

Doc. 11281  
4 May 2007

## **Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY)**

Report  
Committee on Legal Affairs and Human Rights  
Rapporteur: Mr Tony LLOYD, United Kingdom, Socialist Group

### *Summary*

More than ten years have elapsed since the end of the Balkan War but so far only a tiny proportion of those responsible for war crimes have been brought to justice. No matter how long and painful the reconciliation process may be, more efforts are still required.

Given the forthcoming closure of The Hague Tribunal, one particular question requires urgent consideration, namely how to continue to combat and eradicate impunity for war crimes committed in the former Yugoslavia.

Offering the victims justice is the prime objective, justice being an indispensable ingredient in the process of reconciliation for the victims, communities and countries concerned.

With regard to the prosecution of war crimes, much has been achieved so far by the international community. However, the task is far from completed and everything would seem to indicate that the time has now come for the states concerned to take over the work of The Hague Tribunal regarding the prosecution of those suspected of war crimes (with the exception of the six fugitives who have already been indicted by the Tribunal and who will have to appear before international jurisdictions).

The Rapporteur has been able to note that progress has been made in strengthening the judicial systems of the states concerned but there is still a serious need for improvement. Furthermore, it is of particular concern that the authorities of some states or entities concerned show a blatant lack of political will, to the point of undermining the real efforts made by the courts in these countries.

## **A. Draft resolution**

1. More than ten years have elapsed since the end of the Balkan War but so far only a tiny proportion of those responsible for war crimes have been brought to justice. No matter how long and painful the reconciliation process may be, many efforts are still required.
2. The Parliamentary Assembly wishes to point out from the outset that justice is an indispensable ingredient in the process of reconciliation for the victims, communities and countries concerned and that it is essential to resolutely fight unacceptable impunity.
3. Responsibility must be borne not by whole peoples or communities but by individuals found guilty after a fair trial.
4. The Assembly stresses the importance of the International Criminal Tribunal for the former Yugoslavia ("the Tribunal" or "the ICTY") which, in seeking justice, has played and continues to play a fundamental, pioneering role in the development of international criminal law.
5. The Assembly regrets the consequences of the death of Slobodan Milošević before the end of his trial. Although his indictment was a historic event, since he was the first serving head of state to be brought before an international jurisdiction, his conviction, as much historical as symbolic, will not take place, depriving thousands of victims of justice.
6. The Assembly reminds the national authorities of the states concerned that they are obliged under international law to co-operate fully and effectively with the Tribunal.
7. The Assembly welcomes the fact that this co-operation has improved considerably in some cases, particularly with regard to technical aspects. Nevertheless, it regrets that the authorities of some states or entities concerned show a blatant lack of political will, to the point of undermining the real efforts made by the judiciary in these countries.
8. This is particularly obvious with regard to the prosecution and arrest of the fugitives against whom the Tribunal has brought charges: eleven years after their indictment for genocide, Radovan Karadžić and Ratko Mladić, to name only the best known examples, are still at large. The fact that they have not been brought to justice is an insult to the memory of the victims and to the expectations of the survivors of the conflict.
9. The Assembly calls on the authorities concerned to do their utmost to ensure full co-operation with the Tribunal, and in particular urges the Serbian authorities and the authorities of the Republika Srpska to do everything in their power to locate and arrest the fugitives and show that no-one is above the law.
10. The Assembly also asks the authorities of the Russian Federation to do everything they can to help find and arrest Vlastimir Dordević, who is thought to be hiding in the Russian Federation.
11. In this context, the Assembly supports the European Union and invites it to maintain its demands regarding Serbian co-operation with the ICTY as a precondition for resuming its negotiations with Serbia on a Stabilisation and Association Agreement.
12. The Assembly is aware that the Tribunal's mandate will soon expire and that it has devised a strategy for completing its activities, the success of which depends on the support and commitment of the states in putting an end to impunity. The Assembly is concerned by the fact that some fugitives might still be at large when the Tribunal finally closes its doors.
13. The Assembly encourages the United Nations to continue doing everything in its power to combat impunity for war crimes and to find a solution to ensure that war criminals still at large do not escape international justice, irrespective of the date on which they are arrested. Considering the ICTY's long-term (and moral) commitment towards its own witnesses, a residual mechanism, with a view to continuing to maintain witness protection when its mandate ends, should also be established.
14. The length and complexity of the proceedings before the Tribunal have admittedly sometimes been criticised but the Assembly welcomes the serious efforts that have been made to maximise the effectiveness of the proceedings.

15. The Assembly believes that the time has come for the national courts of the states concerned to take over from the Tribunal and prosecute those responsible for war crimes who have not yet been brought to justice (with the exception of the six fugitives who have already been indicted by the Tribunal and will have to appear before international jurisdictions).

16. The Assembly is pleased to note that progress has been made in strengthening the judicial systems of these states; at the same time, it urges the political authorities of the states concerned to do their utmost to guarantee the impartiality and fairness of current and future trials for war crimes and to ensure that courts never base their decisions on ethnic considerations.

17. The Assembly welcomes the significant monitoring activity carried out by the Organization for Security and Co-operation in Europe (OSCE) of war crimes trials within national jurisdictions and strongly encourages the OSCE to continue this important task.

18. The Assembly is particularly concerned to note that the national legislation of the states in question has proven to be a real obstacle to the effective prosecution in their own courts of war crimes suspects, thereby providing a basis for impunity, which can no longer be tolerated.

19. It is obvious that the ban on the extradition of nationals in all the countries concerned constitutes a serious obstacle to the course of justice. The Assembly believes that:

19.1. the non-extradition of nationals should not extend to persons charged with war crimes, once there are guarantees that the accused will receive a fair trial. The Assembly firmly believes that, in the interests of justice, the states concerned must redress this situation;

19.2. in this context, misuse of the acquisition of dual nationality<sup>1</sup> raises concern because it allows some of those charged with war crimes to escape justice in a given country by acquiring the nationality of a neighbouring country and thereby benefiting from the ban on the extradition of nationals.

20. Despite the real technical progress made with the support of the OSCE within the framework of the "Palić Process", which concerns inter-state judicial co-operation at regional level, and the signing of agreements between the Croatian prosecutor's office and its counterparts in Serbia and in Montenegro, the Assembly regrets that, owing to the ban on the extradition of nationals, a large number of judgments are still handed down *in absentia* and strongly encourages the states in the region to continue their efforts to improve judicial co-operation with a view to reducing the number of trials of this type.

21. The Assembly therefore calls on:

21.1. the relevant authorities of the states concerned to:

21.1.1. immediately lift the ban on the extradition of nationals charged with committing war crimes;

21.1.2. carefully examine applications for nationality and not grant nationality to anyone indicted for a war crime in another country;

21.1.3. take positive, informative measures to encourage debate on war crimes with a view to ensuring broader acceptance by the public of the judicial proceedings against those responsible;

21.1.4. remove the restrictive rule which prevents prosecution files being transferred to another country when the legally enforceable term of imprisonment exceeds ten years;

21.1.5. step up their efforts to ensure better judicial co-operation so as to reduce the number of judgments handed down *in absentia*;

21.1.6. improve co-operation and the transfer of information between the police services of their countries in investigations concerning war criminals by means of effective bilateral agreements;

21.1.7. increase the resources allocated to judicial institutions, not only with regard to investigations but also in terms of funding and staff;

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<sup>1</sup> The term "nationality" does not refer to ethnic affiliation but to the nationals of a state.

21.1.8. urge the courts to be as objective as possible, thus guaranteeing the impartiality of war crimes trials and ensure that judges, prosecutors and lawyers working in local courts are given appropriate training;

21.1.9. improve the working conditions for and quality of the defence so as to ensure a fair trial;

21.1.10. ensure the best co-ordination possible between all the players involved in the judicial process in prosecuting war crimes, including police forces;

21.1.11. improve the protection of witnesses at the national level and co-ordination at the regional level and clarify the legal safeguards;

21.2. the authorities of Bosnia and Herzegovina to:

21.2.1. ensure the harmonisation of case law, consider setting up a national supreme court, or grant the powers of a supreme court to an existing court so as to secure legal certainty;

21.2.2. encourage the signing of agreements between the Bosnia and Herzegovina public prosecutor's office and its counterparts in the region, along the lines of those signed by the public prosecutors' offices of Croatia, of Serbia and of Montenegro.

**B. Draft recommendation**

1. The Parliamentary Assembly, referring to Resolution ... (2007), recommends that the Committee of Ministers invite:
  - 1.1. Bosnia and Herzegovina, Croatia, Montenegro and Serbia to sign and ratify, as soon as possible:
    - 1.1.1. the European Convention on the International Validity of Criminal Judgments (ETS No 70);
    - 1.1.2. the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes (ETS No 82);
  - 1.2. Croatia, Montenegro and Serbia to withdraw the restrictive declarations they made to the European Convention on Extradition (ETS No 24) for the purpose of prohibiting the extradition of their nationals;
  - 1.3. Bosnia and Herzegovina and Croatia to sign and ratify the Additional Protocol to the Convention on the Transfer of Sentenced Persons (ETS No 167) as soon as possible;
  - 1.4. Montenegro and Serbia to sign and ratify the European Convention on the Compensation of Victims of Violent Crimes (ETS No 116) as soon as possible;
  - 1.5. Bosnia and Herzegovina to sign and ratify the Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No 99) as soon as possible;
  - 1.6. Bosnia and Herzegovina, Montenegro and Serbia to ratify the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No 182) as soon as possible;
  - 1.7. Croatia to ratify as soon as possible:
    - 1.7.1. the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No 73);
    - 1.7.2. the European Convention on the Compensation of Victims of Violent Crimes (ETS No 116).
2. The Assembly also recommends that the Committee of Ministers encourage member states which have not yet done so to consider signing agreements with the United Nations concerning the execution of sentences handed down by the International Criminal Tribunal for the former Yugoslavia.

**C. Explanatory memorandum**  
by Mr Tony Lloyd, Rapporteur

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*"Justice is an indispensable ingredient of the process of national reconciliation. It is essential to the restoration of peaceful and normal relations between people who have had to live under a reign of terror. It breaks the cycle of violence, hatred and extra-judicial retribution. Thus Peace and Justice go hand-in-hand."*

Antonio Cassese, former President of the ICTY<sup>2</sup>

## I. Introduction

1. On 29 April 2004, the Bureau of the Assembly submitted the motion in document 10528 to the Committee on Legal Affairs and Human Rights (Reference No 3082). The Committee appointed me Rapporteur on 20 June 2005.

2. It may be useful to describe the different stages in the preparation of this report. The Sub-Committee on Crime Problems and the Fight against Terrorism, of which the Rapporteur is a member, first carried out a study visit on 27 April 2006 to the International Criminal Tribunal for the former Yugoslavia (hereinafter the "ICTY" or "Tribunal"). It had very detailed discussions with Mr Hans Holthuis, the Registrar of the Tribunal, Mrs Carla del Ponte, the Chief Prosecutor, her Deputy, Mr David Tolbert, and the Tribunal President, Mr Fausto Pocar. The Committee on Legal Affairs and Human Rights then held a hearing on the subject at its meeting in Budapest on 18 May 2006. This was addressed by Mr Slobodan Kovac, Minister of Justice of Bosnia and Herzegovina, Mrs Ana Lovrin, Minister of Justice of Croatia, Mr Branislav Bjelica, Deputy Minister of Justice of Serbia, and Mrs Mary Wyckoff and Mrs Sabine Bauer, representing the Organisation for Security and Co-operation in Europe (OSCE)<sup>3</sup>.

