



**Organization for Security and Co-operation in Europe  
Mission to Croatia**

**BACKGROUND REPORT: DOMESTIC WAR CRIMES PROCEEDINGS 2006  
3 August 2007**

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## EXECUTIVE SUMMARY

In 2006 and early 2007, the prosecution of war crimes that occurred in Croatia between 1991 and 1995 continued in numerous national courts as well as at the ICTY. As indicated by Appendix IX, some notable changes were observed, while in other instances trends seen in past years continued in 2006. On the whole, the trends point toward a more balanced and fair handling of cases, although considerable problematic areas remain.

Among the new developments – while the number of arrests in 2006 was akin to that seen in past years, the arrests of an equal number of Serbs and Croats was a new feature. Also notable was that Serbs and Croats were convicted in equal numbers. The number of indictments issued increased considerably over past years as did the number of appeals decided by the Supreme Court. The increase in Supreme Court activity is apparently linked to its overall effort to reduce its backlog. As a consequence, however, more than half of the appeals decided had been pending for three and a half years or longer – a length of time previously found by the European Court of Human Rights to amount to a fair trial violation. Considerable Supreme Court delays prevented re-trials in several cases due to the intervening death of the accused and witnesses. Other Supreme Court delays exceeded the length of sentences imposed on convicted persons, while several acquitted persons remained under the cloud of further prosecution for up to five years. Also notable was the significant decrease in the Supreme Court's reversal rate as contrasted to past years.

Common with past years, the overall level of activity remained high, i.e., more than 25 arrests were made and more than 20 trials were ongoing. Repeated proceedings were frequent. More than half of the trials concluded in 2006 were re-trials, while one trial was conducted *in absentia* for the third time. Similarly, nearly half of all the appeals had been previously decided by the Supreme Court, four had been decided twice before. While the number of fully *in absentia* trials remained relatively low, more than half of all defendants and 60 per cent of Serb defendants were tried *in absentia*. In addition, *in absentia* proceedings continued to occupy a significant percentage of the Supreme Court's docket. After several years of decline, *in absentia* proceedings may increase in 2007 as some parts of the judiciary, citing the failure of international warrants to bring the accused before the Croatian court, initiate such proceedings anew. NGOs reported that a substantial proportion of victims and witnesses experience *in absentia* proceedings as another form of victimization, motivated more by politics and the pressure for courts to meet statistical quotas than to ensure that those responsible for crimes are personally held accountable. Another aspect of *in absentia* proceedings came to light in early 2007 when a television journalist interviewed a Croat convicted *in absentia* in the 'Lora' case whom the police say they cannot locate.

Past *in absentia* convictions continue to occupy the Croatian judiciary as well as judiciaries in third countries. There is growing official acknowledgement that at least some of the final *in absentia* convictions are flawed. At present, the only means to review *in absentia* convictions is by the arrest and re-trial of the accused in Croatia. The Mission continues to recommend that reforms be undertaken to authorize a review of final *in absentia* convictions to assess whether they are sufficiently substantiated to support the arrest, detention, and re-trial of all the persons so

convicted. Questionable final *in absentia* convictions reflect negatively on the Croatian judiciary in general, but in particular its prosecution of war crimes.

Croatia continued to make advances toward even-handed war crimes prosecution in 2006, particularly in regard to newly initiated cases. During the year, several war crimes with Serb victims, which had previously gone unprosecuted, were subject to investigation and trial of several Croats accused. These cases, however, remain the exception and there is a continued need to establish accountability for crimes committed by members of the Croatian armed forces. Prosecutors refer to a “wall of silence,” which hampers their investigation and prosecution of such cases.

Past ethnic bias continued to have effects in the present as evidenced by the continuation of many cases at the trial or appellate level that were initiated in earlier years when primarily Serbs were accused of war crimes in large group proceedings, with little individualized accountability, and for types of crimes or conduct for which Croats are not prosecuted. Final *in absentia* convictions have left hundreds of persons, primarily Serbs, in the position of having to prove their innocence. Service in the Croatian armed forces has continued to be used as a mitigating circumstance, although membership in a military unit is a virtual *sine qua non* of any war crimes charge. Thus, overall the system has continued to apply a different standard of criminal accountability apparently based on national origin. In May 2007, the Chief State Attorney, in response to a request from a veteran’s organization, indicated that more than 98 per cent of those charged with war crimes since 1991 had been members of Yugoslav Army or Serb paramilitary forces, while less than two per cent had been members of the Croatian armed forces.

Use of the ‘special war crimes courts’ remains the exception. In the more than three years since the adoption of authorizing legislation, five cases have been referred to a special court, primarily to Zagreb, upon the request of the prosecution. As a result, the vast majority of war crimes cases continue to be investigated and tried in the community where the crimes occurred. Considering greater use of the more neutral setting of these ‘special’ courts appears warranted in order to better safeguard the fair trial rights of accused, the justice interests of the general public, and to encourage participation of witnesses. In 2006, the first transfer to a special court was granted based on the Chief State Attorney’s acknowledged concerns regarding impartiality and witness intimidation in the local jurisdiction.

Also in 2006, concerns about the confidentiality of investigations continued, suggesting gaps in the law or lack of enforcement of available measures to maintain confidentiality. Concerns also continued in relation to the inadequacy of assistance provided by some court-appointed defense counsels.

In 2006 and the first half of 2007, the Chief State Attorney in partnership with his counterparts in Serbia, Montenegro and Bosnia and Herzegovina continued to lead the way in inter-state cooperation, increasing the exchange of information and evidence. Given legal barriers to extradition of nationals and transfer of proceedings, co-operation between national prosecutors is the primary means by which accountability for war crimes committed by persons who remain outside state borders is being pursued. Despite this laudable aim, the Chief State Attorney’s co-operation agreements with his counterparts have been criticized from some quarters. Ministries

of Justice in the region made little progress in relation to the reform of laws that protect state sovereignty but significantly limit inter-state co-operation. This inaction has facilitated impunity for accused who remain outside state borders. While Croatia cannot resolve the inter-state co-operation issues alone, the initiative and collaborative approach of the national prosecutors provides an example for how these obstacles could be tackled by Governments. The differing approaches of prosecutors and judges are becoming increasingly evident as courts seek to try unavailable defendants *in absentia*, while prosecutors seek to have the defendants tried in person, even if that is outside Croatia's borders. Political will is essential to undertake interim confidence-building measures as well as longer term legislative reforms to overcome what the ICTY Chief Prosecutor has coined "the impunity gap."

The inter-linkage between Croatian proceedings and those at the ICTY became increasingly apparent in both legal and political terms in 2006. Transfer from the ICTY of the Ademi/Norac indictment as well as investigative materials in 'Category II' and 'Category III' cases demonstrates that Croatia's war crimes prosecutions are entering a new phase, with continued and increased responsibility and activity, particularly in relation to crimes committed by members of its armed forces.

At the same time, Croatia's highest political figures have equated the interests of Croatian ICTY indictees with the interests of the State. The impact of this message on the atmosphere in which national prosecutions take place, as well as on the public, witnesses, prosecution and judiciary, conflicts with the legal obligation to prosecute war crimes impartially. An effort to balance the Government's position was made by the Minister of Justice and her deputies through public statements made during May and June 2007 of the Government's commitment to ending impunity and the impartial adjudication of war crimes.

Significant progress in ensuring accountability and impartiality, regardless of the national origin of victims or accused, in the adjudication of war crimes depends not only on judicial actors but also upon State policy and action in support of this aim. This would include re-invigorated efforts by State bodies, in particular the Ministries of Defense and Interior, to assist in establishing accountability for crimes through proactive cooperation with the State Attorney and the judiciary. Of utmost importance is the establishment by political leaders at all levels of a climate that facilitates and encourages those with information and evidence to come forward. Also crucial will be progress toward the elimination of legal obstacles to enhanced inter-state judicial cooperation.

Starting in April 2006, the Mission, together with the EC Delegation and the ICTY Liaison Office, began an intensified discussion with the Minister of Justice, the Chief State Attorney, and representatives of the Supreme Court to address concerns related to the prosecution of war crimes. Among issues identified for discussion were inter-state judicial cooperation, enhancing the integrity and confidentiality of investigations, including witness security, ensuring adequate court-appointed defense, and possible mechanisms for addressing the cases of more than 1500 persons wanted by Croatia, including 400 convicted *in absentia*. One concrete outcome of these discussions was the adoption of legislation allowing the use of video-link testimony.

## **A. DEVELOPMENTS DURING 2006 AND EARLY 2007**

In 2006 and early 2007, the role of Croatia, in ensuring full, impartial, and individualized accountability for violations of international humanitarian law became increasingly evident. Acceleration of the ICTY Completion Strategy resulted in an increased 'reverse flow' of cases and investigative materials from The Hague to Croatia, which is now responsible for going forward with cases it had not previously pursued. An investigation into possible crimes committed by independent parliamentarian Branimir Glavaš signaled a growing willingness to examine the conduct of members of the Croatian armed forces and powerful political figures, while at the same time highlighting gaps or ambiguities in the law. These included regulating the confidentiality of investigations and weaknesses in the judiciary's enforcement of such measures. Four ICTY contempt convictions of Croatian journalists emphasized the importance of striking the proper balance between press freedom and maintaining the integrity of judicial proceedings and ensuring witness security. Developments in cases at the ICTY underscored the continuing political potency of war crimes prosecutions in Croatia as well as the inter-connectedness of the national and international proceedings. The Government's selective use of different numbers for missing persons continued to diminish efforts by the International Committee for the Red Cross to facilitate consensus on this issue, which is closely related to ensuring accountability for war crimes. The EU accession process continued to highlight that Croatia's handling of war crimes prosecutions has implications for regional stability and minority/human rights, but also relates to fundamental institutional reforms required for harmonization with the EU *acquis*. Civil society enhanced its engagement in the monitoring of war crimes proceedings.

### **I. ICTY transfers to Croatia – Rule 11 bis; 'Category II' and 'Category III'**

#### **1. Rule 11 bis: 'Medak Pocket' Operation – Rahim Ademi and Mirko Norac**

In late December 2006, the State lodged its indictment against Rahim Ademi and Mirko Norac with the Zagreb County Court (ZCC),<sup>1</sup> which case had been referred by the ICTY Trial Chamber under Rule 11 *bis* in September 2005. The indictment charged the accused with committing war crimes against Serb civilians and prisoners of war during a September 1993 operation by Croatian armed forces in the 'Medak Pocket,' an area south of Gospić (south-central Croatia). In addition to charges of ordering indiscriminate attacks, Ademi and Norac were charged on the basis of command responsibility for failing to prevent and punish crimes by their subordinates. As a result approximately 30 Serb civilians, mainly elderly, were killed and widespread property destruction occurred. To date, no one has been prosecuted for carrying out these crimes and prosecutors have referred to a "wall of silence" that hampers their ability to prosecute the direct perpetrators.

After filing the indictment, a representative of the Chief State Attorney stated for the media that it was important for the Croatian public to know that the indictment was "less harsh" than the ICTY indictment. He also emphasized that the indictment

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<sup>1</sup> K-DO-349/05, 22.11.2006. In December 2005, the Supreme Court upon the request of the Chief State Attorney referred the case to the ZCC, one of four courts with extra-territorial jurisdiction to try war crimes.

defined the military operation as a legitimate action to liberate occupied territory and did not include any reference to a “joint criminal enterprise.” Given differences between the Croatian Criminal Code and the ICTY Statute, the indictments are structured somewhat differently. While the ICTY indictment included two counts of crimes against humanity and three counts of war crimes against both accused,<sup>2</sup> the Croatian indictment included three war crimes counts each against Ademi and Norac individually.<sup>3</sup> Another difference between the indictments is that the ICTY indictment alleges the crime against humanity of persecution of Serb civilians, while crimes against humanity were not part of the Criminal Code during the conflict and hence are not used for charging in the Croatian indictment in this or other war crimes cases.

In late January 2007, the Supreme Court (SC) upheld the ZCC’s determination that detention was unnecessary and precautionary measures to assure that the accused would be available for trial and not interfere with witnesses were sufficient.<sup>4</sup> Ademi is on provisional release in Split. Norac continued to serve a 12-year sentence for an unrelated war crimes conviction, although after serving half his sentence he is eligible for periodic short-term release. In early February 2007, the ZCC rejected objections to the indictment lodged by Mr. Norac on the grounds that the indictment was final in late July 2004, the date the ICTY indictment was confirmed.<sup>5</sup> The trial started in mid-June 2007.

## **2. ‘Category II’ and ‘Category III’ transfers of investigative materials**

In addition to the Tribunal’s formal transfer under Rule 11 *bis* of the Ademi-Norac case, during 2006 the ICTY Prosecutor (OTP) transferred materials to the Chief State Attorney in several ‘Category II’ cases, i.e., cases which the OTP fully investigated, but due to the Completion Strategy deadline, never issued indictments. In 2006, the OTP also transferred materials in response to requests for information from the State Attorney in several ‘Category III’ cases, i.e., cases in which the OTP developed information related to perpetrators or crimes, but was unable to fully investigate given the Completion Strategy limitation on investigations. Cases in which the State Attorney requested information from the ICTY included the ‘Garage’ and ‘Sellotape’ indictments against independent parliamentarian Branimir Glavaš and several co-accused for the torture and killing of Serb civilians [See Section A.VII below]. The transfer of such materials is expected to continue and increase.

While cooperation with the ICTY by states including Croatia remains a continuing international obligation, Croatian judges and prosecutors are increasingly requesting ‘reverse cooperation’ from the ICTY in relation to ongoing domestic proceedings. This includes access to information as well as to ICTY detainees and convicted persons.

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<sup>2</sup> Count 1, persecutions as a crime against humanity; Count 2, murder as a crime against humanity; Count 3, murder as a war crime; Count 4, plunder of property as a war crime; Count 5, wanton destruction of cities, towns or villages as a war crime.

<sup>3</sup> Counts 1 and 4, ordering indiscriminate attacks as a war crime against civilians; Counts 2 and 5 failing to prevent or punish killings, property destruction and plunder as a war crime against civilians; Counts 3 and 6 failing to prevent killings and torture of war prisoners as a war crime against prisoners of war.

<sup>4</sup> SC Kz 45/2007-3, 26.01.2007; ZCC, Kv-rz-1/07, k-rz-1/06, 12.01.2007.

<sup>5</sup> ZCC, Kv-rz-2/07, 07.02.2007.

## **II. ICTY convicts journalists of contempt for revealing identity of witnesses**

In September 2006, the ICTY Appeals Chamber affirmed the contempt convictions of Ivica Marijačić and Markica Rebić as well as the €15,000 fine imposed on each.<sup>6</sup> Mr. Marijačić, former editor-in-chief of the Croatian weekly *Hrvatski List*, and Mr. Rebić, former head of the Croatian Intelligence Service, were found guilty of knowingly and deliberately revealing the identity and testimony of a protected witness in violation of an ICTY order in the trial against Bosnian Croat General Tihomir Blaškić.

In March 2007, the ICTY Appeals Chamber also affirmed the contempt conviction and €20,000 fine imposed on Josip Jović. Mr. Jović, the former editor-in-chief of *Slobodna Dalmacija*, was found guilty of revealing in 2000 that President Stjepan Mesić testified in the Blaškić trial as a protected witness. Jović violated ICTY orders protecting witnesses as well as an order directing him to cease and desist from publication<sup>7</sup>.

In February 2007, the ICTY convicted Domagoj Margetić for contempt for publishing a confidential list of 102 witnesses from the Blaškić trial on his Internet website. Many of those named were protected witnesses. Mr. Margetić was found guilty of disclosing information in violation of Tribunal orders as well as interfering with witnesses.<sup>8</sup> Mr. Margetić was sentenced to three months in prison and fined €10,000. The Trial Chamber determined that Mr. Margetić's actions warranted a prison sentence because of the number of protected witnesses revealed as well as the serious consequences the disclosure had on at least three witnesses. Mr. Margetić has not appealed.

Referring to the contempt prosecutions in her statement to the OSCE Permanent Council on 7 September 2006, the ICTY Chief Prosecutor stressed that witness protection issues at the ICTY "are questions of life and death," noting that potential witnesses had been killed in Kosovo.<sup>9</sup> The balance between press freedom and respect for court orders at issue in these cases has direct relevance for media coverage of war crimes proceedings in Croatia.

## **III. ICTY trials for war crimes in Croatia**

During 2006 and early 2007, there were developments in a number of ICTY cases related to war crimes in Croatia, including those alleged to have been committed by the Croatian armed forces as well as those by the Serb occupying forces. While taking place outside Croatia, these developments reflect the political and legal context in which domestic prosecutions go forward. Concerns about the effectiveness of security measures for witnesses in Croatia have been raised as possible complicating factors for ICTY cases.

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<sup>6</sup> Prosecutor v. Ivica Marijačić and Markica Rebić, Case No. IT-95-14-R77.2-A, Judgment, 27.09.2006, affirming Judgment, 10.03.2006. The protected witness was a Dutch army officer.

<sup>7</sup> Prosecutor v. Josip Jović, Case No. IT-95-14 & IT-95-14/2-R77, Judgment, 30.08.2006.

<sup>8</sup> Prosecutor v. Domagoj Margetić, Case No. IT-95-14-R77.6, Judgment, 07.02. 2007.

<sup>9</sup> PC. DEL/827/06.



