

Responsibility for war crimes before national courts in Croatia

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Abstract

This article analyses problems with which the Republic of Croatia, as a country in transition, has to contend during war crimes proceedings. A major characteristic of the recent wars waged on the territory of the former Yugoslavia is that war crimes were committed, though on a different scale, by all parties involved, irrespective of the political and other motives that prompted them to engage in armed conflict. Political unwillingness is the principal reason why national courts, including those in the Republic of Croatia, did not prosecute war crimes in accordance with internationally acceptable standards. The international community responded by setting up the International Criminal Tribunal for the former Yugoslavia (ICTY), the main objectives of which are to establish justice, render justice to victims and determine the historical truth. Implicitly, despite political and other opposition to its work, the ICTY is helping to define legal and ethical standards appropriate for a democratic society in the countries established on the territory of the former Yugoslavia. This is particularly important for the reason that all these countries aspire to membership of the European Union. The work of the ICTY, as well as proceedings before domestic courts, is therefore an important legal, political and moral catalyst on their way towards accession to the European Union. This is fully confirmed by the example of the Republic of Croatia.

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The disintegration of the former Yugoslavia sparked a series of wars in which numerous atrocities were committed, in particular crimes against humanity, war

crimes and genocide. The brutality of the armed conflicts in Croatia¹ and in Bosnia and Herzegovina between 1991 and 1995, and of those that followed in Kosovo and Macedonia, took the international community by surprise. The lack of readiness of national judiciaries to prosecute perpetrators of crimes, together with a clearly expressed wish of the international community to “shape” the development of events in the Balkans not only by political and military means (negotiations, international forces, the NATO bombing campaign in the then Federal Republic of Yugoslavia) but also by the international criminal judiciary, led to the establishment of the International Criminal Tribunal for the former Yugoslavia (ICTY), the first international court for war crimes to be established since the Second World War.² In addition to certain legal problems and doubts related to their work, a general remark applies to both the ICTY and its “twin,” the International Criminal Tribunal for Rwanda (ICTR),³ namely that they are of a selective nature. Nonetheless these tribunals, together with the so-called mixed courts established for Bosnia and Herzegovina, Kosovo, Sierra Leone, Cambodia and East Timor,⁴ have unquestionably made a significant contribution to the development of international criminal law and affirmation of the principle of universality. The crowning accomplishment of this accelerated development of international criminal law is the permanent International Criminal Court (ICC).

Transition in the south-east European countries and responsibility for war crimes

The work of the ICTY should, however, also be viewed against the backdrop of the transition experienced by the countries that emerged from the dissolution of the former Yugoslavia.⁵ That transition is a dual process, (i) from war to a peaceful society, particularly with regard to standards of justice and acceptance of international criteria for responsibility in armed conflicts; and (ii) from a single-party (or simplistically and to some extent wrongly termed communist) society to a pluralistic society based on what is commonly called Western democracy. Besides offering bright prospects for the development of newly established societies, both forms of transition have also revealed their darker side. More specifically, in terms of

1 The war in Croatia has complex historical, political and economic roots, and took the form of an armed conflict between the armed forces of a newly established country and the federal army supporting the interests of Serbia and the ethnic Serbs. For more details see Nikica Barić, *Srpska pobuna u Hrvatskoj 1990–1995*, Golden Marketing – Tehnička knjiga, Zagreb, 2005.

2 International Tribunal for the Prosecution of Persons Responsible for Serious Violations of Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 (ICTY), established by UN Security Council Resolution 827 (1993), 25 May 1993.

3 Established by UN Security Council Resolution 955 (1994).

4 For these courts see Ivo Josipović (ed.), *Responsibility for War Crimes: Croatian Perspective – Selected Issues*, Faculty of Law, University of Zagreb, Zagreb, 2005, pp. 30–61.

5 Slovenia (which, except for a short low-intensity conflict, was not affected by war), Croatia, Bosnia and Herzegovina, Serbia and Montenegro (the final legal status of which as a state is still open because of Montenegro's and Kosovo's aspirations to independence), and Macedonia.

responsibility for war crimes, the issue raised is the existence of double standards for responsibility – “ours” and “theirs” – when even the gravest crimes committed against enemies were not punished, whereas the criminal prosecution of representatives of hostile military formations was in many cases conducted without legal grounds, in a discriminatory manner and without any respect for the right to fair trial. Besides, in times of war and periods of transition, national judiciaries were both professionally and morally devastated and often accused of corruption and political or mafia connections. Different political, legal and moral standards in assessing responsibility for war crimes, combined with problems of the judiciary’s competence, have made it very difficult in all transitional countries to administer justice in accordance with internationally accepted standards.

The ICTY is playing an important part in various ways in the transition of those countries established by the dissolution of the former Yugoslavia. First, at times when national judiciaries were not ready to punish crimes by members of their own country, that Tribunal has enabled justice to be achieved and also rendered to victims. Second, during its work the ICTY has set new standards of responsibility for war crimes, crimes against humanity and genocide, thereby not only improving international criminal law and providing valuable experience for the establishment of the ICC, but also inducing national judiciaries to start adjusting their standards to those set by the ICTY. This has not only helped national courts to raise the quality of war crimes proceedings, but has also led to a general rise in legal awareness and the quality of the judiciary in newly established countries. The truth is that public opinion research still shows resistance among much of the population when it comes to making the country’s “own” perpetrators of crimes accountable, whether such proceedings are conducted before the ICTY or by domestic courts. Accused compatriots still enjoy the status of public heroes, and their possible responsibility is at most discussed sporadically or broached in the media without eliciting any broad public response.

Command responsibility

Particularly important for raising awareness of responsibility for crimes is the doctrine of command responsibility formulated in Article 7 of the ICTY Statute and particularly Article 7(3), in that responsibility for crimes is centred on those who had real power, whether military or political, and who, by their decisions or omissions, led to commission of the crime by its direct perpetrators. According to that doctrine, the main culprits for crimes possibly committed by anonymous perpetrators are precisely those in positions of power. This approach and the doctrine of joint criminal enterprise met with resistance due to an alleged lack of legal grounds, as well as politicization, particularly in the countries that had waged defensive wars. As long as the doctrine of joint criminal enterprise, already accepted by the ICTY in the first case brought before it,⁶ was applied to politically

6 *Tadić* case, IT-94-1.

marginal indictees, there were no broad objections to it either by the general public or in professional circles, but it encountered strong resistance when applied to high-ranking military and political officials.⁷

Completion strategy

After the Security Council's decision that the Tribunal must complete its work by the year 2010, the ICTY started on the so-called Completion Strategy.⁸ This requires, on the one hand, a rationalization of work with concentration only on the highest-ranking perpetrators of war crimes and compliance with a schedule according to which the ICTY is expected to complete investigations and file indictments by the end of 2004, to complete first-instance activities by the end of 2008 and to complete all work by the end of 2010. On the other hand, it means that the international community expects the former warring parties to demonstrate their membership of the group of democratic countries and their "capability" of acceding to the European Union by co-operating fully with the ICTY and by holding war crimes trials before their own courts. Such trials are expected to be fair and to adhere to the standards which are exemplary in democratic societies. Fairness includes the readiness to try one's "own" perpetrators of war crimes, which has seldom been the case in practice hitherto. General social, primarily political, improvements and the wish of the countries on the territory of the former Yugoslavia to join the European Union have also led to obvious changes in the prosecution of perpetrators of war crimes. In Croatia and in Serbia and Montenegro the national judiciary has been reinforced and has received professional training in conducting difficult proceedings such as those for war crimes; relevant regulations implementing international standards of criminal responsibility for crimes have been adopted;

7 For example, the *Slobodan Milošević* case, IT-02-54, and the *Ante Gotovina* case, IT-01-45. In Croatia, qualification of a resolute military liberating operation (the "Oluja" operation) as a joint criminal enterprise is a particularly sensitive issue both emotionally and politically. That qualification in the indictment of General Ante Gotovina provoked almost general disgust among the Croatian public. See the opinion of Mirjan Damaška, an esteemed Croatian professor at Yale University, in his article "How to defend Croatia in The Hague", in the *NACIONAL* weekly, No. 529, 3 January 2006, available in English at <<http://www.nacional.hr/articles/view/22379/18/>> (last visited 15 January 2006).

