Blic*, April 15, 2007, reported by BBC Worldwide Monitoring, April 19, 2007; "Belgrade daily slams State Security," RTV B92 News (Belgrade), October 10, 2006 (summarizing *Blic* report).

144. According to a report of the Belgrade-based Humanitarian Law Center published in late 2006, "parts of police and military security agencies, loyal to the former ideology that endorsement of Hague indictees is in Serbia's national interest, play a major role among those who protect the ICTY indictees." Humanitarian Law Center, "Political elites in Serbia show no responsibility for legacy of the past," December 11, 2006.

145. Laura Silber, "Serbia Loses More than a Leader" (opinion piece), *New York Times*, March 14, 2003.

146. Some articles use the last name "Luković" instead of Ulemek.

147. See Misha Glenny, "The Death of Djindjić," *New York Review of Books*, July 17, 2003, p. 32.

148. According to Glenny, since they were organized by Milošević in 1994, the Red Berets "had acted as paramilitary murderers in Bosnia and Kosovo; as a death squad inside Serbia; as the representatives of organized crime groups inside the Serbian state;" and as the trainers of a Macedonian equivalent of the Red Berets. Id.

149. See id., p. 33; see also Daniel Simpson, "Serbs' Premier Is Assassinated; Led in Reforms," *New York Times*, March 13, 2003.

150. Michael Dobbs, "Pivotal Alliance Frayed Before Serb's Death," *Washington Post*, March 14, 2003. See also Steven Erlanger, "Did Serbia's Leader Do the West's Bidding Too Well?," *New York Times*, March 16, 2003.

151. See Michael Dobbs, "Pivotal Alliance Frayed Before Serb's Death," *Washington Post*, March 14, 2003.

152. See Misha Glenny, "The Death of Djindjić," *New York Review of Books*, July 17, 2003, p. 34.

153. See Daniel Simpson, "Serbs' Premier Is Assassinated; Led in Reforms," *New York Times*, March 13, 2003.

154. See Dušan Stojanović, "Milošević Militia Chief, 11 Others Guilty in '03 Killing of Serbian Premier," *Associated Press*, May 23 2007.

155. See Douglas Hamilton, "Serb to give deadly evidence in assassination trial," *Reuters*, November 22, 2006.

156. See Ellie Tzortzi, “Djindjić verdict will leave unanswered questions,” *Reuters*, May 22, 2007. In its verdict, the Serbian court “said the 12 [defendants] had conspired to kill Djindjić to halt his pro-Western reforms, bring Milošević’s allies back to power and stop further extradition of war crimes suspects to the [ICTY].” “Serbian court convicts 12 in PM assassination,” *Associated Press*, May 23, 2007.

157. See Steven Erlanger, “Did Serbia’s Leader Do the West’s Bidding too Well?,” *New York Times*, March 16, 2001.

158. Interview with Antonela Riha, Belgrade, November 27, 2006.

159. Legija was, however, reportedly concerned about whether he was among those being investigated by the ICTY Prosecutor. Interview with Judge Radmila Dragičević-Dičić, November 21, 2006; Interview with Antonela Riha, Belgrade, November 27, 2006. See also “Ulemek feared Hague,” *RV B92* (Belgrade), March 27, 2007. Some, however, believe that although Djindjić’s assassins said that they acted to prevent their colleagues from being sent to The Hague, their principal motivation was “to prevent a crackdown on organized crime” by Djindjić. Interview with Ivan Jovanović, Belgrade, June 6, 2007.

160. Against the view that Western governments pressed Djindjić too hard on ICTY cooperation and thus derailed Belgrade’s democratic transition, some Serbians counter that the “real problem” was that government leaders, including Djindjić, did not make enough effort sooner to crack down on organized crime, thereby allowing “elements involved in crime ... to regroup.” Telephone interview with Bogdan Ivanišević, November 3, 2006. Making a similar point, journalist Dejan Anastasijević observes: “It was a problem with the revolution in Belgrade. It didn’t go far enough.” Interview with Dejan Anastasijević, Belgrade, November 20, 2006. As noted above, moreover, Djindjić reportedly was assassinated because of his efforts to crack down on organized crime as well as because of his willingness to cooperate with the ICTY.

161. International Crisis Group, “Serbian Reform Stalls Again,” Europe Report No. 145, p. 1, July 17, 2003, available at [http://www.crisisgroup.org/library/documents/report\\_archive/A401049\\_17072003.pdf](http://www.crisisgroup.org/library/documents/report_archive/A401049_17072003.pdf).

162. Milanka Saponja-Hadžić, “Regional Report: Serbs Finally Back Hague Cooperation,” IWPR’s Tribunal Update No. 314, May 29, 2003.

163. A state of emergency was imposed following the assassination of Djindjić. See Daniel Simpson, “Serbs Mourn Slain Premier; Police Arrest 56 Suspects,” *New York Times*, March 14, 2003.

164. See Tenth Annual Report of the [ICTY], 243, UN Doc. A/58/297; S/2003/829.

165. See UN Doc. A/58/297; S/2003/829, 232. During this period Zoran Živković, a Djindjić ally, served as Prime Minister.

166. Miloš Vašić, “Patriots by Trade, Criminals by Persuasion; Operation Sabre illuminates the overlap of interests of the ICTY and the Serbian justice system,” *Transitions Online* (Prague), May 15, 2003, at <http://www.tol.cz/look/BRR/article/tpl?IdLanguage=1&IdPublication=9&NrIssue=1&NrSection=2&NrArticle=9502>.

167. See Milanka Saponja-Hadžić, “Regional Report: Serbs Finally Back Hague Cooperation,” IWPR’s Tribunal Update No. 314, May 29, 2003.

168. Summarizing developments in March 2004, the International Crisis Group wrote: “Milošević-era structures and personnel are still relatively intact in the judiciary, police, army and

other key institutions. Serbia's media and judiciary are less independent today than two years ago. The myriad intelligence services still appear out of control ..." International Crisis Group, "Serbia's U-Turn," Europe Report No. 154, p. ii, March 26, 2004.

169. With 27.33 percent of the vote, the Serbian Radical Party was the biggest winner in the December 2003 elections. See "Serbia at the Crossroads Again," United States Institute of Peace, Special Report 128, p. 8, November 2004. As noted earlier, the ICTY Prosecutor has been faulted by some observers for indicting several high-level Serbian officers in the lead-up to these elections.

170. The Bush Administration was unable to certify that Serbia had met conditions for release of aid appropriated for FY 2004 by the certification deadline of March 31, 2004, and therefore suspended \$16 million in aid appropriated for that year. See Steven Woehrel, "Conditions on U.S. Aid to Serbia," CRS Report for Congress, Order Code RS21686, p. 3, updated July 21, 2005.

171. See Boris Tadić, "Serbia's Fresh Start," *Washington Post*, July 24, 2004.

172. "Serbia at the Crossroads Again," United States Institute of Peace, Special Report 128, p. 5, November 2004.

173. See International Crisis Group, "Serbia's New Government: Turning from Europe," p. 8, Europe Briefing No. 46, Belgrade/Brussels, May 31, 2007.

174. See "Serbia at the Crossroads Again," United States Institute of Peace, Special Report 128, p. 4, November 2004.

175. See Rod Nordland, "Pensions for Patriots," *Newsweek*, June 25, 2005; Humanitarian Law Center, "Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005," p. 9. In 2004, the Serbian parliament enacted a law that provides for payment of salaries to and legal expenses of indictees, along with compensation for their families. *Id.* Although the law's implementation was suspended pending a legal challenge, the government's policy of seeking voluntary surrenders through financial inducements rather than arresting indicted ICTY suspects continued. See "Serbian PM encouraging Hague indictees to surrender with tycoon money—ex-minister," HINA Croatian News Agency, March 27, 2005. According to a former Serbian justice minister, much of the financing for these rewards has been "money acquired through the institutionalized racketeering of businessmen and tycoons connected with crime." *Id.*

176. Confidential interview.

177. Humanitarian Law Center, "Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005," p. 9.

178. Christian Jennings, "Serbia's shameful past hides in capital," *The Scotsman* (Edinburgh), May 31, 2007. See also "Serbian prosecutor: Mladić is in Serbia," RTV B92 News, December 25, 2007 (quoting Serbian War Crimes Prosecutor saying he believes that Mladić is in Serbia and "feels that Radovan Karadžić is in the region too"). In addition to Mladić and Karadžić, one other ICTY indictee—Goran Hadžić—is believed to be in Serbia or "within reach of the authorities in Serbia," according to ICTY Prosecutor Serge Brammertz. Report of Serge Brammertz, Prosecutor of the [ICTY], provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2008/326, Annex II, 25. (Brammertz's statement referred to four indictees believed to be within reach of Serbian authorities; as noted below, the fourth, Stojan Župljanin, was arrested in Serbia in June 2008.)

179. See “Del Ponte: Serbian authorities and Mladić negotiated his surrender in 2006,” HINA Croatian News Agency, December 25, 2007 (reporting that then ICTY Prosecutor Carla del Ponte said her office knew Karadžić was in Belgrade in 2004).

180. “Karadžić, Mladić ‘phone call’ away from arrest, claims US diplomat,” *Deutsche Press-Agentur*, December 18, 2007. In his report to the UN Security Council in late May 2008, ICTY Prosecutor Serge Brammertz said that the four remaining ICTY fugitives—including Karadžić and Mladić—were all within the reach of Serbian authorities. Soon after Brammertz delivered this report, one of the outstanding indictees, Stojan Župljanin, was apprehended five miles away from the center of Belgrade, leading Brammertz’s spokeswoman to note that the arrest “confirms what the Prosecutor has been saying for some time now, that the remaining fugitives are within the reach of Serbia.” Nidžara Ahmetašević, “Delight and Doubt over Župljanin Capture,” *Balkan Insight*, June 12, 2008.

181. See “Koštunica outlines tough stance on Hague cooperation,” News from RTV B92 for March 2, 2004; “Hague arrests not an option, say government,” News from RTV B92 for January 17, 2005. Although Koštunica’s “two-way cooperation” policy is often reported in terms of its implicit hostility toward the ICTY (or at best conditional cooperation with it), it has in practice included periods of mutually beneficial cooperation. During periods of substantial Serbian cooperation with the ICTY, its chief prosecutor has praised the “reciprocal cooperation between the Hague and Belgrade.” “Serbia turns a corner as EU, Hague give OK,” *Reuters*, September 29, 2005.

182. See Eric Jansson, “Serbian premier calls for war crimes dialogue,” *Financial Times*, April 8, 2004.

183. See “Cooperation between Belgrade and Hague Tribunal Should Be Two-Way,” Ministry of Foreign Affairs, Serbia and Montenegro, December 10, 2004, available at [http://www.mfa.gov.yu/Policy/Multilateral/UN/activities\\_e/icty/111202\\_e.html](http://www.mfa.gov.yu/Policy/Multilateral/UN/activities_e/icty/111202_e.html).

184. See Chapter IV.B.

185. See “Serbia turns a corner as EU, Hague give OK,” *Reuters*, September 29, 2005.

186. More specifically: “No further arrests or transfers were made; documents were largely unavailable or inaccessible; witnesses were hard to find.” Gareth Evans and James Lyon, “No Mladić, no talks,” *International Herald Tribune*, March 21, 2007. Along with Montenegro and Bosnia-Herzegovina, Serbia was nonetheless admitted into the North Atlantic Treaty Organization’s pre-membership Partnership for Peace in late November 2006, apparently due to a belief that this would strengthen Serbia’s pro-reform sector in the lead-up to parliamentary elections and as the international community prepared to decide on the future status of Kosovo. See “NATO brought Serbia into pre-membership program to boost moderates, diplomat says,” *Associated Press*, December 3, 2006; Brian Knowlton and Helene Cooper, “Serb’s letter persuades U.S. to drop NATO bar,” *International Herald Tribune*, December 1, 2006.