## 1. Crimes During and After Operation Storm

In October 2006, the ICTY Appeals Chamber confirmed that Ante Gotovina, Ivan Čermak and Mladen Markač would be tried jointly.<sup>10</sup> The three are charged with committing crimes against Serb civilians during and in the aftermath of the Croatian military offensive "Operation Storm." At the time, Gotovina and Čermak were senior military commanders while Markač was the commander of the Croatian Special Police.<sup>11</sup> In response to a Trial Chamber order to reduce the scope of the indictment so as to ensure a "fair and expeditious trial," the Prosecution submitted a shortened indictment in March 2007, limiting its time frame to August and September 1995 and its geographic scope to 14 municipalities.<sup>12</sup> Gotovina remains in detention in the Hague, while Čermak and Markač remain on provisional release in Croatia, although the ICTY found that Čermak violated the terms of his provisional release several times between late 2006 and early 2007.<sup>13</sup> To date, no one has been prosecuted domestically for underlying crimes cited in the ICTY indictment.

Originally scheduled to begin in May 2007, the trial has been delayed indefinitely given the disqualification of three defense attorneys due to conflicts of interest. In early May 2007, the Appeals Chamber confirmed the Trial Chamber's conclusion that one of Markač's attorneys, Miroslav Šeparović, who served as Croatian Minister of Justice at the time of the crimes alleged in the indictment, had a personal interest in the case and was likely to be called as a witness by Gotovina.<sup>14</sup> In late June 2007, the Appeals Chamber similarly confirmed the Trial Chamber's disqualification of both attorneys representing Čermak – Čedo Prodanović and Jadranka Sloković - given their simultaneous representation of Rahim Ademi in Croatia, whom the Gotovina defense team indicated they intend to call as a witness as he was Gotovina's superior officer.<sup>15</sup>

The conflicts of interest were first raised by Gotovina's defense in April 2006 as part of its argumentation against a joint trial. The disqualifications have resulted in recriminations between the defense teams. Subsequent to their disqualifications, the attorneys for Markač and Čermak raised counter-charges about a possible conflict of

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<sup>10</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-01-45-AR73.1, IT-03-73-AR73.1, IT-03-73-AR73.2, Decision on Interlocutory Appeals against the Trial Chamber's Decision to Amend the Indictment and for Joinder, 25.10.2006.

<sup>11</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Indictment, 24.07.2006.

<sup>12</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Request to the Prosecution Pursuant to Rule 73 *bis* D to reduce the scope of its case, 21.02.2007. OTP eliminated reference to crimes committed in 6 municipalities and during October and November 1995. In September 2006, the OTP similarly submitted a reduced indictment against Vojislav Šeselj, eliminating crimes in Western Slavonia.

<sup>13</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Decision to Reinstate the Provisional Release of Ivan Čermak, 15.02.2007.

<sup>14</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Decision on Miroslav Šeparović's Interlocutory Appeal against Trial Chamber's Decisions on Conflict of Interest and Finding of Misconduct, 04.05.2007. The Appeals Chamber upheld the Trial Chamber's findings that Mr. Šeparović has a personal interest because at trial a relevant issue for the defense will be whether the Ministry of Justice or the Ministry of Defense was responsible for the military court system and that Mr. Šeparović jeopardized his client's interests by failing to withdraw despite repeated notice of a likely conflict, and engaged in gross professional negligence.

<sup>15</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Decision on Ivan Čermak's Interlocutory Appeal Against Trial Chamber's Decision on Conflict of Interest of Attorneys Čedo Prodanović and Jadranka Sloković, 29.06.2007.

interest on the part of one of Gotovina's attorneys who previously worked for the OTP.<sup>16</sup> The Prime Minister and the President of the Parliament Vladimir Šeks called on the defense teams to cooperate, re-iterating the Government's commitment to establishing the truth about the Homeland War. Mr. Šeks was quoted as saying it would be a scandal if Šeparović was disqualified, adding that disputes and shifting blame among the defense „could only please the tribunal's prosecution, which is at the expense of Croatian interests.“

During the lead-up to the trial, the OTP has raised concerns about the security of its witnesses who reside in Croatia. In early April 2007, the OTP requested protective measures for a number of witnesses, indicating that one witness refused to testify due to death threats and citing the Glavaš case as an example of problems with witness security in Croatia [see Section A.VII].

## **2. Crimes in the Occupied Territories, Bombing of Zagreb and Ovčara**

In mid-June 2007, the ICTY Trial Chamber convicted Milan Martić, former leader of the rebel Serb authorities in Croatia.<sup>17</sup> Martić was convicted on 16 counts of crimes against humanity and war crimes against Croats and other non-Serbs in several occupied areas, such as persecutions, murder, torture, deportation, and attacks against civilians. He was also convicted of ordering rocket attacks on the Croatian capital in 1995. Martić was found to have participated in a joint criminal enterprise with Slobodan Milošević and others, with the aim of creating a unified Serbian state through a widespread and systematic campaign of fear and crimes against non-Serbs inhabiting occupied areas in Croatia and Bosnia and Herzegovina. In setting the 35-year sentence, the Trial Chamber considered as aggravating circumstances the fact that most of the crimes were committed against particularly vulnerable people, such as the elderly, detainees, and civilians, noting that virtually the entire Croat and other non-Serb population was expelled from the area under Martić's control. In particular, the Trial Chamber recalled the suffering of civilians as a result of indiscriminate attacks on Zagreb. Finally, the Trial Chamber noted that Martić evaded international justice for seven years after an ICTY indictment was issued against him, giving only minimal weight to his voluntary surrender in 2002.

The ICTY's trial of Mile Mrkšić, Miroslav Radić, and Veselin Šljivančanin (“Vukovar Three”) ended in March 2007. The three are charged with commanding Yugoslav army soldiers and paramilitaries who executed more than 250 Croat civilians at the Ovčara farm near Vukovar (eastern Croatia) in 1991. A judgment is expected later in 2007. In a related development, in October 2006 the Supreme Court of Serbia reversed the conviction of 14 Serbs and acquittal of 2 others for the Ovčara murders, remanding all 16 to the Belgrade District Court for re-trial, while in February 2007, it confirmed one conviction.<sup>18</sup> The re-trial began in March 2007.

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<sup>16</sup> Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Order to the Registrar Regarding Greg Kehoe's Appointment as Defense Counsel for Ante Gotovina, 25.06.2007.

<sup>17</sup> Prosecutor v. Milan Martić, Case No. IT-95-11-T, Judgement, 12.06.2007.

<sup>18</sup> Kž I r.z.3.1/06, 18.10.2006; Kž I r.z.2/06, 09.02.2007. The trial of those accused of carrying out the executions at Ovčara was held in Belgrade given Serbia's prohibition against extradition of nationals.

#### IV. Croatia's Requests to Appear as *amicus curiae* Rejected by ICTY

In December 2006, the ICTY Appeals Chamber upheld the Trial Chamber's denial of Croatia's requests to appear as "friend of the court" or *amicus curiae* in the ongoing trial of Jadranko Prlić and five others as well as in the upcoming trial against Gotovina, Čermak, and Markač, for war crimes committed in Bosnia and Herzegovina and Croatia, respectively.<sup>19</sup> The ICTY determined that the State's participation would not assist the Tribunal. In February 2007, the Government instructed legal experts to re-examine the possibility of Croatia becoming a friend of the court in the trial of Gotovina, Čermak, and Markač.

#### V. EU and Council of Europe on Domestic War Crimes Prosecutions

Several reports issued by EU bodies in late 2006 and early 2007 noted the need for further progress in domestic war crimes prosecutions and the link between cases at the ICTY and Croatia.

The EC observed progress in "tackling the hitherto persistent ethnic bias against Serbs in domestic war crimes prosecutions," noting "willingness to prosecute Croats for war crimes is slowly increasing."<sup>20</sup> It also noted the Chief State Attorney's elimination of some unfounded cases against Serbs. It commented that many war crimes remained unprosecuted and that "a systematic mechanism for resolving and ending ethnic bias by ensuring application of a uniform standard of criminal responsibility has not been developed." It also raised questions about the extent to which prosecutions had been successful against persons who might have aided fugitives, covered up war crimes, or intimidated and revealed the identity of witnesses. The EC observed that some problems remained with the adequacy of court-appointed counsel and that greater efforts were needed to ensure the integrity of the judicial process and protect witnesses from intimidation. The EC welcomed agreements to share evidence between Chief State Prosecutors of Croatia, Serbia, and Montenegro. [See Section B below]. However, it noted that such cooperation should be intensified, citing continuing hindrances to prosecution such as bars to the extradition of nationals and the transfer of proceedings.

In late April 2007 the European Parliament adopted a resolution observing *inter alia* that "the effective prosecution of war crimes might be undermined by hostility at local level, persisting bias amongst some of the judicial staff against non-Croatian nationals and insufficient protection of witnesses against intimidation."<sup>21</sup> The Parliament urged the Government "to continue actively to encourage and support the prosecution of war crimes, regardless of the nationality of the perpetrators." It expressed concern about the Government's "offer to support the defense costs for army generals and its request to act as *amicus curiae* in cases pending before the ICTY."

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<sup>19</sup> Prosecutor v. Jadranko Prlić et al., Case No. IT-04-74-T, Decision on Requests of Republic of Croatia to Appear as *Amicus Curiae*, 11.10.2006; Prosecutor v. Ante Gotovina, Ivan Čermak, and Mladen Markač, Case No. IT-06-90-PT, Decision on Requests of Republic of Croatia to Appear as *Amicus Curiae*, 18.10.2006.

<sup>20</sup> EC, Croatia 2006 Progress Report, SEC (2006) 1385, 08.11.2006.

<sup>21</sup> European Parliament Resolution on Croatia's 2006 Progress Report, 2006/2288, 25.04.2007, para. O.9.c).

The Parliamentary Assembly of the Council of Europe (PACE) also focused on war crimes prosecutions in the national courts. In May 2007, the PACE Committee on Legal Affairs and Human Rights issued a report on the prosecution of crimes within the jurisdiction of the ICTY, which was the culmination of a year of fact-finding activities.<sup>22</sup> The report focussed on state cooperation with the ICTY, the ICTY's progress in its Completion Strategy and the readiness and ability of national judiciaries to conduct war crimes proceedings consistent with international standards. Based on its consideration of the report, in June 2007, the PACE recognized positive steps undertaken in the region, but urged national political leaders "to do their utmost to guarantee the impartiality and fairness of current and future trials for war crimes and to ensure that the courts never base their decisions on ethnic considerations."<sup>23</sup> With concern, the PACE noted that "national legislation ... has proven to be a real obstacle to the effective prosecution in their own courts of war crimes suspects, thereby providing a basis of impunity, which can no longer be tolerated." In particular, the PACE urged greater inter-state judicial co-operation so as to reduce the number of *in absentia* proceedings. Until legislative reform was finalized, the report urged that practical measures be taken to ensure in-person trials of war crimes suspects, even if that meant the proceedings occurred in a state other than where the crimes occurred. The PACE called on the States concerned to undertake a series of measures, including law reform and public discussion. The PACE also recommended that the Council of Europe (CoE) Committee of Ministers invite the concerned states to ratify or withdraw reservations to CoE conventions related to inter-state co-operation in criminal matters.<sup>24</sup>

## **VI. Domestic NGOs continue increased involvement in trial monitoring**

Croatian NGOs continued to monitor war crimes trials in an increasingly systematic manner. With the Mission's assistance, the Centre for Peace, Non-violence, and Human Rights Osijek launched a new project aimed at enhancing the monitoring capacities of a consortium of NGOs. The NGOs publish findings on the Centre for Peace website and issued a 2006 annual report in early 2007. The NGOs noted that courts are more open to their trial monitoring and the prosecution is more willing to provide documents and statistics. The NGOs particularly emphasize the plight of victims, as demonstrated by a public statement in May 2007 criticizing the accused in the 'Sellotape' case for complaining about their detention and staging a hunger strike. The NGOs expressed the view that such actions inappropriately shifted public attention away from victims and on to defendants.

## **VII. Member of Parliament investigated and indicted for war crimes**

In May and October 2006, Parliament lifted the immunity of independent parliamentarian Branimir Glavaš, thereby allowing two separate judicial investigations to go forward into allegations of detention, torture, and killing of Serb civilians in Osijek in 1991. In October, Parliament lifted Glavaš' immunity for the

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<sup>22</sup> Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), Doc. 11281, 04.05.2007.

<sup>23</sup> Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), Resolution 1564 (2007), 28.06.2007, provisional edition.

<sup>24</sup> Prosecution of offences falling within the jurisdiction of the International Criminal Tribunal for the former Yugoslavia (ICTY), Recommendation 1803 (2007), 28.06.2007, provisional edition.

purposes of detention, which had been ordered by the ZCC given concerns about witness tampering. Glavaš was detained from late October until early December when he was released by the ZCC given concern about his health due to a hunger strike he had staged to protest his detention. Between December 2006 and January 2007, both investigations were suspended on the grounds that Glavaš was unable to follow court proceedings due to impaired mental faculties. They resumed after Glavaš was deemed sufficiently competent to assist in his defense. The Osijek County State Attorney indicted Glavaš and six others in April 2007 in the 'Sellotape' case,<sup>25</sup> whereupon Glavaš was again detained by order of the Osijek County Court due to the severity of the crimes charged. The Zagreb County State Attorney indicted Glavaš in May 2007 in the 'Garage' case,<sup>26</sup> after the ZCC granted his co-accused the status of a crown witness, including immunity from prosecution. Also in May 2007, the President of the Supreme Court transferred the 'Sellotape' case to the Zagreb County Court to prevent witness tampering as well as for the purposes of efficiency given that the 'Garage' case against the same accused was already pending there.<sup>27</sup> In mid June, the Zagreb County Court joined the 'Garage' and 'Sellotape' cases.<sup>28</sup>

A high-profile suspect who benefits from considerable political support, Glavaš, together with his defense attorneys, aggressively challenged institutions that investigated him, including through the use of the media. One of Glavaš' co-accused in the 'Sellotape' case alleged that incriminating evidence she provided against Glavaš was obtained as a result of police coercion and reportedly recanted. Criminal charges initiated by this accused against the Head of the Osijek-Baranja Police Administration and several police employees from Osijek and Zagreb, for allegedly coercing false testimony and falsifying official documents were rejected by the Osijek Municipal Court in April 2007. The State filed criminal charges against a defense attorney in the 'Sellotape' case for revealing testimony given during the investigation contrary to a confidentiality order of the Osijek County Court. In April 2007, Glavaš' defense attorney released photographs to the media, which depicted the Head of the Osijek Police Administration together in a public place with the former defense attorney of a co-accused, arguing that this amounted to improper influence on witnesses.

In April 2007, the Osijek Municipal Court convicted and sentenced to six months imprisonment the head of the youth section of the political party associated with Glavaš – the Croatian Democratic Union of Slavonija and Baranja (HDSSB) - for making a death threat against an Osijek-based investigative journalist Drago Hedl who has written extensively about Glavaš.

### **VIII. Missing persons**

Resolution of the fate of missing persons is linked to ensuring accountability for war crimes. In February 2007, the International Committee of the Red Cross (ICRC) in

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<sup>25</sup> In the 'Sellotape' case, Glavaš and his co-accused have been charged in relation to the murder of 10 Serb civilians and attempted murder of one, whose hands and mouths were bound with tape prior to being shot and whose bodies were dumped in the Drava River in Osijek.

<sup>26</sup> In the 'Garage' case, Glavaš has been investigated in relation to the murders of other Serb civilians in and around the garage of the Secretariat for National Defence in Osijek.

<sup>27</sup> Su-IV-617/07-5, 29.05.2007.

<sup>28</sup> Kv-rz-6/07, K-rz-1/07, 13.06.2007.

co-operation with the Government presented ICRC's *Book of Missing Persons from Croatia*. Consistent with ICRC methodology, the *Book* includes all who went missing in Croatia, regardless of their national origin, citizenship or affiliation with one of the warring parties. The *Book* was intended to facilitate consensus about the remaining number of persons missing from the conflict in Croatia and end disputes about different numbers and lists, which were often related to national origin of those missing. The *Book* contains information on 2,144 persons reported missing to the ICRC by their families between October 1991 and November 1995 whose fate remains to be determined. The Deputy Prime Minister who is responsible for the State office on missing persons as well as veteran's affairs has been selective in her use of ICRC's figure. In some public statements and reports, the ICRC number is cited. However in other frequently reported public statements such as those targeted at veterans, it is emphasized that Croatia is searching for approximately 1,100 missing persons. This latter number corresponds to those missing from the early years of the conflict as a result of Yugoslav Army or Serb paramilitary actions, primarily although not exclusively Croats. It does not include Serb civilians from Croatia who went missing during and after Croatian military operations. Such diverging statements have the potential to undermine the public perception of the Government's efforts to investigate all disappearances with equal vigour.

#### **IX. Civil damages actions examine unprosecuted war-related crimes**

Survivors and family members continued to bring civil damages cases against the State as a means of focussing attention on war-related crimes committed by members of the police or military that remain unprosecuted or were subject to amnesty. For example, in February 2007, the Zagreb County Court upheld the trial court's judgment and ordered Croatia to pay more than €35,000 to the widow of Josip Reihl-Kir, the pre-war Chief of Police in Osijek who was killed in July 1991 by another police officer while on the way to negotiations with paramilitary forces.<sup>29</sup> In 1994, Antun Gudelj was convicted *in absentia* by the Osijek County Court for the murder of Reihl-Kir and several others, on which basis he was extradited from Germany in 1996. In 1997, the Supreme Court ended Gudelj's re-trial by applying amnesty. In 2001, the Constitutional Court invalidated the amnesty, but Gudelj had left Croatia for Australia. In July 2007, Gudelj agreed to be extradited from Australia to Croatia.