8 In its Resolution 1503 (2003) of 28 August 2003, the Security Council, *inter alia*, "7. Calls on the ICTY and the ICTR to take all possible measures to complete investigations by the end of 2004, to complete all trial activities at first instance by the end of 2008, and to complete all work in 2010 (the Completion Strategies) ...". The Security Council recalls the Completion Strategy in Resolution 1532 (2004) of 26 March 2004. With the purpose of completing their work accordingly, on 6 April 2004 the ICTY judges amended Rule 28 of the Rules of Procedure and Evidence, and introduced authorization for the Tribunal to ascertain whether a new indictment is in compliance with the restrictive approach to indictments (limitation to the most important cases) requested by the Security Council in its Resolution 1534, which also confirms the Completion Strategy. The Prosecutor, Carla Del Ponte, was not satisfied with this amendment (see text: "Del Ponte to bring disagreement with judges before the Security Council" of 28 April 2004, at <www.vijesti.net> (last visited 15 January 2006)). However, the President of the ICTY, Theodor Meron, indicated that he would ask the Security Council to prolong the work of the Tribunal if some of the most important accused (Karadžić, Mladić) had not been prosecuted by the set date for completion (compare SHAPE News Summary & Analysis of 12 May 2004).

and separate courts or organizational units within them have been established for proceedings against perpetrators of war crimes. Furthermore, courts and judges are becoming specialized, new measures are being introduced for the protection of witnesses and victims, mutual co-operation is being established between the states (particularly in collecting evidence and making witnesses available), and other measures are being taken to reinforce the role of the judiciary. In Bosnia and Herzegovina and in Kosovo, where because of specific circumstances a decisive role is played by the international community in the administration, decisions on responsibility for war crimes are made by so-called mixed courts consisting of domestic and international judges and prosecutors. Such a solution obviously shows that there are no conditions for domestic courts to conduct fair proceedings for war crimes in accordance with acceptable international standards.

Prosecution of war crimes in Croatia

Croatia, today often cited as an example of moving in the right direction and commended by the opening of accession negotiations between the Republic of Croatia and the European Union, has also experienced transitional problems relating to the work of the judiciary and the punishment of war crimes.⁹ The opening of those negotiations was itself long postponed precisely because difficulties arose in Croatia's co-operation with the ICTY, above all in locating and arresting the Hague indictee General Ante Gotovina. Quite apart from those concerning prosecutions of perpetrators of war crimes, the Croatian judiciary also suffers from transitional problems mostly reflected in slowness of work and lack of efficiency. The high number – over 1.5 million – of unresolved cases, including those dating back several decades, the fact that many criminal offences have never been prosecuted and brought to trial, together with multiple public accusations of corruption among the judiciary, are just the most critical symptoms of these transitional problems. One of the largest and most important projects is to reform

9 Croatia's approach to the European Union was given a strong boost by the change of government in 2000. The previous Croatian Democratic Union government, which was considered nationalistically oriented and disinclined to co-operate with the ICTY, was replaced by a multi-party coalition headed by the Social Democratic Party. In 2001 the Stabilization and Association Agreement was concluded and ratified (official gazette *Narodne novine*, International Agreements, No. 14/2001). A major political provision of the Agreement was full co-operation by Croatia with the ICTY and a strengthening of the judiciary and the rule of law in Croatia. However, although a substantial improvement had been made, the expectations of full co-operation by the new government with the ICTY were not completely fulfilled, due primarily to strong political resistance. After the Croatian Democratic Union won the elections in 2003, contrary to expectation, full co-operation was established between Croatia and The Hague. After earlier delays this made it possible for accession negotiations to begin, following the EU Council of Ministers' Decision on 3 October 2005, with an exchange of general views at the first EU–Croatia Intergovernmental Conference.

the judiciary in Croatia, and some progress in improving the situation has been made in recent years.¹⁰

War crimes trials in Croatia

Until recently, Croatia tried war crimes by applying its internal law on the basis of the activities of its police, state attorneys and judges. A number of cases will, however, be referred by the ICTY as part of its exit strategy and in accordance with Rule 11 *bis*¹¹ of its Rules of Procedure and Evidence to authorities of the various states, including Croatia, which means that the ICTY's desire to refer cases must be matched by the domestic judiciary's ability to conduct the trials *lege artis*. This calls for the appropriate legal instruments, a well qualified and capable judiciary and the relevant political will. In Croatia, taking over the Hague cases is considered to be not only a professional but also a major political issue, since nationals are thereby transferred from the competence of international courts to the jurisdiction of their own country's domestic courts, thus confirming the appropriate democratic status of that country and mitigating the serious political problems occasionally generated by the Hague trials.

Croatia has in fact held a large number of war crime trials, but almost all of them were against members of different hostile units, and only rarely against representatives of its own armed forces. Besides, the proceedings were partly conducted unfairly and sometimes even in a virtual travesty of justice. Although the number of those carried out properly (mostly against Serbs) is perhaps significantly higher than the number of cases in which verdicts convicting accused Serbs were obtained in an inappropriate manner under duress, initiation of the proceedings was refused, or proceedings were farcically directed towards acquittals for Croats, the general impression is crushing for the Croatian judiciary and the

10 An in-depth study of the reform of the judiciary in Croatia is beyond the scope of this article. For details of planned comprehensive reforms and of those already carried out, see the website of the Ministry of Justice, <<http://www.pravosudje.hr/default.asp?ru=121&sid=&akcija=jezik=1>> (last visited January 2006).

11 Rules of Procedure and Evidence, Rev. 37 (16 Nov. 2005), "Rule 11 *bis*, Referral of the Indictment to Another Court: A. After an indictment has been confirmed and prior to the commencement of trial, irrespective of whether or not the accused is in the custody of the Tribunal, the President may appoint a bench of three Permanent Judges selected from the Trial Chambers (hereinafter referred to as the "Referral Bench"), which solely and exclusively shall determine whether the case should be referred to the authorities of a State: (i) in whose territory the crime was committed; or (ii) in which the accused was arrested (Amended 10 June 2004); or (iii) having jurisdiction and being willing and adequately prepared to accept such a case (Amended 10 June 2004), so that those authorities should forthwith refer the case to the appropriate court for trial within that State. (Revised 30 September 2002, amended 11 February 2005). B. The Referral Bench may order such referral *proprio motu* or at the request of the Prosecutor, after having given to the Prosecutor and, where applicable, the accused, the opportunity to be heard and after being satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out. (Revised 30 September 2002, amended 10 June 2004, amended 11 February 2005). C. In determining whether to refer the case in accordance with paragraph (A), the Referral Bench shall, in accordance with Security Council resolution 1534 (2004), consider the gravity of the crimes charged and the level of responsibility of the accused. (Revised 30 September 2002, amended 28 July 2004, amended 11 February 2005) ...

state as a whole. Although the Croatian judiciary certainly has the professional and other qualifications to try all cases, it is obvious that the general political and moral climate was not conducive to initiating and conducting correctly criminal proceedings for war crimes. There are many reasons for this: politics, the influence of the media, relations between religious communities, the solidarity of different social groups and so on. The question is whether the state authorities are strong enough to change the attitude of the general public – and of the entire hierarchy of state bodies – towards this issue within a relatively short time. Because of the very points mentioned above, the international community carefully monitors trials in Croatia. The project “Dealing with the Past – Monitoring of War Crime Trials”, run by esteemed non-governmental organizations for the protection of human rights,¹² aims to improve judicial practice and help build trust in domestic courts. As the desired effects of war crime trials before domestic courts, the project places emphasis on justice for victims, fair trials of the accused, legal and political distancing of the social community from crimes, and raising moral, ethical, legal and political standards to the level necessary for Croatia’s accession to the European Union.¹³ In summing up the findings, the non-governmental organizations stress as positive developments the adjustment of the domestic judiciary’s work to ICTY criteria, the enforcement of legal and institutional conditions for protection and support to witnesses, the establishment of regional co-operation in the prosecution of war crimes, the publicity given to proceedings and their openness to monitoring. On the other hand, they recognize as shortcomings the bias of the judiciary,¹⁴ the large number of trials held *in absentia*,¹⁵ the insufficient quality of indictments and the inappropriate treatment of witness, victim and plaintiff.¹⁶ The same problems are seen in the technical

12 The project is carried out by the Centre for Peace, Non-violence and Human Rights in Osijek in co-operation with the Altruist Centre for Protection of Human Rights and Civic Freedoms, Split, the Civic Board for Human Rights in Croatia and the Croatian Helsinki Committee for Human Rights, with the support of the Delegation of the European Commission to the Republic of Croatia, the American Embassy in the Republic of Croatia and the Open Society Institute – Croatia. The results of monitoring of trials for war crimes in Croatia are published in *Monitoring of War Crime Trials: Annual Report 2005*, Centre for Peace, Non-violence and Human Rights, Osijek, 2005.