187. See “Please let us join your club; Renewed questions over the Balkans’ future in the European Union,” *The Economist*, May 6, 2006, p. 52.

188. By one account, President Tadić agreed that Koštunica could remain on as Prime Minister if he, in turn, would agree to cooperate with the ICTY. See Nicholas Wood, “New round of EU talks with Serbia confirmed,” *International Herald Tribune*, June 8, 2007.

189. See Merdijana Sadović, “Bosnian Serbs Turn in Mladić Aid,” IWPR Tribunal Update, No. 504, June 1, 2007. As reported in the *Economist*, police in Belgrade “piled into [Tolimir’s] flat and bundled him out in a body-bag, according to some reports, and then spirited him to the Serb part of Bosnia, where he was officially arrested. This way Serbia’s prime minister, Vojislav Koštunica, who dislikes the tribunal, appears not to have betrayed his principles.” “Crimes and misdemeanors,” *The Economist*, p. 60, June 9, 2007.

190. Serbian authorities said that Republika Srpska authorities apprehended Tolimir in Bosnia near the Serbian border but Tolimir claims he was arrested in Belgrade and then transported to Bosnia. See Alexandra Hudson, “Serb war crimes suspect says arrest violated rights,” *Reuters*, June 4, 2007.

191. Immediately after Tolimir’s arrest, EU enlargement commissioner Olli Rehn indicated that SAA negotiations between the EU and Belgrade might soon resume. Sara Goodman, “Is Tolimir Arrest Evidence of New Cooperation?,” Institute for War and Peace Reporting, June 1, 2007. On June 7, 2007, the EU confirmed that it would resume SAA negotiations with Serbia. See Nicholas Wood, “New round of EU talks with Serbia confirmed,” *International Herald Tribune*, June 8, 2007.

192. *Id.*

193. Serbian intelligence services reportedly helped track down Djordjević, whom Serbian media had previously reported to be hiding in Russia. Serbian and Montenegrin authorities disputed how long the fugitive had lived in Montenegro. See BBC Monitoring European, June 21, 2007, “Serbian news agency sees six months of stability for new government,” Source: Beta Week, Belgrade, in English 0000 gmt 21 Jun 07; Douglas Hamilton, “Charges fly after Serb fugitive’s surprise arrest,” *Reuters*, June 18, 2007.

194. See “Serbia: \$1.4 Million Reward offered for Fugitive General,” *New York Times* (Reuters dispatch), October 13, 2007.

195. See “EU leaders clash over Kosovo, Serbia,” *Deutsche Press-Agentur*, December 14, 2007. EU members have been divided over whether to allow Serbia to sign the SAA without first apprehending Mladić. See Ingrid Melander and Mark John, “EU agrees to send mission to Kosovo,” *Reuters*, December 13, 2007.

196. “Ball now in Serbia’s court on EU ties: Denmark,” *Agence France-Presse*, January 30, 2008.

197. To forestall worst-case scenarios threatened by Serbia in the event that Kosovo declared independence, reports in December 2007 suggested that “Brussels has given a green light for Serbia to become an EU member-candidate through the signing of an SAA” in January 2008, according to one report, even if Serbia failed to apprehend Mladić. Susanne Simon, “EU agreement even without surrendering Mladić; Stability more important than arrest of war criminals,” *Die Welt*, December 18, 2007; see also Ingrid Melander and Mark John, “EU agrees to send mission to Kosovo,” *Reuters*, December 13, 2007; Dan Bilefsky, “U.S. and Germany Plan to Recognize Kosovo,” *New York Times*, January 11, 2008.

198. See Dan Bilefsky, “In a Showdown, Kosovo Declares Its Independence; Serbians Express Rage,” *New York Times*, February 18, 2008.

199. See “EU Offers New Deal to Serbia,” *Balkan Insight*, January 30, 2008.

200. See Dan Bilefsky, “Pro-West Incumbent Wins Serbia’s Presidential Runoff,” *New York Times*, February 4, 2008.

201. See Dan Bilefsky, “Rift Over Closer Ties to Europe Ignites Serbian Political Crisis,” *New York Times*, February 6, 2008.

202. See “Election time: The government quits, paving the way for an early election,” *The Economist*, March 13, 2008.

203. See “Tadić travels to Luxembourg for SAA signing,” RTV B92 News, April 29, 2008; Simon Jennings, “EU–Serbia Agreement Sparks Controversy,” IWPR’s ICTY—Tribunal Update No. 550, May 9, 2008.

204. Although pre-election polls had showed the nationalist Serbian Radical Party ahead of other parties, it received only 29 percent of the vote on election day, with the party of President Boris Tadić winning approximately 39 percent. See “Nationalist Premier of Serbia Teams Up with Radical Party,” *Reuters*, May 14, 2008; President Tadić has 90 days to attempt to form a new government. See Dan Bilefsky, “Tilt to West Is Seen in Elections in Serbia,” *New York Times*, May 12, 2008. During the period of post-election negotiations, Serbia apprehended and surrendered to the ICTY one of four remaining fugitives, Stojan Župljanin, who was found approximately five miles from the center of Belgrade. See “Ivana Sekuralac and Dina Kyriakidou, “Serbia arrests top Bosnian Serb war crimes fugitive,” *Reuters*, June 11, 2008. Some analysts said that Župljanin’s arrest “may indicate that a pro-European coalition was the most likely outcome of Serbia’s month-long government negotiations.” *Id.*

205. Dejan Anastasijević, “Serbian Voters Spurn Nationalists,” *Time Magazine* online, May 12, 2008, at <http://www.time.com/time/world/article/0,8599,1739295,00.html>.

206. Interview with Biljana Kovačević-Vučo, Belgrade, June 6, 2007.

207. “Serbia at the Crossroads Again,” United States Institute of Peace, Special Report 128, p. 1, November 2004.

208. In her final assessment of Serbian cooperation before leaving office at the end of 2007, then ICTY Prosecutor Carla del Ponte concluded that, “[d]espite Serbian authorities’ declared commitment to fully cooperate with my office and improved procedures, there is no clear roadmap, no clear plan in the search for fugitives, no serious leads and no sign that serious efforts have been taken to arrest the fugitives.” Oliver Bullough, “Del Ponte Slams Serbia in Last Report to UN; Chief prosecutor pulls no punches in her assessment of Belgrade’s cooperation with the tribunal,” IWPR’s Tribunal Update No. 530, December 14, 2007.

### III. Benchmarks for Successful Impact in Serbia

209. Public opinion surveys undertaken in 2003, 2004, 2005 and 2006 show that for each of these years except 2005, 15 percent of Serbians polled believed that their country should cooperate with the ICTY “to achieve justice” (in 2005, 17 percent of respondents took this position), while a majority supported cooperation for pragmatic reasons, such as to avoid new sanctions and ensure integration with the rest of the world. See Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal,” p. 29, December 2006.

210. We address performance-based criticisms of the ICTY in Chapter VI.

211. For obvious reasons, we were more likely to hear opinions about what would constitute a positive impact from Serbians who are fundamentally supportive of the ICTY, even if critical of or disappointed in its performance in some respects, than from Serbians who are fundamentally opposed to the Tribunal.

212. See Chapters IV and V.

213. While this view may seem to represent a retributivist approach—and for some of our interlocutors doubtless does—the explanations offered for the positions described in this section at times emphasized other justifications of punishment, including general deterrence and the expressive function of punishment.

214. Interview with Svetlana Logar, Belgrade, November 21, 2006. Another interviewee made the point this way: “It’s simple. If not for the Hague Tribunal, no one would ever actually bring to trial anyone who committed these crimes.” Interview with Filip Svarm, Belgrade, November 24, 2006.

215. Interview with Judge Fausto Pocar, The Hague, March 5, 2007.

216. *Id.*

217. Interview with Judge Theodor Meron, The Hague, March 6, 2007.

218. Interview with Filip Svarm, Belgrade, November 24, 2006.

219. Interview with Judge Theodor Meron, The Hague, March 6, 2007. Judge Meron indicated that if in the long run the ICTY succeeds in punishing atrocities, “this will have a deterrent effect” but did not know whether in the short term this had happened.

220. Interview with Judge Wolfgang Schomburg, The Hague, March 5, 2007.

221. E-mail communication with Judge Wolfgang Schomburg, April 24, 2008.

222. Telephone Interview with Bogdan Ivanišević, November 3, 2006.

223. Interview with Adrej Nosov, Belgrade, November 23, 2006.

224. Interview with Goran Svilanović, Belgrade, November 20, 2006. As we note below, Svilanović believes that the Tribunal’s emphasis on securing transfers of indictees has undercut its potential to provoke a broader reckoning with the past in Serbia. See Chapter VI.B.

225. *Id.* Although we note this point here to provide a full context for Svilanović’s observation concerning the ICTY’s role in ensuring prosecution, it is directly relevant to the subject addressed in the next section—“addressing the past.”

226. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.

227. *Id.*

228. Interview with Ana Miljanić, Belgrade, November 22, 2006.

229. *Id.*

230. Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005,” p. 6. The organization links Serbia’s cooperation with the Hague Tribunal in the form of arresting indictees to the “building of Serbia’s democratic future based on respect for the Law and human rights.” Humanitarian Law Center, “Political elites in Serbia show no responsibility for legacy of the past,” December 11, 2006.

231. See Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal,” p. 56, December 2006.

232. *Id.*, p. 29.

233. Interview with Ivan Janković, Belgrade, November 24, 2006.

234. See Chapter VI.C.2.iii.

235. We assess the degree to which Serbians have accepted responsibility for crimes committed by, or with the criminal involvement of, Serbians in Chapter V, and consider in Chapter VI.A and B whether the ICTY has done all that it reasonably could to meet the challenges presented by anti-Hague sectors of Serbian society and leadership.

236. As has often been noted, the term *reconciliation* has multiple meanings and “is rarely defined clearly.” Oskar N.T. Thoms, James Ron and Roland Paris, “The Effects of Transitional Justice Mechanisms,” p. 26, April 2008. See also Eric Stover and Harvey M. Weinstein, *My Neighbor, My Enemy: Justice and Community in the Aftermath of Mass Atrocity*, pp. 4–5 (Cambridge University Press, 2004). We do not define *reconciliation* here but instead try to make clear, where possible, how those who invoked the term understood its meaning. One key meaning implicitly attached to this word by Serbians quoted above is an absence of renewed ethnic conflict.

237. Interview with Filip Ejodus, Belgrade, November 23, 2006.

238. Id.

239. Interview with Andrej Nosov, Belgrade, November 24, 2006.

240. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.

241. Interview with Andrej Nosov, Belgrade, November 24, 2006.

242. In any event, the premise underlying the view that prosecutions provide a foundation for future reconciliation—for present purposes, in the sense of an absence of renewed ethnic conflict—presumably is that justice eliminates one key risk factor for conflict, not that it is an ironclad guarantee against it.

243. Aryeh Neier, *War Crimes: Brutality, Genocide, Terror, and the Struggle for Justice*, p. 5 (Times Books, 1998).

244. See id., pp. 115–16.

245. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.

246. Id.

247. Id.

248. Interview with Filip Svarm, Belgrade, November 24, 2006.

249. Interview with Dušan Protić, Belgrade, November 23, 2006.

250. Interview with Goran Svilanović, Belgrade, November 20, 2006.

251. Interview with Radmila Nakarada, Belgrade, November 24, 2006.

252. Interview with Antonela Riha, Belgrade, November 27, 2006.

253. Id.

254. Interview with Ana Miljanić, Belgrade, November 22, 2006.

255. Id.

256. See Chapter IV.C.

257. These interviews were conducted before the WCC issued its verdict in the *Scorpions*’ case in April 2007. As we note below, local human rights advocates and other observers were highly critical of this verdict.