3. To broaden his understanding of the situation, the Rapporteur visited Podgorica (Montenegro), Belgrade (Serbia), Sarajevo (Bosnia and Herzegovina) and Zagreb (Croatia), on 20, 21, 22 and 23 November 2006 respectively. He spoke to numerous government members and officials, members of parliament and of the judiciary and representatives of the ICTY and the OSCE on the spot. The material collected has been of great value, both quantitatively and qualitatively.

4. On 12 December 2006, the Rapporteur also sent a letter to the Ministers of Justice of the four countries visited, asking them if and when they intended to sign and ratify the relevant Council of Europe conventions; and if they did not intend to do so, to explain the legal reasons behind such a decision. He also asked them to take position on some of the reservations and declarations made to texts already signed and/or ratified. To date, the Rapporteur has received three replies: from the Ministers of Justice of Bosnia and Herzegovina, Croatia and Montenegro. The full text of the replies is appended to the report. Although he is fully aware of the difficulties encountered in the process of forming a new government, the Rapporteur nevertheless regrets that the Serbian authorities have not replied to his request for information and have failed to provide him with the technical note (including statistics), which the Minister of Justice had proposed to provide him in English. In particular, the Minister promised to furnish information on the status of war crimes proceedings, regional co-operation on this matter and difficulties encountered in the framework of the witness protection programmes.

5. To complete the process, the Rapporteur visited The Hague once more on 14 February 2007 for bilateral discussions with the Chief Prosecutor, the President and the Registrar of the Tribunal.

6. These different stages are evidence of the care with which this report has been prepared.

7. As this process is now complete, the Rapporteur believes he will be seen to have taken a comprehensive approach that enables him to present objective conclusions and recommendations.

### *i. Background*

8. More than ten years have elapsed since the end of the Balkans War but so far only a tiny proportion of those responsible for war crimes have been brought to justice.

9. The International Criminal Tribunal for the former Yugoslavia plays an absolutely fundamental role in this process and has taken the first steps towards ending impunity for war crimes. Those who led the way –

<sup>2</sup> Stated in November 1995, upon the conclusion of the Dayton peace agreement; see <http://www.un.org/icty/glance-e/index.htm>.

<sup>3</sup> The discussions at the two meetings appear in the minutes of the Committee and its Sub-Committee.

even and especially the highest ranking - have had to face up to their responsibilities and answer for their actions.

10. Nor can the historical aspects of the Tribunal's work be over-emphasised. The research undertaken in connection with the Tribunal's proceedings has highlighted beyond all reasonable doubt the historical accuracy of numerous events that took place in the former Yugoslavia, so that they can no longer be denied.

11. Bringing those responsible to justice is a long and painful process. The time factor cannot be ignored. The more time passes, the more difficult it becomes to obtain key evidence for establishing the truth. The events of March 2006 offered a very clear reminder of this. Slobodan Milošević's death on 11 March 2006 in the United Nations detention centre in Scheveningen, before the end of his trial, showed how time can frustrate the course of justice. On that day, thousands of victims felt betrayed by the injustice of an uncompleted trial.

12. This highlights the urgent need to prosecute war crimes and other atrocities committed during the Balkans war. Bringing those responsible to justice must be an absolute priority for both international justice and the domestic courts of the countries concerned. The Hague Tribunal's mandate is, however, soon coming to an end. Theoretically, it will close its doors in 2010. Although its achievements are considerable, the level of justice achieved will be far from sufficient in quantitative terms. Many of the lesser and even some very prominent figures involved remain at large and untroubled by the judicial process. The countries concerned have a key role to play. This requires them to guarantee the effectiveness and impartiality of their own judicial systems.

13. Establishing what really happened can make a significant contribution to the reconciliation process but only justice can ensure full reconciliation of victims, communities and countries. Responsibility must be borne not by entire peoples and communities but by individuals found guilty after a fair trial, whether this be in The Hague or before the domestic courts.

14. The task, both judicial and historical, is far from complete.

## **ii. Interpretation of the terms of reference**

15. One particular question requires urgent consideration, namely how to combat and eradicate impunity for war crimes committed in the former Yugoslavia, given the forthcoming closure of the Hague Tribunal.

16. How can national courts deliver justice fairly and effectively, in accordance with the principles and norms of international law?

17. Can the Hague Tribunal really cease to operate in 2010, whatever the circumstances and even if some of the leading figures who are currently fugitives from justice have still not been brought before it?

## **II. The pioneering work of the ICTY**

*"The very reason that certain armed conflicts occur, entailing crimes against international humanitarian law, is, in my view, that the international community has so far been unable to demonstrate that those responsible would be brought to justice - sooner or later. Until the day when the international community can demonstrate that those who ultimately bear the responsibility for violations of the most fundamental rules for the protection of the human being are brought to justice, history will repeat itself."*

Hans Corell, United Nations Under-Secretary-General for Legal Affairs<sup>4</sup>.

18. Offering the victims justice is the prime objective of the Tribunal, which is committed to ending impunity. The Tribunal has played a key role in the prosecution of war crimes and has succeeded in establishing a definitive body of case-law on the subject.

### **i. The Tribunal's terms of reference**

19. The International Criminal Tribunal for the former Yugoslavia, based in The Hague, was established by the United Nations Security Council on 23 February 1993 *"for the sole purpose of prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia" [since 1991]*<sup>5</sup>.

<sup>4</sup> <http://www.un.org/icc/justice.htm>

<sup>5</sup> See United Nations Security Council [Resolution 827 \(1993\)](#).

20. The Tribunal was formed in response to the threat to international peace and security caused by "widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia, and especially in the Republic of Bosnia and Herzegovina, including reports of mass killings, massive, organized and systematic detention and rape of women, and the continuance of the practice of "ethnic cleansing", including for the acquisition and the holding of territory"<sup>6</sup>.

21. Its task is to prosecute persons suspected of serious violations of humanitarian law, including crimes against humanity and genocide, to bring justice to the victims.

22. Its ultimate aim is to put an end to impunity and thus prevent fresh violations of international humanitarian law.

23. It should be emphasised that the Tribunal does not have exclusive jurisdiction but shares it with national courts. However, it may choose to take precedence over the latter, which is why it can ask national courts at any stage of proceedings to defer to its competence in the interests of justice<sup>7</sup>.

24. The Tribunal has an additional role that should not be ignored. This is to help establish the legal (and thus, in a sense, historical) truth, to forestall attempts at revisionism and foster the necessary process of reconciliation between the peoples of the former Yugoslavia.

## **ii. Progress report**

25. The Tribunal has played a genuine pioneering role in the field of international criminal justice and made a significant contribution to the development of international law<sup>8</sup>. By holding some of the highest officials and political leaders legally accountable, the ICTY has dismantled the tradition of impunity, thus demonstrating that the international community can make those responsible for the most serious violations of elementary human rights answerable for their crimes.

26. It even put an end to the impunity of heads of state when it filed an indictment against President Slobodan Milosevic<sup>9</sup>. This was a highly symbolic act and sent a clear message to potential human rights abusers that international criminal justice would no longer tolerate impunity no matter who the individual, and particularly not in the case of senior political figures.

27. As well as putting an end to impunity, at least at the highly symbolic level since it would be naïve to think that none of those responsible will escape justice, the Tribunal has helped to establish the facts of the situation. This is very important since it contributes to an acceptance of historical reality, which is a necessary element of the reconciliation process.

28. For example, the Srebrenica massacres have been shown to be an incontrovertible fact<sup>10</sup>. The same applies to the crimes committed in Dubrovnik, Zvornik, Vukovar and Brcko. The term "genocide" was

<sup>6</sup> *Idem*.

<sup>7</sup> Article 9 of the [Statute of the ICTY](#).

<sup>8</sup> Among other things, it has helped to produce a clearer definition of what constitutes genocide and has made significant advances in international humanitarian law regarding the legal treatment and punishment of sexual violence in wartime. It has also stated clearly that a formal superior-subordinate relationship is not necessarily required for criminal responsibility.

<sup>9</sup> [Indictment](#), Case No IT-01-50-I.

<sup>10</sup> That the Srebrenica massacre could be classified as genocide was confirmed, *inter alia*, at the trial of General Radislav Krstic, sentenced to 35 years' imprisonment by the Appeal Chamber of the Hague Tribunal on 19.04.2004. As the President of the trial chamber, which had sentenced Radislav Krstic to 46 years' imprisonment on 02.08.2001, expressed it when delivering sentence: "*Srebrenica - the name of a town which has become synonymous with the conflict which devastated the former Yugoslavia. It is a name which immediately calls to mind thousands of people subjected to siege, famine and deprivation of everything - even water and time to breathe. The name of an enclave which the United Nations declared a safe area and which fell almost without a shot being fired. Srebrenica - a name which conjures up images one would prefer not to see: women, children and old people forced to climb into buses leaving for destinations unknown; men separated from their families, stripped of their belongings, men fleeing, men taken prisoner, men never to be seen again, men who would be found - but not always - dead, corpses piled up in mass graves; corpses with their hands tied or their eyes blind-folded - frequently; dismembered corpses as well; unidentified corpses ... corpses. Srebrenica is also a name for a post-traumatic syndrome, the syndrome displayed by the women, children and old people who did not die and who, ever since July 1995, six years now, still have no news of their husbands and sons, fathers, brothers, uncles, grandfathers. Thousands of amputated lives six years later, robbed of the affection and love of their kin now reduced to ghosts who return to haunt them day after day, night after night.*" For more information, see [the report of the parliamentary delegation of the French National Assembly, 22.11.2001 \(French only\)](#).

recognised by an international court for the first time when the Hague Tribunal applied it to the Srebrenica massacres<sup>11</sup>. The scale of the massacre was subsequently acknowledged in October 2004 by the Republika Srpska, a major victory in terms of recognition for the victims.

29. It is worth mentioning at this stage the recent decision of the International Court of Justice (ICJ) of 26 February 2007 on this issue. In the case of *Bosnia-Herzegovina v. Serbia and Montenegro*, the ICJ found that Serbia has violated its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide "by having failed to prevent genocide (...) in respect of the genocide that occurred in Srebrenica in July 1995"<sup>12</sup>.

30. From a strictly statistical point of view<sup>13</sup>, the Tribunal has currently concluded 100 sets of proceedings, which have led to 48 convictions. Sixty-one proceedings are still under way. Of the 61 accused, 6 are still at large.

### **iii. Tasks not (yet) completed**

31. Having considered the Tribunal's achievements, we cannot ignore that which has not yet, or cannot yet, be done.

32. Clearly, certain aspects of its task are still outstanding and one of its declared aims (by no means the least), namely to complete the trial of a head of state, is no longer possible.

33. The death of Slobodan Milošević before the end of his trial is a matter for great regret and deprived an enormous number of victims of justice. His indictment was an historic event since he was the first serving head of state to be brought before an international court, but there will be no historic or symbolic conviction. Obviously, there was an element of *force majeure* in the Tribunal's failure to conclude the proceedings but a number of criticisms have still been levelled at it, some of which deserve our attention.