13 *Ibid.*, p. 6.

14 The conclusion about bias on grounds of the perpetrator’s ethnicity is based on the ratio of convictions and acquittals in relation to the nationality of the accused, the large disproportion between the numbers of accused Serbs and Croats, the fact that Croats were accused only in cases of murder whereas Serbs were also accused of other offences, and the attitude towards witnesses.

15 Trials *in absentia* also exist in Croatian law for other criminal offences, so remarks that such trials give rise to speculations about political motives for them, that they are long and futile, that they multiply the need for hearings and thus result in multiple re-victimization, and that they are not economical are made about all trials *in absentia*, and not only those for war crimes. According to Article 305(5) of the Croatian Criminal Procedure Act (hereinafter CPA), the accused can be tried *in absentia* only if he has fled or is otherwise not available to state authorities, and if there are particularly important reasons for him to be tried in spite of being absent (official gazette *Narodne novine*, Nos. 110/97, 27/98, 58/99, 112/99, 58/02, 143/02 and 62/03). The decision on trial *in absentia* is made by the Trial Chamber upon obtaining the opinion of the Prosecutor.

16 Centre for Peace report, above note 12, pp. 8 ff. Although for methodological reasons some conclusions in the report can be considered rash, it does highlight the most important problems of war crime trials in Croatia.

equipment of courts (quality of courtrooms, security conditions, conditions for undisturbed hearings, means for audio- and audiovisual recording, etc.). Similar shortcomings of war crimes proceedings are also recognized by the OSCE Mission.¹⁷

From 1991 to 2005 in the Republic of Croatia 4,774 persons were reported for war crimes, 1,675 were indicted, 778 were convicted and 245 were acquitted. In 1993, the State Attorney of the Republic of Croatia announced the review of a large number of war crimes cases, which was carried out in 2005. He informed the public that this review had resulted in the suspension of over 800 proceedings.¹⁸ In the period from 2003 to 2005 new procedures were opened, but in a significantly smaller number than before.

Since 2000 extensive efforts have been made in Croatia to address problems related to war crime trials. Such problems can be divided into real and legal ones. Substantive problems pertain primarily to the fact that quite a long time has passed since the crimes were committed and that many witnesses have died or moved away, do not remember the events well or do not want to testify because of threats, fear or for other reasons. Furthermore, according to experience hitherto, some pressure on judicial bodies by groups or the general public is also to be expected. To resolve these problems Croatia has attempted through broad education programmes to upgrade the professional level of policemen, judges and state attorneys, and also of members of non-governmental organizations and the media.

17 With reference to annual reports of the State Attorney of the Republic of Croatia and its own sources, the OSCE Mission to Croatia states in the document “Background information on war crime procedures in Croatia and findings from trial monitoring” that “Croatia since 1991 has engaged in the large-scale prosecution of war crimes. Nearly 5000 persons have been reported and over 1700 have been indicted. Final verdicts have been entered against 800 to 900 persons, of which more than 800 were convicted, while approximately 100 were acquitted. The overwhelming majority of proceedings were against Serbs for crimes against Croats and the vast majority of convictions were obtained against *in absentia* Serb defendants. Procedures are pending against another 1400 to 1500 persons, including indictments against 450 to 500 people and judicial investigations against another 850 to 900 persons. According to the Mission’s statistical report, during 2003, 37 individuals were arrested, 53 were indicted, 101 were tried, 37 were convicted, 4 were acquitted, charges were dropped against 12 individuals on trial and appeals of 83 individuals were pending at the Supreme Court. Between 1 January and 5 May 2004, 15 persons were arrested, 4 were indicted, 68 were on trial, 10 were convicted, 3 were acquitted and appeals of 63 persons were pending at the Supreme Court.” It is interesting that the OSCE data, the data of the State Attorney of the Republic of Croatia and those contained in the report of the Centre for Peace (above note 12), are not the same. Discrepancies in the numbers of reported, indicted and convicted persons probably result from the fact that a different methodology and different sources were used.

18 “The Croatian State Attorney suspended over 800 criminal proceedings which had been conducted for war crimes since the nineties”, said Croatian State Attorney Mladen Bajić. Bajić stated that this was a review of proceedings conducted mostly against Serbs, but also against Croats, in which it had been established that there were not sufficient elements for further prosecution. So far the Law of Forgiveness, relating to participation in armed rebellion, has been applied to 22,000 Serbs, but more than 500 Serbs are on the list of accused for war crimes, and many have been convicted and sentenced *in absentia* to long-term imprisonment. The Supreme Court rejected several verdicts convicting Serbs and several verdicts acquitting Croats, but the fact remains that so far only four members of Croatian armed forces have been convicted of crimes against Serbs (HTnet/Vecernji list, 29 May 2004). In part, the difference in the numbers of criminal prosecutions of members of Croatian and Serbian formations results from events unfolding in Croatia during the war and the number of crimes committed on both sides, but also from the Croatian judiciary’s unwillingness (or better, from a lack of the political will which precedes action by criminal prosecution authorities) to deal with cases involving their “own” compatriots.

Legal problems

The main problem of possible domestic trials, particularly those which the ICTY has referred to Croatia as part of its exit strategy under Rule 11 *bis* of the Rules of Procedure and Evidence, is that Croatian substantive criminal law does not recognize the command responsibility laid down in Article 7(3) of the ICTY Statute. The second important problem concerns the usability of certain evidence which the ICTY might hand over to the Croatian criminal prosecution authorities in cases referred by it to Croatia, or in cases where the ICTY does not initiate the proceedings on its own.

Croatian law (like other European bodies of law) does not recognize command responsibility in the way stipulated by the ICTY Statute. It appears that despite its incorporation in the law by amendments and supplements to the Criminal Code in 2004, this provision cannot be applied for constitutional reasons (prohibition of retroactivity in substantive criminal law provisions, the principle of legality). Command responsibility therefore remains to be “covered” by interpretation of existing substantive criminal law, particularly of provisions relating to crimes of omission. Developments in this respect will be very interesting from a professional point of view, since so far the Croatian judiciary has shown no signs of an interpretative approach to legislation, especially the norms of criminal law. The role of the Supreme Court here will therefore be decisive. To date, most cases have been tried on grounds of direct responsibility for committing the crime or of ordering it to be committed. Almost without exception, they have concerned commanders of lower or intermediate rank, except in cases of high-ranking officers of the Serbian or Yugoslav forces against whom proceedings were or are being conducted *in absentia*. There have been no trials on grounds of command responsibility in the narrow sense of the term (Art. 7.3 of the ICTY Statute). A large number of trials of members of Serbian military formations, including the Yugoslav army, have taken place *in absentia*. The quality of these trials was low. A consistent problem during the presentation of evidence has been and still is the unwillingness of witnesses, particularly those from Serbia and Montenegro, to come and testify before the court. Nonetheless, there have been cases in which the Croatian court used the notion of command responsibility *stricto sensu*, in whole or in part. Here, the verdict in the case against Dinko Šakić, the Ustasha commander of the Jasenovac¹⁹ camp who was tried in Zagreb in 1998–2000 after Argentina extradited him to Croatia, merits attention.²⁰

19 During the Second World War Dinko Šakić was a member of military formations of the Independent State of Croatia, a quisling creation which, contrary to the majority Croat anti-Fascistic movement, collaborated with Germany and Italy. Jasenovac was a concentration camp notorious for mass murders and atrocities, where a large number of Jews, Serbs, Roma and anti-Fascist Croats were killed.

20 The first-instance verdict of the County Court in Zagreb of 4 October 1999 No. K-242/98 sentenced Šakić to twenty years' imprisonment (maximum penalty in the then Criminal Code). The Supreme Court of the Republic of Croatia confirmed the imposed punishment by verdict No. I Kž-210/00-5 of 26 September 2000.

Unfortunately, there have also been cases in Croatia in which proceedings were not conducted in a legally and morally acceptable manner.²¹ It is encouraging, however, that in these proceedings the Supreme Court of the Republic of Croatia has quashed disputable verdicts and returned the case for retrial.