In contrast, other similar claims against the State were rejected because killings committed by members of the armed forces were deemed to be "off-duty" or barred by the statute of limitations because the killings had been subject to amnesty. In February 2007, the Supreme Court determined that the State was not financially liable for the December 1991 deaths of a Serb mother and daughter killed by Croatian Army soldiers in their home in December 1991 because the soldiers had been amnestied by the Zagreb Military Court in November 1992. Because the amnesty had stopped the criminal prosecution, the Supreme Court found that it had not been established that the deaths were the result of a crime, hence the claim failed due to the expiration of the civil statute of limitations.<sup>30</sup> Similarly, in May 2006 the Sisak County Court found that the State was not responsible for the November 1991 killing of Mihajlo Šeatović and three others by members of the Croatian Army, even though they committed the

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<sup>29</sup> *Jadranka Reihl Kir v. RH*, 06.02.2006, P-5084/03, affirmed Zagreb County Court.

<sup>30</sup> *Petar and Goran Mileusnić v. RH*, Rev. 106/07-2, 21.02.2007.

killings in uniform and with weapons issued by the Army.<sup>31</sup> At least one soldier was involved in both sets of killings and amnestied for both. The court found that the soldiers did not kill the civilians “while performing military duty or in relation to military duty”. The court further found that the perpetrators’ conduct was explainable or perhaps excusable because they were “most likely intoxicated by alcohol and revolted by the images of the fall of Vukovar they saw on the TV prior to the act.” While the Sisak County Court found that the killings were not war-related, criminal proceedings for murder initiated at the Zagreb Military Court in 1992 ended through application of war-related amnesty provisions.<sup>32</sup>

## **B. DEVELOPMENTS IN INTER-STATE CO-OPERATION**

Given the nature of the 1991-1995 conflict, war crimes prosecutions frequently have trans-national aspects – with witnesses, perpetrators, and crime scenes located in different successor states of the former Yugoslavia. Croatia took a step forward in late 2006 in facilitating witness participation in Croatian proceedings by amending its law and ratifying a Council of Europe convention to explicitly allow witnesses who are outside of Croatia to testify before Croatian courts through the use of video-link technology.<sup>33</sup> As in prior years, the Chief State Attorney in cooperation with his counterparts was the most active at the State level in undertaking efforts to circumvent legal obstacles through practical means. Given the large number of fugitives sought by Croatia – with 600-700 Interpol warrants pending - cooperation between police authorities remains key.

Despite these positive steps, Croatia’s legal framework, like that of Bosnia and Herzegovina, Montenegro, and Serbia, continues to significantly limit inter-state judicial co-operation. It thereby facilitates impunity for those who committed war crimes on Croatian territory but remain outside Croatia. Croatia and its neighbors all prohibit the extradition of nationals and the transfer of proceedings for serious crimes such as war crimes.<sup>34</sup> As noted by the ICTY Chief Prosecutor, legal obstacles that frustrate domestic prosecution also have significant negative implications for the success of the ICTY’s Completion Strategy.<sup>35</sup> She noted that in order to address the resulting “impunity gap” political will was needed to change legislation.

Direct contacts between the Croatian judiciary and judicial authorities of Serbia, Bosnia and Herzegovina and Montenegro remain a rarity, with requests for assistance running through the Ministry of Justice.<sup>36</sup> The continued use of centralized communications between states delays proceedings in local courts, which require

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<sup>31</sup> Marica Šeatović v. RH, 18.05.2006, Gž – 494/2005 (revision pending at the Supreme Court),

<sup>32</sup> RH v. Dubravko Leskovar and Damir Raguz, K-42/92, 13.11.1992.

<sup>33</sup> Law on Amendments to the Criminal Procedure Code, NN 115/2006, 25.10.2006; Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters, NN 1/07 Int. Agreements, 12.01.2007. Previously, video-link in war crimes trials had only been used in the inter-state context to permit witnesses in Croatia to testify in foreign proceedings. E.g., video-link between the Zagreb County Court and the Belgrade Special War Crimes Court in the "Ovcara" case (June 2005) for witnesses who did not want to travel to Belgrade.

<sup>34</sup> EC, Croatia 2006 Progress Report, SEC (2006) 1385, 08.11.2006.

<sup>35</sup> PC.DEL 827/06.

<sup>36</sup> Croatia maintains a reservation to Article 15 of the European Convention on Mutual Assistance in Criminal Matters, which limits direct inter-state co-operation between judicial bodies.

assistance with relatively routine matters such as summoning witnesses.<sup>37</sup> In September 2006, the Minister of Justice agreed in principle with her counterpart from Serbia on the need for direct contacts between the judiciary, but further concrete action will be addressed only as part of Croatia's overall judicial reform.

The inability to gain access to war crimes suspects fuelled the judiciary's continued use of *in absentia* trials, spawning objections from the prosecution, defense and victim's advocates. For example, the Rijeka County Court conducted the third *in absentia* trial since 1994 against five accused for crimes committed in Lovinac, near Gospic, despite opposition from the prosecution.<sup>38</sup> In late 2006 and early 2007, the Vukovar County Court ordered that four trials against 17 persons would proceed *in absentia*, noting that while Interpol warrants had been issued, this had not resulted in the surrender of the accused.<sup>39</sup> The Court further noted that the public had an interest in war crimes cases being tried and hence an *in absentia* proceeding was appropriate. The Vukovar County State Attorney, consistent with the policy of the Chief State Attorney, expressed its opposition, indicating that *in absentia* trials would frustrate efforts to try the accused in person, albeit in their country of residence. As discussed further [see Section C.III.4.d] the Supreme Court rejected some of these requests to begin new *in absentia* proceedings on the grounds that inadequate efforts were undertaken by the trial court or insufficient time had elapsed to ensure the accused's presence. However, where the Supreme Court judged that adequate measures had been taken or adequate time had elapsed, it upheld the decision to proceed *in absentia*.

Inter-state cooperation mechanisms require varying degrees of confidence in the functioning of another state's judiciary, ranging from mutual legal assistance to extradition of nationals. In light of the need to develop trust as well as the ongoing judicial reforms in each state, limited interim or 'pilot' measures between selected courts could be considered, in order to break down the 'taboos' on direct contacts between courts, transfer of proceedings and extradition of nationals. As of September 2006, Croatia is seeking approximately 1,100 persons on suspicion of war crimes, while approximately 400 additional persons are sought on the basis of final *in absentia* convictions. It is likely that many of these persons reside in the states of the former Yugoslavia. The number of persons sought by Croatia alone underscores the need for enhanced cooperation in order to prosecute those against whom sufficient evidence exists and eliminate charges against those for whom it does not.

In 2006, the Chief State Attorney concluded agreements specific to the prosecution of war crimes with his counterparts in Serbia and Montenegro.<sup>40</sup> These agreements are

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<sup>37</sup> E.g., In late January 2007, the Sibenik County Court adjourned the trial against Milan Atljija and Djordje Jaramaz for four months in order to summon witnesses through the Ministry of Justice from Serbia and Bosnia and Herzegovina.

<sup>38</sup> RH v. Radoslav Cubrilo et al., KT 45/92, remanded from Supreme Court after two prior *in absentia* trials by the Gospic County Court.

<sup>39</sup> RH v. Milan Osotojic et al., Kv-254/06, 29.11.2006, Supreme Court reversed I Kz 61/07-3, 05.04.2007; RH v. Bogdan Kuzmic, Kv-289/06-7, 03.01.2007, Supreme Court affirmed I Kz 91/07-3; RH v. Darko Radivoj, Kv-2/07, K-9/03, 09.01.2007; RH v. Stanko Vujanovic, Kv-291/06, K-23/03, 26.01.2007.

<sup>40</sup> The Agreement on Co-operation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide concluded between the Croatian and Montenegrin Chief State Attorneys was signed on 28 July 2006, while the agreement on Co-operation and Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide between the Croatian and Serbian Chief State Attorneys was signed on 13 October 2006. These agreements are in addition to general cooperation



designed to facilitate prosecution by the state of the perpetrator's citizenship. The agreement between Croatia and Serbia contemplates a reciprocal mechanism for the hand-over of evidence for prosecution of citizens of their respective countries suspected of committing war crimes in Croatia. The agreement between Croatia and Montenegro contemplates the hand-over of evidence by Croatia to Montenegro for purposes of prosecuting its citizens.

These agreements have facilitated cooperation at both the central and local level. Local State Attorneys have provided investigative information to their counterparts,<sup>41</sup> requested that their counterparts confirm whether suspects reside in the other state,<sup>42</sup> and have travelled to the other state to interview witnesses.<sup>43</sup> In the first half of 2007, concrete steps were taken by the State Attorney in co-ordination with his counterparts in Serbia and Montenegro to hand-over investigative materials and evidence for purposes of prosecution of those suspected of war crimes by Croatia. According to the Chief State Attorney, evidence in eight cases was provided to Serbian prosecutors. The Serbian prosecutor initiated an investigation in two cases based on transferred materials. The Serbian prosecutor also provided witness statements to his Croatian counterpart in relation to three investigations involving Croatian citizens. In addition, in late May 2007, the Serbian authorities arrested twelve persons suspected of participating in the torture and killing of numerous Croat civilians in the eastern village of Lovas. A trial against one present and fifteen *in absentia* defendants has been ongoing in the Vukovar County Court since 2003.

Regarding co-operation with Montenegro, the Chief State Attorney transferred investigative materials and evidence to his Montenegrin counterpart related to allegations of the torture of Croat prisoners in the 'Morinj' prison camp in Montenegro.

These agreements do not have the effect of ceding prosecution to the other state as would be the case in a formal inter-state transfer of proceedings between courts. The sending state would not be bound by any verdict resulting from a prosecution based on such transferred evidence. If, for example, Croatia was dissatisfied with the outcome of a trial conducted on the basis of evidence transferred to Serbia, it could initiate its own prosecution of the same person. The agreements also contemplate that someone convicted *in absentia* in Croatia could be tried anew and in person by his/her own state, raising the possibility that one individual could be convicted of the same crime by two states.

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agreements signed in 2005. Memorandum on the Agreement Achieving and Improving Mutual Cooperation in Combating all Forms of Serious Crime concluded between the Croatian and BiH Chief State Attorneys was signed in January 2005 and between the Croatian and Serbian Chief State Attorneys in February 2005.

<sup>41</sup> E.g., Croatia has provided information on five cases to Serbia, including investigative material from the Gospić State Attorney in relation to Cedo Budisavljević et al. In late March 2007, Croatia provided evidence related to the 'Morinj prison' case to Montenegro in relation to crimes against Croatian armed forces members that occurred in Montenegro.

<sup>42</sup> E.g., Both Bjelovar and Gospić States Attorney have requested information from the Belgrade war crimes prosecutor as to whether suspects are still alive and reside in Serbia.

<sup>43</sup> E.g., in the investigation of the "Lora II" case, Split State Attorney travelled to Belgrade to interview 15 witnesses.

As vehicle for developing a track record of obtaining individual accountability through successful co-operation the agreements are welcome and should significantly contribute to building confidence between the States. These advantages outweigh any disadvantages in terms of convenience or logistics that might arise from conducting proceedings in another state. Until other interim measures or legal reforms are adopted, they remain the only options for significant inter-state co-operation.

## **C. FINDINGS FROM TRIAL MONITORING**

During 2006, the Mission followed 96 war crimes cases involving police investigations, fourteen trial courts plus the Supreme Court as well as extradition proceedings in third countries. As in past years, more than half of all persons against whom proceedings continued in 2006 were pursued *in absentia*. The monitored proceedings involved 333 individuals, approximately 81 per cent (271) Serbs, 15 per cent (50) Croats and a small number of other minorities.<sup>44</sup> Fifty seven (57) cases involved single defendants<sup>45</sup> while 39 cases involved groups ranging from two to 35 defendants and totalling 276 defendants.<sup>46</sup>

### **I. Pre-trial: Arrests, Extraditions, Detention, Releases, and Indictments**

In contrast to past years, arrests in 2006 were nearly equally divided between Serb and Croat suspects. While Serbs were arrested in all parts of the country, Croats were arrested primarily in Vukovar and Osijek Counties. Most arrests were for newly initiated proceedings, although several were for long-standing cases. In particular, two accused were re-arrested after nearly five years at liberty, based on the Supreme Court's reversal of their 2002 acquittal.<sup>47</sup> One Serb arrestee was indicted, tried, and convicted within three months of arrest.<sup>48</sup> One accused who had been extradited on the basis of genocide charges at the end of 2005 was released early in 2006 when charges were dropped.<sup>49</sup> The number of persons indicted significantly increased in 2006 contrasted with prior years.

#### **1. Arrests and extraditions**

During 2006 the Mission followed 27 arrests (13 Serbs, 13 Croats, and 1 Bosniak) in Croatia based on war crimes charges, an increase from 2005 [see Appendix I]. Six of these arrestees were Serb returnees.<sup>50</sup> Most were arrested on suspicion of war crimes against civilians, four for war crimes against prisoners of war, and one for genocide. One additional Serb was arrested at the primary international border crossing with

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<sup>44</sup> Eight Ruthenians, 2 Bosniaks, 1 Roma, and 1 Hungarian.

<sup>45</sup> Fifty-four (54) Serbs, 3 Croats.

<sup>46</sup> Two hundred and sixteen (217) Serbs, 46 Croats, 8 Ruthenians, 2 Bosniaks, 1 Roma, 1 Hungarian, and 1 Albanian.

<sup>47</sup> Kasim Hekic and Mihail Husnik ('Vukovar II'), Vukovar County Court acquitted on 12 February 2002, Supreme Court reversed on 11 January 2006.

<sup>48</sup> Milan Stanojevic was arrested on 9 March 2006 and convicted on 30 May 2006.

<sup>49</sup> Milan Loncar was extradited from Germany based on a 2004 investigation from the Slavonski Brod County Court.

<sup>50</sup> Rade Miljevic, Milan Atlija, Milan Svilar, Zeljko Suput, Mirolad Zigic, and Milan Panic.

Serbia on war-related charges, but was released after approximately three weeks on the grounds of mistaken identity.<sup>51</sup>

In addition, the Mission is aware of the arrests of 11 Serbs in 2006 in third countries on the basis of international arrest warrants issued by Croatia for war crimes.<sup>52</sup> One was released by the third country after mistaken identity was confirmed.<sup>53</sup> During 2006, 2 individuals wanted for war crimes were extradited.<sup>54</sup> At year's end, one of these accused extradited early in 2006 remained in detention with no trial date imminent, pending the extradition of a co-accused.<sup>55</sup> In March 2007, the Split County Court held a single hearing. To date, there is no information when the second accused might be surrendered to Croatia. One person arrested in the Netherlands in relation to a conviction for a war-related murder was extradited after he voluntarily surrendered and consented to extradition.<sup>56</sup> In March 2007, a first-instance court in the United Kingdom rejected a request for extradition, finding that there were serious impediments to a fair re-trial of Milan Spanovic, convicted by the Sisak County Court *in absentia* in 1993 together with 18 others, because of difficulties to reconstruct evidence from 16 years ago.<sup>57</sup> In April 2007, a first-instance Australian court granted a request for extradition of Dragan Vasiljkovic (Kaptan Dragan) relying in part on information from Mission monitoring and noting Government guarantees that the investigation would take place at a special war crimes court and finding that the crimes alleged were more serious than those for which Spanovic was convicted *in absentia*.<sup>58</sup> In May 2007, a first instance Greek court granted an extradition request for Ernst Radjen based on a 2001 investigation from Zadar. In July 2007, a second instance Norwegian court granted both Croatia's and Serbia's extradition requests for Damir Sireta.<sup>59</sup>

## 2. Reasons for detention

Detention of war crimes suspects was the subject of considerable discussion and judicial decision making in 2006 and early 2007. The Supreme Court confirmed that pre-extradition detention in a third country does not count toward the 3-year period, which as a general rule is the maximum permitted in Croatia for detention, prior to the

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<sup>51</sup> Zlatko Borojevic was arrested in late December 2006 on suspicion of subversive and terrorist activities against the sovereignty and territorial integrity of the Republic of Croatia. He was released in mid-January 2007 after witnesses were unable to identify him and Slavonski Brod County Court abandoned further proceedings due to mistaken identity.

<sup>52</sup> Australia – 1; Belgium, -1; Bosnia and Herzegovina – 2; Bulgaria – 1; Greece – 2; Norway – 1; Russia – 1; Serbia – 1; United Kingdom – 1.

<sup>53</sup> Milan Savic was arrested in Belgium in April 2006.

<sup>54</sup> Mitar Arambasic extradited from the United States in January 2006; Zoran Obradovic extradited from Bulgaria in December 2006.

<sup>55</sup> RH v. Mitar Arambasic [Split County Court]. Convicted *in absentia* in 1997 together with 38 other defendants and sentenced to 20 years. Re-trial pending extradition of co-accused Dragan Arnaut arrested in Russia in mid-2006.

<sup>56</sup> Munib Suljic was extradited in June 2006 based on the September 2005 murder conviction by the Zagreb County Court in the 'Pakracka Poljana' case. Suljic fled Croatia prior to the verdict. Terminally ill, Suljic surrendered in order to receive medical treatment and died within two months of being extradited.

<sup>57</sup> Government of Croatia v. Milan Spanovic, City of Westminster Magistrates' Court, 20.03.2007.

<sup>58</sup> Republic of Croatia v. Dragan Vasiljkovic, Local Court New South Wales, 12.04.2007.