#### IV. Strengthening the Rule of Law by Enhancing Local Justice in War Crimes Cases

258. Today, however, the ICTY's Web site includes "Strengthening the Rule of Law" as one of five categories of ICTY achievements. See <http://www.un.org/icty/glance-e/index-t.htm>.

259. Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, *Sluzbeni glasnik Republike Srbije* (Official Gazette of the Republic of Serbia), No. 67/2003, July 1, 2003. This law entered into force on July 9, 2003.

260. *Id.*, art. 4.

261. *Id.*, art. 8.

262. *Id.*, art. 21.

263. See *id.*, art. 5.

264. International Center for Transitional Justice, "Serbia and Montenegro: Selected Developments in Transitional Justice," p. 5 (October 2004).

265. The Security Council resolution endorsing the ICTY's completion strategy noted that "the strengthening of national judicial systems" was "crucially important" to implementation of the completion strategy, but focused on the need for "the expeditious establishment ... and early functioning of a special chamber within the State Court of Bosnia and Herzegovina ... and the subsequent referral by the ICTY of cases of lower- or intermediate-rank accused" to the Bosnian chamber rather than to Serbian courts. SC Res. 1503, preamble (2003). The role of the ICTY in the establishment of the Bosnian War Crimes Chamber is described and analyzed in William W. Burke-White, "The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia & Herzegovina" (2007), available at <http://lsr.nellco.org/upenn/wps/papers/185>.

266. The Organization for Security and Co-operation in Europe provided substantial technical assistance to Serbian authorities in relation to the Serbian War Crimes Chamber. See Mark S. Ellis, "Coming to Terms with Its Past: Serbia's New War Court for the Prosecution of War Crimes," 22 *Berkeley Journal of International Law* 165 (2004).

267. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

268. *Id.* Vukčević was likely referring to the Djindjić government, which initiated plans for the WCC. As noted below, by the time the WCC was established—after Djindjić's assassination—the Serbian government's relationship with the chamber was antagonistic.

269. Interview with Nataša Kandić, Belgrade, November 27, 2006. Journalist Antonela Riha made the point this way: "That's the main impact of The Hague. If it didn't exist, there would be no War Crimes Chamber." Interview with Antonela Riha, Belgrade, November 27, 2006.

270. Interview with Radmila Nakarada, Belgrade, November 24, 2006. Journalist Ljiljana Smajlović told us she thought that "there would have been a war crimes chamber here" even if Milošević had not been turned over to the Hague Tribunal, but also said that "watching those proceedings [in The Hague] maybe made the War Crimes Chamber more acceptable here." Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

271. Interview with Filip Svarm, Belgrade, November 24, 2006.

272. Interview with Dušan Protić, Belgrade, November 23, 2006.

273. Id. Filip Svarm made a similar point: “Setting up the special court showed that we’re also part of the international community.” Interview with Filip Svarm, Belgrade, November 24, 2006. As another observer noted, “the new government saw domestic trials as an opportunity to change [Serbia’s] image in the international community and to empower the judiciary to do so.” Interview with Ivan Jovanović, Belgrade, November 22, 2006.

274. Interview with Dušan Protić, Belgrade, November 23, 2006.

275. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

276. Interview with Dušan Protić, Belgrade, November 23, 2006.

277. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

278. Id.

279. Interview with Dušan Protić, Belgrade, November 23, 2006.

280. See above, Chapter II.B.

281. According to several sources, in the wake of the Djindjić assassination, the U.S. government and the OSCE encouraged the Serbian government to introduce a law on war crimes as well as one on organized crime. E.g., Interview with Bruno Vekarić, Belgrade, November 21, 2006. The Humanitarian Law Center attributes the establishment of the WCC in large part to international pressure. See “HLC Press Release on War Crimes Trials in Serbia,” July 2006 (“Under the International Community’s pressure and in direct relation to the state’s obligation to respond to the war crimes committed in the recent past with legal instruments, the state of Serbia adopted laws, which were the basis for establishment of special institutions for prosecution of war crimes.”).

282. When it entered office, the Koštunica government reportedly also opposed the special chamber for organized crime but later backed off threats to close that court. See “On trial: A lively start for a new organized-crime court,” *The Economist*, May 21, 2005, p. 56.

283. Interview with Vladimir Vukčević, Belgrade, November 21, 2006; Interview with Bruno Vekarić, Belgrade, November 21, 2006. The dispute between the government and Vukčević revolved around the ICTY’s attempts to secure the transfer of four high-ranking Serbian suspects. The Koštunica government sought to try these suspects in Serbia and, according to Vukčević, sought to oust him when he refused publicly to espouse the government’s own position. International intervention in support of Vukčević prevented his ouster. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

284. “Confidence Is the Key to Cooperation,” Interview by Tatjana Tagirov with Vladimir Vukčević in *Justice in Transition*, p. 56 (Special Edition September 2006).

285. Interview with Vladimir Vukčević, Belgrade, November 21, 2006. Vukčević told us that he received support at that time from the ICTY and, even more importantly, from the U.S. embassy in Belgrade. Id.

286. The provision of the ICTY’s Rules of Procedure and Evidence that governs the referral of ICTY indictments to local courts stipulates that such referrals can take place only when the ICTY referral bench is satisfied that “the accused will receive a fair trial.” Rules of Procedure and Evidence, ICTY, Rule 11bis (B).

287. Of this total, 24 percent responded “absolutely yes” when asked whether Serbia’s courts were ready to prosecute war crimes, while 33 percent responded “mostly yes” to this question. See Orga-

nization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal,” p. 48, December 2006. While 57 percent of those who responded said they thought Serbia’s courts were ready to prosecute war crimes, only 47 percent responded that they thought the War Crimes Prosecutor’s Office had “the fortitude to initiate all proceedings for war crimes.” *Id.*, p. 51.

288. See *id.*, pp. 48–49.

289. Confidential interview.

290. See “Confidence Is the Key to Cooperation,” Interview by Tatjana Tagirov with Vladimir Vukčević in *Justice in Transition*, pp. 56–57 (Special Edition September 2006).

291. Interview with Vladimir Vukčević, Belgrade, November 21, 2006; see also “Confidence Is the Key to Cooperation,” Interview by Tatjana Tagirov with Vladimir Vukčević in *Justice in Transition*, pp. 56–57 (Special Edition September 2006).

292. Describing Vukčević’s motivations, one observer said that from the prosecutor’s perspective it is “false pride to say that what happened in [Serbians’] name was good if it’s a war crime.” Confidential interview. Another confidential source believes that Vukčević sees war criminals as “human garbage who should be behind bars.” Confidential interview.

293. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

294. “Confidence Is the Key to Cooperation,” Interview by Tatjana Tagirov with Vladimir Vukčević in *Justice in Transition*, p. 56 (Special Edition September 2006).

295. Interview with Bruno Vekarić, Belgrade, November 21, 2006.

296. Interview with Siniša Važić, Belgrade, November 21, 2006.

297. In addition to the various forms of engagement noted below, ICTY representatives participated in a roundtable meeting hosted by the OSCE mission to Serbia and Montenegro in 2003 in which the draft law establishing the WCC was discussed, and the ICTY provided detailed comments on the draft law. Interview with Ivan Jovanović, Belgrade, November 22, 2006; e-mail communication with Ivan Jovanović, May 7, 2008.

298. On November 17, 2006, a referral bench of the ICTY rendered a decision to transfer to Serbia the case of Vladimir Kovačević, who had been indicted in connection with the shelling of Dubrovnik in 1991. See *Prosecutor v. Vladimir Kovačević*, Case No. IT-01-42/2-I, Decision on Referral of Case Pursuant to Rule 11bis, November 17, 2006. Because of his mental condition, Kovačević had been thought unlikely to stand trial. But on July 30, 2007, Serbia’s War Crimes Prosecutor instituted charges against Kovačević. According to the *Associated Press*, “The Serbian prosecutor said Kovačević was being treated at the Belgrade military hospital and that experts would assess his capacity to attend trial in the future.” “Serbia’s war crimes prosecutor charges ex-army officer in 1991 shelling of Dubrovnik,” *Associated Press*, July 30, 2007.

299. Interview with David Tolbert, The Hague, March 5, 2007.

300. Confidential interview.

301. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

302. *Id.* In addition, pursuant to an amendment to the ICTY’s Rules of Procedure and Evidence adopted in July 2007, local authorities can directly petition the ICTY for access to protected material.

According to ICTY President Fausto Pocar, “[t]his amendment was particularly aimed at improving judicial cooperation between the International Tribunal and domestic courts in the region of the former Yugoslavia.” Assessment and report of Judge Fausto Pocar, President of the [ICTY], provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2008/326, Annex I, 40. Judge Pocar also “appointed a specific bench to consider applications for access to confidential material in cases that have already been finalized.” *Id.*

303. Report of Serge Brammertz, Prosecutor of the [ICTY], provided to the Security Council pursuant to paragraph 6 of Security Council resolution 1534 (2004), UN Doc. S/2008/326, Annex II, 23.

304. Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, art. 14 a.

305. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

306. Human Rights Watch, “Unfinished Business: Serbia’s War Crimes Chamber,” p. 24, June 2007. As of early May 2008, there had not yet been a judgment that would clarify this uncertainty. E-mail communication with Ivan Jovanović, May 9, 2008.

307. E.g., Interview with Nataša Kandić, Belgrade, November 27, 2006. As the Humanitarian Law Center has reported, even though the post-Milošević government “supported domestic war crimes trials, ... it soon became clear that [the police were] not willing to share its data on war crimes perpetrators with prosecutors, primarily because most of them belonged to the police.” Humanitarian Law Center, “Report: Victim/Witness Counseling and Legal Representation: a Model of Support—Project implementation report,” February 21, 2007.

308. For example the ICTY Prosecutor had identified four suspects in the “Zvornik case” before transferring it to the WCC; Vukčević’s office identified four more, and then later expanded its investigation to include hundreds of potential victims. Interviews with Vladimir Vukčević, Belgrade, November 21, 2006; Bruno Vekarić, Belgrade, November 28, 2006; and Nataša Kandić, Belgrade, November 27, 2006.

309. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

310. Interview with Nataša Kandić, Belgrade, November 27, 2006.

311. *Id.*

312. These include the Organization for Security and Co-operation in Europe, the United Nations Development Programme, the Humanitarian Law Center and the U.S. government.

313. Interview with Judge Siniša Važić, Belgrade, November 21, 2006.

314. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

315. Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” p. 25 (2007), International Center for Transitional Justice.

316. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

317. *Id.*

318. *Id.*

319. Interview with Alexandra Milenov, Belgrade, November 23, 2006.

320. Nataša Kandić, who has represented victims in cases before the WCC, does not see the use of video links as “the best thing to take from the ICTY,” however. “If you want to give space

for victims' voices," she told us, "you need to bring them to court." Interview with Nataša Kandić, Belgrade, November 27, 2006.

321. Interview with Judge Siniša Vazić, Belgrade, November 21, 2006.

322. Although inspired by ICTY facilities, this was funded by the U.S. government.

323. Judge Radmila Dragičević-Dičić, Belgrade, November 21, 2006. Judge Dragičević-Dičić is a member of the specialized chamber on organized crime but was involved in the formation of the WCC.

324. Interview with Ivana Ramić, Belgrade, November 21, 2006. The WCC's unit was established with funding from the U.S. Government. *Id.*

325. *Id.*

326. Human Rights Watch, "Unfinished Business: Serbia's War Crimes Chamber," p. 8, June 2007. A Draft Law on Government Authorities and Prosecution of Crimes against International Humanitarian Law, which if enacted would replace the law establishing the WCC, includes a provision (Article 13) establishing a "Unit for providing assistance and support to victims and witnesses." The draft provision states that this unit "ensures that the victims receive psychological, social, financial, legal, medical, and other assistance. It instructs victims and witnesses about the work of the [Department for Crimes against International Humanitarian Law] in the course of the proceedings, their rights, and performs other related tasks."