34. Certain problems have been identified in the Tribunal's method of operation. Some claim that the Prosecutor's office drew up too many charges against Slobodan Milošević, thus making the proceedings particularly long and complicated. Others point the finger at the Tribunal's application of common law principles, which oblige the Prosecutor to re-establish facts already established in prior proceedings<sup>14</sup>. Moreover, there are real difficulties in securing evidence, for example witnesses who refuse to appear or who modify their version of the facts. Whatever the argument raised, a part of the conclusion to be drawn is that the length and complexity of the proceedings before the Tribunal prevented it from concluding the trial of Slobodan Milošević before his death, thus depriving thousands of victims of justice. That said, one also has to acknowledge that the prosecution case was conducted over a period of only 90 days, despite the fact that they were spread out over two years. The illness of the accused and his choice to defend himself considerably slowed down the procedure<sup>15</sup>.

35. Serious efforts have since been made to expedite current proceedings before the Tribunal. As the President of the Tribunal, Fausto Pocar, has noted, reforms have been introduced and practical measures taken to "[maximise] the efficiency of trial proceedings, without sacrificing due process". He spoke of

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<sup>11</sup> The term "genocide" did not exist at the time of the Nuremberg trials; see also UN 1948 Convention on the Prevention and Punishment of the Crime of Genocide, Article II of which provides a definition of genocide.

<sup>12</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (*Bosnia-Herzegovina v. Serbia and Montenegro*), Decision of 26.02.07, see <http://www.icj-cij.org/cijwww/cdoocket/cbhy/homepage/homepage/index.php?lang=en>.

<sup>13</sup> Figures relate to 7.12.2006, source <http://www.un.org/icty/glance-e/index.htm>.

<sup>14</sup> However, there have been certain changes to the application of these principles since, for the sake of efficiency, the chambers have now decided in a number of cases to take judicial notice of facts adjudicated upon in prior proceedings, for which it will therefore not be necessary to supply further evidence. A further example is Rule 73 bis (D) which has been amended (on 17.07.2003 and 30.05.2006) and now reads as follow: "***After having heard the Prosecutor, the Trial Chamber, in the interest of a fair and expeditious trial, may invite the Prosecutor to reduce the number of counts charged in the indictment and may fix a number of crime sites or incidents comprised in one or more of the charges in respect of which evidence may be presented by the Prosecutor which, having regard to all the relevant circumstances, including the crimes charged in the indictment, their classification and nature, the places where they are alleged to have been committed, their scale and the victims of the crimes, are reasonably representative of the crimes charged.***" (emphasis added).

<sup>15</sup> See the Court order rescheduling and setting the time available to present the defence case, IT-02-54-T, 25.02.2004.

significant progress and stated in positive vein that "*all trials of accused in the custody of the Tribunal are now scheduled to be completed no later than 2009*"<sup>16</sup>.

36. The other uncompleted aspect of the Tribunal's activities is regularly under the spotlight. This concerns the six fugitives indicted by the Tribunal, who are still said to be untraceable<sup>17</sup>. Two of them are particularly important, in view of the senior positions they occupied during the Balkans war. Radovan Karadžić and Ratko Mladić, the former political and military heads of the Bosnian Serbs during the 1992-1995 war, are key figures on the path to justice and reconciliation. After Slobodan Milošević, they are undoubtedly the two most important persons indicted. Until they have been arrested and tried there can be no question of justice having been done. Yet eleven years after being charged with genocide, Radovan Karadžić and Ratko Mladić are still at large<sup>18</sup>.

37. What is done is done. However, the fact that the Tribunal was unable to pass judgment on Slobodan Milošević makes it all the more urgent and necessary for Radovan Karadžić and Ratko Mladić to be arrested and brought before it. The Rapporteur believes that as long as the two accused have not appeared before an international court, the Tribunal will not have fulfilled its mandate. Its Chief Prosecutor has asked the UN Security Council to send a clear message concerning Radovan Karadžić and Ratko Mladić, namely that "*their trial can begin in The Hague at any time until 2010, and a mechanism will be established for them to be tried in The Hague after that date*"<sup>19</sup>. The Rapporteur can only add his support to this message.

38. The Rapporteur wishes to emphasise that he fully shares the view of the President of the ICTY, who believes that closing down the Tribunal without keeping open the possibility to try the fugitives at a later point would send an unacceptable message of impunity<sup>20</sup>. If Radovan Karadžić, Ratko Mladić and the other fugitives were to manage to hide for three more years, until the ICTY is closed, they would be free men, thereby nullifying all efforts that have so far been undertaken to eradicate impunity.

39. Furthermore, the ICTY has a long-term (and moral) commitment towards its own witnesses. The question is open as to what will be foreseen with respect to this commitment once the Tribunal has closed down. The Rapporteur believes that a residual mechanism with a view to continuing to ensure adequate witness protection will be needed. ICTY's commitment in this regard could hardly be taken over at national level.

#### **iv. Completion strategy**

40. [Resolution 1503 \(2003\)](#), adopted by the UN Security Council on 28 August 2003, on which the Tribunal's activity is based, called on the Tribunal to complete investigations by the end of 2004, complete all trial activities at first instance by the end of 2008 and complete all work by 2010.

41. In order to achieve the aims of the completion strategy, the Tribunal is now concentrating on the highest-ranking leaders suspected of bearing most responsibility for the crimes falling within its jurisdiction, and transferring cases concerning intermediate and lower-ranking indictees to national courts capable of offering them a fair trial<sup>21</sup>.

42. Successful implementation of this strategy depends on the following three factors:

- the ability to transfer cases to the competent national courts and the ability of the national courts to conduct such proceedings in conformity with internationally accepted standards;
- improved co-operation of the states that were formerly part of Yugoslavia;
- the assignment of resources primarily to the prosecution of high-ranking leaders.

43. Further, the arrest and transfer of the remaining six fugitives to the Tribunal, especially Mladić and Karadžić, who are believed to bear the greatest responsibility for the genocide in Srebrenica, is an absolutely crucial factor in the ICTY's ability to fulfil its mandate effectively.

<sup>16</sup> Statement by Judge Fausto Pocar, President of the ICTY, to the General Assembly of the United Nations, 09.10.2006 – see <http://www.un.org/icty/pressreal/2006/p1136e-annex.htm>

<sup>17</sup> Vlastimir Đorđević, Goran Hadžić, Radovan Karadžić, Ratko Mladić, Zdravko Tolimir and Stojan Župljanin.

<sup>18</sup> See [indictments](#) respectively, Case No 95-5-I.

<sup>19</sup> [Address](#) by Carla Del Ponte, Prosecutor of the ICTY, to the United Nations Security Council, 15.12.2006; see also "[Appeal to the United Nations Security Council to ensure that the ICTY fulfils its mandate](#)", Amnesty International, 11.12.2006.

<sup>20</sup> Based on a discussion between the Rapporteur and the President of the ICTY on 14.02.2007.

<sup>21</sup> Pursuant to Rule 11 bis of the Rules of Procedure and Evidence.

44. Evidently, therefore, the aims set by the completion strategy can only be achieved with the support and commitment of the states concerned.

45. There are two procedures for transferring cases to the domestic courts of the country concerned. The first is based on Rule 11 *bis* of the Tribunal's Rules of Procedure and Evidence<sup>22</sup>. A significantly greater number of cases have been transferred to domestic courts under a practice whereby the Tribunal Prosecutor passes on to national prosecutors the results of investigations that have not led to Tribunal indictments. In this way, the Tribunal Prosecutor helps to combat impunity by facilitating investigations and proceedings in national courts<sup>23</sup>.

46. A referral bench of three judges decides whether cases should be referred to a domestic court, pursuant to Rule 11 *bis*. Cases may only be referred to national courts if they concern persons of intermediate or subordinate rank. The most senior accused remain within the jurisdiction of the ICTY. The referral bench also determines the countries to which cases will be referred, bearing in mind the principles of international law, human rights and the right to a fair trial.

47. In this context, it is particularly important to acknowledge the key role played by the OSCE in terms of monitoring war crimes trials by national jurisdictions. Since the pre-requisite for the transfer of cases by the ICTY to domestic courts was an assurance that these cases would be monitored, the Office of the Prosecutor of the ICTY and the OSCE established co-operation with respect to the transfer of cases pursuant to Rule 11 *bis* of the ICTY's Rules of Procedure and Evidence<sup>24</sup>. Considering the importance of this monitoring procedure in the context of war crimes trials before national courts, the Rapporteur would like to underscore the need for the OSCE to continue this task and to remain present in the different countries in the region, with the full support and co-operation from the authorities in these countries.

#### **v. The Tribunal's key contribution to establishing the rule of law - transition**

48. The Tribunal is making a critical contribution to the development and long-term establishment of the rule of law in the countries of the former Yugoslavia.

49. It has helped to improve the judicial systems of the countries concerned by passing on its judicial know-how and experience and supporting the establishment of institutions specialising in the prosecution and trial of persons suspected of serious breaches of international humanitarian law. Various training programmes have also been organised, for example judicial training seminars.

50. Once the rule of law has been established, the countries concerned must carry on the judicial process and put an end to impunity for war crimes. As an *ad hoc* tribunal, the ICTY is fated to disappear from the scene. However, the end of its mandate must not create a legal vacuum.

51. The Rapporteur will therefore look at national legal arrangements, their effectiveness, how far they comply with international law and their ability to ensure a fair trial. He will also try to determine whether and to what extent the transition from the ICTY to the domestic legal systems of the countries concerned can be made without detriment to justice and the victims of these crimes.

### **III. Role of the countries concerned in combating impunity**

52. Article 29 of the Tribunal's Statute requires all the countries of former Yugoslavia to co-operate with it in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law that come within its jurisdiction. This obligation of the states concerned also clearly emerges from the Dayton agreements<sup>25</sup>.

#### **i. Effectiveness of co-operation with the ICTY**

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<sup>22</sup> The cases of 11 accused have been transferred and the Prosecutor has requested the referral of five other persons: figures relate to 07.12.2006, source <http://www.un.org/icty/glance-e/index.htm>.

<sup>23</sup> Based on this arrangement, for example, three persons have been found guilty by the Rijeka cantonal court for offences committed in Gospic and 15 have been convicted by the war crimes chamber of the Belgrade district court for offences committed in Vukovar. Four cases have also been transmitted to "the former Yugoslav Republic of Macedonia".

<sup>24</sup> See Decision of the Permanent Council of the OSCE No 673 on the Co-operation between the OSCE and the ICTY, 556th Plenary Meeting, PC.DEC/673, 19.05.2005.

<sup>25</sup> See the General Framework Agreement for Peace in Bosnia and Herzegovina, initialled in Dayton on 21.11.1995 and signed in Paris on 14.12.1995, see [http://www.ohr.int/dpa/default.asp?content\\_id=380](http://www.ohr.int/dpa/default.asp?content_id=380).

53. As the President of the Tribunal made clear in his most recent report to the UN General Assembly, the Tribunal will be unable to complete its work without the full and effective co-operation of the countries concerned<sup>26</sup>. Clearly, the timely arrest of fugitives is a *sine qua non* if the Tribunal is to carry out its mandate within the time scale it has laid down for itself.