<sup>59</sup> Croatia sought extradition on the basis of a 2000 *in absentia* conviction from the Vukovar County Court, RH v. Stevan Curnic et al. ('Vukovar I'), Vukovar County Court. K-86/98, 16.05.2000.

issuance of a verdict for crimes punishable by long-term imprisonment.<sup>60</sup> The Constitutional Court (CC) grappled with the question whether a detainee could challenge the constitutionality of a time-limited detention decision after that time period had expired and detention had been extended by a new decision.<sup>61</sup> Although initially finding that it could not review the merits of such decisions, a result which essentially eliminated review of detention given the short duration of each individual detention decision, the CC in response to a third complaint from the same detainee accepted jurisdiction, but found continued detention consistent with the Constitution.<sup>62</sup> The CC issued a similar decision in July 2007, upholding the constitutionality of the continued detention of Branimir Glavaš.<sup>63</sup> Local courts also extended the investigative detention of war crimes suspects beyond the standard six-month period up to a maximum of one year by invoking provisions applicable solely to organized crime and war crimes cases.<sup>64</sup>

Excluding *in absentia* proceedings, a considerable percentage of those under investigation or in trial for war crimes were detained for significant periods. For example, of 28 indicted persons in detention as of July 2007 whose trial was ongoing or pending, more than eighty per cent had been detained for more than six months, with detention periods ranging from three to sixteen months. Courts frequently order and extend detention without specifying the indicators that justify detention or its continuation, relying solely on the legal provisions. The European Court of Human Rights (ECHR) has emphasized that a court must provide a specific, relevant, and sufficient factual basis that justifies continued detention pending trial, particularly as the length of detention increases.<sup>65</sup> Local courts routinely cited multiple legal bases for detention, particularly with Serb accused. Flight risk was cited as a basis for detention for a number of Serb suspects, particularly extradited persons, persons arrested at border crossings, and returnees.<sup>66</sup> Possible witness tampering during the judicial investigation was cited as the basis for the Zagreb County Court in late October to detain Branimir Glavaš as well as by the Sibenik County Court in detaining several Serb suspects.<sup>67</sup>

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<sup>60</sup> RH v. Mitar Arambasic, Decision on Extension of Detention, Supreme Court, Kž 693/06-3, 19.09.2006. Article 109 (1) (5) Criminal Procedure Code (CPC) sets the 3-year limit. The Supreme Court confirmed that if convicted, the accused's 3 ½ years of pre-extradition detention in the United States would however count toward his sentence.

<sup>61</sup> Articles 106 and 107, CPC provide for detention decisions lasting one month during the investigation and two months after indictment, respectively.

<sup>62</sup> The CC rejected two complaints due to lack of jurisdiction. U-III-2124/2006, 03.07.2006; U-III-2596/2006, 13.10.2006. In response to a third complaint, the CC found extension of detention constitutional, confirming the Supreme Court's decision that pre-extradition detention does not count toward the allowable detention period prior to issuance of a verdict. U-III-3460/2006, 16.11.2006.

<sup>63</sup> U-III/2023/2007, 05.07.2007.

<sup>64</sup> E.g., Slobodan Raic. See Article 16 of the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts against the International Law on War and Humanitarian Law (ICC Law).

<sup>65</sup> E.g., *Lobita v. Italy*, Appl. No. 26772/95, 06.04.2000.

<sup>66</sup> Article 102, para. 1, point 1 CPC. Local courts cited indicators such as suspects having another citizenship, having residence, employment, or family in another state, or crossing the Croatian border for the first time.

<sup>67</sup> Article 102, para. 2, CPC provides for detention where reasonable suspicion exists that an accused would destroy or otherwise alter evidence or influence witnesses.

Severity of the crimes charged was frequently cited as a basis of detention, both alone and in combination with other reasons.<sup>68</sup> As of July 2007, nearly seventy per cent of persons indicted for war crimes whose trial was ongoing or pending were being detained on the sole ground of severity of the crime. In mid-May 2007, the Supreme Court upheld the Osijek County Court's continued detention of Branimir Glavaš and the six other 'Sellotape' case suspects due to the severity of the crimes alleged. Distinguishing its decision to allow provisional release for Rahim Ademi [see Section A.I.1. above], the Supreme Court reasoned that in contrast to Ademi and Mirko Norac, Glavaš' conduct during the proceedings had provoked negative public reaction.<sup>69</sup> Concluding that the purpose of detention on the ground of the gravity of the crime was to protect the credibility of and public confidence in the judiciary, the Supreme Court decided that provisional release with precautionary measures was inappropriate. The Supreme Court did not explain how Glavaš' conduct warranted detention of his co-accused. The ECHR is currently seized of a challenge to Croatia's 'serious crime' detention provision,<sup>70</sup> in light of its case law limiting the length of time for which severity of the offense is permissible as the sole basis for detention.<sup>71</sup>

### 3. Releases and Precautionary Measures

During 2006 the Mission followed the release in Croatia of 4 persons [see Appendix II]. One Serb was extradited from Germany on genocide charges, detained for less than 1 month and released after charges were withdrawn.<sup>72</sup> Another Serb was arrested in Croatia and within a month released on bail. When ordered back into detention, he was no longer in Croatia, apparently insufficient precautionary measures having been taken by the trial court to prevent his departure.<sup>73</sup> A third Serb was detained overnight and released a day later, with no charges brought.<sup>74</sup> A fourth accused, independent parliamentarian Branimir Glavas, was released from detention in early December given concerns about his deteriorating health due to a hunger strike. In addition, Tihomir Oreskovic, serving a fifteen-year sentence for war crimes as part of the "Gospic Group," was released from prison in October 2006 in order to obtain medical treatment. He will remain at liberty until at least October 2007 and is frequently seen in public in Zagreb and Gospic.

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<sup>68</sup> Article 102, para. 1, point 4, CPC, permits a court to order detention where an accused is charged with specified crimes as well as "any other criminal offense punishable by imprisonment for 12 years or more and if this is necessary because of the particularly grave circumstances of the offense."

<sup>69</sup> II Kz 319/2007-3, 11.05.2007, constitutionality upheld U-III/2023/2007, 05.07.2007.

<sup>70</sup> *Karan v. Croatia*, 21139/05, adjourned 07.12.2006 (applicant detained for 2 ½ to 3 years prior to final conviction complains that detention based on seriousness of war crimes charges inconsistent with Article 5.3 of the European Convention of Human Rights).

<sup>71</sup> See e.g., *Khudoyorov v. Russia*, 6847/02. See e.g., *Goral v. Poland* 38654/97 (seriousness of offense not a sufficient and relevant ground for detention that lasted almost 18 months); *Jecius v. Lithuania*, 34578/97 (seriousness of offence not a sufficient and relevant ground for detention that lasted almost 15 months.)

<sup>72</sup> Milan Loncar.

<sup>73</sup> Aleksandar Trifunovic was released by the Vukovar County Court in late April 2006. The Supreme Court reversed in May 2006. As of the end of April 2007, Trifunovic has not been arrested.

<sup>74</sup> Milan Svilar, a returnee to Lika-Senj County, was detained, interrogated, and released in December 2006.

Provisional release with precautionary measures to prevent flight or influencing witnesses was granted in a number of cases.<sup>75</sup> In early 2007, the Zagreb County Court, having rejected the State's request to detain Rahim Ademi exercised its discretion to impose conditions on the accused who remained at liberty. These conditions, which replaced conditions imposed by the ICTY, limited freedom of movement, contacts with witnesses, and required periodic reports to authorities.<sup>76</sup>

#### 4. Indictments

The Mission is aware of twelve cases in 2006 in which prosecutors raised indictments against 71 individuals (61 Serbs, 9 Croats, and 1 Albanian), a significant increase from previous years [see Appendix III]. Four persons were indicted individually, while the other eight indictments were against groups ranging from two to 35 persons. Large group indictments were limited to the Vukovar County Court. Sixty-seven individuals were indicted for having committed war crimes against civilians, one for war crimes against prisoners of war, and three for both. Several indictments resulted from investigations started in the 1990s, while others were based on contemporaneous investigations. Although limited in number, all indictments against Croats involved killing. Some indictments against Serbs and others involved killing, while others involved allegations where there was no loss of life.

Indictments were issued in 2006 alleging that the defendants committed the following crimes:

- Together with other members of Serb paramilitary forces, a Serb paramilitary abducted four Croat civilians from Glina Prison and killed them.<sup>77</sup>
- Two Serb paramilitaries killed one Croat and severely injured another.<sup>78</sup>
- Croatian Army commander tortured and killed nine Serb civilians and stole their property, severely injured two other Serbs and ordered co-accused to kill a Serb civilian, which he did, all near Osijek.<sup>79</sup>
- 16 Serb paramilitaries in Sotin (near Vukovar) abused Croat civilians during an occupation by limiting their movement, ordering them to wear white armbands, marking their houses, forced recruitment into Serbian paramilitary units, forced labour, illegal arrest, detention, interrogation and torture, looting and expulsion.<sup>80</sup>

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<sup>75</sup> E.g., Gospić County Court seized the passport and required Nikola Cvjeticanin to check in with police every 8 days.

<sup>76</sup> Kv-rz-1/07, K-rz-1/06, 12.01.2007, aff'd Supreme Court, II Kž 45/2007-3, 26.01.2007. The Supreme Court stated that the purpose of detention on this basis was to avoid the possibility that an accused remaining at liberty would act so as to diminish the reputation of and the public's trust in the judiciary.

<sup>77</sup> RH v. Rade Miljevic, K-DO-3/06, Sisak County State Attorney, 04.9.2006.

<sup>78</sup> RH v. Stanojevic and Jovic, K-DO-2/03, Sisak County State Attorney, 07.03.2006.

<sup>79</sup> RH v. Fred Margus and Dilber, K-DO-54/05, Osijek County State Attorney, 26.4.2006.

<sup>80</sup> RH v. Milan Ostojic et. al. ('Sotin'), K-DO-3/01, Vukovar County State Attorney, 5.5.2006.

- 35 Serb paramilitaries forcibly removed 120 Croats from their homes, which they looted and set on fire, and detained them in a prison camp where they were physically abused and forced to labour.<sup>81</sup>
- Serb paramilitary in Vukovar murdered a Croat detainee upon orders from his superior.<sup>82</sup>
- Serb paramilitary abused a Croat civilian by handcuffing and hanging him over a tree, beating him with a shovel, and burning him with a cigarette.<sup>83</sup>
- In the village of Cerna (near Vinkovci), Croatian armed forces commander ordered four soldiers to execute a four-member Serb family, which they did, robbed the family and attempted to destroy their house.<sup>84</sup>
- In Borovo Naselje (near Vukovar), the Yugoslav Army unit to which the accused belonged gathered about 100 non-Serb civilians, singled out approximately 50 men and ordered them to lay face down on the ground and put their hands behind heads. The accused fired a shot which grazed a civilian's head.<sup>85</sup>
- On the orders of his co-accused, Serb paramilitary killed a Croat civilian while co-accused planned and carried out attacks on Croat villages in the vicinity of Knin, resulting in inhuman treatment and terror and torturing prisoners of war at the Knin Police station.<sup>86</sup>
- Two commanders in the Croatian armed forces ordered indiscriminate attacks on Serb civilians and failed to prevent and punish the killings of approximately 30 Serb civilians and widespread property destruction in the "Medak Pocket" near Gospic.<sup>87</sup>
- Yugoslav defense minister and air force commander ordered attacks in and around Osijek (Eastern Slavonia) that resulted in at least 30 civilian deaths and extensive destruction of property.<sup>88</sup>

## II. Trial Court Activity

Throughout 2006, the Mission monitored 23 trials in 9 courts involving 90 individuals (64 Serbs, 17 Croats, 8 Ruthenians, and 1 Roma) [see Appendix IV]. Approximately 45 per cent (10 of 23) of the active trials were re-trials. Similar to prior years, two trials were conducted fully *in absentia*, both of which constituted the third *in absentia*

<sup>81</sup> RH v. Mihajlo Eror et. al. ('Berak'), K-DO-42/01, Vukovar County State Attorney, 05.04.2006.

<sup>82</sup> RH v. Savan Dakic, ('Velopromet') K-DO-11/04, Vukovar County State Attorney 29.9.2006.

<sup>83</sup> RH v. Zeljko Lacic, K-DO-33/06, Vukovar County State Attorney 20.6.2006.

<sup>84</sup> RH v. Tomislav Madi et al. ('Cerna' group), K-DO-52/06, Vukovar County State Attorney, 29.12.2006.

<sup>85</sup> RH v. Dusan Zinajic, K-DO-5/06, Vukovar County State Attorney, 29.12.2006.

<sup>86</sup> RH v. Djordje Jaramaz and Milan Atljija, K-DO-14/06, Sibenik County State Attorney, 19.9.2006.

<sup>87</sup> RH v. Rahim Ademi and Mirko Norac, K-DO-349/05, Zagreb County State Attorney, 22.11.2006.

<sup>88</sup> RH v. Veljko Kadjevic and Zvonko Jurjevic, KT-268/91, Osijek County State Attorney, 18.05.2006.

trial in the same case.<sup>89</sup> Five trials were conducted partially *in absentia*<sup>90</sup>. Approximately 53 per cent (48 of 90) of all defendants and 58 percent (37 of 64) of Serb defendants were tried *in absentia*, primarily as a result of several large *in absentia* trials in the Vukovar County Court. In one case in which 31 of the 35 defendants were *in absentia*, the Vukovar County Court separated proceedings against the present defendants.<sup>91</sup>

All but one of the trials was conducted by courts in the jurisdiction where the crimes occurred. No trials were referred in 2006 to specially designated war crimes courts, although the Split and Osijek County Courts tried local cases and the Rijeka County Court accepted a case from Gospić on a change of venue. At least one trial in 2006, continuing into 2007 was conducted before a panel at one of the special war crimes courts with less than three professional judges contrary to the legal requirement.<sup>92</sup> This error was corrected in May 2007. Another trial started in March 2007 also began proceedings with a panel of less than three professional judges.<sup>93</sup>

## 1. Verdicts

During 2006, nine trials involving 28 individuals (17 Serbs, 11 Croats) were concluded, fewer than in prior years [see Appendices V, VI, VII]. More than half (5) of these concluded trials were re-trials. Sixteen persons (8 Serbs, 8 Croats) were found guilty, all for war crimes against civilians. Four persons (2 Serbs, 2 Croats) were acquitted. In addition, seven Serbs and 1 Croat were amnestied after war crimes or genocide charges were re-qualified into armed rebellion and the court either terminated proceedings or brought a dismissal verdict.<sup>94</sup> Based on the 20 verdicts against individuals, the overall conviction rate was 80 per cent, an increase from recent years. Viewed from the perspective of the defendants' ethnic origin, 50 per cent of Serbs and 50 per cent of Croats were found guilty. Three Serbs and 4 Croats were convicted *in absentia*.<sup>95</sup>

Five re-trials involving 11 Serbs and 10 Croats were completed. In one case, the Zadar County Court tried the *in absentia* defendants for the third time.<sup>96</sup> Four re-trials

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<sup>89</sup> RH v. Stevo Macakanja et al. (Zadar County Court conducted trials from 1995 to 2000, in 2003, verdicts from which were overturned by the Supreme Court, and in 2006); RH v. Radoslav Cubrilo et al. ('Lovinac') (Gospić County Court conducted trials in 1994 and 2000, verdicts from which were overturned by the Supreme Court, the third trial in 2006 was conducted by the Rijeka County Court).

<sup>90</sup> E.g., RH v. Ljuban Devetak et al. ('Lovas') [Vukovar County Court] (1 present defendant tried with 15 (12 Serbs, 3 Croats) *in absentia*; RH v. Jugoslav Misljenovic et al. ('Miklusevci') [Vukovar County Court] (8 present defendants tried with 17 (13 Serbs, 3 Ruthenians, and 1 Roma) *in absentia*).

<sup>91</sup> RH v. Slobodan Vucetic et al. ('Berak').

<sup>92</sup> RH v. Radoslav Cubrilo ('Lovinac') [Rijeka County Court] (trial panel composed of two professional judges and three lay judges). Article 13(2) of the ICC Law mandates that war crimes trials are conducted by "three judges from the ranks of judges distinguished by their experience in dealing with the most complex cases." Article 48 of the ICC Law mandates that trials started after November 2003 would apply its provisions.

<sup>93</sup> RH v. Predrag Guzvic [Pozega County Court].

<sup>94</sup> RH v. Nikola Alaica et al. ('Baranja II') [Osijek County Court], charges against 5 Serbs were re-qualified into armed rebellion and the Court brought a dismissal verdict. In RH v. Vaso Petrovic et al. ('Baranja III') [Osijek County Court], charges against 3 accused (2 Serbs, 1 Croat) were re-qualified into armed rebellion and the Court terminated the proceedings.

<sup>95</sup> RH v. Miroslav Jovic [Sisak County Court]; RH v. Stevo Macakanja & Zeljko Lezaja [Zadar County Court]; RH v. Tomislav Duic, Miljenko Bajic, Josip Bikic and Emilio Bungur [Split County Court].

<sup>96</sup> RH v. Stevo Macakanja et al.



were conducted after the Supreme Court reversed the trial court verdict and remanded.<sup>97</sup> One was conducted after a defendant extradited from Bosnia and Herzegovina in 2005 on the basis of a prior *in absentia* conviction requested a new trial.<sup>98</sup> According to the Mission's information, this case represented the first time an extradition from a state of the former Yugoslavia led to a conviction. Sixty-nine (69) per cent of previously convicted defendants were exonerated of war crimes as a result of charges being dropped for lack of evidence, re-qualification of the charges to armed rebellion and amnesty applied, or acquittal.<sup>99</sup> The rate of exoneration upon re-trial slightly increased compared to past years.