327. Interview with Nataša Kandić, Belgrade, November 27, 2006.

328. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

329. *Id.*

330. *Id.*

331. Interview with Ivan Janković, Belgrade, November 24, 2006. The spillover effect foreseen by Janković has not yet taken the form of substantial participation in WCC cases by attorneys who have served as defense counsel before the ICTY. According to the International Center for Transitional Justice, "Serbian lawyers who have acquired experience as counsel at the ICTY rarely participate in the trials in Belgrade because of their continued commitments in The Hague and the relatively low earnings for the trials at home." Bogdan Ivanišević, "Against the Current—War Crimes Prosecutions in Serbia," p. 35 (2007), International Center for Transitional Justice.

332. Interview with Judge Sonja Prostan, Belgrade, June 7, 2007.

333. Human Rights Watch published an assessment of the WCC in June 2007, "Unfinished Business: Serbia's War Crimes Chamber," and the International Center for Transitional Justice published an assessment in February 2008, "Against the Current—War Crimes Prosecutions in Serbia."

334. See Organization for Security and Co-operation in Europe, Mission to Serbia and Montenegro, "War Crimes before Domestic Courts," pp. 9–10 (October 2003); International Center for Transitional Justice, "Serbia and Montenegro: Selected Developments in Transitional Justice," p. 5 (October 2004). According to the Humanitarian Law Center, only one war crimes trial before a Serbian court ended "in a final judgment before the change of government in December 2000." Humanitarian Law Center, "Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005," p. 31.

335. Organization for Security and Co-operation in Europe, Mission to Serbia and Montenegro, "War Crimes before Domestic Courts," p. 47 (October 2003).
336. Interview with Ivan Jovanović, Belgrade, November 22, 2006.
337. Humanitarian Law Center, "Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005," p. 31.
338. Interview with Dušan Protić, Belgrade, November 23, 2006.
339. See Humanitarian Law Center, "Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005," pp. 31–32. One of these cases is known as the Sjeverin case because the 16 victims were from Sjeverin (though they were killed in the Bosnian town of Višegrad); the other is known as the Podujevo case because the victims were killed or wounded in Podujevo, Kosovo.
340. *Id.*, p. 32.
341. E.g., Confidential interviews; Interview with Dušan Protić, Belgrade, November 23, 2006; Interview with Nataša Kandić, November 27, 2006.
342. Confidential interview.
343. See Documenta, Humanitarian Law Center and Research and Documentation Center, "Transitional Justice in Post-Yugoslav Countries: Report for 2006," p. 14; Bogdan Ivanišević, "Against the Current—War Crimes Prosecutions in Serbia," pp. 10–11 (2007), International Center for Transitional Justice; Humanitarian Law Center Press Release, "HLC on War Crimes Trials in Serbia," July 26, 2006. In the view of the Humanitarian Law Center's executive director, Nataša Kandić, one factor behind what she believes are instructions to Vukčević from state authorities "not to go higher" is the Serbian government's desire to suppress evidence that would prejudice the case against it before the International Court of Justice (ICJ), brought by Bosnia in 1993, alleging Serbian responsibility for genocide. Interview with Nataša Kandić, Belgrade, November 27, 2006. In February 2007, the ICJ finally rendered judgment on the merits in this case, finding that there was insufficient evidence that the Serbian state was legally responsible for genocidal conduct in Srebrenica (though the Court found Serbia in violation of the Genocide Convention because of its failure to prevent the Srebrenica genocide and ensure punishment of Ratko Mladić). Evidence withheld by Serbia might have affected the outcome. See Marlise Simons, "Genocide Court Ruled for Serbia without Seeing Full War Archive," *New York Times*, April 9, 2007.
344. This represented a decrease from the two preceding years. See Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal," p. 51, December 2006.
345. Interviews with Bruno Vekarić, Belgrade, November 21, 2006 and November 28, 2006.
346. Interview with Bruno Vekarić, Belgrade, November 21, 2006. This pattern may have changed somewhat following the formation of a new government in 2007. Within days after his appointment, the new justice minister visited the WCC and its Prosecutor's Office to express full support for its work. See Bogdan Ivanišević, "Against the Current—War Crimes Prosecutions in Serbia," pp. 2–3 (2007), International Center for Transitional Justice.
347. Interview with Bruno Vekarić, Belgrade, November 28, 2006.
348. The accused in several cases include three mid-level officers—an assistant commander of the Serbian gendarmerie; a deputy gendarmerie commander, and the commander of the Scorpions,

an “elite unit of the Serbian special police.” Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” p. 8, n. 64 (2007), International Center for Transitional Justice. Noting concerns about the Prosecutor’s failure to indict high-level suspects, a report by three regional human rights organizations added that “[s]ome progress was made in this respect” in a case launched in October 2006. Documenta, Humanitarian Law Center and Research and Documentation Center, “Transitional Justice in Post-Yugoslav Countries: Report for 2006,” p. 14.

349. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

350. Id. In early April 2008, however, a plan to assassinate Vukčević and two other individuals was uncovered. The spokesman for the War Crimes Prosecutor indicated that the assassination attempt was likely due to Vukčević’s separate role in seeking fugitives indicted by the ICTY rather than his role in prosecuting lower-level suspects before the WCC. See Ivana Sekularac, “Group was plotting to kill Serb prosecutor-official,” *Reuters*, April 9, 2008, at <http://www.reuters.com/article/latestCrisis/idUSL09483068>. Similar threats followed the arrest of ICTY indictee Stojan Župljanin in June 2008. See “New Threats for Serb War Crimes Prosecutor,” *BalkanInsight.com*, June 17, 2008.

351. As of June 19, 2008, the total number of first-instance trials completed by the WCC was five, while another 20 trials involving 41 accused were ongoing or in the pre-trial phase, according to the War Crimes Prosecutor’s Office (WCPO). E-mail communication, June 19, 2008 (drawing upon information in WCPO database). A case transferred from the ICTY before its Prosecutor had issued indictments was completed at the first instance in June 2008. See “Serbia Jails Three for Killing Muslims,” *Reuters*, June 12, 2008.

352. See Documenta, Humanitarian Law Center and Research and Documentation Center, “Transitional Justice in Post-Yugoslav Countries: Report for 2006,” p. 14; Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” pp. 7–9 (2007), International Center for Transitional Justice.

353. For further discussion of this, see Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” pp. 6–8 (2007), International Center for Transitional Justice; Caroline Tosh and Aleksandar Roknić, “Politicians Stymie Belgrade War Crimes Trials,” *IWPR’s Tribunal Update*, April 28, 2008.

354. Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, art. 8.

355. E.g., Interview with Ivan Jovanović, Belgrade, November 22, 2006.

356. These two previous supervisors were transferred or retired in the face of protests over their human rights disqualifications. See “Serbian government sacks head of war crimes department,” *BBC Monitoring European*, February 8, 2006 (Source: *Danas*, Belgrade, in Serbian, February 8, 2006) (reporting that at the request of then ICTY Prosecutor Carla del Ponte, the Serbian government discharged then head of the Interior Ministry’s department for investigating war crimes Slobodan Borisavljević, “as it was believed that he might obstruct operations for the capture of Hague fugitives recently launched by war crimes prosecutor Vladimir Vukčević.” See also Humanitarian Law Center, “From Mass Graves to Serbian MUP,” February 24, 2006 (reporting that an investigator in the MUP War Crimes Investigation Department, Danilo Bulatović, had been involved in the cover-up of Serbian crimes in Kosovo); Human Rights Watch, “Unfinished Business: Serbia’s War Crimes Chamber,” p. 27, June 2007.

357. *Id.* See also Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005,” p. 26.
358. Interview with Ivan Jovanović, Belgrade, November 22, 2006. The President of the WCC described “police support” as the “biggest challenge for the court,” though he attributed this problem to the small number of officers detailed to investigate war crimes. Interview with Siniša Važić, Belgrade, November 21, 2006.
359. Interview with Ivan Jovanović, Belgrade, June 6, 2007.
360. *Id.*
361. Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” p. 12 (2007), International Center for Transitional Justice. If enacted into law, a revised version of the law governing the WCC will give the War Crimes Prosecutor greater control over the appointment and firing of the head of this unit and its internal organization. See Draft Law on Government Authorities and Prosecution of Crimes against International Humanitarian Law, art. 14 (October 31, 2006).
362. In the period up to June 2008, only seven war crimes verdicts—four rendered by the WCC—had been reviewed by the Supreme Court, which ordered retrials in four cases. E-mail communication from War Crimes Prosecutor’s Office, June 19, 2008. The sole case in which the Supreme Court left fully intact the first trial verdict by the WCC involved a Kosovo Liberation Army member, Anton Lekaj, who was convicted of rape and other abuses of Romani victims in Kosovo in September 2006. Lekaj was sentenced to 13 years’ imprisonment; the Supreme Court upheld the conviction in April 2007. In March 2007, the Supreme Court confirmed the conviction of another defendant (Milan Bulić) but reduced his sentence from eight to two years’ imprisonment. Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia,” p. 4, No. 23 (2007), International Center for Transitional Justice. The Supreme Court had rendered judgment on only two other WCC verdicts. In December 2006, it overturned the WCC verdict in the *Ovčara* case. A retrial began in March 2007. In April 2007, it overturned the verdict in the *Radak* case. See *id.*, p. 4, n. 24.
363. Humanitarian Law Center Press Release, “HLC on War Crimes Trials in Serbia,” July 26, 2006.
364. Nicholas Wood, “To-and-Fro in Serbian War Crimes Cases,” *International Herald Tribune*, April 13, 2007.
365. See *id.* The Supreme Court’s apparent proclivity for overturning judgments by the WCC is aided by Serbia’s criminal procedure code. According to WCC President, “It’s very easy to send a verdict back to the WCC.” Interview with Siniša Važić, Belgrade, November 21, 2006.
366. More important than the court’s overall composition, four of the five Supreme Court judges who consider appeals from the WCC were appointed during the Milošević-era. Human Rights Watch, “Unfinished Business: Serbia’s War Crimes Chamber,” p. 31, June 2007.
367. Interview with Bogdan Ivanišević, Belgrade, June 5, 2007; Interview with Ivan Jovanović, Belgrade, June 6, 2007; Interview with Judge Sonja Prostan, Belgrade, June 7, 2007.
368. E.g., Interview with Ivan Jovanović, Belgrade, June 6, 2007. In its unpublished assessment of the Supreme Court’s decision in the *Ovčara* case—a decision widely denounced by NGOs—the OSCE Mission in Serbia “duly noted all remarks made in public that the Supreme Court decision was politically driven, but its trial monitors ... did not find any proof supporting such statements.”



The mission nonetheless noted that “[s]ome of the Supreme Court’s reasoning ... could be argued with on legal grounds,” while other portions of its controversial decision “are also inconsistent.” OSCE Mission to Serbia, Rule of Law and Human Rights Department, “The ‘Ovčara’ Case Background,” p. 3 (undated).

369. *Id.* When the Supreme Court sends a case back to the WCC, the latter does not conduct an entire trial *de novo*. Instead, it typically conducts a hearing on those aspects of the original trial faulted by the Supreme Court. On re-review, the Supreme Court has usually affirmed the trial verdict.

370. Organization for Security and Co-operation in Europe, Mission to Serbia and Montenegro, “War Crimes before Domestic Courts: OSCE Monitoring and empowering of the domestic courts to deal with War Crimes,” pp. 8–9, October 2003.

371. See Report of the Head of the OSCE Mission to Serbia and Montenegro, Ambassador Hans Ola Urstand, to the Permanent Council, Vienna, p. 4 (February 27, 2006). As noted, the Belgrade District Court conducted two major war crimes prosecutions during the post-Milošević period, before the WCC was created.