54. The report reviews the general situation regarding co-operation of the countries concerned with the ICTY.

55. Co-operation with Croatia is deemed to be satisfactory and the report notes that the authorities' efforts have led to the arrest and transfer of the fugitive Ante Gotovina<sup>27</sup>.

56. In the case of Serbia, the situation is much less positive. According to the report, co-operation with Serbia is not complete, consistent or expeditious.

57. In Bosnia and Herzegovina, the degree of co-operation varies according to entity. With the Federation of Bosnia and Herzegovina it is considered satisfactory, but this is far from being the case with the Republika Srpska.

58. Montenegro has not yet been considered separately in the report, but the direct and positive co-operation between its authorities and the Chief Prosecutor's office has continued uninterrupted.

59. The Rapporteur would like to stress that "the former Yugoslav Republic of Macedonia" is also duty bound to cooperate with the ICTY<sup>28</sup>.

**a. Technical improvements to co-operation**

60. The Rapporteur is pleased to note that considerable progress has been made in the transmission of and access to documents. The President of Serbia's National Council for Cooperation with the ICTY, Rasim Ljajić, has made considerable efforts. For example, the staff of the Tribunal Prosecutor's office now have access to the Serbian archives<sup>29</sup>. This is clearly a positive step that reflects a more transparent and open approach by the Serbian authorities. Another positive development is improved co-operation with the authorities of the Republika Srpska, although certain important documents have still not been transmitted to The Hague. Unfortunately, it has been reported that this co-operation has stalled since October 2006. As a result, further improvement is essential.

**b. Unacceptable lack of political will to arrest fugitives**

61. The real problem of co-operation concerns the six fugitives who have still not been arrested.

62. As the Chief Prosecutor has noted: "*while the judicial authorities in Bosnia and Herzegovina, Croatia and Serbia have stepped up their efforts to try war crimes, the political bodies in Bosnia and Herzegovina and in Serbia have not shown the political will necessary to arrest the remaining fugitives*"<sup>30</sup>.

63. So far, neither the Serbian authorities nor those of the Republika Srpska have arrested any fugitives. However, there is evidence to show that the six fugitives have relations with Serbia and that at least one of them has been resident in the Republika Srpska<sup>31</sup>. The Tribunal Prosecutor has constantly criticised the Serbian authorities for their failure to act on this matter.

64. This blatant lack of political will has had repercussions on Serbia. On 3 May 2006, the European Commission decided to suspend its negotiations with Serbia on a stabilisation and association agreement (SAA) as Ratko Mladic had not been arrested within the deadline set<sup>32</sup>. However, the fact that NATO leaders

<sup>26</sup> [13th annual report of the ICTY](#) to the United Nations General Assembly, 21.08.2006.

<sup>27</sup> See also [Croatia 2006 Progress Report](#) prepared by the European Commission, 08.11.2006.

<sup>28</sup> Some difficulties, especially at the political level, have been brought to the attention of the Rapporteur.

<sup>29</sup> Following an agreement signed with the office of the Prosecutor of the ICTY.

<sup>30</sup> Address to the United Nations Security Council, 15.12.2006 - <http://www.un.org/icty/pressreal/2006/p1137e-annex.htm>.

<sup>31</sup> See [Doc 10200](#) of the Assembly and [Resolution 1383 \(2004\)](#) on honouring of obligations and commitments by Bosnia and Herzegovina.

<sup>32</sup> Brussels had given Belgrade until 30.04.2006 to arrest Mladic and hand him over to the ICTY. When negotiations were suspended, the European Commissioner for enlargement, Olli Rehn, said: "*Serbia must show that nobody is above the law and that anybody indicted for serious crimes will face justice*". See article in the Washington Post [EU suspends Talks](#)

have invited Serbia to rejoin the Partnership for Peace, and the recent move of the EU to resume the SAA, provided the new government in Belgrade shows clear commitment and takes concrete and effective action for full co-operation with the ICTY, may throw doubt on the international community's capacity to resist considerations that have little in common with international justice<sup>33</sup>. Faced with the inaction of the country's governing forces, the Prosecutor of the ICTY must not be left to fight the battle alone. In this context, it is worth recalling that, on 16 March 2005, the EU decided to defer negotiations with Croatia because of the country's failure to honour its obligation to co-operate fully with the Tribunal, and in particular its failure to transfer Ante Gotovina<sup>34</sup>. This pressure proved effective, as Ante Gotovina was arrested in Spain on 8 December 2005 and was immediately transferred to The Hague.

65. Furthermore, the recent ICJ judgment of 26 February 2007 in the case of *Bosnia-Herzegovina v. Serbia and Montenegro* held that Serbia has violated its obligation under the Convention on the Prevention and Punishment of the Crime of Genocide "by having failed to transfer Ratko Mladić, indicted for genocide and complicity in genocide, for trial by the International Criminal Tribunal for the former Yugoslavia, and thus having failed fully to co-operate with that Tribunal"<sup>35</sup>.

66. This long-standing lack of action is totally unacceptable, since the prosecution of war criminals should be an absolute political priority. It should be noted that the lack of political will is also visible at the local level.

67. The Rapporteur was also less than convinced by the assurances he received from the authorities during his on-the-spot visit. Declarations of good faith abounded, but unfortunately seemed to be largely rhetorical<sup>36</sup>. The Serbian authorities do have an action plan for Mladic's arrest, but words count for little if they are not followed by action<sup>37</sup>. The arrest of a number of Mladic's "aides", which has received wide media coverage, is not sufficient to constitute full and total co-operation. Nor will it be sufficient for the authorities to arrest and transfer the emblematic figure of Mladic. The other five fugitives must also be taken in and brought to justice. The country's authorities must now make sure that the public is also aware that co-operation with the ICTY is not confined to Mladic.

68. In his last report on Serbia, the Council of Europe Secretary General deplored "the lack of a coherent investigative strategy and of a strong and open public commitment by the Serbian leadership to locating, arresting and surrendering Ratko Mladic to the International Tribunal"<sup>38</sup>.

69. According to information supplied to the Rapporteur, the authorities of Bosnia and Herzegovina are also currently drawing up an action plan to arrest fugitives. This is to be welcomed, but only if it leads to concrete action.

70. It must be borne in mind that the ICTY has no authority or means to arrest fugitives itself, and is therefore entirely dependent on the actions of the countries concerned.

71. The Rapporteur would also make the point that, when asked whether they had sufficient resources to protect witnesses, without exception the authorities of the four countries concerned said that it was impossible to guarantee real protection to individuals, even within their own territories. Their small size made

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[with Serbia Over Mladic](#) (3.05.2006), and <http://www.fenetreeurope.com/php/page.php?section=actu&id=5800> (French only).

<sup>33</sup> Admittedly, NATO's Secretary General has stated that the organisation would maintain its demands regarding Serbian co-operation with the ICTY, but Carla del Ponte for one has expressed regrets about this invitation. See *L'OTAN offre un partenariat à la Serbie*, RFI actualité, 29.11.2006 (French only). Serbia, Bosnia and Herzegovina and Montenegro joined the partnership on 14.12.2006; see also [HRW's letter](#) to the EU High Representative for Foreign and Security Policy, Javier Solana, and the German Presidency of the European Union of 26.03.2007 as regards the EU Approach to Cooperation of Serbia with the ICTY.

<sup>34</sup> See HRW 29.03.2005, Real Progress in The Hague, [http://hrw.org/english/docs/2005/03/29/serbia10386\\_txt.htm](http://hrw.org/english/docs/2005/03/29/serbia10386_txt.htm)

<sup>35</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Decision of 26.02.07, see <http://www.icj-cij.org/cijwww/cdocket/cbhy/homepage/homepage/index.php?lang=en>.

<sup>36</sup> When his country joined the NATO Partnership for Peace (see above), the Serbian President, Boris Tadic, said that it was "a moral imperative that all fugitives from justice, Ratko Mladic in particular, be located, arrested and extradited to The Hague", but similar statements have already been made on many occasions.

<sup>37</sup> Many of those whom the Rapporteur met thought that the action plan, presented in Brussels on 17.07.2006 in response to the suspension of negotiations by the European Commission, was mere window dressing and criticised the absence of any report so far on measures taken under the plan.

<sup>38</sup> Information document presented by the Secretary General – "Republic of Serbia: Compliance with obligations and commitments and implementation of the post-accession co-operation programme", [SG/Inf\(2006\)15](#), 24.11.2006; see also [SG/Inf\(2006\)1](#), 19.01.2006.

it impossible to hide someone. This makes it even more disturbing that it has not proved possible to locate these fugitives, some of whom are said to be on the territory of the former Yugoslavia.

72. If these countries are to be more committed to tracking down and arresting fugitives, more will have to be done to show the public why this is necessary. It has to be acknowledged that currently part of the population still supports the fugitives. Governments' political commitment may well be tempered by the fear of losing votes<sup>39</sup>. Such considerations should not apply to a subject as serious as war crimes and the Serbian authorities, and those of the other countries concerned, must actively explain the gravity of the crimes in question and insist that no one can be above the law. The place of politicians in society gives them a very particular responsibility. Although they may choose to lead public opinion they also sometimes refuse to do so. Some issues may shock, or even offend, public opinion but politicians should never shirk their duty to prosecute war criminals. Above all, they must stimulate rather than stifle debate on the subject, to prepare the way for acceptance<sup>40</sup>.

73. While there can be no collective responsibility of a whole people for war crimes, a persistent lack of political will to prosecute and occasional attempts at the highest level to deny such crimes<sup>41</sup> eventually render an entire state, as State, politically responsible.

74. Some of the (non-governmental) figures whom the Rapporteur met detected a trend towards greater social acceptance that war crimes had been committed. This appears to be the case in Montenegro. The Rapporteur welcomes this development but thinks that efforts should be made by the authorities of all the countries concerned, particularly in Serbia and in the Republika Srpska, to inform the public of the positive work undertaken by the Tribunal and the importance of arresting fugitives, to bring an end to impunity<sup>42</sup>.

75. In this respect, the Rapporteur strongly welcomes President Boris Tadic's invitation to the Serbian Parliament on 26 February 2007, following the aforementioned decision by the ICJ recognising Serbia's failure to prevent genocide with respect to the genocide that occurred in Srebrenica<sup>43</sup>, to pass a declaration unequivocally condemning the Srebrenica crime. The Rapporteur believes that such a declaration would necessarily represent an important step towards reconciliation and towards greater acceptance in the Serbian society and hopes that all political parties will agree on this proposal. It is of the outmost importance that the Serbian politicians show their readiness to recognise the reality of history.

76. He also urges Russia to co-operate fully with the Serbian authorities in their search for a fugitive who is thought to be hiding in the Russian Federation<sup>44</sup>.

### ***c. Co-operation of the ICTY with the countries concerned: principle of reciprocity***

77. The Rapporteur was disturbed by certain comments made by the authorities of the countries visited. Some complained of poor co-operation by the ICTY. The complaints varied but it appears that securing access to relevant documents held by the Tribunal that could assist investigations by internal judicial bodies is a complicated and slow process. There were also allegations that defence lawyers found it particularly difficult to obtain information from the ICTY.

78. When the Rapporteur visited Belgrade, the issue of Mr Seselj's trial conditions was also raised. It was alleged that several of his rights (especially as regards his defence) were being violated. Since the Rapporteur's visit to Belgrade, the Appeal Chamber of the ICTY withdrew the decision on the appointment of Mr Seselj's officially assigned defence counsel and granted him the right to present his own defense in the trial. As a result, Mr Seselj terminated his hunger strike.