Yet war crime trials in Croatia can be successful only if observations which objectively draw attention to existing problems are taken into account. Like the report on the project by non-governmental organizations cited above, the OSCE report on war crimes proceedings in Croatia recognizes a certain progress.²² But it is still very critical about the situation in the Croatian judiciary and in war crimes proceedings, emphasizing similar shortcomings to those mentioned in the aforesaid report: weaknesses of procedures *in absentia*,²³ discrimination on an ethnic basis “in initiating and conducting proceedings, as well as in their final outcome”, inappropriate treatment of witnesses, long duration of proceedings, weaknesses in presentation of evidence, public pressure, inferiority of indictments, inappropriate defence (particularly if tried *in absentia*), insufficiency and weaknesses in elaboration of the verdict and incoherent judicial practice.²⁴ Among other things, the OSCE stresses that the Croatian judiciary “largely reiterates the definition of genocide contained in Article 2 of the 1948 Convention on the Prevention and Punishment of the Crime of Genocide” describing it as “forcible population displacement”.²⁵ Interestingly, the OSCE does not highlight the two problems mentioned above (command responsibility, usability of evidence) which Croatian professional circles single out as presenting the biggest challenge to war crime trials taken over from the ICTY.

21 The press regularly reported on the “Lora case” and trial of the accused Karan in Gospić. On the other hand, it is generally considered that the proceedings against General Norac and others before the County Court in Rijeka have been conducted correctly. As these are *sub judice* cases, they will not be discussed here.

22 “Several indicators in 2004 permit a conclusion that, in general, the chances of a Serb war crime defendant to receive a fair trial before the Croatian judiciary improved when contrasted to past years. Prosecutors eliminated large numbers of unsubstantiated proceedings against Serbs. Serbs were convicted at a lower rate than in prior years and some unsubstantiated charges were dropped at trial. Although arrests still occurred on the basis of unsubstantiated or already dismissed charges, an increased number of Serbs arrested in 2004 were released when the charges were abandoned. The number of fully *in absentia* trials diminished considerably, particularly toward the end of the year, due to intervention by prosecutors, the Supreme Court, and the Ministry of Justice. High-ranking officials affirmed the importance of fair trials. These factors suggest progress toward remedying the significant ethnic bias against Serbs that has heretofore characterized Croatia’s prosecution of war crimes.” *Background Report: Domestic War Crime Trials 2004*, OSCE, 26 April 2005, p. 3. Changes in the legislation and the dropping of charges against 370 persons, mostly Serbs, in cases being conducted without legal grounds were described as positive (p. 9).

23 On weakness of trials *in absentia* see Mohamed El Zeidy, “*Universal Jurisdiction in Absentia: Is it a Legally Valid Option for Repressing Heinous Crimes?*”, Oxford University Comparative Law Forum, 2003, Oxford University Comparative Law Forum 4 at <<http://ouclf.iuscomp.org/articles/zeidy.shtml>> (last visited January 2006).

24 See *ibid.*, pp. 31–40. These conclusions are supported by numerous examples from court decisions, some of which (e.g. the *Karan*, *Lora* and *Savić* cases) have achieved notoriety among the Croatian public as well.

25 OSCE *Background Report*, above note 22, p. 20.

Croatian legislation and punishment of war crimes

In the Republic of Croatia, the principal relevant legal sources of internal law relating to punishment of war crimes²⁶ or important for it are²⁷ the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY), valid until the end of 1991, then taken over into the Croatian legal system as a Croatian law (with certain modifications) and later amended in content (but not in relation to command responsibility) and renamed the Basic Criminal Code of the Republic of Croatia;²⁸ the new Criminal Code, which came into force on 1 January 1998;²⁹ 1996 Constitutional Act on Co-operation of the Republic of Croatia with the International Criminal Tribunal;³⁰ 2003 Act on Application of the Statute of the International Criminal Court and Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law;³¹ Law on Protection of Witnesses;³² Criminal Procedure Act;³³ Law on International Legal Assistance in Criminal Matters;³⁴ and Law on International Restrictive Measures.³⁵ Croatia is also bound by all the most important international conventions relating to war and humanitarian law, including the 1949 Geneva Conventions on the protection of war victims and their two 1977 Additional

26 For the sake of brevity, the term “war crime” as used in this paper means all criminal offences against values protected by international law relating to armed conflict and contained in the Criminal Code of the Republic of Croatia, as well as crimes listed in the ICTY and the ICC Statutes, respectively.

27 For detailed data on the most important sources of international law, particularly those binding for the Republic of Croatia, see Ivo Josipović, Davor Krapac and Petar Novoselec, “Stalni međunarodni kazneni sud”, *HPC-Narodne novine*, Zagreb, 2002, pp. 36–45.

28 See *Narodne novine* (Official Gazette of the Republic of Croatia), No. 53/1991 (taking over of the Criminal Code of the SFRY), and amendments and name change in *Narodne novine* 39/1992 and 91/1992. The consolidated text was published in *Narodne novine* 39/1993, and further amendments in *Narodne novine* 108/1995 16/1996 and 28/1996. Subject matter that at the time of the former SFRY was under the jurisdiction of the republics and provinces was regulated by the Criminal Code of the Republic of Croatia (previously Criminal Code of the Socialist Republic of Croatia). As this law has no content of interest for problems of war crimes, it will not be discussed here. The new Criminal Code which brought together the subject matter of criminal legislation was published in *Narodne novine* 110/1997 and entered into force on 1 January 1998. Corrections, amendments and supplements were published in *Narodne novine* 27/98, 50/00 (Decision of the Constitutional Court), 129/00, 51/01, 111/03, 190/03 (Decision of the Constitutional Court on suspension of amendments and supplements published in *Narodne novine* 111/03 because they were not passed by the necessary majority of votes in Parliament) and 105/04. Nevertheless, the last adopted amendments included the amendments relating to war crimes.

29 See previous note.

30 *Narodne novine*, 32/1996. In spite of tempestuous debates during its adoption, permanent challenges to it in high political circles and several requests for examination of its constitutionality (not yet resolved by the Constitutional Court), this Act is one of our most durable laws. Moreover, it entirely fulfils its purpose (complete co-operation of the Republic of Croatia with the ICTY). It is obvious that political reasons also contribute to its duration. Although the Constitutional Act itself does not contain substantial provisions on war crimes, it regulates co-operation between Croatia and the ICTY.

31 *Narodne novine*, No. 175/103. This law has no direct impact on command responsibility, but its provisions on conducting war crime procedures were to be important for the determination thereof.

32 *Narodne novine*, No. 163/03.

33 *Narodne novine*, Nos. 110/97, 27/98, 58/99, 112/99, 58/202, 143/02, 62/03 and 178/04.

34 *Narodne novine*, No. 178/04.

35 Ibid.

Protocols (which Croatia accepted by succession); the 1948 Convention on the Prevention and Punishment of the Crime of Genocide (which Croatia likewise accepted by succession); the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity; and the Rome Statute of the International Criminal Court, which Croatia ratified by the Law on Ratification of the Rome Statute of the International Criminal Court.³⁶

Co-operation with the International Criminal Tribunal for the former Yugoslavia

Croatia's precise co-operation with and fulfilment of its obligations towards the ICTY are regulated by the Constitutional Act on Co-operation of the Republic of Croatia with the International Criminal Tribunal. It renders possible all modes of co-operation with the ICTY, including the transfer or extradition of the accused. For this very reason it is often a target for criticism by those politicians, experts and analysts who oppose full co-operation with the ICTY.³⁷ However, the Act does not regulate certain specific features of war crime trials before Croatian courts. Ratification of the Rome Statute served as an occasion to introduce, at the end of 2003, separate provisions on command responsibility into the Croatian Criminal Code. Although that harmonization with the Rome Statute was effected in accordance with the whole Croatian system of criminal law, the Constitutional Court of the Republic of Croatia dismissed those very extensive amendments to the Criminal Code of 2003 in their entirety (and not only the provisions on command responsibility) because they had not been passed by the required majority of votes of representatives in the Croatian Parliament. The new government submitted less ambitious amendments and supplements to the Criminal Code to Parliament; the amendments were far fewer, but the provisions on command responsibility and improved provisions on crimes against humanity were identical to the previous version. The said amendments and supplements were adopted in 2004. In them, command responsibility is regulated according to German law.³⁸ This removed theoretical and practical contradictions to the Rome Statute and the Croatian Criminal Code.³⁹ But the question remains of how to deal with command responsibility before Croatian courts in cases of crimes committed before the amendments to the Criminal Code entered into force.

³⁶ *Narodne novine*, Međunarodni ugovori (International Conventions), 5/2001.

³⁷ For a detailed description of the adoption and application of the Constitutional Act and the reasons for which it is contested, see Ivo Josipović, *The Hague Implementing Criminal Law*, Hrvatski pravni centar and Informator, Zagreb, 2000.