372. Relatives of victims and victims’ organizations that had participated in or attended the *Ovčara* case have refused to participate in the retrial following the Supreme Court’s invalidation of the first instance verdict. See Caroline Tosh and Aleksandar Roknić, “Politicians Stymie Belgrade War Crimes Trials,” IWPR’s Tribunal Update, April 28, 2008.

373. Interview with Nataša Kandić, Belgrade, November 27, 2006. This interview was conducted before the WCC issued its verdict in the *Scorpions* case. See below.

374. Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999–2005,” p. 26. See also Humanitarian Law Center Press Release, “HLC on War Crimes Trials in Serbia,” July 26, 2006 (reporting that trials before the WCC “are being administered in technically impeccable conditions”).

375. Humanitarian Law Center, “Political elites in Serbia show no responsibility for legacy of the past,” December 11, 2006.

376. Nicholas Wood, “Serbian Court Convicts 4 in Srebrenica Massacre,” *New York Times*, April 11, 2007.

377. See Emir Suljagić, “In the Sign of Scorpio,” *Oslobodjenje*, April 12, 2007, reprinted by BBC Monitoring European, April 17, 2007.

378. Nicholas Wood, “Serbian Court Convicts 4 in Srebrenica Massacre,” *New York Times*, April 11, 2007.

379. See Dejan Anastasijević, “The Price of Speaking Out in Serbia,” *Time Magazine*, April 17, 2007, available at <http://www.time.com/time/world/article/0,8599,1611396,00.html>.

380. *Id.*

381. “HLC: Scorpions verdict politically motivated,” April 12, 2007.

382. Nicholas Wood, “Serbian Court Convicts 4 in Srebrenica Massacre,” *New York Times*, April 11, 2007. The quoted text is the *Times*’ paraphrase of Kandić’s critique, not a direct quote of Kandić.

383. Interview with Judge Radmila Dragičević-Dičić, November 21, 2006.

384. *Id.*

385. As Human Rights Watch reports, “[w]ithout the intervention of the Humanitarian Law Center, ... it is doubtful victims living outside Serbia would be prepared to cooperate” with the WCC. Human Rights Watch, “Unfinished Business: Serbia’s War Crimes Chamber,” p. 7, June 2007.

386. Interview with Nataša Kandić, Belgrade, November 27, 2006.

387. *Id.*

388. *Id.*

389. Interview with Filip Svarm, Belgrade, November 24, 2006.

390. Ivan Jovanović, quoted in Caroline Tosh and Aleksandar Roknić, “Politicians Stymie Belgrade War Crimes Trials,” IWPR’s Tribunal Update, April 28, 2008.

391. E.g., Interview with Ana Miljanić, Belgrade, November 22, 2006; Interview with Judge Radmila Dragičević-Dičić, November 21, 2006.

392. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

393. Interview with Nataša Kandić, Belgrade, November 27, 2006. Opinions to this effect among our Serbian interlocutors are borne out by public opinion surveys conducted in recent years. In 2004, 2005, and 2006, a fairly constant majority ranging from 69 percent to 71 percent of respondents said that it is better to conduct war crimes trials in Serbia than in The Hague. See Organization for Security and Co-operation in Europe, Belgrade Center for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal,” p. 49 (December 2006).

394. Interview with Dejan Anastasijević, Belgrade, November 20, 2006; Interview with Jovan Nicić and Mato Meyer, Belgrade, November 20, 2006.

395. As previously noted, however, our interlocutors disagree somewhat about who belongs in the category of cases that still must be prosecuted by the ICTY.

396. Some suspects who are ethnic Serbs but who committed atrocities in Bosnia or Croatia found refuge in Serbia, where they obtained Serbian citizenship. Because Serbia has been unable to extradite its nationals—a limitation that might no longer apply under a new Constitution that entered into force in 2007—these individuals would likely elude prosecution unless Serbia itself brought charges against them. But since their crimes took place in other countries, the cooperation of those countries’ prosecutors is often crucial to Serbia’s ability to bring successful prosecutions. Formal and actual cooperation has been greater between Serbia and Croatia than between Serbia and Bosnia, as the latter country believes that crimes committed in its territory should be prosecuted there rather than in Serbia. Even so, Bosnia’s war crimes prosecutor has cooperated with his counterpart in Serbia in various ways, including by conducting a joint investigation of atrocities committed in Zvornik, Bosnia. See Nenad Radičević, “Legacy of War Crimes Hinders Balkan Reconciliation,” Balkans Investigative Reporting Network, November 15, 2007; Bogdan Ivanišević, “Against the Current—War Crimes Prosecutions in Serbia (2007),” pp. 30–31, International Center for Transitional Justice.

## V. Addressing the Past

397. See Chapter III.B.

398. In one respect, of course, the Hague Tribunal’s contribution has already been significant: by helping spur relatively credible war crimes prosecutions in Serbia, the ICTY has helped foster an

important process of reckoning with past crimes. As noted above, however, a verdict rendered by Serbia's War Crimes Chamber in April 2007 may signify that this process of legal reckoning ends where evidence of state responsibility for atrocities begins.

399. German attitudes concerning social responsibility for Nazi era crimes evolved significantly over decades. See Gunnar Theissen, "Between Acknowledgment and Ignorance: How white South Africans have dealt with the apartheid past," Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/papers/papgt2.htm>.

400. We use the term "war crimes" here as a shorthand for international crimes committed during the 1990s Balkans conflicts, which also include crimes against humanity and genocide.

401. See Belgrade Centre for Human Rights and Strategic Marketing Survey, "Public opinion in Serbia: Attitudes towards ICTY," August 2004.

402. See Belgrade Centre for Human Rights and Strategic Marketing Survey, "Public Opinion in Serbia: Attitudes to National Courts Trying War Crimes and to ICTY," April 2005.

403. See Organization for Security and Cooperation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal," pp. 24–26, December 2006.

404. *Id.*, p. 27.

405. The fact that there were changes does not, of course, tell us whether the ICTY's work was a principal or sole causal factor.

406. See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeals Chamber Judgment, 37, 39, April 19, 2004.

407. See Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 297, February 26, 2007.

408. See Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Attitudes to national courts trying war crimes and to ICTY," p. 10, April 2005.

409. Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal," p. 24, December 2006.

410. See *id.*

411. See "Survey: 71% of Serbians know about Srebrenica massacre, only a half believe it," HINA Croatian News Agency, March 9, 2007. See also Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal," p. 24, December 2006 (showing that 48 percent of those polled in 2004 reported that they believed what they had heard about the massacre of civilians in Srebrenica, compared to 50 percent in 2006).

412. For example, when asked if they believed reports that Croatian army and police had committed war crimes against Serbs in Western Slavonia in 1995, 82 percent of Serbian respondents answered yes in 2004, while only 75 percent answered yes in 2006. When asked if they believed reports that members of the Kosovo Liberation Army had committed crimes during the 1999 war in Kosovo, 80 percent said yes in 2005, while only 74 percent responded yes in 2006. See Organi-

zation for Security and Co-operation in Europe, Belgrade Center for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Views on domestic war crimes judicial authorities and the Hague Tribunal,” p. 24, December 2006.

413. Among many reasons, the survey results we discuss did not attempt to ascertain what sources of information affected respondents’ reported knowledge of key events.

414. See Belgrade Centre for Human Rights and Strategic Marketing Research, “Public Opinion in Serbia: Attitudes to national courts trying war crimes and to ICTY,” p. 18, April 2005.

415. Organization for Security and Co-operation in Europe, Strategic Marketing Research and Belgrade Centre for Human Rights, “Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal,” p. 39, December 2006.

416. *Id.*, p. 10.

417. Interview with Svetlana Logar, Belgrade, November 21, 2006. It is unclear how exposure to the ICTY affects attitudes toward it. On the one hand, surveys undertaken in 2003 and 2004 indicate that a small percentage of respondents (13 percent in 2003 and 19 percent in 2004) changed their opinion of the ICTY based on their exposure to actual proceedings there, and a significant majority of those who reported that their minds had been changed (71 percent in 2003 and 95 percent in 2004) reported that their opinion of the Tribunal had changed in a *negative* direction. See Belgrade Centre for Human Rights and Strategic Marketing Research, “Public opinion in Serbia: Attitudes towards ICTY,” August 2004. The survey results do not, however, disclose whether specific trials had a particularly strong effect on these shifts. Perhaps also relevant, sources who follow the ICTY closely say that people from the Balkans tend to pay the most attention to trials in which their nationals are defendants. E.g., Interview with Mirko Klarin, March 9, 2007 (“People are more interested in their own criminals than in victims”). This may suggest that attitudes captured in these poll results—by definition, those of individuals who actually followed ICTY proceedings—reflect in particular the views of individuals who identify with the defendants on trial.

418. Interview with Svetlana Logar, Belgrade, November 21, 2006.

419. *Id.*

420. For examples of anti-ICTY statements by SRS representatives in parliamentary debates, see Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo, 1999-2005,” pp. 13-16.

421. See Documenta, Humanitarian Law Center and Research and Documentation Center, “Transitional Justice in Post-Yugoslav Countries: Report for 2006,” p. 36 (citing statements of members of parliament from the SRS hailing Ratko Mladić as a “Serbian hero” who had “entered into legend”).

422. A poll conducted by Strategic Marketing Research in August 2005 showed that the SRS commanded 37 percent of the public’s support. See “Radicals Maintain First Place in Serbia,” Angus Reid Polls & Research, Aug. 22, 2005, available at <http://www.angus-reid.com/polls/index.cfm/fuseaction/viewItem/itemID/8614>. The SRS won fewer votes (28 percent) than widely expected in the elections held in January 2007. In the lead-up to national elections slated for May 11, 2008, polls showed that the SRS enjoyed 34 percent of the public’s support, with 34 percent—the next largest bloc—supporting the pro-Western coalition led by President Tadić. See Dušan Stojanović, “Serbs face stark election choice: Pro-Western path or alliance with Russia,” *Associated Press*,

May 8, 2008. On election day, however, 39 percent voted for Tadić's party, while the SRS received only 29 percent of the vote. "Nationalist Premier of Serbia Teams Up with Radical Party," *Reuters*, May 14, 2008.

423. Interview with Srđan Bogosavljević, Belgrade, November 21, 2006.

424. Interview by Ana Marija Vojković, "Čedomir Jovanović," *Javno*, April 16, 2007, available at <http://www.javno.com/en/world/clanak.php?id=35470>. Similarly, another Liberal Democratic Party leader, Vesna Pešić, says "Serbia cannot be a respectful country before we reach a consensus that crime must be punished and must not be defended in the parliament." "Nationalist lawmakers display pro-Mladić placards during Serbian parliament session," *Associated Press*, May 25, 2007.

425. "Serb suspects must face U.N. war crimes court, Council of Europe says," *Associated Press*, May 24, 2007.

426. See "Tadić: It was my duty to apologize," RTV B92 News, June 25, 2007.

427. Telephone interview with Bogdan Ivanišević, November 3, 2006.

428. *Id.*

429. See Organization for Security and Co-operation in Europe, Belgrade Centre for Human Rights and Strategic Marketing Research, "Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal," p. 29, December 2006. Twenty-eight percent of the respondents in the December 2006 survey said they supported cooperation to avoid international sanctions; 26 percent said they supported cooperation because it is a precondition to Serbia's integration with Europe. *Id.*

430. Interview with Radmila Nakarada, Belgrade, November 24, 2006.

431. Moreover it is hardly clear whether or to what extent this group would counter anti-Hague attitudes if it were a more influential political constituency. Savo Strbac, who has for years submitted evidence of crimes against Croatian Serbs to the ICTY and who described himself in an interview as a "big supporter of the ICTY," has been disappointed in the results of his efforts. During the same interview, Strbac expressed disappointment in the ICTY's decision to transfer one case in particular to Croatian courts and was critical of the approach of local war crimes courts in Serbia and Croatia. Summarizing his views, Strbac described the ICTY as a "lesser evil—one that causes less damage—than Croatian courts." Interview with Savo Strbac, Belgrade, November 22, 2006.