<sup>39</sup> This was particularly the case during the Rapporteur's visit to Serbia and to Bosnia and Herzegovina, countries which both were in pre-election periods.

<sup>40</sup> See 'Political Elite in Serbia show no Responsibility for Legacy of the Past', Humanitarian Law Center, 09.12.2006.

<sup>41</sup> See Assembly Resolution 1397 (2004) on the functioning of democratic institutions in Serbia and Montenegro, in which the Assembly criticises a public campaign against the Tribunal conducted since 05.10.2000 by some leading Serbian politicians (§ 9). See also Assembly Doc 10281 p. 15.

<sup>42</sup> In its [Croatia 2006 Progress Report](#), dated 08.11.2006, the European Commission notes that "As elsewhere in the region, the general public does not have easy access to objective information about the work of the ICTY".

<sup>43</sup> ICJ, Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia-Herzegovina v. Serbia and Montenegro), Decision of 26.02.07, see <http://www.icj-cij.org/cijwww/cdoocket/cbhy/homepage/homepage/index.php?lang=en>; the ICJ considered that the most appropriate form of response for Serbia's failure to prevent the genocide in Srebrenica would be a declaration in the operative clause of the Judgment that the Respondent has failed to comply with this obligation.

<sup>44</sup> Vlastimir Đorđević.

79. The Rapporteur raised these matters, which he considers serious, with Tribunal officials while in The Hague. He notes that, in principle, efforts have been made and agreements signed to ensure that the authorities of the countries concerned do have access to the Hague Tribunal's archives<sup>45</sup>.

80. The Office of the Prosecutor explained to the Rapporteur that, while the defence counsel in national proceedings do not have the same direct access to ICTY documents as the national prosecutors do, it is clearly a matter that should be settled within the internal procedure of the national systems. The Office of the Prosecutor recalled that the prosecutors of the countries concerned have full access to the documents of the Office of the Prosecutor of the ICTY<sup>46</sup>. As a result, the defence counsel should be able to request from the national prosecutors the transmission of the information which the latter have received directly from the ICTY. In order to guarantee respect for the 'principle of equality of arms'<sup>47</sup>, the Rapporteur believes that clear and effective mechanisms must be put in place in order to ensure that information received from the ICTY by national prosecutors is transmitted to the national defence counsel.

## **ii. Domestic judicial arrangements**

81. Based on his on-the-spot observations, the Rapporteur wishes to stress from the outset that in general, the judicial authorities of the countries concerned give high priority to prosecuting war criminals, thus helping to combat impunity. Unfortunately, these judicial bodies do not seem to have the necessary political support to carry out this task successfully. This lack of political support takes numerous forms, but in particular that of inadequate resources – investigatory, financial and staffing.

### **a. Adequacy of domestic arrangements**

82. All the countries concerned have made efforts, supported by the international community, to set up specialist judicial bodies, in both the courts and the prosecution service<sup>48</sup>.

83. As regards Bosnia and Herzegovina, the ICTY indicated in 2004 its growing confidence in the ability of the country's courts to hear war crimes cases. Between 1996 and 2004 cases could not be brought before its courts until the case files had been reviewed and approved by the ICTY prosecution service, under the so-called "rules of the road"<sup>49</sup>. This was to determine whether they contained credible allegations and evidence, to avoid arbitrary decisions. Since October 2004, the authorities of Bosnia and Herzegovina have themselves been responsible for applying the "rules of the road" process. It is therefore the Bosnian prosecutor who decides whether it is appropriate to bring a war crime prosecution. Only the most sensitive cases are heard by the State Court of Bosnia and Herzegovina, with the majority coming before cantonal or district courts.

84. Generally speaking, the Rapporteur found that courts and prosecution services lacked resources in all the countries visited. Although in some of them the situation is not yet critical, it will inevitably become so in the next few years, given the likely increase in the number of prosecutions. War crimes investigations are extremely costly and require substantial resources<sup>50</sup>. The Rapporteur received numerous assurances that resources would be increased accordingly but it remains to be seen whether this is sufficient to deal with the rising caseload before domestic courts following the closure of the Tribunal<sup>51</sup>.

85. Other concerns were expressed by those whom the Rapporteur met during his visits. The Montenegrin legal apparatus faces particular difficulties because of delays in appointing judges. The financial

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<sup>45</sup> This access has been particularly useful in a number of cases, such as the 'Glavaš' case before the Croatian courts.

<sup>46</sup> This access is limited to the extent that the access is not provided to confidential materials, such as witness statements and material protected under Rule 70 of the Rules of Procedure and Evidence of the Tribunal. Moreover, national prosecutors are given access to the Tribunal's judicial database, which consists of all public Court documents, including decisions, orders, motions, and the parties' submissions, but excluding the confidential filings and closed session/private session transcripts.

<sup>47</sup> The 'principle of equality of arms' is an essential criterion of a fair trial, which demands that both parties be treated in a manner ensuring a procedurally equal position during the course of the trial.

<sup>48</sup> The Bosnia and Herzegovina Court includes a war crimes division, which was the first permanent state body charged with examining serious violations of international humanitarian law. Serbia has established a war crimes division and a special prosecutor. In Croatia, war criminals are dealt with by four specialist courts. Some of the judges of these courts have been specially trained for this purpose. In addition, since 2003 there has been a special prosecutor for war crimes, and a special police division to undertake inquiries.

<sup>49</sup> This process formed part of the Rome Agreement of February 1996.

<sup>50</sup> For example, they require numerous visits abroad.

<sup>51</sup> Certain promises were made to the Rapporteur in Serbia, but we must await the formation of a new government following the elections of 21.01.2007, to see whether these promises are kept.

conditions of the judicial profession appear not to be sufficiently attractive to ensure that it is properly staffed, at a time when the number of cases continues to rise. The country's supreme court has asked for judges' salaries to be increased and their social status improved, and the Rapporteur hopes that these proposals will be reflected in the new Constitution as a means of safeguarding judicial independence.

86. The Belgrade war crimes division lacks sufficient staff to deal with the likely increase in cases but is very committed and has already achieved very satisfactory results. Those concerned themselves acknowledge that there is excellent co-operation between the division and the Tribunal Prosecutor's office.

87. More generally, though, there seems to be a lack of co-operation between some of those responsible for prosecuting war criminals in the countries concerned<sup>52</sup>. The Rapporteur sees an urgent need for co-ordinated action, backed up by strong political support, to ensure maximum effectiveness.

**b. Quality and impartiality of decisions**

88. The main shortcomings of domestic legal systems are particularly marked at local level. Countries' highest courts cannot deal with all such cases and to varying extents have to rely on local ones. Yet the latter do not have the same technical capacity or legal training. Some states have taken steps to train more judges and prosecutors to deal with war crimes but there are still major gaps that call for radical measures<sup>53</sup>.

89. The Rapporteur wishes to draw attention to a problem he was informed of on his visit to Bosnia and Herzegovina. The judicial authorities of the State operate totally independently of those of the entities. The result is that the Court of Bosnia and Herzegovina has no jurisdiction to act as the state supreme court because the entities have their own supreme courts<sup>54</sup>. For example, it is unable to effect even a minimum harmonisation of case-law. Even more surprisingly, different criminal codes apply at state and entity levels. Certain crimes, such as genocide or crimes against humanity, exist in the criminal code of the Federation but not in the Republika Srpska code<sup>55</sup>. The Rapporteur believes that legal harmonisation is necessary to secure certainty of the law and that the Court of Bosnia and Herzegovina should therefore have the powers and jurisdiction of a supreme court, or alternatively that such a supreme court should be established<sup>56</sup>. However, some have argued that such a solution would take too long to implement and would not offer a sufficiently rapid response to an urgent need. Besides, the legal foundations should also be harmonised. The offices of the State and entity prosecutors reportedly also do not co-operate. Efforts have been made under the auspices of the High judicial and Prosecutorial Council to offer a harmonised curriculum in the two training centres for judges and prosecutors, which should promote harmonisation.

90. Many of those whom the Rapporteur met said that local judicial bodies were unable to guarantee impartial trials in accordance with the principles of international law. A lack of legal consistency is thus all too common in the region.

91. One sign of this is the frequency with which higher courts overturn local court decisions<sup>57</sup>.

92. The Rapporteur hopes that the authorities will carry out the necessary reforms to strengthen their judicial systems at local level.

93. It has to be said that in certain cases the judicial process in the region is still subject to political influence. The judiciary must be independent of any outside influence if the rule of law is to be established in

<sup>52</sup> Some good examples exist though, such as the establishment within the Ministry of Justice of Croatia of the Department for Assistance to Witnesses and Participants in War Crime Trials since April 2006, but remain insufficient.

<sup>53</sup> For a specific example, see Human Rights Watch's very detailed report on the Republika Srpska '[A chance for Justice? War Crime Prosecutions in Bosnia's Serb Republic](#)', March 2006; In Croatia, in co-operation with the ICTY, the Judicial Academy organised a series of specialised seminars to train Croatian judges and state attorneys in the course of 2005 and 2006.

<sup>54</sup> Cases can only be referred to the Court of Bosnia and Herzegovina from the entity courts if the latter request it.

<sup>55</sup> The differences between the criminal codes are such that the heaviest sentences prescribed by law range from 45 years' imprisonment in the Federation code to fewer than 20 in certain of the entities.

<sup>56</sup> In its [Resolution 1513 \(2006\)](#), the Assembly has already called on the authorities of Bosnia and Herzegovina to create a state-level supreme court to enhance the reform of the judiciary.

<sup>57</sup> According to the figures provided on 13.02.2007 to the Rapporteur by Mr Žužul, member of the Croatian Parliamentary delegation to PACE, the Croatian Supreme Court upheld 57%, altered 16%, completely repealed 24,5% and partly overruled 2,5% local court decisions from 1993 to 2006 inclusive.

the region. This is unfortunately all too real a problem in the countries concerned and a matter of great concern to the international community<sup>58</sup>.

94. There were a number of reports of courts handing down biased judgments based on ethnic considerations. For example, no one disputes that in the early days the great majority of Croat and Bosniac courts only prosecuted persons of Serb origin. Although the situation appears to have improved, with prosecutions more objective and less related to ethnic origin<sup>59</sup>, the Rapporteur is disturbed to note that certain Croat courts of first instance continue to treat service in the Croat army as grounds for reducing sentences<sup>60</sup>. Fortunately, the Supreme Court has rejected this reasoning on several occasions.

95. The Rapporteur calls on the region's political leaders to urge the courts to adopt a more objective approach that guarantees the impartiality of war crime trials.

### **c. Adequacy of police assistance**

96. The work of the region's prosecution services depends very much on the support they receive from the police. According to some of the Rapporteur's interlocutors the police are too inclined simply to respond to specific requests by the prosecution, without taking the slightest initiative themselves. Some see this as a lack of commitment to the effective prosecution of war criminals, reflecting an absence of political support.

97. The structural reforms of the police do not appear to have been implemented effectively.

98. However, certain improvements have been observed. For example, the Rapporteur's attention has been drawn to the "Suva Reka" case, one of the most important in Serbia, in which the Serbian police have played a particularly active role.