³⁸ See *Völkerstrafgesetzbuch* of 26 June 2002, paras. 4, 13 and 14.

³⁹ On the most important theoretical obstacles concerning command responsibility and particularly on problems relating to its application in Croatian law, see Petar Novoselec, "Materijalnopravne odredbe Rimskog statuta", in Josipović, Krapac and Novoselec, above note 27, pp. 106 ff. See also Davor Derčinović, *Kritički o institutu zapovjedne odgovornosti u međunarodnom kaznenom pravu*, Zbornik Pravnog fakulteta u Zagrebu 1/2001, and Mirijan Damaška, "The shadow side of command responsibility", *American Journal of International Law*, Vol. 80, No. 3 (1986).

Criminal offences

Descriptions of certain criminal offences (crimes) in the Criminal Code of the Republic of Croatia and the Basic Criminal Code of the Republic of Croatia which correspond to the crimes listed in the ICTY Statute were inherited from the criminal legislation of the former Yugoslavia. These are the criminal offences of “Genocide” (Article 156 of the Criminal Code), “War crime against civilians” (Article 158), “War crime against wounded and sick” (Article 159), “War crime against prisoners of war” (Article 160), “Illegal killing and wounding of enemy” (Article 161), “Unlawful appropriation of belongings from the killed or wounded on battlefield” (Article 162), “Illegal means of combat” (Article 163), “Wounding of negotiators” (Article 164), “Inhumane treatment of wounded, sick and prisoners of war” (Article 165), “Unjustified delays in return of prisoners of war” (Article 166), and “Destruction of cultural property and objects containing cultural property” (Article 167). Croatian legislation also recognizes a criminal offence of “Aggressive war” (Article 157), which corresponds to a crime against peace. The descriptions are identical in both laws, and both are cited here because there may be doubt about which of them should be applied in certain cases. It is worth mentioning that until 2004 Croatian legislation did not include a separate offence of crimes against humanity, and that the latest amendments to the Criminal Code introduced that criminal offence in a way which almost entirely follows the wording of the Rome Statute of the ICC. However, it is hard to imagine a situation in which some forms of conduct qualified in international law as a crime against humanity (especially those listed in Article 5 of the ICTY Statute) could not be considered as one of the forms of war crime in Croatian legislation. In particular, it is important to note that the provisions relating to the above-mentioned criminal offences make no distinction between military commanders and civilian superiors, so that in this respect all doubts about punishing civilian “commanders” (superiors) are to be dismissed. Most descriptions of the said crimes begin with the formulation “Whoever, by violating the rules of international law...”⁴⁰ Moreover, in the description of other criminal offences, responsibility is not limited to military commanders.⁴¹ Similarly, the formulation “Whoever, by violating the rules of international law ...” clearly shows that this is about blanket norms, the full content of which is formed by application of relevant norms of international law: “Considering that war crimes against the civilian population can be committed only by violating the rules of international law, the court is obliged to exactly indicate, in a verdict pronouncing the accused guilty for that criminal offence, which rules of international law the

40 Genocide, war crime against civilians, war crime against wounded and sick, war crime against prisoners of war, illegal killing and wounding of enemy, wounding of negotiators, inhumane treatment of wounded, sick and prisoners of war, destruction of cultural goods and objects with cultural goods, illegal means of combat (para. 2).

41 Thus we see the formulations: “Whoever orders ...” (Unlawful appropriation of belongings from the killed or wounded on the battlefield) or “Whoever makes or improves, produces, purchases...” (Illegal means of combat, para. 1).

accused had violated.”⁴² It should be emphasized that the Criminal Code recognizes a separate criminal offence of “Organizing a group and inciting to genocide and war crimes” (Article 123), and that the latest amendments to the Criminal Code in 2004 introduced the separate criminal offences of “Command responsibility” (Article 167a),⁴³ “Planning criminal offences against values protected by international law” (Article 187a) and “Subsequent assistance to the perpetrator of a criminal offence against values protected by international law” (Article 187b).

Constitutional provisions

Some of the above legal sources have specific meaning for the punishment of war crimes. However, prior to consideration of these specific provisions of certain laws, it is appropriate to recall the relevant provisions of the Constitution of the Republic of Croatia. First of all, there are the constitutional provisions on application of norms of international law. Thus Article 140⁴⁴ of the Constitution of the Republic of Croatia states that “International agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects.” Such a formulation clearly indicates which international contracts form part of the internal legal system, but it also clearly (*a contrario*) excludes international customary law from direct application. It hence rules out the need for discussion of possible solutions for application of command responsibility according to the criteria of Article 7(3) of the ICTY Statute – a discussion which would stem from the idea that such command responsibility should be applied as part of international customary law.⁴⁵ At the same time it also makes redundant, at least for this article, the otherwise very interesting discussion as to whether command responsibility under Article 7(3) of the ICTY Statute is a part of international customary law at all, and if so, since

42 The Constitutional Court of the Republic of Croatia in its decision U-III-368/98. Also, Supreme Court of the Republic of Croatia in cases Kž-213/01 and Kž-588/02.

43 *Command Responsibility* (1) A military commander or another person acting in effect as a military commander or as a civilian in superior command or any other person who in a civil organization has the effective power of command or supervision shall be punished for the criminal offenses referred to in Articles 156 through 167 of this Code if he knew that his subordinates had committed these criminal offenses or were about to commit them and failed to take all reasonable measures to prevent them. The application of this Article excludes the application of the provision contained in paragraph 3, Article 25 of this Code. (2) The persons referred to in paragraph 1 of this Article who had to know that their subordinates were about to commit one or more criminal offenses referred to in Articles 156 through 167 of this Code and failed to exercise the necessary supervision and to take all reasonable measures to prevent the perpetration of these criminal offenses shall be punished by imprisonment for one to eight years. (3) The persons referred to in paragraph 1 of this Article who do not refer the matter to competent authorities for investigation and prosecution against the perpetrators shall be punished by imprisonment for one to five years.

44 The Constitution of the Republic of Croatia – consolidated text, *Narodne novine* No. 41/2001.

45 But when the Croatian Criminal Code describes different crimes as performed “against international law” (so-called blanket norm), this also includes violations of international customary law.

when? Since the *Yamashita* case, since the entry into force of Protocol I additional to the Geneva Conventions, since the ad hoc International Criminal Tribunals started work, or since some other point in time? Replies to these questions would be relevant for application of command responsibility only if we would like or be able to apply it, as a part of international customary law, to cases of crimes committed in the war on the territory of the former Yugoslavia.⁴⁶

In addition, the constitutional provisions important for the application of criminal legislation and relevant norms in criminal legislation should likewise be borne in mind. Article 31(1) (first sentence) of the Constitution specifies that “no one shall be punished for an act which before its perpetration was not defined by law or international law as a punishable offence, nor may he be sentenced to a punishment which was not defined by law” (principle of legality and implicit prohibition of retroactivity of criminal legislation).⁴⁷ Furthermore, the Constitution stipulates that “if after the perpetration of an act a less severe punishment is determined by law, such punishment shall be imposed” (Article 31(1), second sentence – principle of obligatory application of less severe law). With regard to the principle of legality (and implicit prohibition of retroactivity) and the principle of application of less severe law, the Criminal Code went much further by prescribing that “no one shall be punished nor can other criminal sanctions be imposed upon him for an act which before its perpetration was not defined by law or international law as a punishable offence and for which the law did not define the kind and measure of punishment the perpetrator can be sentenced to”.⁴⁸ The principle of legality according to the Criminal Code namely requires prior prescription of the type and measure of punishment for a certain criminal offence. Also, in relation to the obligatory application of less severe law, the Criminal Code specifies that “if after commitment of a criminal offence the law is amended once or several times, it is obligatory to apply the law that is less severe for the perpetrator”.⁴⁹ Unlike the Constitution, which links the application of less severe law exclusively to prescribed punishment, the Criminal Code gives broader scope to the application of less severe law, linking that principle not only to punishment but also to other possible criteria (the statute of limitations, for example).⁵⁰ It must be stressed that during the war in Croatia (1991–5) the most severe punishment prescribed by criminal law was twenty years’ imprisonment. In view of all that has been said above, it is easy to conclude that for crimes committed in the course of the war, Croatian courts cannot hand down a prison sentence that would be more severe than twenty years’ imprisonment. Of course,

46 See also Jean-Marie Henckaerts and Louise Doswald-Beck, *Customary International Humanitarian Law*, Vol. I: Rules, ICRC/Cambridge, 2005, Rules 152/3, pp. 556–63 and the references mentioned there.