432. Interview with Antonela Riha, Belgrade, November 27, 2006.

433. *Id.*

434. Hodžić later served as Spokesperson for the ICTY Registry and Chambers.

435. Interview with Refik Hodžić, The Hague, November 17, 2006.

436. *Id.*

437. See Belgrade Centre for Human Rights and Strategic Marketing Survey, "Public Opinion in Serbia: Attitudes to National Courts Trying War Crimes and to ICTY," p. 9, April 2005. This point was noted as well by Vojin Dimitrijević, whose Belgrade Centre for Human Rights co-sponsored the public opinion surveys summarized in this section. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.

438. Interview with Srđan Bogosavljević, Belgrade, November 21, 2006.

439. *Id.*

440. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.
441. Interview with Ivan Janković, Belgrade, November 24, 2006.
442. Interview with Jadranka Jelinčić, Belgrade, November 24, 2006.
443. Id.
444. Interview with Ivan Janković, Belgrade, November 24, 2006.
445. Telephone interview with Bogdan Ivanišević, November 3, 2006.
446. Interview with Jadranka Jelinčić, Belgrade, November 24, 2006.
447. Id.
448. For example, in 2004 the government of Republika Srpska (RS), the Bosnian Serb entity in Bosnia-Herzegovina, issued a report that acknowledged Serb responsibility for the massacre in Srebrenica. See Nicholas Wood, "Bosnian Serbs Admit Responsibility for the Massacre of 7,000," *New York Times*, June 12, 2004. This followed an earlier report that obscured the extent of the carnage. In its wake, Lord Paddy Ashdown, then serving as High Representative for Bosnia and Herzegovina, fired two high-ranking RS officials for obstructing the work of the Srebrenica commission. See Dan Saxon, "Exporting Justice: Perceptions of the ICTY Among the Serbian, Croatian, and Muslim Communities in the Former Yugoslavia," 4 *Journal of Human Rights* 559, p. 562 (2005).
449. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.
450. Id.
451. Id.
452. Interview with Sonja Stojanović, Belgrade, November 23, 2006.
453. Id.

## VI. Performance-Related Factors

454. Although formally established in May 1993, the ICTY did not become fully operational until 1994.
455. Lal C. Vohrah & Jon Cina, "The Outreach Programme," Ch. 40 in Richard May, ed., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, p. 550 (Kluwer, 2000).
456. Victor Peskin, "Courting Rwanda: The Promises and Pitfalls of the ICTR Outreach Programme," 3 *Journal of International Criminal Justice* 950, p. 953 (2005).
457. Sixth Annual Report of the [ICTY], UN Doc. A/54/187; S/1999/846, 148 (1999).
458. Although several preliminary initiatives took place earlier, the Outreach Program became operational in October 1999. See Lal C. Vohrah & Jon Cina, "The Outreach Programme," Ch. 40 in Richard May, ed., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, p. 554 (Kluwer, 2000).
459. Id., 150. See also Press Release, ICTY, March 16, 1999, at <http://www.un.org/icty/latest-e/index.htm>; David Tolbert, "The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings," 26 *Fletcher Forum of World Affairs* 5, p. 11 (2002). Shortly before the Outreach Program was launched, Judge McDonald elaborated further on its underlying rationale:

It's important for the people in the former Yugoslavia to understand our tribunal, to believe that it's fair, to believe that the decision-makers the judges are fair, that we don't have a stake

in the controversy, that we're making our decisions based upon evidence that's deduced during the trial process, that involves a very active participation by defense counsel and that it's not simply a presentation of evidence by the prosecutor to the judges and the judges accepting them.

Our decisions are to help to bring about reconciliation, but our decisions cannot do that—even if you assume they can do that—if there isn't a belief that the tribunal is fair, that the decision-makers are fair. And that's why I'm so interested in the outreach or what I call the "awareness project."

Kitty Felde, "Gabrielle Kirk McDonald; From Civil Rights to War Crimes, a Pioneer Promotes the Rule of Law," *Los Angeles Times* interview, February 7, 1999.

460. FIDH, *Victims' Rights Before the ICC*, Ch. III: Outreach, p. 8 (quoting Olga Kavran).

461. E-mail communication with Bogdan Ivanišević, April 2, 2008.

462. Interview by Jasna Šarčević-Janković with Mirko Klarin, "Systematic Difficulties for Denial," *Justice in Transition*, Special Edition Sept. 2006, p. 136.

463. Interview with Svetlana Logar, Belgrade, November 20, 2006.

464. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

465. Id.

466. E.g., Interview with Andrej Nosov, Belgrade, November 23, 2006; Confidential Interviews.

467. Interview with Ivan Jovanović, Belgrade, November 22, 2006.

468. Interviews with Alexandra Milenov, Belgrade, November 22, 2006 and June 7, 2007. At the time of these interviews Milenov was the senior outreach officer in Belgrade. This position is currently staffed by Matias Hellman, whose immediately previous position was senior ICTY outreach officer in Sarajevo.

469. Interview with Alexandra Milenov, Belgrade, November 22, 2006.

470. Id.

471. Id.

472. Id.

473. During its first year, the Outreach Program was funded by voluntary contributions from four governments and one private foundation. See Lal C. Vohrah & Jon Cina, "The Outreach Programme," Ch. 40 in Richard May, ed., *Essays on ICTY Procedure and Evidence in Honour of Gabrielle Kirk McDonald*, p. 554 (Kluwer, 2000). Since 2004, it has been "entirely supported by the European Commission." "ICTY Outreach Programme," available at <http://www.un.org/icty/bhs/frames/outreach.htm>.

474. According to an advisor to the ICTY Prosecutor, by the time then ICTY President Gabrielle Kirk McDonald established the Outreach Program, it was too late to include it in that year's budget. Interview with Anton Nikiforov, Special Advisor to the Prosecutor for Political Affairs, The Hague, March 5, 2007. In later years, there were no efforts to include its costs in the ICTY budget because, he recalled, "It's a lost battle." Id. Another source believes, however, that the Outreach Program is extra-budgetary because outreach was not contemplated in the Security Council resolution establishing the Tribunal. Confidential interview.

475. Confidential interview.

476. Interview with Refik Hodžić, The Hague, November 17, 2006.
477. Under its “Bridging the Gap” program, the ICTY’s Outreach Program has undertaken somewhat similar programs in Bosnia. Unlike the program described above, however, Bridging the Gap programs take place in the area where crimes prosecuted before the ICTY actually took place. These programs can occur only after the ICTY Appeals Chamber has rendered final judgment in the cases that are the focus of a Bridging the Gap program visit; the ICTY Registry avoids commenting on cases that are still pending.
478. Interview with Andrej Nosov, Belgrade, November 23, 2006.
479. Interview with Alexandra Milenov, Belgrade, November 22, 2006.
480. Interview with Andrej Nosov, Belgrade, November 23, 2006.
481. *Id.*
482. *Id.*
483. *Id.* The experience from postwar Germany suggests that transforming attitudes of the post-Milošević generation may be crucial to Serbia’s long-term progress as a democratic society. Surveys undertaken decades after the Holocaust show that “[t]he desire to forget about the past is greater among the older generation [of Germans], who personally experienced the [Nazi] dictatorship.” Germans born after World War II are, in contrast, both more likely to support accountability for Nazi-era crimes and to possess values that are strongly supportive of human rights. Gunnar Theissen, “Between Acknowledgment and Ignorance: How white South Africans have dealt with the apartheid past,” p. 3, Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/papers/papgtz.htm>.
484. Interview with Alexandra Milenov, Belgrade, November 22, 2006.
485. Interview with Refik Hodžić and Olga Kavran, The Hague, November 17, 2006.
486. Interview with Alexandra Milenov, Belgrade, November 22, 2006.
487. Although the Prosecutor has a spokesperson in The Hague and staff in the region, s/he does not have a spokesperson in the Balkans.
488. Emma Thomasson and Ellie Tzortzi, “Mixed feelings as prosecutor Del Ponte bows out,” *Reuters*, December 12, 2007. The current Prosecutor, Serge Brammertz, visited Belgrade for the first time as ICTY Prosecutor in mid-April 2008.
489. Interview with Srđan Bogosavljević, Belgrade, November 20, 2006.
490. Interview with Goran Svilanović, Belgrade, November 20, 2006.
491. *Id.*
492. *Id.*
493. *Id.*
494. *Id.*
495. Interview with Sonja Biserko, Belgrade, November 23, 2006.
496. *Id.*
497. *Id.*
498. Interview with Biljana Kovačević-Vučo, Belgrade, June 6, 2007.



499. Barry Wood, “Serbs Slowly Come to Terms with Srebrenica Massacre,” VOA, July 13, 2005 (reporting, but not quoting, Serbian publisher and media analyst Bratislav Grubačić’s views concerning the impact in Serbia of the Scorpions video described in this subsection).

500. Video images are not, however, inherently likely to advance the ICTY’s aims. As we note later, the broadcasting in Serbia of the trial of Slobodan Milošević unexpectedly produced negative effects.

501. Although shown in the course of a prosecutor’s cross-examination of a witness, the Scorpions video was not formally admitted into evidence. See Human Rights Watch, “Weighing the Evidence: Lessons from the Slobodan Milošević Trial,” p. 14 (December 2006).

502. The video had been taken by a member of the Scorpions. An ICTY prosecutor and investigator obtained the original videotape in September 2004, according to another former ICTY prosecutor.

503. Nicholas Wood, “Videotape of Serbian Police Killing 6 Muslims from Srebrenica Grips Balkans,” *New York Times*, June 12, 2005.

504. Daniel Williams, “Srebrenica Video Vindicates Long Pursuit by Serb Activist,” *Washington Post*, June 25, 2005.

505. Nicholas Wood, “Serbian Court Convicts 4 in Srebrenica Massacre,” *New York Times*, April 10, 2007.

506. See Beti Bilandžić, “Serbs are Stunned by Video of Srebrenica,” *Reuters*, June 3, 2005. As noted earlier, the trial concluded with a verdict that outraged human rights advocates in Serbia and elsewhere. See Chapter IV.B.

507. Tim Judah, “Serbia Struggles to Face the Truth about Srebrenica,” at <http://www.crimesof-war.org/news-srebrenica2.html>.

508. See Beth Kampschror, “Serbs divided over grim video,” *Christian Science Monitor*, June 15, 2005.

509. Interview with Srđjan Bogosavljević, Belgrade, June 6, 2007.

510. Interview with Svetlana Logar, Belgrade, November 20, 2006.

511. See Chapter V.A.

512. Before the Holocaust series was broadcast, 45 percent of the Germans polled believed that Germany was “morally obliged to pay compensation” to survivors of the Holocaust. Among those who saw the television series, the percentage rose to 54 percent. See Gunnar Theissen, Chapter 2: “Survey research dealing with the past in West Germany,” in “Between Acknowledgement and Ignorance: How white South Africans have dealt with the apartheid past,” Centre for the Study of Violence and Reconciliation, available at <http://www.csvr.org.za/papers/papgt2.htm>.

513. Id.

514. The case was officially closed on March 14, 2006.

515. See “Serbia glued to trial coverage,” Radio B92 News for February 18, 2002.

516. Interview with Adrej Nosov, Belgrade, November 23, 2006.

517. The case was the most comprehensive prosecution mounted before the ICTY in the sense that it was the first one that examined crimes committed during conflicts in Croatia, Bosnia-Herzegovina and Kosovo. See Human Rights Watch, “Weighing the Evidence: Lessons from the Slobodan

Milošević Trial,” p. 2 (December 2006). Thus it had the potential to illuminate not only discrete crimes but also broad patterns underlying “ethnic cleansing” in Croatia, Bosnia and Kosovo.