### **d. Safety of and support for witnesses**

99. There was general agreement among those whom the Rapporteur met that the size of the countries concerned made long-term witness protection impossible unless there was effective regional, and even international, co-operation. This has apparently been discussed by regional justice and interior ministries<sup>61</sup>. The Rapporteur strongly supports such efforts since proper witness protection is one of the essential and basic preconditions for the effective prosecution of war criminals. As long as potential witnesses have reason to fear that their evidence might place them in danger, many of them will prefer to remain silent.

100. Even though the highest courts may have the facilities to offer witnesses protection, this is certainly not the case with their local counterparts, who have no resources for this purpose<sup>62</sup>. In Bosnia and Herzegovina, the SIPA (State Investigation and Protection Agency) only has jurisdiction at Federation level. Moreover, potential witnesses do not always receive sufficient information on the types of protection to which they may be entitled. The authorities should make more efforts in this regard<sup>63</sup>.

101. Admittedly, the countries concerned have legislation on witness protection. However, some of the problems are a direct consequence of this legislation, whose drafting often lacks clarity<sup>64</sup>.

102. Witness protection has encountered serious difficulties. Journalists and at least one politician<sup>65</sup> have failed to respect the anonymity of certain witnesses and have deliberately revealed their identities or the content of their evidence to the public. Several journalists are currently being prosecuted by the ICTY for

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<sup>58</sup> This also reflects the views expressed in the Rapporteur's meetings with various representatives of the international community during his visits.

<sup>59</sup> See OSCE Background Report: Domestic War Crime Trials 2005, 13.09.2006, p 27 ff, and Croatia 2006 Progress Report, dated 08.11.2006, in which the European Commission notes some improvements in this respect.

<sup>60</sup> This reasoning was also taken up by the Split Court of First Instance during the revision of the "Lora" trial; this trial was moreover considered as having been carried out in a satisfactory manner.

<sup>61</sup> This information emerged from the Rapporteur's conversation with one of his interlocutors in Montenegro.

<sup>62</sup> For example, local courts have no technical means of preserving the anonymity of witnesses summoned to give evidence.

<sup>63</sup> Under draft legislation in Serbia, judges will have a legal obligation to inform witnesses of their rights. While this development is to be welcomed, the obligation should also apply to the public prosecutor, who is the first person with whom potential witnesses come into contact.

<sup>64</sup> This would appear to be the case with the Serbian legislation on victim protection, which lays down that the parties to proceedings must be informed of witnesses' identity, as a result of which many of them refuse to appear.

<sup>65</sup> Mr Djapić, a Croatian member of parliament.

such conduct<sup>66</sup>. Very recently, the ICTY has condemned a Croat journalist for having committed contempt of the Tribunal by publishing a Witness List<sup>67</sup>. Motivated by the particular case concerning the politician, mentioned above, the Republic of Croatia passed the Act on Amendments to the Criminal Code, which entered into force in June 2006 and introduced greater sanctions for this kind of offence<sup>68</sup>. According to information provided to the Rapporteur by a Member of the Croatian parliamentary delegation to the Assembly, "the system of protection of witnesses in criminal proceedings for war crimes was enhanced by means of the Act on Amendments to the State Attorney's Office Act, passed at the last session of the Parliament"<sup>69</sup>. While welcoming these steps, the Rapporteur urges the Croatian authorities to take the necessary legal action against the Member of Parliament concerned.

103. The international community could also probably do more to protect witnesses<sup>70</sup>.

104. One means of making war crimes prosecutions more effective is to allow witnesses to testify on video. Closer regional co-operation would make it possible to collect evidence without the need for witnesses to make onerous journeys. Although some courts are equipped for this purpose, provision appears to be very uneven. Nevertheless, the Rapporteur would draw attention to the positive application of this technique in, among others, the 'Lora' and 'Vukovar' cases and urges countries to develop this tool, both technically and in terms of legal recognition<sup>71</sup>.

105. Short-term witness protection in contrast does not seem to be a real problem. When witnesses travel from one of the countries to give evidence in one of the other countries of the region adequate care and protection seems to be available.

#### **e. Appropriate/adequate defence**

106. Major concerns have been expressed concerning the rights of defence. A vigorous defence is a key element of any trial, but appears to be cruelly lacking in the case of war crimes proceedings before local courts in the countries concerned<sup>72</sup>. The reason for this is the quite inadequate level of remuneration for lawyers defending such charges.

107. In Serbia, one of the aims of the very progressive draft war crimes legislation is to improve defence conditions and raise the standard of the services offered. However, the outcome of the elections and the formation of a new government must be awaited before the bill can be passed. The Rapporteur hopes that the country's authorities will seize this opportunity and approve the new law, as evidence of a greater political commitment.

### **iii. Adequacy of regional and international co-operation**

#### **a. National legislation: a major source of impunity**

108. All the countries concerned have imposed legal or constitutional bans on the extradition of their own nationals. This makes it particularly difficult to combat impunity since many of those charged can only be tried in their absence. The Rapporteur believes that the non-extradition of nationals should not extend to persons charged with war crimes, once there are guarantees that the accused will receive a fair trial. He also proposes that the countries concerned consider the possibility of authorising the extradition of their nationals charged with war crimes on the basis of reciprocity<sup>73</sup>.

<sup>66</sup> See [address](#) by Carla Del Ponte, Prosecutor of the ICTY, to the Permanent Council of the OSCE, 07.09.2006. See also [Croatia 2006 Progress Report](#) prepared by the European Commission, 08.11.2006.

<sup>67</sup> *Prosecutor v. Domagoj Margetić*, Case No. IT-95-14-R77.6, dated 07.02.2007.

<sup>68</sup> New Article 305a of the Criminal Code now reads as follows: "Whoever without authorisation communicates, delivers or publishes information concerning the identity of a person for whom the proceedings for entry into a protection programme were initiated or is enrolled into a protection programme, or whoever takes over actions with the aim to disclose information on the said person's identity or to locate the said person, shall be punished by imprisonment from three months to three years".

<sup>69</sup> Information provided by Mr Žužul, member of the Croatian Parliamentary delegation to PACE, on 13.02.2007 and available at the Secretariat.

<sup>70</sup> *Idem*. Several of the persons whom the Rapporteur met on his visits made the same point.

<sup>71</sup> In July 2006, the Croatian Code of Criminal Procedure was modified in order to allow the use, in the Croatian courts, of testimonies by video-link from witnesses in other countries.

<sup>72</sup> See, as regards Bosnia and Herzegovina, "[Narrowing the Impunity Gap – Trials before Bosnia's War crimes Chamber](#)", HRW, February 2007, pp. 26-28.

<sup>73</sup> In practice, the new Serbian constitution no longer prohibits the extradition of nationals. Such a ban now only exists in legislation, and not in the constitution. Similarly, in Bosnia and Herzegovina, such extradition is banned in the criminal

109. In this context, several of those he met criticised the misuse of dual nationality, which offered those concerned an additional legal refuge. For example, persons indicted or likely to be indicted with war crimes in the Bosnian courts can very easily claim permanent residence in Serbia and take Serbian nationality. With the protection of the ban on the extradition of nationals, such persons can then continue to live in total impunity. Here again, the Rapporteur considers that applications for nationality should be closely examined and that those charged with war crimes in another country (particularly one whose nationality they hold) should not be granted a second "nationality of convenience", above all if this may be used to escape justice.

110. Another important point is that none of the countries concerned authorise the formal transfer of prosecution files to another country when the legally enforceable term of imprisonment exceeds ten years, as is normally the case with war crimes.

111. These provisions, which have both legislative and constitutional force, create a vacuum that offers war criminals real impunity.

112. These countries must amend their legislation to end this basis for impunity. Two Council of Europe conventions are particularly relevant. But although Croatia, Montenegro and Serbia have indeed signed and ratified the European Convention on Extradition (ETS No 24), they have also made declarations prohibiting the extradition of their nationals. Finally, Croatia has not yet ratified the European Convention on the Transfer of Proceedings in Criminal Matters (ETS No. 73). It should also be noted that as part of their negotiations with the European Union these countries will in any case have to contend with the European arrest warrant, which provides for nationals to be extradited for much less significant offences.

113. The Rapporteur welcomes the ratification by Croatia on 12 January 2007 of the Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (ETS No. 182) and urges Bosnia and Herzegovina, Montenegro and Serbia to also ratify it.

#### **b. International legal co-operation**

##### **• technical**

114. It should be stressed from the outset that there has been particularly positive progress in this area. The OSCE has sponsored a real effort to increase the number of prosecutions and improve the judicial process by developing cross-border co-operation on war crimes prosecutions<sup>74</sup>. This is referred to as the "Palić Process", under which regular meetings of prosecutors and judges from Bosnia and Herzegovina, Croatia, Serbia and Montenegro have discussed such issues as access to and protection of victims, the transmission of prosecution files, extradition and the transfer of cases by the Hague Tribunal.

115. One practical result of these efforts is that the Croatian prosecutor's office has signed agreements with its Montenegrin and Serbian counterparts, on 28 July 2006 and 13 October 2006 respectively. Under these agreements, investigation documents (and thus any evidence obtained) will be exchanged between prosecution offices to enable the latter to prosecute suspects residing in their countries. According to several of those spoken to, co-operation under these agreements is already under way. Such agreements offer the advantage of avoiding bans on the extradition of nationals (see above).

116. The Rapporteur stressed the positive aspects of these agreements during his on-the-spot visits. He also encouraged the prosecutors' offices of the other countries concerned to sign similar ones. The reactions received leave him in no doubt that agreement could very rapidly be reached between the prosecutors of Serbia and Montenegro. However, Bosnia and Herzegovina does not appear to be at all ready to accept such technical co-operation between prosecution services. Instead it would prefer those who committed crimes in its territory to be judged by its own courts.

117. This may be understandable from an emotional standpoint but the Rapporteur cannot support a line of reasoning that leads the Bosnian courts to deliver a large number of judgments *in absentia*. In the interests of justice and to ensure that the courts' decisions take effect, it is preferable for suspects to be tried

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code but not in the constitution. There would be no difficulty in applying international treaties on extradition between the countries concerned since such treaties take precedence over domestic law. This principle is embodied in article 16§2 of the new Serbian constitution, is already established in those of Croatia and Bosnia and Herzegovina and will become part of the new constitution of Montenegro that is currently being drawn up.

<sup>74</sup> See the comments on regional co-operation by the Head of the OSCE Mission in Sarajevo to the International Summer School of the Konrad Adenauer Stiftung, 15.8.2006 ([http://www.oscebih.org/public/print\\_news.asp?id=1850](http://www.oscebih.org/public/print_news.asp?id=1850)).

in person. It can never be of overriding importance that the trial court is physically located in the country where the alleged events took place. Given the impossibility, to date, of extraditing nationals, such a practical arrangement is certainly the most effective way of combating impunity. The Rapporteur therefore urges the office of the prosecutor of Bosnia and Herzegovina to negotiate agreements on the subject with its regional counterparts.

118. The 'Scorpions' and 'Lora' cases offer a perfect illustration of the excellent co-operation between Serbian and Croatian prosecutors' offices. The Serbian prosecutor's office has provided logistical support to Split district court in Croatia, in connection with war crimes in that country<sup>75</sup>. Moreover, despite the Bosnian authorities' reluctance to joining this sort of agreement, the country has co-operated closely with Serbia in the "Zvornik group" case<sup>76</sup>.