47 Obviously, such a formulation excludes the exceptional possibility stipulated by Article 89(5) of the Constitution that “Only individual provisions of a law may have a retroactive effect for exceptionally justified reasons.”

48 Principle of legality, Article 2(2) of the Criminal Code.

49 Obligatory application of less severe law, Article 3(2) of the Criminal Code.

50 Compare Bačić, Franjo, *Kazneno pravo, opći dio*, peto izdanje, Zagreb 1998.

many will consider such a punishment too mild for serious criminal offences (particularly genocide).

Implementation of the International Criminal Court Statute

A specific, maybe unusual, but certainly pragmatic legal source important for the criminal prosecution of perpetrators of war crimes before Croatian courts is the Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against International Laws of War and International Humanitarian Law (hereinafter: Act on Application). The name of the Act already indicates that it has been passed for the sake of implementing the Rome Statute of the ICC. But together with its content on implementation the Act also has specific provisions supplementing domestic legislation and pertaining to the prosecution of war crimes, independently of the ICC's jurisdiction. These provisions are also applicable for the prosecution of perpetrators of crimes committed during the 1991–5 war. Furthermore, certain solutions in that Act were purposely created to facilitate the conduct, and improve the efficiency, of proceedings for crimes of that period,⁵¹ particularly those referred to the national judiciary by the ICTY. The legislator aims to achieve the intended goal by several important measures. First of all the Act enables (optionally, at the proposal of the State Attorney, and to be decided by the President of the Supreme Court of the Republic of Croatia) all or some actual war crimes proceedings to be conducted in one of four “big” county courts: Osijek, Rijeka, Split and Zagreb (Article 12). In addition, special investigation departments were established within these four courts, with specially qualified investigating judges (Article 13(1) and (3)). In accordance with the need for specialization, professionalization and resistance to possible pressures, war crime cases are not tried by mixed panels of judges and jurors but by a panel of three professional, specially qualified judges (Article 13(2), (3) and (4)). A special state attorney for war crimes has been appointed, with authority for the entire state (Article 14). A special department for war crimes is

51 “In the Conclusion of the Government of the Republic of Croatia of 11 January 2001, it was already assessed that the previous activities of the police and the judicial institutions on the revealing, investigating and prosecuting war crimes committed during and immediately after the Homeland War had not given adequate results. In addition, it was emphasized that Croatia had to collect the data on the war crimes committed in the course of the aggression against it more efficiently and that it had to inform the International Criminal Tribunal for the Former Yugoslavia accordingly. In the meantime, apart from the continuation of the described situation, some proceedings before the Croatian courts have been a travesty of court. These were: the “Lora” case before the County Court in Split and the “Karan” case before the County Court in Gospić. They received widespread media coverage. In the latter case, the statement of reasons in the judgment of the guilt of the accused was based on the “historical guilt of his people”. Later, the Supreme Court abolished both judgments to be retried. However, in her discussion during the second reading of the Act in *Sabor*, the representative Ljerka Mintas-Hodak denied the right of the proposer of the Act to motivate its passage in such a way, because “some even dared to apostrophize and refer to some concrete and recent cases, like the one at the court in Split. Such conduct of the authorities is utterly inadmissible, not only because it proves the interference of politics in the work of the judiciary but because it sanctions lack of confidence in the quality of the country's own judiciary” (Transcript, 493/6/KM).” See Josipović, above note 4, p. 201, ref. 53.

established within the police service (Article 15). Owing to the fact that war crimes are the gravest criminal offences, often committed in an organized manner and in conjunction by several persons, Article 16 of the Act stipulates that the Law on the Office for Suppression of Corruption and Organized Crime must also be applied to war crimes cases, in relation to the possibility of longer pre-trial detention under investigation (up to one year), a stronger role of the state attorney and special use of the institution of witness-penitent. Also, the Act requires the application of the highest standards of protection of victims and witnesses (Articles 8 and 9).⁵²

Taking over proceedings from the International Criminal Tribunal for the former Yugoslavia: a test of democratic maturity of Croatia as a society in transition

The fact that criminal procedures against top domestic military and political officers are conducted before an international court is a serious legal, moral and political challenge for any country. First of all it demonstrates that, at least in the opinion of the international community, the legal and moral system necessary for sentencing perpetrators of the crimes is not sufficiently developed in that country. Moreover, and as shown by the experience of the countries on the territory of the former Yugoslavia, there is a serious gap between the way in which war events (including crimes and their perpetrators) are perceived by the home population, who regard the accused as heroes, and the way in which the international community sees them through the eyes of the ICTY. The legal obligation to cooperate with the ICTY, and particularly to extradite the accused to the Hague Tribunal, is considered in some sections of the population to be a betrayal of national interests. The governments of all former warring countries have therefore expressed an interest in taking over proceedings from the ICTY. But this brings new challenges. First, in order for the ICTY to refer proceedings, it must be sufficiently assured of the domestic judiciary's capability of conducting the proceedings fairly and adhere to internationally accepted standards. This presupposes appropriate legislation and independent judges with the appropriate professional and moral profile. The idea of a betrayal of national interests that followed co-operation with the ICTY is now being transformed into dissatisfaction that (domestic) courts try "our heroes". The capability of holding fair trials is estimated by the ICTY when deciding on the referral of criminal prosecution. But the procedures themselves will be evaluated through detailed monitoring. If this evaluation is positive, it will certainly open the door to membership of the European Union, whereas a negative evaluation will almost certainly close it for a considerable period of time.

52 With respect to the protection of witnesses, the Law on the Protection of Witnesses will be applied, *Narodne novine*, No. 163/03.

First trial cases

As part of its “Completion Strategy” mentioned above,⁵³ and in order to reduce its workload, the ICTY has decided to refer certain cases to national judiciaries. Its Rules of Procedure and Evidence include the provisions of Rule 11 *bis*, which allow for the possibility of referring cases from the ICTY to national courts.⁵⁴ The Republic of Croatia has repeatedly expressed its wish to take over those cases in which the accused are citizens of Croatia, or cases of crimes that took place in Croatia. Two such referrals have been possible hitherto. In the case against the so-called Vukovar trio, Šljivančanin, Radić and Mrksić (Case No. IT-95-13/1-PT), the Office of the Prosecutor proposed that the Tribunal refer the case to a national court; both the Republic of Croatia and Serbia and Montenegro expressed an interest in taking it over. The Office of the Prosecutor did not make any proposals as to which of the two countries the case should be referred to, while both countries had their own arguments, both explicitly legal and implicitly political. The Croatian request was based on the legal and moral demand that the accused be tried in the country where the crimes were committed. This is a very important principle, given that the said case concerns the most serious crimes committed during the war in Croatia. On the other hand, Serbia and Montenegro emphasized that it had extradited the accused to the Hague Tribunal, and not to a third country. Also, its Constitution does not allow extradition to a third country; thus, by taking such a step, the ICTY would be indirectly violating Serbia and Montenegro’s Constitution. With regard to both countries, there were implicit doubts as to their ability to conduct an unbiased trial. This sensitive issue was resolved when the Office of the Prosecutor withdrew its request, leaving the case within the jurisdiction of the ICTY.⁵⁵

Yet another case Croatia hoped to take over was that against the Croatian generals Rahim Ademi and Mirko Norac (Case No. IT-04-78/PT). The Office of the Prosecutor proposed its referral, though without any great enthusiasm, emphasizing that it was a case which, owing to the seriousness of the crime and the responsibility of the accused, should be tried in The Hague. In view of the completion strategy and the Tribunal’s excessive workload, it was nonetheless proposed that the case be referred to Croatia.⁵⁶ Without going into the quite lengthy procedure in detail, it should be mentioned that the Office of the Prosecutor, the accused and their defence lawyers, the Republic of Croatia and the *amici curiae*⁵⁷ submitted some very interesting motions to the Tribunal. During the procedure some very important issues emerged with regard to the objectivity,

53 See note 8 above.

54 The section on the referral of cases is from Josipović, above note 4, pp. 230–2.

55 See Decision on Prosecutor’s motion to withdraw motion and request for referral of indictment under Rule 11 *bis* (30 June 2005).

56 See Request by the Prosecutor under Rule 11 *bis* for referral of the indictment to another court, filed 2 September 2004.