518. See *id.* As noted earlier, both the ICTY and the International Court of Justice have judged the 1995 Srebrenica massacre to have been a genocide. See *Prosecutor v. Radislav Krstić*, Case No. IT-98-33-A, Appeal Judgment, 37 (April 19, 2004); Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia and Herzegovina v. Serbia and Montenegro*), Judgment, 297 (February 26, 2007).

519. More than 35 percent of those questioned in a survey taken soon after the trial began “said they believed the trial would finally resolve the issue of guilt and lay the blame squarely on Milošević and his associates rather than the people.” “Serbia glued to trial coverage,” Radio B92 News for February 18, 2002.

520. Interview with Antonela Riha, Belgrade, November 27, 2006.

521. Among other examples of cases that have already established criminal links between Milošević and defendants in Croatia and Bosnia, see *Prosecutor v. Milan Martić*, Case No. IT-95-II-T, Judgment, 446, June 12, 2007, which found that the defendant—a Croatian Serb who was convicted of war crimes and crimes against humanity in Croatia—participated in a joint criminal enterprise with Milošević and others, including Bosnian Serbs.

522. Interview with Sonja Stojanović, Belgrade, November 23, 2006.

523. See Vojin Dimitrijević, “Justice Must Be Done, and *Be Seen* to Be Done: The Trial of Slobodan Milošević,” p. 2 (2002). According to one source, before his trial began “Milošević’s political support ha[d] held steady at 15-20% since he left power.” Joshua Kucera, “Milošević the martyr is history,” *Scotland on Sunday*, February 10, 2002, at <http://www.scotsman.com> (citing research by polling company Medium).

524. Interview with Svetlana Logar, Belgrade, November 20, 2006. According to Srđan Bogosavljević, whose firm conducts public opinion surveys, in the years before his trial Milošević’s approval ratings were 16–17 percent; at the outset of his trial, it rose to 20-22 percent. Interview with Srđan Bogosavljević, Belgrade, November 20, 2006.

525. See “Serbia glued to trial coverage,” Radio B92 News for February 18, 2002.

526. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

527. Beyond his inherently superior knowledge of Serbia by virtue of his background, Milošević was extensively briefed by Serbian sources during his trial, enhancing his ability to cross-examine witnesses effectively.

528. Interview with Srđan Bogosavljević, Belgrade, November 20, 2006.

529. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.

530. The prosecution called Bakalli as a witness, according to the *New York Times*, “because he testified that he had warned Mr. Milošević early on that his forces were committing abuses against civilians in Kosovo”—a predicate for establishing command responsibility for crimes charged in the indictment. Ian Fisher, “Combative Milošević Displays a Flair for Courtroom Tactics,” *New York Times*, February 20, 2002.

531. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.

532. Vojin Dimitrijević, “Justice Must Be Done, And *Be Seen* to Be Done,” pp. 2–3 (2002).

533. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006. The context of this observation related to the Djindjić government's decision to transfer Milošević to The Hague in the face of U.S. threats to withhold funding. See Chapter II.
534. "Milošević on trial," *The Economist*, February 15, 2002.
535. Ian Fisher and Marlise Simons, "Defiant, Milošević Begins His Defense by Assailing NATO; Calls U.N. Charges 'Lies'," *New York Times*, February 15, 2002.
536. See id.
537. See id.
538. "Milošević on trial," *The Economist*, February 15, 2002.
539. Noting that during the NATO bombardment "people here felt themselves as victims," journalist Antonela Riha says it was hard for "ordinary people" to accept the indictment's charge that Milošević was "guilty of war crimes" against people whom they saw "as enemies of Serbia." Interview with Antonela Riha, Belgrade, November 27, 2006.
540. Interview with Filip Svarm, Belgrade, November 24, 2006. Although the war was still underway when Milošević was indicted, he was not transferred to the ICTY until some months after the war ended, following the change in Serbia's government. See Chapter II.
541. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.
542. Press Release, "Statement by Justice Louise Arbour, Prosecutor ICTY," May 27, 1999.
543. Interview with Ambassador Clint Williamson, Washington, D.C., May 31, 2007.
544. Charles Trueheart, "Hague Indictment Names Serb Chiefs; Milošević and 4 Others Face Kosovo War-Crimes Charges," *International Herald Tribune*, May 28, 1999.
545. Milošević was first indicted for crimes committed in Croatia on October 8, 2001, and for crimes committed in Bosnia-Herzegovina on November 22, 2001.
546. Interview with Ambassador Clint Williamson, Washington, D.C., May 31, 2007 (U.S. Ambassador-at-Large for War Crimes Issues at the time of our interview and of publication, Williamson previously served as a member of the ICTY-OTP staff).
547. Id.
548. Confidential interview.
549. Those who do not share this view generally cite as their reason the fact that that there was a comparatively straightforward case against Milošević in respect of the Kosovo charges. As indicated above, Milošević commanded the Serbian police forces involved in perpetrating the alleged crimes, while his relationship to the forces who committed atrocities in Bosnia and Croatia was more attenuated.
550. See Human Rights Watch, "Weighing the Evidence: Lessons from the Slobodan Milošević Trial," p. 12, December 2006.
551. See Daniel Simpson, "Milošević Trial Leaves Most Serbs Cynical," *New York Times*, August 9, 2002.
552. Interview with Goran Svilanović, Belgrade, November 20, 2006.
553. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.
554. Id.

555. Id.

556. Id.

557. A page of the ICTY's Web site denoted as "not an official document" appears to endorse the view that the ICTY's achievements include clarifying historical facts. Under the heading "The Tribunal's Core Achievements," that page includes the sub-heading "Establishing the Facts," which enumerates the following:

- As the work of the ICTY progresses, important elements of a historical record of the conflicts in the former Yugoslavia in the 1990's have emerged. Facts once subject to dispute have been established beyond a reasonable doubt by Judgments
- Trials at the ICTY have covered crimes and incidents across the former Yugoslavia and throughout the conflicts in the 1990's
- Admissions of guilt from a number of accused have also contributed to the establishment of the facts, too. In his Plea Agreement, Dragan Obrenovic provided valuable insider military information and cooperated well beyond what was required under the Agreement. Obrenovic made the following statement during his Sentencing Hearing,  
*"In Bosnia, a neighbor means more than a relative. In Bosnia, having coffee with your neighbor is a ritual, and this is what we trampled on and forgot. We lost ourselves in hatred and brutality. And in this vortex of terrible misfortune and horror, the horror of Srebrenica happened."*  
*"I will be happy if my testimony helps the families of the victims, if I can spare them having to testify again and relive the horrors and the pain during their testimony. It is my wish that my testimony should help prevent this ever happening again, not just in Bosnia, but anywhere in the world."*
- The determination beyond reasonable doubt of certain facts is crucial in combating denial and preventing attempts at revisionism
- It is now not tenable for anyone to dispute the reality of the crimes that were committed in and around Bratunac, Brcko, Celebici, Dubrovnik, Foca, Prijedor, Sarajevo, Srebrenica, and Zvornik to name but a few. As other trials are completed, further facts will be established regarding these and other areas in the former Yugoslavia

Available at: <http://www.un.org/icty/glance-e/index.htm>.

558. Interview with Dejan Anastasijević, Belgrade, November 20, 2006.

559. Interview with Filip Svarm, Belgrade, November 24, 2006.

560. Id. Several of our Serbian interlocutors faulted the indictments against Milošević as well as the prosecution's conduct at trial. For example, former Foreign Minister Goran Svilanović believes there was "too much collectivity" in the prosecutor's case. In his view, "Serbian nationalism was in the [Milošević] indictment. Interview with Goran Svilanović, Belgrade, November 20, 2006.

561. For example, although the IMT determined that its temporal jurisdiction over crimes against humanity began in 1939, its review of pre-1939 persecution of German Jews shed light on the intentions behind the post-1939 acts that were charged against the defendants.

562. Under ICTY jurisprudence, an element of the offense of crimes against humanity is that certain acts occurred in the context of a widespread or systematic attack against a civilian population. See, e.g., *Prosecutor v. Duško Tadić*, Case No. IT-94-I-T, Opinion and Judgment, 644-648, May 7, 1997.

563. Interview with Judge Fausto Pocar, The Hague, March 5, 2007. Judge Theodor Meron noted that in the early years of the ICTY, there was tension between those “who felt the trials should focus on legal aspects only, and those who felt that the trials should also create a fuller historical record along the lines of what truth commissions have been doing.” Interview with Judge Theodor Meron, The Hague, March 6, 2007 and e-mail communication, May 4, 2008.

564. The Israeli District Court noted that there had been a desire within Israel for the court “to give, within the limits of this trial, a comprehensive and exhaustive historical account of the events of the catastrophe” that “befell the Jewish people during” World War II. *Attorney General of Israel v. Eichmann*, Israeli District Court Judgment, 1, December 12, 1961.

565. *Id.*, 2.

566. Interview with Filip Svarm, Belgrade, November 24, 2006.

567. This evidence would help establish the requisite mental element necessary to establish that Milošević bore responsibility for the crimes committed in Srebrenica.

568. This testimony would help establish that Milošević “exercised substantial influence over” the Bosnian Serbs who planned and carried out the Srebrenica genocide as well as other crimes charged in the indictment under the theory of criminal responsibility invoked in the indictment.

569. This, too, would help establish the requisite mental element of certain crimes.

570. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

571. BBC World, “Koštunica attacks Milošević trial,” February 19, 2002.

572. *Id.* Even then Prime Minister Zoran Djindjić, who had defied Koštunica by surrendering Milošević to the ICTY, denounced the trial as a “circus” soon after it began. “Milošević trial is a circus: Serbian PM,” *Agence France-Presse*, February 23, 2002. Djindjić told a reporter “that the poor performance of the prosecution has helped undermine the [ICTY’s] already very weak credibility in Serbia.” Tim Judah, “Serbia: Milošević Trial Shocks Liberals,” *Institute for War & Peace Reporting*, February 28, 2002.

573. Interview with Antonela Riha, Belgrade, November 27, 2006.

574. *Id.*

575. *Id.*

576. *Id.*

577. Interview with Filip Svarm, Belgrade, November 24, 2006.

578. Interview with Sonja Biserko, Belgrade, November 23, 2006.

579. E.g., Interview with Nataša Kandić, November 27, 2006 (asserting, “B92 didn’t succeed to find really expert analysts who could explain the procedures and facts”).

580. Interview with Ana Miljanić, Belgrade, November 22, 2006.

581. The ICTY Prosecutor sought to prove 66 counts against Milošević. While the need frequently to adjourn the trial due to the poor health of Milošević significantly affected the trial’s length, many believe (as one observer put it) that the prosecutor “could have dropped a number of allegations and gone for a much quicker trial.” Emma Thomasson and Ellie Tzortzi, “Mixed feelings as prosecutor Del Ponte bows out,” *Reuters*, December 12, 2007 (quoting international law professor Jan Wouters).