119. It then has to be seen whether evidence supplied by a particular country's prosecutor will be deemed sufficiently convincing by the prosecutor's office of the country where the potential accused is residing. Different standards might be applied when weighing up evidence. To ensure maximum co-operation and co-ordination at regional level and thus combat impunity, the Rapporteur sees a need to harmonise the standards applied to evidence in war crimes cases.

120. Also at the technical level, closer co-operation between the police forces of the countries concerned could significantly increase the effectiveness of inquiries, and thus of justice. In certain cases, proceedings cannot continue because of police lack of co-operation and unwillingness to supply information to their opposite numbers. Much of the information and evidence in such cases is inevitably cross-border in nature and the relevant authorities should facilitate access to this information as far as possible through effective co-operation agreements between their police forces<sup>77</sup>.

- **political**

121. It is clearly very encouraging that co-operation between prosecutors is developing in a satisfactory way. However, despite the high level of co-operation at technical level, the Paliæ Process has been impeded by political obstacles. Regional co-operation will only be fully effective if it has the support and commitment of the governments concerned. Several of those spoken to said that regional co-operation needed to be organised at government level. It appears that the countries concerned still lack the political will to complete this stage, necessary though it is. Regrettably, in the absence of political agreement, the process has currently been suspended<sup>78</sup>.

#### **IV. Conclusions**

122. With regard to the prosecution of war crimes, much has been achieved so far by the international community. However, the task is far from completed and everything would seem to indicate that the time has now come for the states concerned to take over the work of The Hague Tribunal regarding the prosecution of those suspected of war crimes (with the exception of the six fugitives who have already been indicted by the Tribunal and will have to appear before the international Tribunal). The Rapporteur has been able to note that progress has been made in strengthening the judicial systems of these states; but there is still a serious need for improvement.

123. The development of the rule of law and the full establishment of an independent judicial system are still under way in the countries visited. Much progress has been made, but a lot of effort is still needed in order to make the judicial organs work effectively and in conformity with the principle of the rule of law.

124. No matter how long and painful the reconciliation process may be, many efforts are still required. Justice is an indispensable ingredient in the process of reconciliation for the victims, communities and countries concerned and it is essential to fight impunity resolutely at all levels.

125. One cannot emphasise the importance of the ICTY enough, which, in seeking justice, has played and continues to play a fundamental, pioneering role in the development of international criminal law.

<sup>75</sup> The Serbian War Crimes Prosecutor's Office has made its facilities available to the Split district court.

<sup>76</sup> The case is being investigated in Serbia but witnesses have been questioned in Bosnia and Herzegovina with the support of that country's prosecuting authorities.

<sup>77</sup> Certain bilateral agreements already exist but are reported to be insufficiently effective, because of lack of political will.

<sup>78</sup> See also [the address](#) by Carla Del Ponte, Prosecutor of the ICTY, to the Permanent Council of the OSCE, 07.09.2006.

126. The co-operation of the States concerned with the ICTY has improved considerably in some cases, particularly with regard to technical aspects. Nevertheless, the authorities of some states or entities concerned show a blatant lack of political will, to the point of undermining the real efforts made by the courts in these countries.

127. This is particularly obvious with regard to the prosecution and arrest of the fugitives against whom the Tribunal has brought charges. The authorities concerned have to do more in this respect, especially the Serb authorities and the authorities of the Republika Srpska, in order to locate and arrest the fugitives and show that no-one is above the law.

128. It is of the outmost importance that the European Union maintains its demands regarding Serbian co-operation with the ICTY as a precondition for resuming its negotiations with Serbia on a stabilisation and association agreement, as this has already proven to be a very effective measure.

129. In view of the end of the Tribunal's mandate, the Rapporteur is concerned by the fact that some fugitives might still be at large when the Tribunal finally closes its doors. The United Nations should find a solution to ensure that war criminals who are still at large do not escape international justice, irrespective of the date on which they are arrested.

130. The Rapporteur is concerned about the fact that the national legislation of the states in question has proven to be a real obstacle to the effective prosecution of war crimes suspects in their own courts, thereby providing a basis for impunity, which can no longer be tolerated. The ban on the extradition of nationals in all the countries concerned constitutes a serious obstacle to the course of justice, as well as the misuse of the acquisition of dual nationality, and measures must be undertaken to avoid impunity.

131. As a final word, the Rapporteur would like to stress that responsibility must be borne not by a whole people or entire communities but by individuals found guilty after a fair trial. For the sake of justice, and for the reconciliation of people in the region, an end must be put to impunity, once and for all. In this fight, not only the international community, but first and foremost the national authorities have a great role to play.

**APPENDIX I****Programme of the visits to Podgorica, Belgrade, Sarajevo and Zagreb  
by Mr Tony Lloyd, Rapporteur  
20-23 November 2006****Podgorica*****Monday 20 November 2006***

- 08h45 Meeting with Ms Paraschive Badescu, OSCE Ambassador in Podgorica
- 10h00 Meeting with Mr Ranko Krivokapic, Speaker of the Parliament of the Republic of Montenegro
- 10h45 Meeting with Mr Miodrag Vukovic, President of the Committee for International Relations and European Integrations in the Parliament of the Republic of Montenegro
- 11h30 Meeting with Ms Vesna Medenica, Supreme State Prosecutor
- 12h15 Meeting with Mr Ratko Vukotic, President of the Supreme Court
- 13h00 Meeting with Mr Miras Radovic, Minister of Justice
- 15h00 Lunch with Ms Irena Radovic, Representative of the British Embassy

**Belgrade*****Monday 20 November 2006***

- 20h30 Dinner hosted by Mr Milos Aligrudic, Head of the Delegation of Serbia to the PACE

***Tuesday 21 November 2006***

- 08h30-09h30 Working breakfast with Mr Deyan Mihov, Head of ICTY Office in Belgrade and Mr Ivan Jovanovic, National Legal Advisor on War crimes, OSCE Mission to Serbia
- 11h00-11h30 Meeting with Mr Predrag Markovic, Speaker of the Assembly
- 11h40-12h30 Meeting with Mr Goran Rakovac, Mr Marko Krstin and Mr Branislav Nedimović, Members of the Committee for Justice and Administration
- 12h30-12h45 Meeting with Mr Tomislav Nikolic, Head of the Serbian Radical Party parliamentary Group
- 12h45-14h00 Working lunch hosted by Mr Milos Aligrudic, Head of the Delegation of Serbia to the PACE
- 14h15-15h00 Meeting with Mr Zoran Stojkovic, Minister of Justice
- 15h15-16h00 Meeting with Mr Vladimir Vukcevic, War Crimes Prosecutor
- 16h15-17h00 Meeting with the War Chamber of the Belgrade District Court:  
- Mr Siniša Važić, President of the Belgrade District Court  
- Ms Tatjana Vuković, judge  
- Mr Milan Dilpakić, judge  
- Ms Ivana Ramić, spokesperson
- 17h15-18h00 Meeting with Mr Rasim Ljajic, President of the National Council for Cooperation with the ICTY

## **Sarajevo**

### ***Wednesday 22 November 2006***

- 09h00-10h00 Meeting with representatives of ICTY:  
- Mr Howard Tucker, Head of Mission  
- Mr Matias Hellman, Registry liaison office
- 10h30-11h45 Meeting with Ms Meddzida Kreso, President of the Court of Bosnia and Herzegovina
- 11h30-12h15 Meeting with Mr Zekerija Mujkanović, Member of the High Judicial and Prosecutorial Council of Bosnia and Herzegovina
- 12h30-13h15 Meeting with Mr Vaso Marinkovic, Deputy Chief Prosecutor of Bosnia and Herzegovina  
13h30-14h45 Lunch hosted by Mr Martin Raguz, current speaker of the House of Representatives and member of the Delegation of Bosnia and Herzegovina to the PACE, and Ms Azra Hadziahmetovic, member of the PACE Delegation
- 15h00-15h45 Meeting with Ms Milana Popadic, Assistant Minister of Justice and Mr Jusuf Halilagic, Secretary of the Ministry of Justice
- 16h00-16h45 Meeting with Mr Chris Engels, Director of the Criminal Defense Section
- 17h00-18h00 Meeting with representative of OSCE  
- Ms Pipina Katsaris, Legal Adviser, Head of Monitoring Section  
- Mr James Rodehaver, Director of the HR Department  
- Ms Maja Zozolly, Cabinet of the Head of Mission

## **Zagreb**

### ***Thursday 23 November 2006***

- 10h00 Meeting with Mr Josip Čule, Deputy State Prosecutor
- 11h00 Meeting with Mr Branko Hrvatin, President of the Court, and Ms Garačić, Deputy President of the Court
- 12h15 Meeting with Mr Branko Turić, Head of the Terrorism and War Crimes Department
- 13h30 Meeting with Emil Tomljanović, President, and some members of the Judiciary Committee
- 14h30 Lunch hosted by Mr Frano Matušić, Head of the Delegation of Croatia to the PACE
- 16h15 Meeting with Mr Thomas Osoriot, Head of ICTY mission, and Ms Mary Wyckoff, OSCE
- 18h00 Meeting with Ms Snježana Bagić, State Secretary in the Ministry of Justice
- 19h30 Dinner hosted by Mr Frano Matušić, Head of the Delegation of Croatia to the PACE

## APPENDIX II

### **Reply from the Ministry of Justice of Croatia, dated 14 December 2006, to Mr Tony Lloyd, Rapporteur**

...

The Ministry of Justice of the Republic of Croatia refers to your note, dated on 12th December 2006, in which you have sought supplementary information regarding signature and / or ratification of the relevant Council of Europe Conventions.

We have the honor to answer on your questions for the purpose of the improvement our further co-operation.

Considering the signing and ratifying the European Convention on the International Validity of Criminal Judgments please note that the Republic of Croatia does not envisage its ratification in the year 2007. We would like to inform you that the Croatian competent authorities are planning to sign of the mentioned convention in the near future.

Regarding the signing and ratifying the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes please be informed that the Croatian Criminal Code already contains provisions (Article 18 and Article 24 of the said Code) according to which no statutory limitation shall apply to the prosecution as well as to the execution of sentence for criminal offence of genocide, war of aggression, crime against humanity, command responsibility, war crimes or other criminal offences which, pursuant to international law, are not subject to the statute of limitations.

As regards te the Additional Protocol to the Convention on the Transfer of the Sentenced Persons please note that the Republic of Croatia is intending to access the mentioned Protocol during the year 2007.

As far as the Second Additional Protocol to the European Convention on the Mutual Assistance in Criminal Matters is concern the procedure of its ratification is currently going on before the Croatian Parliament.

Regarding the ratification of the European Convention on the Transfer of Proceedings in Criminal Matters, which the Republic of Croatia has signed on le December 2003 please be informed that its ratification is not planned in the year 2007.

In view of the ratification of the European Convention on the Compensation of Victims of Violent Crimes please note that the Republic of Croatia has signed that Convention on 7th April 2005 and its ratification is planed in 2007.

In the respect of the withdrawing of the Declaration contained in the instrument of ratification of to the European Convention on Extradition, deposited on 25th January 1995, pursuant to which the Republic of Croatia will not allow extradition of its own citizens, please note the provision of the Article 9 of Croatian Constitution "No Croatian citizen shall be exiled from the Republic of Croatia nor extradited to another state-. Und the Croatian Parliament amends the said provision the withdrawal of the mentioned declaration will not occur.