## 2. Length of Proceedings

Seven of the 9 trials concluded in 2006 were completed within less than six months, one trial lasting less than one month<sup>100</sup>, and two continuing for 6 to 12 months. [see Appendix IV]. All written verdicts were delivered within the legal deadline, i.e., within two months of oral pronouncement. However, the Mission observed delays in the commencement of some re-trials after the Supreme Court granted appeals and remanded the case for further proceedings.<sup>101</sup>

Two group mainly *in absentia* genocide trials in the Vukovar County Court have been ongoing for three to four years with periodic hearings and frequent re-starts. While no accused are in detention, the trials do not appear to be progressing or nearing completion.<sup>102</sup> Proceedings were delayed in at least one case due to the unexplained absence of one of the three judge panel, as a result of which the trial could not proceed as scheduled.<sup>103</sup>

## 3. Conduct found to constitute war crimes against civilians

All convictions issued in 2006 involved war crimes against civilians. This offense can *inter alia* be committed by anyone who, in violation of international humanitarian law, orders or directly commits "attacks against civilians," "killings," "torture," inhuman treatment," "intimidation and terror," and "wanton destruction of property."<sup>104</sup> While some defendants were presumed to be aware that their actions

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<sup>97</sup> RH v. Tomislav Duic ('Lora') [Split County Court]; RH v. Zeljko Iharos et al. ('Virovitica' group) [Bjelovar County Court]; RH v. Nikola Alaica ('Baranja II') [Osijek County Court] and RH v. Stevo Macakanja et al. [Zadar County Court] (reversed and remanded twice).

<sup>98</sup> RH v. Neven Pupovac [Zadar County Court].

<sup>99</sup> In 2006, 9 of 13 previously convicted defendants were freed of war crimes charges as a result of re-trial. Four were acquitted - RH v. Zeljko Iharos and Luka Perak ('Virovitica' group) [Bjelovar County Court] and RH v. Zeljko Cupac and Branko Kuzen. [Zadar County Court] - while for 5, the war crimes charges were re-qualified into armed rebellion and amnesty was applied - RH v. Nikola Alaica et al. ('Baranja II') [Osijek County Court]. All four acquittals are under appeal.

<sup>100</sup> RH v. Milan Stanojevic and Miroslav Jovic [Sisak County Court], 30.05.2006.

<sup>101</sup> E.g., RH v. Nikola Alaica et al. ('Baranja II') [Osijek County Court] (re-trial started in 2006 more than 2 years after the Supreme Court decision).

<sup>102</sup> The trials in RH v. Ljuban Devetak et al. ('Lovas') and RH v. Jugoslav Misljenovic et al. ('Miklusevci') began in September 2003 and May 2004, respectively.

<sup>103</sup> RH v. Rade and Dusan Ivkovic [Vukovar County Court], K-42/02.

<sup>104</sup> Article 120, 1993 Basic Criminal Code.

violated the Geneva Conventions,<sup>105</sup> others lacked explicit knowledge but were deemed to be aware they were committing a crime.<sup>106</sup> In at least one war-related case, PTSD was seen to reduce the defendant's accountability.<sup>107</sup> With two exceptions,<sup>108</sup> all defendants convicted in 2006 were found guilty of murder or attempted murder, frequently in addition to other crimes. This would appear to represent a change from past years when a significant number were convicted for crimes other than murder. In addition, at least one war-related murder prosecuted as a "common crime" resulted in the conviction of a member of the Croatian armed forces for the killing of a Serb civilian while returning to duty.<sup>109</sup>

Similar to 2005, all defendants were found guilty based on their direct responsibility for committing crimes. Although in several cases defendants held positions of authority,<sup>110</sup> no convictions involved military superiors held responsible on the basis of command responsibility for failing to prevent war crimes.

Several accused were found guilty of having committed crimes in association with others, although the courts did not specifically find that the defendants were co-perpetrators.<sup>111</sup> The Sisak County Court found Dragan Djokic guilty because he was a member of a Serb paramilitary group, an unidentified member of which killed a Croat civilian.<sup>112</sup> Relying on the principle of *cum animus auctoris*, which was rejected by the Supreme Court ten years ago<sup>113</sup>, the court found that Djokic knowingly accepted the consequences of the group's action, thereby demonstrating the requisite intent to kill. The verdict was reversed by the Supreme Court in early 2007.<sup>114</sup>

In 2006, trial courts issued convictions for the following crimes:

- Eight members of Croatian armed forces killed two Serb civilians detained in "Lora" prison in Split after and as a result of psychological abuse, beating with hands and implements, such as rubber bats and hose, and kicking; torture by electric shock and suffocation; and then shot; abused eight other Serbs - 6 to 8 years (4 *in absentia*).<sup>115</sup>

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<sup>105</sup> RH v. Milan Cacic, [Karlovac County Court] (Cacic as a former member of the Yugoslav People's Army was presumed to be aware of the Geneva Conventions and demonstrated a clear intent to violate them).

<sup>106</sup> RH v. Petar Mamula et al. ('Baranja II') [Osijek County Court] (irrelevant whether Mamula knew with precision which rules of international law he violated "as long as he knew he was engaging in prohibited activity".)

<sup>107</sup> RH v. Vladimir Strehovsky [Zadar County Court], 12.04.2006.

<sup>108</sup> Milan Cacic [Karlovac County Court], 29.05.2006; Petar Mamula ('Baranja II') [Osijek County Court], 08.05.2006.

<sup>109</sup> RH v. Vladimir Strehovsky [Zadar County Court].

<sup>110</sup> E.g., RH v. Tomislav Duic et al. ('Lora'), K-93/04 [Split County Court], 02.03.2006.

<sup>111</sup> E.g., RH v. Milan Stanojevic and Miroslav Jovic, k-4-06 [Sisak County Court], 30.05.2006 ("both were acting with intent to kill the victims, while aware of the illegality of their action".)

<sup>112</sup> RH v. Dragan Djokic, K-44/05 [Sisak County Court] 29.06.2006, Supreme Court reversed I Kz 897/06-6, 08.03.2007.

<sup>113</sup> Under this theory, an accused committed a crime through another person regardless of his/her contribution to the criminal act as long as he/she had the requisite criminal intent. The Supreme Court rejected the *cum animus auctoris* theory as "extreme, and not accepted in Croatian judicial practice." I Kz 835/1996-5, 13.11.1997.

<sup>114</sup> I Kz 897/06-6, 08.03.2007.

<sup>115</sup> RH v. Tomislav Duic et al. ('Lora') [Split County Court], K-93/04, 02.03.2006.

- Serb paramilitary beat and kicked two Croat civilians, fired gunshots in their proximity to intimidate and instil terror, and arrested others in villages in Baranja - 4 years, 10 months.<sup>116</sup>
- Serb paramilitary beat and attempted to murder a Croat woman by locking her in a burning house and expropriated civilian property, all intended to intimidate Croats and force them to abandon a village near Benkovac - 6 years.<sup>117</sup>
- Two Serb paramilitaries beat a Croat civilian to death in a village near Zadar - 5 and 20 years (both *in absentia*).<sup>118</sup>
- Serb paramilitary beat eight Croat civilians, repeatedly threatened two Croat civilians with a gun, including a 12-year old boy, robbed these victims and set at least four houses on fire in Slunj and nearby villages - 5.5 years.<sup>119</sup>
- Two Serb paramilitaries shot two Croat civilians, killing one and severely injuring the second, intended to expel the non-Serb population from a village near Glina –both 15 years (1 *in absentia*).<sup>120</sup>
- Serb paramilitary from a group, one of whom killed a Croat civilian in a village near Glina - 12 years.<sup>121</sup>

#### 4. Sentencing and Mitigating/Aggravating Factors

Fifteen of the 16 people convicted (7 Serbs, 8 Croats) received sentences over the legal minimum of five years, a substantial increase from previous years<sup>122</sup> [see Appendix V]. Sentences ranged from a low of 4 years and 10 months to the maximum sentence of 20 years. Serbs received sentences over this entire range,<sup>123</sup> while Croat sentences, albeit in only one case, were clustered in the range of six to eight years. Based on the limited sample of verdicts, Serbs received sentences for non-lethal conduct that were the same or somewhat less than Croats sentenced for killings. Serb sentences for killings in multiple cases were considerably higher than the sentences for eight Croats sentenced for killings in one case. Based on the 16 sentences passed in 2006, the average sentence was approximately 8 ½ years, similar to past years. Including killings and non-lethal crimes, the average sentence for Serbs was nearly 10

<sup>116</sup> RH v. Petar Mamula ('Baranja II') [Osijek County Court], K-92/03, 08.05.2006.

<sup>117</sup> RH v. Nevan Pupovac [Zadar County Court], K-64/05, 19.05.2006.

<sup>118</sup> RH v. Stevo Macakanja and Zeljko Lezaja [Zadar County Court], 04.10.2006.

<sup>119</sup> RH v. Milan Cacic [Karlovac County Court], 29.05.2006.

<sup>120</sup> RH v. Milan Stanojevic and Miroslav Jovic [Sisak County Court], 30.05.2006.

<sup>121</sup> RH v. Dragan Djokic [Sisak County Court], 29.06.2006.

<sup>122</sup> Tomislav Duic (*in absentia*) and Tonci Vrkic - 8 years; Miljenko Bajic (*in absentia*) and Davor Banic – 7 years; Josip Bikic (*in absentia*), Emilio Bungur (*in absentia*), Ante Gudic and Andelko Botić – 6 years [Split County Court]; Neven Pupovac (6 years), Stevo Macakanja (20 years *in absentia*), Zeljko Lezaja (5 years *in absentia*) [all from Zadar County Court]; Milan Cacic (5.5 years) [Karlovac County Court]; Milan Stanojevic and Miroslav Jovic (*in absentia*) – 15 years [Sisak County Court]; Dragan Djokic (12 years) [Sisak County Court]; Petar Mamula - 4 years and 10 months [Osijek County Court].

<sup>123</sup> Stevo Macakanja, a Serb convicted *in absentia* for killing a Croat civilian received the only 20-year sentence issued in 2006.

½ years, while the average sentence for Croats convicted of killing in one case was slightly less than 7 years. In at least one case, holding a position of authority when the crimes were committed was deemed by the trial court to increase culpability and merit a higher sentence.<sup>124</sup>

In imposing a sentence below the statutory minimum, the Osijek County Court applied several mitigating factors, including the limited criminal acts for which the accused was convicted.<sup>125</sup> Some mitigating factors were routinely applied regardless of the ethnicity of the accused. As in prior years, the most frequently invoked factor was the defendant's lack of a criminal record except for war-related crimes.<sup>126</sup> Another was the accused's current family and parental responsibilities.<sup>127</sup>

Some mitigating factors applied only to those who served in the Croatian armed forces, for both war crimes and common crimes related to the war, including:

- participation in the Homeland War, including being decorated and wounded<sup>128</sup>
- compromised current health condition, including war-related ailments such as post-traumatic stress disorder, emotional instability and disabled veteran status<sup>129</sup>

Mitigating factors related to circumstances of the crimes included:

- young age at the time of the crime, increasing susceptibility to indoctrination by Great Serbia doctrine or negative example of co-accused<sup>130</sup>
- helping non-Serb civilians during the conflict<sup>131</sup>
- not established that the defendant fired the fatal shot, therefore “decreasing the criminal element of his conduct”<sup>132</sup>

Aggravating factors applied in sentencing considered both the conduct and intent of the accused as well as the relationship between the accused and the victims. Several courts commented that the brutality of several Croat defendants likely resulted from

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<sup>124</sup> RH v. Tomislav Duic et al. ('Lora'), [Split County Court], K-93/04. 02.03.2006 (Tomislav Duic and Tonci Vrkić)

<sup>125</sup> RH v. Petar Mamula. ('Baranja II') [Osijek County Court] K-92/03, 08.05.2006.

<sup>126</sup> RH v. Milan Stanojević and Miroslav Jović [Sisak County Court] 30.05.2006 (mitigation applied to both); RH v. Neven Pupovac [Zadar County Court] 19.05.2006; Milan Cacic [Karlovac County Court] 29.05.2006; RH v. Tomislav Duic et al. ('Lora') [Split County Court] 02.03.2006 (mitigation applied to all); RH v. Dragan Djokić [Sisak County Court] 29.06.2006.

<sup>127</sup> RH v. Tomislav Duic et al. ('Lora'), K-93/04 [Split County Court] 02.03.2006 (mitigation applied to all); RH vs. Nikola Alaica et. al, ('Baranja II') [Osijek County Court] K-92/03, 08.05.2006; RH v. Neven Pupovac [Zadar County Court] 19.05.2006.

<sup>128</sup> RH v. Tomislav Duic et al. ('Lora'), K-93/04 [Split County Court] 02.03.2006 (mitigation applied to all); RH v. Vladimir Strehovský [Zadar County Court] 12.04.2006.

<sup>129</sup> RH v. Tomislav Duic et al. ('Lora'), K-93/04 [Split County Court], 02.03.2006 (Tonci Vrkić).

<sup>130</sup> RH v. Milan Stanojević and Miroslav Jović [Sisak County Court] 30.05.2006 (mitigation applied to both); RH v. Neven Pupovac [Zadar County Court] 19.05.2006; RH v. Tomislav Duic et al. ('Lora'), K-93/04 [Split County Court] 02.03.2006 (mitigation applied to all except Tomislav Duic and Tonci Vrkić).

<sup>131</sup> RH v. Petar Mamula, ('Baranja II') [Osijek County Court], K-92/03, 08.05.2006.

<sup>132</sup> RH v. Dragan Djokić [Sisak County Court], 29.06.2006.

their disturbing experiences during the war, which would appear linked to mitigating factors above.<sup>133</sup> Aggravating factors included:

- exceptional brutality of crimes inflicted on victim “who gave no reason” for such abuse<sup>134</sup>
- repeated nature of defendant’s crimes<sup>135</sup>
- defendants acted “with explicit intent, while aware of the illegality of their acts and that they violate the most precious values in society, human life”<sup>136</sup>
- defendant acted “with explicit intent” and the crime was motivated by the ethnicity of the victim, who did nothing to provoke such conduct<sup>137</sup>
- victims were defendants’ pre-war neighbours, whom they knew very well, and “with whom they had good and friendly relations”<sup>138</sup>

In imposing sentence on Dragan Djokic, the Sisak County Court cited the “need of the community in today’s conditions of peace to process and adequately punish such crimes for the affected parts of the society to obtain at least moral satisfaction for the losses they suffered during the armed conflict between the citizens of Serb and Croatian national origin”.<sup>139</sup> This judgment, which has tones of collective punishment rather than determination of individual guilt for crimes against individual victims was reversed by the Supreme Court in early 2007.

### III. Supreme Court Supervision of Lower Courts - Appeals

During 2006, the Mission followed 46 cases at the Supreme Court pending appeal from trial court verdicts involving 117 individuals - 88 Serbs, 26 Croats, 2 Bosniaks, and 1 Hungarian [see Appendix VIII].

#### 1. Decisions on Appeal

The Supreme Court decided appeals in 23 cases involving 56 individuals (51 Serbs, 2 Croats, 2 Bosniaks, and 1 Hungarian). Five cases were fully *in absentia*,<sup>140</sup> two others

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<sup>133</sup> RH v. Tomislav Duic et al. (‘Lora’), K-93/04 [Split County Court] 02.03.2006. The court opined that the brutality of one accused, Duic, “was probably due to his war experience in Vukovar”); RH v. Vladimir Strehovsky [Zadar County Court] 12.04.2006 (the court held that attending the funeral of a friend killed by a grenade soon before the murder “decreased accountability at the moment of committing the crime”).

<sup>134</sup> RH v. Tomislav Duic et al. (‘Lora’), K-93/04 [Split County Court] 02.03.2006 (aggravation applied to all accused); RH v. Vladimir Strehovsky [Zadar County Court] 12.04.2006.

<sup>135</sup> RH v. Milan Cacic [Karlovac County Court], 29.05.2006.

<sup>136</sup> RH v. Milan Stanojevic and Miroslav Jovic [Sisak County Court], 30.05.2006 (aggravation applied to both accused).

<sup>137</sup> RH v. Dragan Djokic [Sisak County Court], 29.06.2006.

<sup>138</sup> RH v. Milan Stanojevic and Miroslav Jovic [Sisak County Court], 30.05.2006 (aggravation applied to both accused).

<sup>139</sup> RH v. Dragan Djokic [Sisak County Court], 29.06.2006, Supreme Court reversed I Kz 897/06-6, 08.03.2007.

<sup>140</sup> RH v. Damir Zuzic et al. (‘Batina’ group) [Osijek County Court], 19.01.2006; RH v. Dragoslav Nakicen and Milan Kosevic, 16.02.2006; RH v. Dragor Opacic and Milan Opacic, 22.03.2006; RH v. Caslav Kostic et al., 12.09.2006; Momir Pupovac and Branko Bota, 12.10.2006 [all 4 Zadar County Court].

were partially *in absentia*,<sup>141</sup> and over half (30) of the defendants were *in absentia*. The number of decided appeals significantly increased from prior years and included a number of cases that had been pending for four or more years, likely reflecting the Supreme Court's effort to reduce its backlog. Almost half (11) of the cases had been previously decided by the Supreme Court, including four which had been decided twice before<sup>142</sup>.