582. Communication from former ICTY Prosecutor Alex Whiting, February 28, 2008.
583. See Ian Fisher, "Power Drove Milošević to Crime, Prosecutors Say as Trial Opens," *New York Times*, February 12, 2002 (reporting at outset of trial that it was "expected to last for two years").
584. Interview with Srđjan Bogosavljević, Belgrade, November 20, 2006.
585. Interview with Ana Miljanić, Belgrade, November 22, 2006.
586. See Marlise Simons and Gregory Crouch, "Milošević Is Found Dead in Cell, U.N. Officials Say," *New York Times*, March 12, 2006.
587. Interview with Ivan Janković, Belgrade, November 24, 2006.
588. Interview with Srđjan Bogosavljević, Belgrade, November 20, 2006.
589. Interview with Filip Svarm, Belgrade, November 24, 2006.
590. Interview with Ivan Janković, Belgrade, November 24, 2006.
591. Interview with Filip Svarm, Belgrade, November 24, 2006.
592. Interview with Ivan Janković, Belgrade, November 24, 2006.
593. Id. When the ICJ issued its judgment in February 2007, it relied heavily on ICTY precedents in reaching its conclusion that the 1995 Srebrenica massacre constituted genocide and in concluding that it had not been proved that Serbia was legally responsible for causing the genocide or for complicity in it.
594. Interview with Ivan Janković, Belgrade, November 24, 2006.
595. See Marlise Simons and Gregory Crouch, "Milošević Is Found Dead In Cell, U.N. Officials Say," *New York Times*, March 12, 2006. There were suspicions that Milošević contributed to his own death by manipulating his heart medicine, possibly in the hopes of persuading ICTY officials to grant his request for a medical visit to Russia. See Daniel Williams and Molly Moore, "Milošević May Have Taken Harmful Drugs; Toxicologist's Remarks Feed Speculation; Private Burial Planned in Belgrade," *Washington Post*, March 14, 2006; Marlise Simons, "Expert Suggests Milošević Died in a Drug Ploy; Serb Leader May Have Sought to Fake Illness," *New York Times*, March 14, 2006.
596. See Molly Moore and Daniel Williams, "Milošević Found Dead in Prison; Genocide Trial Is Left Without a Final Judgment," *Washington Post*, March 12, 2006.
597. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006. This perception may have been partially fueled by the fact that a Croatian Serb, Milan Babić—who had pleaded guilty to war crimes charges at the ICTY and was cooperating with the Tribunal in other cases—committed suicide in his cell less than two weeks before Milošević died in his cell.
598. Bogdan Ivanišević notes that, had Milošević survived to judgment, public opinion in Serbia would likely have forgiven the flaws in his trial recounted above, including its length. Interview with Bogdan Ivanišević, Belgrade, June 5, 2007.
599. Interview with Vojin Dimitrijević, Belgrade, November 28, 2006.
600. Interview with Alexandra Milenov, Belgrade, June 7, 2007.
601. "Bosnian Muslim leader hails Hague verdict on Orić," BBC Worldwide Monitoring, June 30, 2006 (from Federation News Agency, Sarajevo).
602. "Serbian president: ICTY verdict for Orić 'absolutely scandalous'," BBC Worldwide Monitoring, June 30, 2006 (from FoNet News Agency, Belgrade).

603. Interview with Anton Nikiforov, The Hague, March 5, 2007. This has been the position of each Prosecutor at the ICTY, according to Nikiforov.

604. Mark B. Harmon and Fergal Gaynor, "Ordinary Sentences for Extraordinary Crimes," 5 *Journal of International Criminal Justice* 683, p. 685, n. 7 (2007).

605. The ICTY has also often imposed sentences that are widely perceived as too low on Serbian defendants. See generally *id.* In a forthcoming report on the ICTY's impact in Bosnia, we will describe the negative impact this pattern has had on Bosniak perceptions of the Tribunal.

606. See ICTY Press Release, "Hadžihasanović & Kubura Appeals Only Partially Granted," April 22, 2008, at <http://www.un.org/icty/pressreal/2008/pr1240e.htm>.

607. Interview with Radmila Nakarada, Belgrade, November 24, 2006.

608. Interview with Vladimir Vukčević, Belgrade, November 21, 2006.

609. ICTY prosecutors plan to appeal Haradinaj's acquittal. "UN prosecutors to appeal war crimes acquittal of Kosovo's ex-Premier Haradinaj," *Associated Press*, May 1, 2008.

610. Nicholas Wood, "Kosovo War-Crimes Trial Splits West and Prosecutors," *New York Times*, April 8, 2007. A former ICTY staff person notes, however, that the restrictions imposed on Haradinaj during his provisional release were also exceptional in the sense that other defendants granted provisional release typically are not subjected to restrictions on their political activities. Confidential e-mail communication, July 18, 2007.

611. Tim Judah, "'War crimes' storm over former PM," *The Observer* (UK), October 30, 2005.

612. *Prosecutor v. Ramush Haradinaj et al.*, Case No. IT-04-84-PT, Decision on Defense Motion on Behalf of Ramush Haradinaj to Request Re-assessment of Conditions of Provisional Release Granted 6 June 2005, 1-2, October 12, 2005.

613. Tim Judah, "'War crimes' storm over former PM," *The Observer* (UK), October 30, 2005. When Haradinaj was granted provisional release in June 2005, he was permitted "only limited work within his own party." *Id.*

614. *Id.*

615. The Appeals Chamber ruled:

First, any request from the Accused to UNMIK must also be sent to the Prosecution. Second, any such requests must be made at least 48 hours before the proposed activity, so the prosecution can have some time to respond. Third, for each request of the Accused, the Prosecution will have the right to deliver to UNMIK a submission of no more than 400 words, and UNMIK may not grant the request in question without taking the submission into account. Fourth, any grant of permission from UNMIK to the Accused must (1) contain a reasoned explanation of why it has been granted, (2) be sent to the Prosecution as well, and (3) be transmitted to both parties at least four hours before the contemplated activity is to take place. Finally, ... UNMIK's reports to the Trial Chamber must contain a reasoned explanation of the grounds on which UNMIK based any decision to grant a request made by the Accused.

*Prosecutor v. Haradinaj et al.*, Case No IT-04-84-AR65.1, Decision on Ramush Haradinaj's Modified Provisional Release, 103, March 10, 2007 (citations omitted).

616. Haradinaj was not granted provisional release during the ICTY's 2007 summer recess. ICTY judges ruled that his release could add to an "atmosphere of fear" surrounding the case.

"Former Kosovo prime minister on trial for war crimes not allowed to return home for summer," *Associated Press*, July 20, 2007. But he was one of 12 ICTY indictees granted provisional release during the ICTY's 2007-08 winter recess. See "Haradinaj and Brahimag Provisionally Released," Sense News Agency, December 14, 2007.

617. Tim Judah, "'War crimes' storm over former PM," *The Observer* (UK), October 30, 2005.

618. *Id.*

619. Interview with Judge Radmilla Dragičević-Dičić, Belgrade, November 21, 2006.

620. Interview with Nataša Kandić, Belgrade, November 27, 2006.

621. Interview with Andrej Nosov, Belgrade, November 23, 2006.

622. Interview with Ljiljana Smajlović, Belgrade, November 24, 2006.

623. E-mail communication with Bogdan Ivanišević, April 4, 2008.

624. *Id.* According to the *New York Times*, the ICTY "prosecution's leading witness, Tahir Zemaj, and his son and nephew were shot dead during the investigation" of the *Haradinaj* case. "Another witness, Kjutim Berisha, died two weeks before the trial when he was hit by a car." Nicholas Wood, "Kosovo War-Crimes Trial Splits West and Prosecutors," *New York Times*, April 8, 2007.

625. Press Release of Trial Chamber, "Judgment Summary for the Case of Haradinaj et al.," April 3, 2008. See also Trial Judgment, *Prosecutor v. Haradinaj et al.*, Case No. IT-04-84-T, 22-28, April 3, 2008.

626. See Merdijana Sadović and Aleksandar Roknić, "Not-guilty verdict in case against former Kosovo premier provokes storm in Serbia," IWPR's Tribunal Update No. 545, April 4, 2008.

627. Sense News Agency, which provides daily coverage of ICTY trials, reported that "the bungling prosecution team also contributed to [the] outcome" of the *Haradinaj* trial. "Why did prosecution fail to prove what 'everybody knows'," Sense News Agency, April 7, 2008, at <http://www.sense-agency.com/en/stream.php?sta=3&pid=11099&kat=3>.

628. The third co-defendant, Lahi Brahimag, was found guilty of the war crimes charges of cruel treatment and torture and was sentenced to six years' imprisonment.

629. "Officials: Scandalous mockery of justice," RTV B92 News (Belgrade), April 3, 2008.

630. *Id.*

631. E-mail communication with Bogdan Ivanišević, April 4, 2008.

632. *Id.* It should be noted that after Tudjman's death, then-ICTY Prosecutor Carla del Ponte stated that Tudjman had been under investigation at the time of his death. Ivanišević's observation, then, presumably related to the quality of the investigation.

633. Krajišnik was arrested on April 3, 2000. His trial began on February 3, 2004 and concluded on August 31, 2006.

634. Šešelj surrendered on February 23, 2003 and his trial began on November 7, 2007.

635. Milutinović surrendered on January 20, 2003. His trial began on July 10, 2006.

636. Interview with Judge Radmilla Dragičević-Dičić, Belgrade, November 21, 2006.

637. Interview with Judge Siniša Vazić, Belgrade, November 21, 2006.

638. *Id.*



639. Interview with Antonela Riha, Belgrade, November 27, 2006.
640. Interview with Filip Svarm, Belgrade, November 24, 2006.
641. Id. The Radical Party came in a distant second in more recent elections, held on May 11, 2008.
642. Communication from Alex Whiting, February 18, 2008. In a case that Whiting prosecuted, the defendant, Milan Martić, “sought delay after delay while at the same time complaining about the length of delay.” Id.
643. See ICTY Rules of Procedure and Evidence, Rule 73*bis*. David Tolbert, who as noted in the text served as Deputy Prosecutor from August 2004 through March 2008, believes that some of the restrictions allowed by this provision tread on the Prosecutor’s independence. Rather than tell the Prosecutor how many witnesses to call, for example, he believes that the Pre-Trial Chamber should “limit the Prosecutor’s time and let her decide how to proceed.” Interview with David Tolbert, The Hague, March 6, 2007.
644. Id. In Tolbert’s view, a key reason why the pre-trial management process has not been more effective is that the pre-trial judges were generally not the same judges who would preside over a case at trial. This deprived the pre-trial judges of a direct incentive to make rulings during the pre-trial phase that would streamline the trial.
645. Communication with Alex Whiting, February 18, 2008.
646. Interview with David Tolbert, The Hague, March 6, 2007.
647. Id.
648. Id.
649. Id.
650. Id.
651. Communication with Alex Whiting, February 18, 2008.
652. Confidential interviews.
653. See, e.g., David Wippman, “The Costs of International Justice,” 100 *American Journal of International Law* 861, at 878-79 (2006).
654. Interview with Judge Fausto Pocar, The Hague, March 5, 2007.

## Acknowledgments

655. Those whom we interviewed in Serbia were selected on several grounds, including in particular their direct or specialized knowledge. While we asked our Serbian interlocutors a standard set of questions, we did not undertake a random-sample survey of public attitudes. We did, however, draw upon public opinion surveys undertaken by several Serbian organizations to illuminate issues with respect to which public attitudes are relevant, and interviewed three individuals whose organizations conducted those surveys to help us understand the significance of their findings.

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Fifteen years ago the United Nations Security Council launched the contemporary era of war crimes tribunals by establishing the International Criminal Tribunal for the former Yugoslavia (ICTY). At the time, ethnic violence was in full rage in Bosnia-Herzegovina, and the Security Council's action struck many as desperate, ad hoc and inadequate. Yet despite its inauspicious origin, the ICTY inspired widespread hope and commitment among those who believed it could partially redeem the world's failure to prevent ethnic carnage in Europe's heart.

The Open Society Justice Initiative believes it important that those involved in the work of international tribunals—whether as practitioners, donors, policy-makers or in other capacities—develop a greater understanding of the impact contemporary war crimes tribunals have had in the regions directly affected by their work. We hope that this report contributes useful insights in this regard and helps stimulate further inquiries into the impact of international tribunals in the countries most affected by their work.