There are no obstacles, except mentioned provision of the Constitution, in national legislation which would influence the ratification of the Conventions and Protocols. But bear in mind that the ratification is a long-standing procedure that involves harmonizing the whole legislation of the certain country.

...

### APPENDIX III

#### **Reply from the Ministry of Justice of Bosnia and Herzegovina, dated 26 December 2006, to Mr Tony Lloyd, Rapporteur**

...

In reply to your letter of 12 December 2006, please find the following supplementary information requested at the meeting on 22 November 2006.

In 2004 the Ministry of Justice of Bosnia and Herzegovina was charged with preparing the ratification of the following conventions:

1. European Convention on the Transfer of Proceedings in Criminal Matters,
2. European Convention on the Compensation of Victims of Violent Crimes,
3. European Outline Convention on Transfrontier Co-operation and its protocols,
4. European Convention on Extradition and its protocols,
5. European Convention on Mutual Assistance in Criminal Matters,
6. European Convention on Laundering, Search, Seizure and Confiscation of the Proceeds from Crime,
7. Convention on the Transfer of Sentenced Persons,
8. Convention on Cybercrime, as a precondition to the opening of negotiations with regard to a stabilisation and association agreement between the European Union and Bosnia and Herzegovina.

The eight above-mentioned conventions have been ratified.

A consultation process has also been set in motion in Bosnia and Herzegovina to promote the signature and ratification of the European Convention on the International Validity of Criminal Judgments and the European Convention on the Non-Applicability of Statutory Limitation to Crimes against Humanity and War Crimes.

When Bosnia and Herzegovina signed and ratified the Council of Europe Convention on the Transfer of Sentenced Persons and the European Convention on Mutual Assistance in Criminal Matters, it decided not to accede to the additional protocols to these two conventions but to continue discussing this subject.

On the other hand, the second additional protocol to the European Convention on Mutual Assistance in Criminal Matters is in the process of being ratified. The Ministry of Justice of Bosnia and Herzegovina has not been informed of any possible obstacles to its ratification. On the contrary, Bosnia and Herzegovina has shown considerable interest in acceding to this protocol. It should be pointed out that a number of the criminal law provisions in Bosnia and Herzegovina are already consistent with the terms of the protocol.

We wish to point out that the Ministry of Justice of Bosnia and Herzegovina was set up and came into operation in 2003 while the staff recruitment process was still underway. These circumstances and the extent of the task with which it is faced has led to a backlog in some of its work with regard to signatures and ratifications and in other areas.

We wish to stress the fact that the judicial system in Bosnia and Herzegovina has been successfully reformed. It now meets the latest requirements and standards and complies with the international legal standards established under the main international agreements.

...

**APPENDIX IV**

Reply from the Ministry of Justice of Montenegro, dated 5 February 2007, to Mr Tony Lloyd, Rapporteur



**Republic of Montenegro  
Government of the Republic of Montenegro  
MINISTRY OF JUSTICE**

Number: 01-392/07  
Podgorica, 5<sup>th</sup> February 2007

**PARLIAMENTARY ASSEMBLY  
Committee on Legal Affairs and Human Rights  
Mr. Tony Lloyd**

Dear Mr. Lloyd,

With reference to your request for further information on the status of signature and ratification of relevant conventions of the Council of Europe by Montenegro, please find enclosed further information and clarifications.

I am availing myself of this opportunity to express my satisfaction with our discussions during your stay in our country.

Sincerely yours,

The official seal of the Ministry of Justice of Montenegro, featuring a circular design with the text "REPUBLIKA CRNA GORA" and "MINISTARSTVO PRAVNIH POSLOVA" around the perimeter.  
**MINISTER,  
Miraš Radović**  


**1.a. Does the Republic of Montenegro envisage the signature and ratification of:**

- **European Convention on the International Validity of Criminal Judgements?**
- **Convention on Reparation for Victims of Violent Crimes?**
- **European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes?**

**1.b. If yes, when?**

By the Decision Declaring the Independence of the Republic of Montenegro, passed by the Parliament of the Republic of Montenegro on 3<sup>rd</sup> June 2006, Montenegro has undertaken to apply and take over all international treaties and agreements concluded or acceded to by the State Union of Serbia and Montenegro. These also include

- European Convention on the International Validity of Criminal Judgements, ratified by the FRY in 2002 (“Official Gazette of FRY”, International Treaties, No. 13/2002), but which had not come into force before Montenegro declared its independence.
- European Convention on the Non-Applicability of Statutory Limitations to Crimes against Humanity and War Crimes, which was ratified and which came into force in the SFRY in 1970 (“Official Gazette of SFRY”, International Treaties, No. 5/1970).

Thereby, these Conventions have been automatically incorporated into the legal system of Montenegro after it gained independence.

- Convention on Reparation for Victims of Violent Crimes has been neither signed nor ratified by the former Yugoslavia.

After The Republic of Montenegro becomes member state of the Council of Europe, the issues of signature and ratification of Treaties open to the member States only, among which is Convention on Reparation for Victims of Violent Crimes, will certainly be considered.

**2. When does the Republic of Montenegro envisage ratification of the Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters?**

Second Additional Protocol to the European Convention on Mutual Legal Assistance in Criminal Matters was signed by the State Union of Serbia and Montenegro on 16<sup>th</sup> April 2005. Furthermore, this is one of international instruments where the membership of Montenegro was recognized after the declaration on succession to all conventions and protocols signed or ratified by the State Union of Serbia and Montenegro. The procedure of ratification, in this

moment, is only the question of normative procedure in the Parliament of the Republic of Montenegro.

**3. Does the Republic of Montenegro envisages to withdraw the reservations contained in the instrument ratifying the European Convention on Extradition, according to which Montenegro denies the extradition of its nationals?**

European Convention on Extradition, with its reservations, was ratified by the Federal Republic of Yugoslavia in 2001 (“Official Gazette of the Federal Republic of Yugoslavia”, International Treaties, No. 10/2001). By the automatic acceptance of all international instruments signed or ratified at the level of the State Union of Serbia and Montenegro, this Convention is also in force in the Republic of Montenegro, in the same form in which it was ratified in 2001. The issues of extradition, *inter alia*, must be defined by the Constitution. The passing of the new Constitution is ongoing in the Republic of Montenegro and these problems will be taken into consideration when devising constitutional solutions. Therefore, newly adopted constitutional solutions will clearly define whether the extradition will be limited to foreign nationals.

**4. How do you explain that the above-mentioned Conventions (questions 1 and 2) have not been ratified yet? Are there some legal obstacles in the national legal system? If yes, which are these and how do you intend to overcome them?**

In the legal system of Montenegro, there are no obstacles to ratify the aforementioned Conventions. Namely, by declaration on succession of the Parliament of the Republic of Montenegro as of 3<sup>rd</sup> June 2006, Montenegro has undertaken to apply and take over all international treaties and agreements concluded or acceded to by the State Union of Serbia and Montenegro, with the aim of direct applicability. This demonstrated political willingness of our country to take over all international instruments so as to continue their direct application. In this moment, the only problem is a somewhat long procedure for the ratification of these Conventions. Moreover, the Republic of Montenegro does not have the status of the member state of the Council of Europe. Immediately after it accedes to this international organization, Montenegro is ready for further integration in modern European developments, by initiating ratification of other relevant conventions and protocols which have not been ratified at the level of the State Union of Serbia and Montenegro, and which are open only for the member states of the Council of Europe. By doing so, I hope, and by respecting principles of the rule of law and guaranteeing human rights and fundamental freedoms in our country, we will contribute to the development of modern social system.

*Reporting committee:* Committee on Legal Affairs and Human Rights

*Reference to committee:* Doc 10528, Reference No 3082 of 29 April 2005

*Draft resolution and draft recommendation* adopted unanimously by the Committee on 17 April 2007

*Members of the Committee:* Mr Dick **Marty** (Chairperson), Mr Erik **Jurgens**, Mr György Frunda, Mrs Herta Däubler-Gmelin (Vice-Chairpersons), Mr Athanasios **Alevras**, Mr Miguel Arias, Mr Birgir Ármannsson, Mrs Aneliya Atanasova, Mr Abdülkadir **Ateş**, Mr Jaume **Bartumeu Cassany**, Mrs Meritxell Batet, Mrs Soledad Becerril, Mrs Marie-Louise **Bemelmans-Videc**, Mr Erol Aslan Cebeci, Mrs Pia Christmas-Møller, Mrs Ingrida **Circene**, Mrs Lydie Err, Mr Valeriy **Fedorov**, Mr Aniello Formisano (alternate: Mr Andrea **Manzella**), Mr Jean-Charles Gardetto, Mr József Gedei, Mr Stef Goris, Mr Valery **Grebennikov**, Mr Holger Haibach, Mrs Gultakin Hajiyeva, Mrs Karin Hakl, Mr Nick Harvey, Mr Serhiy **Holovaty**, Mr Michel Hunault, Mr Rafael Huseynov, Mrs Fatme Ilyaz, Mr Kastriot **Islami**, Mr Želiko **Ivanji**, Mr Sergei Ivanov, Mrs Kateřina Jacques, Mr Antti Kaikkonen, Mr Karol Karski, Mr Hans Kaufmann, Mr András Kelemen, Mrs Kateřina Konečná, Mr Nikolay Kovalev, Mr Jean-Pierre Kucheida, Mr Eduard Kukan (alternate: Mr József **Berényi**), Mrs Darja Lavtižar-Bebler, Mr Andrzej Lepper, Mrs Sabine Leutheusser-Schnarrenberger, Mr Tony **Lloyd**, Mr Humfrey **Malins**, Mr Pietro **Marcenaro**, Mr Alberto Martins, Mr Andrew McIntosh (alternate: Lord John **Tomlinson**), Mr Murat Mercan, Mrs Ilinka Mitreva, Mr Philippe Monfils, Mr João Bosco **Mota Amaral**, Mr Philippe Nachbar, Mrs Nino Nakashidzé, Mr Tomislav Nikolić, Mrs Carina Ohlsson, Ms Ann Ormonde, Mr Claudio Podeschi, Mr Ivan **Popescu**, Mrs Maria **Postoico**, Mrs Marietta **de Pourbaix-Lundin**, Mr Christos **Pourgourides**, Mr Jeffrey Pullicino Orlando (alternate: Mr Leo **Brincat**), Mr Valeriy Pysarenko (alternate: Mrs Olha **Herasyim'yuk**, Mr François Rochebloine, Mr Francesco Saverio Romano, Mr Armen Rustamyan, Mr Christoph Strässer, Mr Mihai Tudose, Mr Øyvind **Vaksdal**, Mr Egidijus **Vareikis**, Mr Miltiadis Varvitsiotis, Mrs Renate **Wohlwend**, Mr Marco Zacchera, Mr Krzysztof Zaremba, Mr Vladimir Zhirinovskiy, Mr Miomir Žužul

N.B.: The names of the members who took part in the meeting are printed in **bold**

*Secretariat of the Committee:* Mr Drzemczewski, Mr Schirmer, Mrs Maffucci-Hugel, Ms Heurtin, Ms Schuetze-Reymann