57 The distinguished professors Davor Krapac of the University of Zagreb and Mirjan Damaška of Yale University appeared before the Tribunal as *amici curiae*.

independence and professionalism of the Croatian judiciary in conducting *lege artis* hearings for war crimes, and concerning the question of whether Croatia has a satisfactory legal framework for conducting proceedings in accordance with the indictment issued by the Chief Prosecutor of the ICTY. At the hearing held on 11 February 2005, the Tribunal closely examined the possibility of trying the accused for command responsibility in Croatia, as provided for by Article 7(3) of the ICTY Statute.⁵⁸ The conclusion of the *amici curiae* was that this would be possible, based on a “creative interpretation of the existing legislation”.⁵⁹ The ICTY decided to refer the case to the Republic of Croatia. In the decision (IT-04-78-PT of 14 September 2005) the Referral Bench found that Croatian substantive law has “limited difference” compared with the ICTY Statute, that witness protection measures available in Croatia are sufficient to ensure a fair trial, that Croatian courts can perform a fair trial and that the death penalty is not applicable. However, in referring the case to Croatia, the chamber ordered regular monitoring of the trial in Croatia, asking the Prosecutor to report to the Referral Bench regularly. The decision was welcomed in the Croatian media and among politicians.

Main legal problems

The main legal problems to be faced by the Croatian judiciary in processing the cases taken over from the ICTY⁶⁰ will be

- (a) “translation” of the Hague indictments into indictments which, in content and form, are in compliance with indictments provided for by the Croatian Criminal Procedure Act;
- (b) admissibility of evidence collected by the ICTY Office of the Prosecutor, and

58 At the hearing, the statement and answers given by *amicus curiae* Prof. Davor Krapac were of central importance. In summary, he stated that the Croatian judiciary was professionally equipped to conduct war crimes proceedings, also pointing to the solutions contained in the Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against the International Law of War and Humanitarian Law (special panels, special prosecutor, centralization of the decision-making process in the four courts, provisions regarding evidence, and so on), the new Witness Protection Act, and other circumstances which justified handing the case over to Croatia. He also emphasized the harmonization of Croatia’s substantive criminal law with international criminal law, but at the same time drew attention to the problems of observing the principle of legality and prohibiting retroactivity.

59 See Prof. Krapac’s detailed, professionally grounded statement at the hearing, as per transcript, p. 80 ff. Available at <<http://www.un.org/icty/transe78/050217MH.htm>> (last visited January 2006).

60 It can be expected that in these proceedings, and because of application of the new Act on Application of the Statute of the International Criminal Court and the Prosecution of Criminal Offences against International Law of War and Humanitarian Law (specialized courts and specialized panels) and the attention with which the domestic and professional public will monitor the trials, there will be no “non-legal” problems such as those that existed in some previously conducted war crimes proceedings (bias of courts, public pressure, other problems quoted in the OSCE *Background Report*, above note 22).

- (c) application of the command responsibility recognized by Article 7(3) of the ICTY Statute to some modes of individual responsibility existing in Croatian criminal legislation.

Of course, these problems are interrelated and come to light as soon as the State Attorney starts to compile the indictment, since for obvious reasons proceedings before Croatian courts must be conducted according to internal law.⁶¹ Article 28 of the Act on Application therefore specifically stipulates that in proceedings taken over from the ICTY, Croatian material and procedural legislation shall be applied. The Croatian prosecutor compiles the indictment in accordance with Croatian law, but on the basis of facts contained in the ICTY indictment. However, as a ground for his indictment he can, by rule,⁶² only present evidence collected by the ICTY Office of the Prosecutor. The Act on Application, in Article 28(4), prescribes that all evidence derived by the ICTY and its Prosecution Office according to the Rules of Procedure and Evidence can be used before a Croatian court. During the indictment phase this rule is applicable, but during the trial phase problems can appear: according to Croatian law some sources of information cannot be used in evidence, because the Criminal Procedure Act explicitly rules out the use of that evidence owing to the manner in which it has been obtained or derived. Apart from the general provision on illegal evidence in its Article 9(2),⁶³ the Criminal Procedure Act explicitly defines certain forms of evidence as illegal. These are (i) sources of information obtained by illegal application of secret surveillance measures;⁶⁴ (ii) records of illegal searches;⁶⁵ (iii) records of interrogation of the accused in a prohibited manner;⁶⁶ and (iv) records of witness interrogations which, because of the content or circumstances of interrogation, the law disqualifies from the court's decision-making process, for example, records of interrogation by a person acting as an expert but who cannot be one.⁶⁷ Problems most likely to arise are those related to acceptance of testimonies of persons – especially the accused – given to the ICTY Office of the Prosecutor, and acceptability of intelligence data (particularly data produced by secret recording and wire-tapping), documents obtained by the ICTY as photocopies and not as originals, and testimonies of persons who would later

61 The reasons lie in general considerations of state sovereignty, the fact that the ICTY regulations were created separately and specifically for that court, the fact that Croatian judges and other participants in the proceedings share the same legal culture, the necessity for the procedure to be conducted within a consistent legal system, etc.

62 The Croatian prosecutor can request the conduct of investigations and the collection of other evidence. However, this would mean that evidence received from the ICTY is not considered sufficient for an indictment. Probably such an attitude would have certain political implications too.

63 “Evidence obtained by violating the right to defence, dignity, respect, and honour and inviolability of personal and family life guaranteed by the Constitution, the law or international law, as well as evidence obtained by violating provisions governing criminal proceedings and explicitly laid down by this Law and other evidence derived therefrom, is illegal.”

64 Criminal Procedure Act, Article 182.6.

65 *Ibid.*, Article 217.

66 *Ibid.*, Article 225.9.

67 *Ibid.*, Articles 235 and 250.1.

not appear before the Croatian court. The defence can be expected mostly to attack the legality of evidence collected by the ICTY and used by the domestic court.

Even in the early stage of completing the indictment, the Croatian prosecutor will have problems with “translating” the personal responsibility of the accused according to the ICTY Statute’s Article 7(3) (command responsibility), since the present Criminal Code’s new provision on command responsibility (Article 167a) was introduced into Croatian legislation only in 1994 and cannot, owing to the constitutional prohibition of retroactivity and to the principle of legality, be applied to crimes that were committed in wartime (1991–5). Still, command responsibility can to a lesser extent be “covered” by application of the law in force at the time the crime was committed. The crucial point is the form of command responsibility in which the commander is a direct perpetrator of a crime by acting, including giving orders for a crime to be committed, or by omission, that is, not taking action (Article 7(1) of the ICTY Statute). In cases when the commander acts as a guarantor, the crime is committed by his subordinates.

The first criterion for establishing command responsibility is that the commander knew that they were about to commit the crime and failed to take the necessary and reasonable measures for it to be prevented (Article 7(3) of the ICTY Statute). This form of criminal responsibility of a commander is undoubtedly also applicable before domestic courts and under domestic law, as it concerns collaboration in crime by not acting (omission): in failing to take action to prevent a crime he knew was about to be committed, the commander obviously agreed to the prohibited consequence. A responsibility corresponding to that laid down in Article 7(1) and part of Article 7(3) (first criterion for establishing responsibility) of the ICTY Statute⁶⁸ has been repeatedly applied in the practice of Croatian courts. However, according to the ICTY Statute’s Article 7(3) – which is disputable – there are other criteria for establishing command responsibility, namely the other two cases in which subordinates have committed a crime. In the first case, the commander did not know that his subordinates were about to commit the crime, but had reason to know, and because of this “failure to know” he did not take the necessary and

68 Thus in the verdict on Dinko Šakić (see note 20 above) the County Court in Zagreb states that the accused is guilty “as a member and officer of “Ustasha Defense” in command of Stara Gradiska and Jasenovac camps who performed various functions ... contrary to the principles and provisions of Articles 46 and 50 of the Regulations annexed to the 1907 Hague Convention (IV) on Laws and Customs of War on Land while managing Jasenovac camp; by commands and other forms of management – the making and implementing of decisions – he abused, tortured and murdered prisoners in that he personally ordered such acts and participated in their commitment and that as a commander of the camp he did not do anything to prevent directly subordinate members of the “Ustasha Defense” from committing such acts ...”. In case K-19/02-81 the County Court in Karlovac sentenced the accused Milan Strunjas to twelve years’ imprisonment (the Supreme Court of the Republic of Croatia confirmed the decision by verdict I Kz-743/03), as he “made plans for the attack and seizure of the Municipality of Slunj by the so-called Krajina Army contrary to Articles 3, 27, 32 and 53 of the Geneva Convention on the Protection of Civilian Persons in Time of War ... and commanded this formation, before entering Hrvatski Blagaj, Donja and Gornja Glina, Pavlovac, Donji and Gornji Niksic, Cerovac, Cvitovic, Marindolsko Brdo and Gornji and Donji Kremen, although there were no troops in these villages and no resistance was given, to shoot at houses and farm buildings with all the weapons they had, which members of this formation did”, so that these activities led to murders, serious injuries, destruction and theft, as is factually described in the verdict.

reasonable measures to prevent the crime. The problem with this form of responsibility is that the Croatian Criminal Code punishes negligence only when to do so is exclusively stipulated by the law. Considering that the Criminal Code does not punish negligence in cases of war crimes (as according to the predominant understanding of criminal responsibility for acts such as war crimes, it might even be understood as *contradictio in adjecto*), the sole application of provisions of the Criminal Code cannot lead to punishment of a commander responsible in this manner according to Article 7(3) of the ICTY Statute. Also, this form of responsibility raises the issue of causality between failure of the commander and the crime itself.