The Supreme Court reversed trial court verdicts in 6 cases (two *in absentia* convicting and 4 acquitting verdicts), reversing twelve *in absentia* convictions (11 Serbs, 1 Hungarian)<sup>143</sup> and six acquittals (4 Serbs, 1 Croat, 1 Bosniak).<sup>144</sup> In one case, it issued a split decision reversing an acquittal and confirming six *in absentia* convictions.<sup>145</sup> The Supreme Court confirmed trial verdicts in 16 cases (10 convicting, five acquitting, and one split verdict), confirming 21 convictions (20 Serbs, 1 Bosniak), of which over half (11) were *in absentia*<sup>146</sup> and ten acquittals (9 Serbs, 1 Croat).<sup>147</sup> Based on individual appeals, the Supreme Court had a reversal rate of approximately 34 per cent (19 of 56), a substantial decrease from previous years.

## 2. Length of Proceedings

Of 56 individual appeals decided in 2006, more than half had been pending at the Supreme Court for more than three and one half years, including three cases pending four years or more. Such lengthy delays arguably constitute fair trial violations such as that found by the ECHR in *Camasso v. Croatia*.<sup>148</sup> As in previous years, the oldest cases primarily involved appeals from acquittals as well as *in absentia* convictions.

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<sup>141</sup> RH v. Neven Rapaja et al. [Zadar County Court] 15.11.2006 (1 present with 6 *in absentia*); RH v. Jovan Curcic et al. ('Borovo Group') [Vukovar County Court] 24.05.2006 (3 present with 3 *in absentia*).

<sup>142</sup> The Supreme Court decided the following cases for the third time: RH v. Ivica Jelušić, 16.08.2006, I Kž 315/04-8; RH v. Mihael Husnik and Kasim Hekić ('Vukovar II'), 11.01.2006, I Kž 557/02-5; RH v. Boško Macura, 15.11.2006, I Kž 194/03-3; RH v. Nikola Cvetičanin, 21.12.2006, I Kž 423/05-3; **and the following for the second time:** RH v. Željko Bjedov, 06.12.2006, I Kž 290/03-3; RH v. Čedomir Jagličić, 26.10.2006, I Kž 172/03-6; RH v. Jovan Čurčić et al., 24.05.2006, I Kž 257/06-7; RH v. Tihomir Drajić, 09.05.2006, I Kž 616/04-6; RH v. Svetozar Karan, 07.02.2006, I Kž 953/05-7; RH v. Milan Stojisavljević, 24.01.2006, I Kž 869/05-8; RH v. Neven Repaja et al., 15.11.2006, I Kž 912/02-4.

<sup>143</sup> Momir Pupovac and Branko Bota [Zadar County Court]; Damir Zuzic, Stevan Lepolt, Stevan Budac, Milan Galetic, Fredika Mihajlovic, Milan Milenkovic, Bela Pap, Nikola Sajlovic, Petar Sajlovic, Dragoljub Stork ('Batina') [Osijek County Court].

<sup>144</sup> Stojan Vujic and Dobrivoje Pavkovic [Bjelovar County Court]; Nikola Cvjeticanin [Gospic County Court]; Bosko Macura [Sibenik County Court]; Kasim Hekic and Mihail Husnik ('Vukovar II') [Vukovar County Court].

<sup>145</sup> RH v. Neven Repaja et al., 15.11.2006 [Zadar County Court]. The Supreme Court reversed the acquittal of Ilija Maričić and confirmed *in absentia* convictions of Neven Repaja, Branko Škopelja, Pavle Vranić, Aleksandar Vranić, Saša Vranić, Nikola Vranić (all Serbs).

<sup>146</sup> Vlado Sladovic [Sisak County Court]; Svetozar Karan [Karlovac County Court]; Nenad Bizic, Tihomir Drajić, [Bjelovar County Court]; Dragoslav Nakicen, Milan Kosevic, Caslav Kostic, Cvjetan Ljubomir, Zoran Tadic, Suad Hasovic, Dragor Opacic, Milan Opacic (all 8 *in absentia*) [Zadar County Court]; Djordje Miljkovic, Jovan Curcic, Milos Drzaic, Dusan Misic, Mladen Maksimovic, Dragan Savic, Jovica Vucenovic (3 *in absentia*) [Vukovar County Court]; Milan Stojisavljevic [Osijek County Court]; Slobodan Davidovic [Zagreb County Court].

<sup>147</sup> Cedomir Jaglicic [Slavonski Brod County Court]; Milenko Radak [Zadar County Court]; Ivica Jelusic, Željko Bjedov, Dane Milovic [Sibenik County Court]; Janko Ostojic, Milanko Stupar, Mico Maljkovic, Strahija Ergic, Dragoljub Trifunovic [Vukovar County Court].

<sup>148</sup> Application no. 15733/02, 13.01.2005 (criminal prosecution that lasted nearly 7 years including Supreme Court appeal lasting more than 3 years violated right to fair trial).

Slightly more than 20 per cent of appeals were decided within a year or less; while slightly more than 20 per cent were decided within 2 to 3 ½ years. [N.B. The periods noted here likely under-estimate the length of time required to issue an appeals decision as the Supreme Court dates its decisions as of the date of the court session, not the date of issuance, which dates can differ by months].

Delays by the Supreme Court had concrete negative ramifications in a number of cases for the possibility of further proceedings. For example, in November 2006, the Supreme Court reversed the November 2001 acquittal of Bosko Macura, instructing the Sibenik County Court to clarify the statements of two prosecution witnesses.<sup>149</sup> Upon re-trial in early 2007, the trial court determined that it could not follow the Supreme Court's instructions because both witnesses had died in the intervening five years. In a trial lasting only several hours, Macura was again acquitted.<sup>150</sup> Similarly, in November 2006, the Supreme Court reversed the June 2002 acquittal of Ilija Maricic. Upon re-trial in early 2007, the Zadar County Court had to abandon the case due to the accused's death in the intervening four and one-half years.

As a result of Supreme Court delays, acquitted persons remained under the cloud of renewed prosecution for extensive periods. For example, Zeljko Bjedov was acquitted by the Sibenik County Court in June 2001, while the Supreme Court only confirmed that acquittal in December 2006.<sup>151</sup> In contrast, Kasim Hekic and Mihael Husnik were acquitted by the Vukovar County Court in February 2002, while the Supreme Court reversed and order a re-trial in January 2006. Upon re-trial, these accused were convicted in March 2007.<sup>152</sup>

The period during which some convictions were pending appeal exceeded the sentence. For example, Djordje Miljkovic was convicted and sentenced to three years imprisonment by the Vukovar County Court in early 2002, while the Supreme Court took four and one-half years to confirm the conviction and sentence.<sup>153</sup> While it appears the Supreme Court in 2006 decided the vast majority of long pending appeals, at least one case remained pending at the end of 2006 in excess of four years as well as others pending approximately three years.<sup>154</sup>

### **3. Conduct and sentences upheld by the Supreme Court for war crimes**

In 2006, the Supreme Court upheld convictions and prison sentences for the following crimes committed by Yugoslav army and Serb paramilitary forces. Most cases involved abuse and property destruction rather than killings. The wide range of conduct upheld as war crimes, including stealing wine, contrasts with the types of

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<sup>149</sup> RH v. Bosko Macura, I Kz 194/03-3, 15.11.2006.

<sup>150</sup> RH v. Bosko Macura [Sibenik County Court], 03.04.2007.

<sup>151</sup> RH v. Zeljko Bjedov, 12.12.2006, I Kz 290/03-3. While there were apparently significant delays at the trial court level, the appeal was pending at the Supreme Court for more than four years.

<sup>152</sup> RH v. Kasim Hekic and Mihael Husnik ('Vukovar II') [Vukovar County Court].

<sup>153</sup> RH v. Đorđe Miljković et al. ('Tovarnik Group'), 28.08.2006, I Kz 461/02-3. See also Nenad Bizic convicted in July 2002 and sentenced to three years imprisonment. The Supreme Court confirmed in April 2006, nearly four years later. However, Bizic was incarcerated serving a sentence for another conviction.

<sup>154</sup> RH v. Bozo Bacelic et al. ('Prokljan') [Sibenik County Court] (appeal from acquittals pending 49 months); RH v. Zoran Stankovic et al. ('Vukovar I') [Vukovar County Court] (appeal from divided *in absentia* conviction/acquittal pending 36 months).

crimes that are the subject of current indictments and verdicts. Several sentences below the statutory minimum confirm that some of these overwhelmingly Serb defendants were convicted of “lesser crimes.” Some of the sentences upheld by the Supreme Court for Serbs convicted of non-lethal conduct are the same or higher than current sentences issued to Croats for lethal conduct [see Section C.II.3, 4 above].

- Two Serb paramilitaries attempted to murder a Croat civilian, one by shooting him 8 times in the back, the second acting as a co-perpetrator - 9 and 10 years (both *in absentia*)<sup>155</sup>
- Two Serb paramilitaries abused and threatened Croat civilians by shooting at their feet and beating one civilian - 6.5 years and 5.5 years (both *in absentia*)<sup>156</sup>
- Serb paramilitary insulted and beat Croat PoWs detained in late 1991 in the Korenica police station as well as in the Frkasic prison camp – 7 years<sup>157</sup>
- Serb paramilitary participated in beating and illegal detention of Croat civilians – 6 years<sup>158</sup>
- Serb paramilitary abused Croat civilians and looted their property – 3 years<sup>159</sup>
- Serb paramilitary member of “Scorpions” unit who together with others abused then killed 6 Bosniak civilians in BiH near Srebrenica – 15 years<sup>160</sup>
- Six Serb paramilitaries, including one commander, illegally detained and abused Croat civilians in a police station in Borovo near Vukovar and looted civilian property - 14, 10, 7, and 6 (3 defendants) years (3 *in absentia*)<sup>161</sup>
- Serb paramilitary, together with 20 others, looted civilian property, illegally detained and abused Croat civilians, some of whom were separated and detained and subsequently exchanged or killed – 3 years<sup>162</sup>
- Serb paramilitary murdered an elderly Croat woman - 9 years<sup>163</sup>
- Serb paramilitary beat a Croat civilian with an iron bar in a detention camp – 3 years<sup>164</sup>

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<sup>155</sup> RH v. Dragoslav Nakićen and Milan Kosevic, 16.02.2006, I Kz 339/03-3.

<sup>156</sup> Dragor and Milan Opačić, 22.03.2006, I Kz 358/04-3.

<sup>157</sup> RH v. Svetozar Karan, 07.02.2006, I Kž 953/05-7.

<sup>158</sup> RH v. Milan Stojisavljević, 24.01.2006, I Kz 869/05-8.

<sup>159</sup> RH v. Tihomir Drajić, 9.05.2006, I Kz 616/04-6.

<sup>160</sup> RH v. Slobodan Davidović, 25.04.2006, I Kz 174/06-4.

<sup>161</sup> RH v. Jovan Ćurčić et.al ('Borovo'), 24.05.2006, I Kz 257/06-7.

<sup>162</sup> RH v. Nenad Bižić, 19.04.2006, I Kž 775/02-3.

<sup>163</sup> RH v. Vlado Sladović, I Kz 103/06-6, 12.04.2006.

<sup>164</sup> RH v. Đorđe Miljković et.al. ('Tovarnik Group'), 28.08.2006, I Kz 461/02.



- Six Serb paramilitaries looted Croat property (stealing wine) and set houses on fire in a village near Zadar - 10 (1 defendant) and 9 (5 defendants) years (all *in absentia*).<sup>165</sup>
- JNA commander ordered and 3 soldiers shot at civilian residences in Zadar causing indiscriminate large scale destruction - 6.5 years (3 defendants) and 7.5 years (1 defendant) (all *in absentia*)<sup>166</sup>

#### **4. Supreme Court review of trial court decision-making and assessment of testimony**

The Supreme Court's review on appeal primarily addressed how the trial courts established facts. The reasons for reversal were errors in fact finding as well as procedural errors. The Supreme Court also addressed the issue of whether *in absentia* trials should go forward as well as indicia of being "in command" or having "command responsibility."

In particular, the Supreme Court examined how trial courts assess the reliability of testimony in light of the inconsistencies frequently seen in war crimes cases. Given that war crimes prosecution depends heavily on testimonial evidence, this issue is of particular importance. The Supreme Court addressed two types of inconsistencies. The first involved the same witness who testified to different versions of the facts at different stages of the proceeding, a common occurrence given the frequency of repeated trials in the same case as well as the use of statements from the judicial investigation and trial. The second type involved inconsistencies between the facts presented by different witnesses who testified to the same events.

The Supreme Court observed that trial courts should not consider "minor" inconsistencies as fatal to the reliability of testimony, explaining that such contradictions are a natural and understandable product of the passage of ten or more years since the crimes and the trauma suffered by the victims/witnesses. The Supreme Court indicated that trial courts should determine whether – given the inconsistencies – the facts can be established to the requisite level of certainty, i.e., reasonable doubt. In other words, are the factual inconsistencies "minor" but sufficient factual basis remains to support a finding of guilt or are they of such magnitude as to create reasonable doubt. In defining when inconsistencies reach the "tipping point," the Supreme Court counselled trial courts to consider the particular circumstances of war crimes cases and to apply a flexible inquiry that will allow testimony to be considered reliable despite considerable inconsistencies.

##### **a. Trial court assessment of inconsistent testimony upheld**

The Supreme Court upheld convictions despite inconsistencies, where the trial court provided an explanation deemed adequate of how it weighed the inconsistent testimony. For example, the Supreme Court confirmed the 2005 conviction of Svetozar Karan, finding that the Karlovac County Court properly assessed what the Supreme Court considered were minor inconsistencies in testimony and explained

<sup>165</sup> RH v. Neven Repaja et. al., 15.11.2006, I Kž 912/02-4.

<sup>166</sup> RH v. Časlav Kostić et.al., 12.09.2006, I Kz 613/04-3.

why it credited certain statements over others.<sup>167</sup> Similarly, the Supreme Court confirmed the 2002 conviction of Nenad Bižić, concluding that the trial court made a sufficiently critical analysis of the testimony and drew accurate conclusions about the guilt of the accused.<sup>168</sup> Finally, the Supreme Court confirmed the 2002 *in absentia* conviction of Neven Repaja and five others, accepting the Zadar County Court's assessment that differences in the trial testimony of an elderly witness from that given previously were a result of the passage of time and her old age.<sup>169</sup>

The Supreme Court also upheld acquittals where the trial court deemed that inconsistencies or changes in testimony created reasonable doubt. For example, the Supreme Court confirmed the Sibenik County Court's 2001 acquittal of Željko Bjedov, during which key witnesses recanted testimony given during an *in absentia* trial in 1992.<sup>170</sup> The Supreme Court found that Bjedov's presence in the courtroom positively influenced the witnesses' recollection of events and persons, thus making their new testimonies credible. The Supreme Court also upheld the 2002 acquittal of Čedomir Jagličić, finding that the Slavonski Brod County Court properly weighed exculpatory material evidence and testimony providing for Jagličić's alibi against incriminating testimony that was inconsistent and doubtful.<sup>171</sup>

#### **b. Errors in finding facts, including assessment of inconsistent testimony**

The Supreme Court reversed verdicts where it determined that the trial courts erred in fact finding such as failing to establish individual guilt or improperly disregarding testimony due to inconsistencies.

Reversing the 2002 *in absentia* conviction of Damir Žužić and 9 others, the Supreme Court found that the Osijek County Court failed to establish beyond a reasonable doubt that the accused committed all the offences, improperly basing its guilty verdict on the "assumptions" of some witnesses.<sup>172</sup> It did not individualize guilt, having failed to determine the contribution of each accused toward the crimes and the relationship between the accused in the perpetration of the offences. The Supreme Court instructed the trial court on re-trial to obtain additional documents, examine witnesses more thoroughly and analyse the facts in light of contradicting testimony and evidence. In addition, the Supreme Court also concluded that the trial court erred in not properly establishing the identity of one of the accused. Relevant to the quality of the quashed *in absentia* verdict, during re-trial in early 2007 of one accused who was apprehended subsequent to the Supreme Court's reversal, the charges were dropped and amnesty applied.<sup>173</sup>

The Supreme Court reversed the 2002 acquittal of Michael Husnik and Kasim Hekić on the grounds that the Vukovar County Court had inappropriately discounted the testimony of a rape victim due to inconsistencies.<sup>174</sup> The Supreme Court found that

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<sup>167</sup> RH v. Svetozar Karan, 07.02.2006, I Kž 953/05-7. Inconsistencies included accused's height, dates of the offences, inability of victims/witnesses to see the perpetrator's face, etc.

<sup>168</sup> RH v. Nenad Bižić, 19.04.2006, I Kž 775/02-3.

<sup>169</sup> RH v. Neven Repaja et. al., 15.11.2006, I Kž 912/02-4.

<sup>170</sup> RH v. Željko Bjedov, 06.12. 2006, I Kž 290/03-3.

<sup>171</sup> RH v. Čedomir Jagličić, 26.12.2006, I Kž 172/03-6.

<sup>172</sup> RH v. Damir Žužić et.al. ('Batina Group') 19.01.2006, I Kž-528/02-7.

<sup>173</sup> RH v. Dragoljub Stork, 12.03.2007, K-5/07.

<sup>174</sup> RH v. Mihael Husnik and Kasim Hekic ('Vukovar II'), 11.01.2006, I Kz 557/02-5.

the passage of ten years between the crimes and the trial as well as the traumatic nature of the offence were sufficient explanation for the discrepancies. In addition, the Supreme Court found that the trial court erred in making “medical” conclusions without examining medical experts. On remand, the trial court was instructed to more critically analyse witness testimony and confront the witnesses with inconsistencies. The defendants were convicted during a third trial in early 2007.