The second disputable form of command responsibility according to Article 7(3) of the ICTY Statute is his responsibility as a guarantor for punishing crimes of his subordinates. In this case the commander did not know and could not have known that his subordinates were about to commit crimes (and for that reason failed to take measures to prevent those crimes), or he did know and did take all necessary and reasonable measures to prevent the crime, which was nevertheless committed; on getting to know about the crime he did not, however, take the necessary measures to punish the perpetrator. In Croatian law this means filing a criminal report, taking some restraint measures (which of course do not exclude criminal responsibility) such as the arrest of the perpetrator of flagrant criminal offences according to Article 94(1) of the Criminal Procedure Law and so on. Under the Croatian Criminal Code, in this case the commander bears no responsibility for the war crime itself. But possibly Article 300 of the Criminal Code on the criminal offence (crime) of “Failure to report a committed criminal offence” can be applied or, if it is a case of subsequent assistance to the perpetrator (*auxilium post delictum*), the provision of Article 301 of the Criminal Code (offence of assistance to perpetrator after commission of criminal offence). The criminal offence provision in Article 300 pertains to anyone who does not report a committed grave criminal offence despite knowing that this report would enable or significantly facilitate clarification of the offence or discovery of the perpetrator of the most serious crimes. For this offence the law prescribes imprisonment of up to three years (Article 300(1)). It also stipulates that any official or responsible person who does not report the commission of a grave criminal offence which came to his knowledge in the performance of his duty shall be sentenced to the same punishment (up to three years’ imprisonment). Bearing in mind that in the cases described above there is no intent, recklessness or even negligence of the commander in relation to the war crime, nor any causal link between his action and the crime, the Croatian Criminal Code as amended in 2004, as well as the German Penal Code, regulates this form of responsibility as an independent criminal offence (Article 167a(3) of the Criminal Code). It is important to note, however, that if the commander failed to take the necessary and reasonable measures to prevent the crime, he is not exculpated by taking measures to punish the perpetrator. In a word, without appropriate incrimination during the time when crimes were committed (1991–5), the stated forms of command responsibility cannot be applied unless Croatian prosecutors and courts find a way to “cover” the said cases of command responsibility through interpretation,

by combining domestic and international law. From the corpus of international law consideration should primarily be given to the application of Protocol I additional to the 1949 Geneva Conventions,⁶⁹ the Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity,⁷⁰ and the European Convention for the Protection of Human Rights and Fundamental Freedoms.⁷¹ The European Convention contains in Article 7(2) an exception to the principle of legality and implicitly also an exception to the prohibition of retroactivity. Such a provision can perhaps lead the court to apply (by interpretation) the new provisions of the Criminal Code even to the war crimes committed in 1991–5 (retroactivity!).⁷² In any case, Croatian case-law has

69 Protocol I additional to the 1949 Geneva Conventions was adopted on 8 June 1977 and entered into force on 7 December 1978. Croatia is a party to it by succession to the former SFRY. Additional Protocol I contains two important articles relating to command responsibility. Article 86, entitled “Failure to act”, states in paragraph 1 that parties “shall repress grave breaches, and take measures necessary to suppress all other breaches, of the Conventions or of this Protocol, which result from a failure to act when under a duty to do so.” Article 86(2) further specifies that “The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach.” Article 87 of the Protocol requests parties to require their *military* commanders to take various measures to prevent crimes and punish perpetrators, including initiation of penal proceedings (emphasis added). Although the text of Articles 86 and 87 speaks of “commander” and only in one place refers to “military commanders and members of armed forces under their command”, it is obvious from the context that the provisions of Articles 86 and 87 are meant to relate to military commanders. Likewise, Protocol I pertains to international armed conflicts, unlike Protocol II, which relates to non-international armed conflicts and which does not stipulate a similar responsibility of commanders.

70 Entered into force on 11 November 1970. Croatia became party to it by succession. This convention stipulates that no statutory limitation shall apply to war crimes, meaning those defined as such by the Charter of the International Military Tribunal of 1945, crimes which constitute grave breaches of the Geneva Conventions, crimes against humanity (whether committed in time of war or in time of peace), crimes resulting from the policy of apartheid, and the crime of genocide, even if such acts do not constitute a violation of the domestic law of the country in which they were committed (Article I (b)). Article 18(2) of the Criminal Code of the Republic of Croatia also contains a provision of non-application of statutory limitations to the criminal offences of genocide, aggressive war, war crimes and other criminal offences to which international law stipulates that no statutory limitations are to be applied.

71 Adopted in Rome on 4 November 1950. Croatia ratified the European Convention in 1997 by passing the Law on Ratification of the Convention for the Protection of Human Rights and Fundamental Freedoms and Protocols 1, 4, 6, 7 and 11 (*Narodne novine*, International contracts, 18/1997). Croatia later ratified other protocols and additional protocols, but they are not of interest for this exposé.

72 Article 7(1) of the European Convention, similar to the Constitution of the Republic of Croatia, requires that an act must, to be punishable as a criminal offence, have been defined as such under internal or international law at the time when it was committed, and the application of less severe law is linked exclusively to a definition of milder punishment. But paragraph 2 stipulates that “This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” This very important exception to the principle of legality stems from the fact that it was established immediately after the Second World War at the time when Nazi perpetrators of war crimes were being tried and sentenced and when numerous legal issues and problems arose, including the question to which extent these proceedings respected the principle of legality. Considering that the Constitution of the Republic of Croatia as a legal source (and *not* as a source of criminal-legal norms) does not stipulate the “general principles of law”, in application of command responsibility in domestic law a question will arise about the role of that legal source, introduced into the domestic legal system by an international contract that is above the law but not above the Constitution.

not yet established precedents that would completely resolve the problem of command responsibility. However, the probable scenario of criminal prosecution (indictments and trials) in Croatia is that the prosecutor will try to avoid qualifications pertaining to the establishment of forms of responsibility which are not covered by the Croatian Criminal Code. Also, for legal (but also political) reasons he will try to avoid qualifications which include joint criminal enterprise.

Probable developments and conclusion

In view of the importance for Croatia of the prosecution of war crimes, but also the fact that the Croatian judiciary is burdened by numerous weaknesses of a transitional society, probable developments in the prosecution of war crimes in Croatia include the following.

1. The continuation of trials in cases autonomously initiated by the Croatian judiciary. Constant international monitoring of these trials will lead to a continuation of trends towards a higher quality of trials, a lessening of bias based on the ethnicity of the accused, and a selection of cases whereby those initiated for political reasons or without sufficient evidence will be dropped. These proceedings will take place for years and will represent a permanent challenge to the Croatian judiciary and to democracy.
2. It is to be expected that the ICTY will not refer a large number of cases to Croatian courts. Besides those in which it has filed indictments (*Norac* and *Ademi* cases) it is probable that there will be very few cases of that kind, and perhaps no more. On the other hand, the ICTY will certainly refer evidence and documents necessary for criminal prosecution in several cases in which indictments have not been filed before it. In all cases taken over from The Hague, the international community will carefully monitor the fairness of the trials.

Finally, just as co-operation with the ICTY (particularly in the *Gotovina* case) was a key to opening Croatia's negotiations on accession to the European Union, the quality and fairness of criminal proceedings for war crimes will be an important key to their positive conclusion. Certainly, that moment will be a clear sign that the transition of Croatia from war to peace and from a single-party society to a society that has embraced Western pluralistic democracy is very nearly or entirely completed.