Similarly, the Supreme Court reversed the 2001 acquittal of Bosko Macura, finding that the Šibenik County Court improperly assessed inconsistent statements by the primary witness who testified against Macura in the 1993 *in absentia* trial, but changed his testimony during the 2001 re-trial in which Macura participated.<sup>175</sup> The Supreme Court held that the trial court improperly evaluated the 2001 testimony, acknowledging that while the witness identified the accused as the person who committed the crime, he testified incorrectly as to the accused’s name.<sup>176</sup> For purposes of conducting the third trial, the lower court was instructed to assess all evidence anew and, in particular, thoroughly examine the key witness who was mentally disabled. However, re-trial was cut short due to death of witnesses. The Supreme Court reversed the 2004 acquittal of Nikola Cvjetičanin, finding that the Gospić County Court had erred in excluding the testimony of a protected witness during the re-trial. The Supreme Court instructed the trial court during the third trial to assess the credibility and relevance of the testimony of the protected witness.<sup>177</sup>

The Supreme Court reversed the 2004 acquittal of Stojan Vujic and Dobrivoj Pavkovic, finding that the Bjelovar County Court inappropriately gave greater weight to exculpatory evidence than incriminating testimony.<sup>178</sup> On remand, the trial court was instructed to more critically examine witnesses and assess the circumstances under which they acquired knowledge of defendants’ activities.

The Supreme Court also reversed the 2002 acquittal of Ilija Maričić, finding that the Zadar County Court had improperly disregarded testimony on the basis of which six *in absentia* co-accused were found guilty. According to the Supreme Court, the trial court had given improper weight to the fact that Maričić’s family included ethnic Croats and he remained in Croatia during “Operation Storm.” The trial court was ordered to take into account the testimony and confront Maričić with incriminating allegations. However, re-trial was not possible due to death of accused.

### **c. Procedural errors**

The Supreme Court reversed the 2003 *in absentia* conviction of Momir Pupovac and Branko Bota, finding that the Zadar County Court failed to adjudicate the case in its entirety.<sup>179</sup> The accused were subjects of two indictments – one issued by Croatian authorities, the other by authorities of the Republika Srpska Krajina (RSK) - charging

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<sup>175</sup> RH v. Boško Macura, 15.11.2006, I Kž 194/03-3.

<sup>176</sup> The Supreme Court found that the inconsistency was only related to “the identity of the accused person, not to the identity of the perpetrator of the relevant offence.” (*Sic.*)

<sup>177</sup> RH v. Nikola Cvjetičanin, 21.12.2006, I Kž 423/05-3.

<sup>178</sup> RH v. Stojan Vujic and Dobrivoje Pavkovic, 12.10.2006, I Kz-790/04-5.

<sup>179</sup> RH v. Momir Pupovac and Branko Bota, 12.10.2006, I Kž 1112/03-3. Article 367, para. 1, point 7, CPC provides that “A substantive violation of criminal procedure exists if (...) the court by its judgment did not completely decide on allegations set forth in the charge.”

them with different crimes.<sup>180</sup> The trial court validated all evidence and decisions of the RSK court, but failed to require the state attorney to address the RSK indictment, either by incorporating or dropping the RSK charges.<sup>181</sup> The trial court based its decision solely on the charges in the Croatian indictment, leaving the RSK indictment unaddressed but nonetheless in force.

**d. *In absentia* trials and assessing command authority**

Appeals from *in absentia* verdicts continued to constitute a significant part of the Supreme Court's docket. In 2006 the Supreme Court also became increasingly involved in determining whether new *in absentia* trials should go forward. The Supreme Court reversed decisions allowing *in absentia* trials to proceed where it determined that the Vukovar County Court failed to take all steps possible to ensure the presence of the defendants at the trial.<sup>182</sup> Namely, the trial court failed to determine whether international arrest warrants had been issued or warrants had been issued only shortly prior to the decision to proceed *in absentia*. However, where the Supreme Court judged that adequate measures had been taken or adequate time had elapsed, it upheld the decision to proceed *in absentia*.<sup>183</sup> In 2006, the Supreme Court confirmed that for persons previously convicted *in absentia*, a request to be re-tried in person cannot be made from outside the country, but can only be made by and granted to an individual who is in Croatia.<sup>184</sup> In April 2007, the Supreme Court ordered the Zadar County Court to assess whether evidence that a person previously convicted *in absentia* was elsewhere at the time of the crimes was sufficient to warrant a new trial.<sup>185</sup> In May, the Zadar County Court rejected the evidence as insufficient and denied a new trial because the individual is not in Croatia and Bosnia and Herzegovina refused to extradite her.<sup>186</sup>

Most war crimes appeals involved rank-and-file combatants. However, in two cases, the Supreme Court addressed the requirements for establishing that an accused was a commander for purposes of direct responsibility as well as command

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<sup>180</sup> The Croatian indictment charged the defendants with war crimes against civilians, while the RSK indictment charged them with common crimes of murder and robbery.

<sup>181</sup> Decree on Implementation of the Law on Convalidation in Judicial Matters (NN 51/98).

<sup>182</sup> RH v. Petar Rasic et al., 13.12.2006, I Kz 879/05-3; see also RH v. Milan Ostojic et al. ('Sotin') I Kz 61/07-3, 05.04. 2007 (Vukovar County Court did not exhaust all means to ensure the presence of the defendants at trial. International arrest warrants were issued only one day before the decision to conduct an *in absentia* trial. Since some absent defendants attended investigative hearings and allegedly moved to Serbia afterwards, the trial court should have tried to locate their actual residence through diplomatic channels in order to send them the summons. Since two defendants were awaiting trial in detention since May 2006, the Supreme Court suggested the trial court consider other options, such as separating the proceedings against the two detained defendants or granting them provisional release. The Supreme Court dismissed the prosecution's appeal contending that the right to fair trial would be violated by conducting an *in absentia* trial..).

<sup>183</sup> RH v. Bogdan Kuzmic, Kv-289/06-7, 03.01.2007, Supreme Court affirmed I Kz 91/07-3.

<sup>184</sup> RH v. Milenko Cancarevic, 11.07.2006, I Kz 264/06-3 (rejected request for new trial lodged by person convicted *in absentia* of murder on the grounds that the applicant who resided in Serbia did not meet the requirement in Article 412, CPC, of being available to the Croatian judiciary.

<sup>185</sup> I Kz 1053/05-3, 27.04.2007. Edita Raden Potkonjak together with 17 others, was convicted *in absentia* in 1995 of the murders of more than forty Croat civilians in Škabrnja and sentenced to 15 years imprisonment. The Croatian State Attorney supported Potkonjak's request that a review of the evidence be granted.

<sup>186</sup> II Kv 148/07, 14.05.2007.

responsibility.<sup>187</sup> The Supreme Court held that for purposes of establishing responsibility for ordering others to commit crimes, it was sufficient to prove that Tihomir Drajić was a *de facto* commander, regardless of whether he was a *de jure* commander. Similarly, the Supreme Court upheld an acquittal based on the Zadar County Court's finding that although Milenko Radak was a *de jure* commander, he lacked *de facto* command powers during the crimes in Škabrnja and lacked actual and effective control of his subordinates.<sup>188</sup> Hence, he could not be held accountable on the basis of command responsibility for failing to prevent crimes committed by his subordinates. These examples demonstrate that for the Supreme Court *de facto* command authority is determinative of criminal responsibility, whereas *de jure* command is largely irrelevant.

#### **IV. WITNESSES: RELIABILITY OF TESTIMONY, SECURITY AND SUPPORT**

As in prior years, witness testimony constituted the main form of evidence in war crimes investigations and trials in 2006. Further indication of the key role of witness testimony is that most decisions by the Supreme Court in response to appeals related to the trial court's evaluation of testimony, in particular inconsistencies [see Section C.III.3 above]. Hence, the importance of creating conditions, which permit and ensure that witnesses provide reliable information and can testify in security and confidence at all stages of the criminal proceeding cannot be over-stated. At the same time, it remains essential that the judiciary ensure fair trial by adequately testing the reliability of witness identification of the accused and knowledge of specific facts relevant to the accountability of the accused, avoiding situations in which witnesses are influenced in their testimony by other witnesses or others.

Efforts to create adequate conditions need to proceed along several tracks. First, a politically supportive environment should be created in which witnesses and victims feel able to come forward. This is particularly necessary for witnesses to crimes committed by members of the Croatian armed forces. Prosecutors have often met a "wall of silence" when investigating such crimes. Second, the legal framework related to investigations needs to be clarified to maintain their integrity, including witness testimony, and courts should have and use the tools to enforce confidentiality. Third, support services for witnesses should be expanded. Adoption of legal provisions approving the use of video-link should facilitate the participation of witnesses who reside outside Croatia.

Given the passage of time and aging of witnesses, preservation of witness testimony is important. But the use of *in absentia* trials for this purpose is questionable, not only in terms of due process for the accused, but also in terms of its impact on victims and witnesses. *In absentia* proceedings as well as the significant error rate by trial courts results in numerous re-trials, which put a particular burden on witnesses who must testify multiple times to traumatic events. Contrary to the view of at least part of the judiciary which appears to believe it is in the public interest to conduct *in absentia* proceedings, a significant proportion of witnesses do not find these proceedings cathartic, but rather a further victimization or injustice. As noted by a Croatian NGO, the victims view this type of "justice" as "a new injustice ... which purpose is not to

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<sup>187</sup> RH v. Tihomir Drajić, 09.5.2006, I Kž 616/04-6.

<sup>188</sup> RH v. Milenko Radak, 11.04. 2006, I Kž 1197/04-6.

establish the truth and accountability of the perpetrators but serve the purposes of specific political and ideological goals, or the attorney's offices' and courts' statistics."<sup>189</sup>

Witnesses frequently provide different versions of events when asked to testify multiple times, potentially compromising the value of their testimony. In particular, the reliability of testimony given in *in absentia* proceedings comes into question, as witnesses frequently change their testimony when faced with the accused. *In absentia* proceedings are not necessary to preserve testimony as witness statements provided during the judicial investigation can be used during trial, under certain conditions, including if witnesses have died or are otherwise unavailable.<sup>190</sup> Greater progress in inter-state co-operation is also a key solution to facilitating witnesses testifying in the presence of the accused, either in their home state or the state of the accused.

As in past years, the Mission observed instances in which witnesses summoned to testify failed to appear before the court and/or refused to cooperate with police who tried to bring them to court.<sup>191</sup> On the other hand, the Mission also observed repeated instances in which witnesses were summonsed to testify at trial, but had no information relevant to the proceeding.<sup>192</sup>

## **1. Use of 'special war crimes courts' and detention**

Similar to past years, most investigations and trials were conducted where the war crimes occurred. For the first time in mid-May 2006, the Supreme Court transferred a case to a special war crimes court due to concerns expressed by the Chief State Attorney about witness intimidation in the local court. The Supreme Court transferred the investigation against Branimir Glavaš in the 'Garage case' to the ZCC from the Osijek County Court – itself a special war crimes court. The ZCC also subsequently ordered Glavaš detained during the investigation to avoid witness tampering. In late 2005, persons cooperating with prosecutors in this case were identified during a press conference by MP Anto Djapić in Osijek. Although an investigation into Djapić's release of names was initiated, to date there has been no outcome. The father of the crown witness Fehir held a press conference in 2005 revealing his son's role in providing information to investigators.

## **2. Quasi-confidentiality of judicial investigations**

By law, a judicial investigation is not a public proceeding, with participation limited to the parties and witnesses.<sup>193</sup> Although closed to the public, it appears that investigations are not confidential as a matter of law and the parties are at liberty to

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<sup>189</sup> 2006 Annual Report on Monitoring War Crimes Trial in the Republic of Croatia for 2006, p.10.

<sup>190</sup> Article 331, CPC.

<sup>191</sup> E.g., In the 'Lovas' case, during a hearing in May 2006, only one of five witnesses called to testify appeared at the court.

<sup>192</sup> E.g., RH v. Rade Miljevic, at the hearing before the Sisak County Court on 11.12.2006, five witnesses who lacked direct knowledge about the crimes were called before the court; RH v. Radoslav Cubrilo, of 16 witnesses called by the Rijeka County Court some were not present at the time of the alleged crimes or others while present saw neither the crimes nor accused. Most were able only to testify to hearsay from others or media reports.

<sup>193</sup> Article 198, CPC specifies those who can be present during investigative hearings: the suspect, defence counsel, prosecutor, victim, and witnesses.

publicly reveal information. For example, at the beginning of the ZCC's investigation in the 'Garage case,' Branimir Glavaš commented on and disseminated on a regular basis to the media and on the Internet court documents, testimony and evidence obtained during the investigation. Several persons named in these documents reported to the police that they had subsequently been subject to harassment and pressure. Court personnel also identified witnesses to the media. After several weeks, the ZCC issued an order providing that all information obtained during the investigation should remain confidential. The OCC issued a similar confidentiality order. The scope of the confidentiality orders remained unclear, however, and apparently allowed some public discussion of the investigation by the parties. Defense counsel in the 'Garage case' publicly commented on the lack of incriminating testimony and released information about witnesses intended to discredit their testimony, e.g., that a witness was serving a 13-year prison sentence, which ultimately led to a witness being identified in the media.

In December 2006, defense counsel in the 'Sellotape case' publicly commented that a witness testified during the investigation that a police officer was trying to bribe him in return for testimony against the accused. Criminal charges were subsequently filed by the Osijek Municipal State Attorney's office against the defense attorney for revealing information in violation of the OCC's confidentiality order.<sup>194</sup> To date, there has been no decision.

The Glavaš investigations demonstrate the need for clear rules about the confidentiality of investigative proceedings, which through adequate and enforceable safeguards for witnesses ensure the effectiveness and integrity of the proceedings, while protecting the fair trial rights of the accused.

### **3. Inappropriate conduct toward witnesses – lack of court response**

The Mission has observed instances in which the court failed to ensure an adequate regard for witnesses. The Sibenik County Court continued a witness' testimony for six hours – with only two five-minute breaks – despite visible indications that the witness was exhausted.<sup>195</sup> In this same case, the Presiding Judge repeatedly interrupted witnesses' testimony, either finishing their answers for them or hitting the bench, and dictating the minutes while questions were being posed to the witnesses.

### **4. Witness support should be expanded**

The need for witness support is now widely acknowledged by the judiciary and the Ministry of Justice. The legal and organizational framework, methodology, and funding remains to be further developed. The Witness Support Unit established in the Ministry of Justice in 2005 has a staff of three. In addition to assisting witnesses involved in inter-state cases, the Unit provided assistance to some witnesses in cases ongoing in local courts. Given the limited staff resources and the large number of cases ongoing throughout the country, the need for additional resources is apparent.

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<sup>194</sup> Article 305(1) of the Criminal Code sanctions unauthorized disclosures of confidential information from proceedings.

<sup>195</sup> RH v. Milan Atlija & Djordje Jaramaz.

In early 2006, two pilot projects for victim support services funded by the United Kingdom in the Vukovar and Sisak County Courts were initiated. While not specifically targeted at war crimes proceedings, witnesses in these proceedings have received assistance. By year's end, it appeared that only the Vukovar County Court witness service was operational, largely due to the personal engagement of the Court President. In early 2007, the UK hosted a roundtable together with the Ministry of Justice to assess the pilot projects and discuss possible steps forward in institutionalizing such services. Wide support was expressed by the participants, concrete follow-up remains to be further specified. A waiting room for witnesses was established in the Osijek County Court in April 2007 and the Ministry of Justice has held trainings for volunteers to provide support services in several courts.

In late 2006/early 2007, the United Nations Development Program (UNDP) conducted a survey of judges and witnesses to gain a better understanding of the experience and needs of witnesses for purposes of proposing recommendations for the development of an institutionalized witness support service.

## **V. DEFENSE COUNSEL – FAIR TRIAL CONCERNS – EQUALITY OF ARMS AND ADEQUATE REPRESENTATION**

Similar to 2005, in 2006 the vast majority of war crimes defendants on trial - 73 per cent - were represented by court-appointed defence counsel<sup>196</sup> whose services were financed from the State budget.<sup>197</sup> The appointment of counsel, while necessary, does not by itself fulfil the State's obligation to provide indigent defendants with representation. Because that representation must be effective, it is relevant to assess the method and standards for appointment, the performance of court-appointed attorneys, and supervision by the appointing courts. Most war crimes defendants represented by court-appointed counsel are tried *in absentia* and are Serbs. Hence, the adequacy of defense provided by court-appointed counsel is also linked to fairness on the basis of national origin. Alternatives exist for some members of the Croatian armed forces who cannot afford to fund their own defense, which enable them to retain private counsel.<sup>198</sup>

In 2006, 68 per cent of those represented by court-appointed counsel were Serbs<sup>199</sup> and the majority of those – again 68 per cent – were tried *in absentia*.<sup>200</sup> Further, of

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<sup>196</sup> Of 90 accused on trial in 2006, 66 were represented by court-appointed (45 Serbs, 12 Croats, 9 others) and 24 by private counsel (19 Serbs, 5 Croats).

<sup>197</sup> Pursuant to guidelines established by the Ministry of Justice, lawyers appointed to represent those accused of serious felonies, including war crimes, are compensated at approximately fifty per cent or less of the standard fees fixed by the Croatian Bar Association. See Article 18, Law on Attorneys (NN 9/94); Article 2, Item 1, point 4 Ministry of Justice Rulebook on Fees for Court-Appointed Defense Counsel (NN 3/05); Tariff of Fees and Reimbursement of Costs for the Work of Attorneys of the Croatian Bar Association (NN 91/04).

<sup>198</sup> E.g., The defense for Rahim Ademi, indicted as a commander of the Croatian armed forces for war crimes against Serb civilians, will reportedly be funded by an association established to defend Croatian ICTY indictees, the Foundation for the Truth about the Homeland War. During the recent trial of Mihajlo Hrastov, a police officer tried three times for killing 13 JNA soldiers, the Mayor of Karlovac offered financial assistance.

<sup>199</sup> Of 66 defendants represented by court-appointed defense counsel, 45 were Serbs. Nine defendants of other ethnic groups (8 Ruthenians, 1 Roma) tried with Serbs also had court appointed counsel in RH v. Jugoslav Misljenovic et al. ('Miklusevci') [Vukovar County Court]. Twelve Croats had court-appointed counsel.



those represented by court-appointed counsel, approximately 60 per cent shared their attorney with between one and four other co-accused.<sup>201</sup> As in 2005, this phenomenon of shared representation was primarily present in two trials ongoing in the Vukovar County Court with six attorneys representing 14 defendants and seven attorneys representing 26 defendants.<sup>202</sup> The ability of a single attorney to adequately represent the individual interests of multiple accused in the same case, including *in absentia* defendants with whom s/he has no contact, is questionable. Such multiple representation raises questions of conflict of interest in the attorney's duty of loyalty to each client.<sup>203</sup> The significant rate of exoneration after re-trial in person of accused previously convicted *in absentia* also raises questions *inter alia* about the effectiveness of defense provided in *in absentia* proceedings.

Trial courts appoint attorneys in war crimes cases – including those few that have been tried before the special war crimes courts - according to the procedure used in all serious felony cases, i.e., from a list of attorneys registered within the court's territorial jurisdiction. Given observed deficits in representation provided by some court-appointed counsel as well as the specialized nature of war crimes proceedings, the Mission as well as the EC delegation and ICTY Liaison Office have proposed that the Ministry of Justice adopt minimum experience and/or training requirements for court-appointed counsel. The Ministry of Justice rejected that proposal on the grounds that all members of the Croatian Bar Association were deemed qualified to provide representation. The Ministry indicated that voluntary training was the only feasible solution to address concerns about the adequacy of court-appointed counsel.

In 2006, at least one trial court removed a court-appointed defense counsel after the defendant expressly complained about the inadequacy of the representation provided.<sup>204</sup> While defendants should be active in assisting with their own defense, it is unclear whether defendants, particularly those who may be intimidated by the proceeding or poorly educated, will feel either capable or at liberty to point out the failings of their attorney and ask for a replacement. The court, both at the time of appointment as well as during the proceedings, should remain active as required by law in assessing whether the appointed lawyer is providing an adequate defense.<sup>205</sup> On occasion, delays were observed in the court's appointment of counsel, including for defendants present in the court, with the result that trial had to be postponed.<sup>206</sup>

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<sup>200</sup> Of 66 represented by court-appointed counsel, 45 (35 Serbs, 6 Croats, 3 Ruthenians, and 1 Roma) were tried *in absentia*.

<sup>201</sup> Of 66 represented by court-appointed counsel, 40 had counsel who represented other co-accused.

<sup>202</sup> RH v. Ljuban Devetak et al. ('Lovas'); RH v. Jugoslav Misljenovic et al. ('Miklusevci').

<sup>203</sup> Defendants can share a lawyer but only when they are charged with different offences or where joint representation is not contrary to the interests of their defence. Article 63 (1), CPC. The Attorney's Code of Ethics permits multiple representation in criminal cases only to the extent that such representation does not create a conflict of interest, see e.g., Sections 47 - 57-71 (NN 64/07).

<sup>204</sup> Fred Margus submitted a written request for appointment of another defense counsel given the inactivity of the first counsel appointed. The Osijek County Court granted the request, appointing a different counsel the next day. RH v. Fred Margus and Tomislav Dilber.

<sup>205</sup> The court is obligated to ensure that an adequate legal defence is provided and to take steps where representation is insufficient, including dismissal of appointed counsel. Article 67, para 4, CPC. The Court President can dismiss a defence counsel who is not performing his/her duties properly and appoint substitute counsel. The Bar Association is to be notified of the dismissal.

<sup>206</sup> E.g., RH v. Marko Loncarevic ('Dalj' group) [Osijek County Court].

In trials ongoing in 2006, the Mission observed irregularities in the representation provided by some court-appointed defence counsel, while other counsel performed professionally. Trial courts largely failed to either respond to or sanction unprofessional conduct by court-appointed defense attorneys, but allowed the representation to continue arguably to the detriment of the accused. Trials were postponed due to a court-appointed attorney's failure to appear for trial.<sup>207</sup> Court-appointed counsel were passive during trial, tardy or left the courtroom during the trial,<sup>208</sup> sent a trainee to replace them during trial,<sup>209</sup> or failed to appear for trial at all,<sup>210</sup> leaving the defendants unrepresented during the ongoing trial, which the court did not postpone. After serving as appointed counsel for 9 months, an attorney asked to withdraw due to a conflict of interest which had existed from the outset, which request was granted.<sup>211</sup> Finally, the appointed lawyer for one Serb defendant used his closing argument to blame his client for creating the "Serbian imperialistic ideology" of which Croats were victims during the war. Although the presiding judge advised the lawyer that he was working for the defence and not the prosecution, it is reasonable to presume that the attorney provided little defense during the trial, which preceded his closing statement, after which his client was convicted *in absentia* for the third time and awarded the maximum sentence of 20 years.<sup>212</sup>

In late October 2006 the American Bar Association – Central European Law Initiative (ABA-CEELI) in cooperation with the OSCE – Office for Democratic Institutions and Human Rights (OSCE-ODIHR) organized a seminar for approximately 40 attorneys from Croatia, BiH and Serbia, most of whom had significant experience in representing war crimes defendants. Topics included access to and admissibility of evidence, equality of arms between the prosecution and defence, education, and the need for legislative reforms. Several Croatian attorneys suggested that legal reform was needed in order to preserve equality of arms including better financing for the defence so that it could conduct its own investigation, better access to evidence, in particular confidential documents, and more time to prepare the defence. The attorneys agreed that Bar Associations should be more active in facilitating inter-state cooperation and providing specialized training.

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<sup>207</sup> E.g., RH v. Radivoj Ivkovic and Dusan Ivkovic [Vukovar County Court]. Ex-officio lawyer absent without justification during one hearing (postponed) and absent during most of the prior hearing.

<sup>208</sup> E.g., RH v. Jugoslav Misljenovic ('Miklusevci') [Vukovar County Court] (presiding judge began hearings although appointed lawyers Vojislav Ore, representing 4 defendants (2 *in absentia*, 2 present) and Biserka Treneski, representing 3 *in absentia* defendants, were absent for approximately 20 minutes); RH v. Djordje Jaramaz and Milan Atlija [Sibenik County Court] (Jaramaz's ex-officio appointed attorney left the courtroom during the trial).

<sup>209</sup> E.g., RH v. Jugoslav Misljenovic ('Miklusevci') [Vukovar County Court] (appointed counsel Stjepan Sporic, who represents two present and two *in absentia* defendants sent a trainee to replace him at multiple court hearings in 2006 and early 2007).

<sup>210</sup> E.g., RH v. Jugoslav Misljenovic ('Miklusevci') [Vukovar County Court] (appointed lawyer Zlatko Jaric, who represents five *in absentia* Serb defendants failed to appear for the hearing on 13 November 2006, which took place as scheduled; appointed counsel Biserka Treneski who represents three *in absentia* defendants failed to appear for a hearing on 17 January 2006; appointed counsel Andrej Georgijevski, who represents 2 present and 3 *in absentia* defendants failed to appear for a hearing in early 2007).

<sup>211</sup> RH v. Fred Margus and Tomislav Dilber [Osijek County Court]. Court appointed counsel had represented the 2 defendants 10 years earlier. The Panel granted the request and appointed a new lawyer.

<sup>212</sup> RH v. Stevo Macakanja et al. [Zadar County Court]. The defense attorney representing Stevo Macakanja during closing arguments on 4 October 2006.

At least one attorney received threats associated with his representation of a Serb war crimes defendant. In December 2006, the attorney for Rade Miljevic, on trial for war crimes in the Sisak County Court, received an anonymous letter threatening his life and that of his family if he continued to represent “the Chetnik.” While reported to the police, there has to date been no outcome.

## APPENDICES

### APPENDIX I

#### WAR CRIME ARRESTS IN 2006 BY JURISDICTION: 27

Court	Croats	Serbs	Others
Gospic County Court	0	4	0
Osijek County Court	7	1	0
Sibenik County Court	0	2	0
Sisak County Court	0	2	0
Vukovar County Court	6	4	1
<b>TOTAL</b>	<b>13</b>	<b>13</b>	<b>1</b>

Suspects were arrested for the following crimes:

- War crimes against civilian population: 22 individuals (13 Croats, 8 Serbs, 1 Bosniak)
- War crimes against prisoners of war: 5 individuals (5 Serbs, 1 of them also arrested for war crimes against civilian population)
- Genocide: 1 individual (Serb)

#### Arrests in third Countries 2006: 11

COUNTRY	Serb	Croat	Others
Australia	1	0	0
Belgium	1	0	0
Bosnia and Herzegovina	2	0	0
Bulgaria	1	0	0
Greece	2	0	0
Norway	1	0	0
Russia	1	0	0
Serbia	1	0	0
United Kingdom	1	0	0
<b>TOTAL</b>	<b>11</b>	<b>0</b>	<b>0</b>

#### Extraditions to Croatia from third Countries 2006: 2

COUNTRY	Serb	Croat	Others
Bulgaria	1	0	0
United States	1	0	0
<b>TOTAL</b>	<b>2</b>	<b>0</b>	<b>0</b>

## APPENDIX II

### RELEASES IN 2006 BY JURISDICTION: 4

Court	Croats	Serbs	Other
Gospic County Court	0	1	0
Slavonski Brod County Court	0	1	0
Vukovar County Court	0	1	0
Zagreb County Court	1	0	0
<b>TOTAL</b>	<b>1</b>	<b>3</b>	<b>0</b>

4 individuals spent the following amount of time in detention:

Duration of detention in Croatia:

- Less than 1 month: 2 individuals (Serbs) (1 of them also spent more than three months detained in a third country).
- 1 to 3 months: 2 individuals (1 Serb, 1 Croat)

Duration of detention in a third country:

- 3 to 6 months: 1 individual (Serb)

### APPENDIX III

#### INDICTMENTS IN 2006 BY JURISDICTION: 12

Court	Croat	Serb	Others	Cases
Osijek County Court	3 (1 in absentia)	1 (in absentia)	0	2
Sibenik County Court	0	2	0	1
Sisak County Court	0	3 (1 in absentia)	0	2
Vukovar County Court	5	55 (48 in absentia)	0	6
Zagreb County Court	1	0	1	1
<b>TOTAL</b>	<b>9 (1 in absentia)</b>	<b>61 (50 in absentia)</b>	<b>1</b>	<b>12</b>

- *War crimes against civilian population*: 67 individuals (58 Serbs, 8 Croats, 1 Albanian)
- *War crimes against prisoners of war*: 1 individual (Serb)
- Both *War crimes against civilian population* and *War crimes against prisoners of war*: 3 individuals ( 1 Serb, 1 Croat, and 1 Albanian)

**APPENDIX IV**  
**TRIALS & RE-TRIALS IN 2006 BY JURISDICTION**  
**TRIALS ONGOING/PENDING IN 2006: 23**

Court	Croat	Serb	Other	Cases
Bjelovar County Court	2	0	0	1
Karlovac County Court	1	1	0	2
Osijek County Court	3	7	0	4
Rijeka County Court	0	5 <i>in absentia</i>	0	1
Sibenik County Court	0	2	0	1
Sisak County Court	0	5 (1 <i>in absentia</i> )	0	4
Split County Court	8 (4 <i>in absentia</i> )	1	0	2
Vukovar County Court	3 <i>in absentia</i>	38 (27 <i>in absentia</i> )	9 (4 <i>in absentia</i> )	6
Zadar County Court	0	5 (4 <i>in absentia</i> )	0	2
<b>TOTAL</b>	<b>17 (7 <i>in absentia</i>)</b>	<b>64 (37 <i>in absentia</i>)</b>	<b>9 (4 <i>in absentia</i>)</b>	<b>23</b>

**TRIALS COMPLETED IN 2006: 9**

Court	Croat	Serb	Other	Cases
Bjelovar County Court	2	0	0	1
Karlovac County Court	0	1	0	1
Osijek County Court	1	8	0	2
Sisak County Court	0	3 (1 <i>in absentia</i> )	0	2
Split County Court	8 (4 <i>in absentia</i> )	0	0	1
Zadar County Court	0	5 (4 <i>in absentia</i> )	0	2
<b>TOTAL</b>	<b>11 (4 <i>in absentia</i>)</b>	<b>17 (5 <i>in absentia</i>)</b>	<b>0</b>	<b>9</b>

**Note:** In four (4) of the 23 ongoing/pending trials in 2006, hearings had began in 2003, 2004 and 2006 and had thereafter been adjourned. After prolonged recesses, hearings recommenced and during 2006:

RH v. Fred Margus and Tomislav Dilber [Osijek County Court], recess of 3.5 months.

RH v. Ljuban Devetak (“Lovas”) [Vukovar County Court], recess of 7 months.

RH v. Jugoslav Misljenovic (“Miklusevci”) [Vukovar County Court], recess of 11 months.

RH v. Tomislav Duic (“Lora”) [Split County Court], recess of 12 months.

**RE-TRIALS ONGOING IN 2006: 10**

Court	Croat	Serb	Other	Cases
Bjelovar County Court	2	0	0	1
Karlovac County Court	1	0	0	1
Osijek County Court	1	6	0	2
Rijeka County Court	0	5 <i>in absentia</i>	0	1
Split County Court	8 (4 <i>in absentia</i> )	1	0	2
Sisak County Court	0	1	0	1
Zadar County Court	0	5 (4 <i>in absentia</i> )	0	2
<b>TOTAL</b>	<b>12 (4 <i>in absentia</i>)</b>	<b>18 (9 <i>in absentia</i>)</b>	<b>0</b>	<b>10</b>

**RE-TRIALS COMPLETED IN 2006: 5**

Court	Croat	Serb	Other	Cases
Bjelovar County Court	2	0	0	1
Osijek County Court	0	6	0	1
Split County Court	8 (4 <i>in absentia</i> )	0	0	1
Zadar County Court	0	5 (4 <i>in absentia</i> )	0	2
<b>TOTAL</b>	<b>10 (4 <i>in absentia</i>)</b>	<b>11 (4 <i>in absentia</i>)</b>	<b>0</b>	<b>5</b>

**THE 9 CASES MONITORED IN 2006 WERE COMPLETED WITHIN THE FOLLOWING TIME PERIODS:**

Less than 1 month: 1 trial involving 2 individuals (Sisak 2)  
1 to 6 months: 6 trials involving 19 individuals (Bjelovar 2; Karlovac 1; Osijek 6; Sisak 1; Zadar 1; Split 8)  
6 to 12 months: 2 trials involving 7 individuals (Zadar 4; Osijek 3)



## APPENDIX V

### CONVICTIONS AND SENTENCES 2006 BY JURISDICTION: 16

Court	Croat	Serb	Others
Karlovac County Court	0	1	0
Osijek County Court	0	1	0
Sisak County Court	0	3 (1 <i>in absentia</i> )	0
Split County Court	8 (4 <i>in absentia</i> )	0	0
Zadar County Court	0	3 (2 <i>in absentia</i> )	0
<b>TOTAL</b>	<b>8 (4 <i>in absentia</i>)</b>	<b>8 (3 <i>in absentia</i>)</b>	<b>0</b>

Sentence (years)	Croat	Serb	Others
1-4	0	1	0
5-9	8	3	0
10-14	0	1	0
15-20	0	3	0
<b>TOTAL</b>	<b>8</b>	<b>8</b>	<b>0</b>

Convictions were as follows:

- War crimes against civilians: 16 individuals (8 Serbs, 8 Croats)

## APPENDIX VI

### ACQUITTALS IN 2006 BY JURISDICTION: 4

Court	Croat	Serb	Others
Bjelovar County Court	2	0	0
Zadar County Court	0	2	
<b>TOTAL</b>	<b>2</b>	<b>2</b>	<b>0</b>

## APPENDIX VII

### DISMISSALS IN 2006 BY JURISDICTION: 8

#### *Dismissals by verdict:*

Court	Croat	Serb	Others
Osijek County Court	0	5	0
<b>TOTAL</b>	<b>0</b>	<b>5</b>	<b>0</b>

In RH v. Nikola Alaica et al. ("Baranja II"), the Prosecution re-qualified the charges into armed rebellion for 5 out of 6 accused. The Court then issued a dismissal verdict against them.

#### *Dismissals by decision:*

Court	Croat	Serb	Others
Osijek County Court	1	2	0
<b>TOTAL</b>	<b>1</b>	<b>2</b>	<b>0</b>

In RH v. Vaso Petrovic et al. ("Baranja III"), the Prosecution re-qualified the charges into armed rebellion against 3 present accused. The Court then terminated proceedings against 2 Serbs and 1 Croat.

## APPENDIX VIII

### APPEALS PENDING IN 2006 BY JURISDICTION:

#### ALL PENDING APPEALS: 117

Court	Croat	Serb	Other	Cases
Bjelovar County Court	2	5	0	5
Gospic County Court	0	2	0	2
Karlovac County Court	0	2	0	2
Osijek County Court	2 <i>in absentia</i>	22 (15 <i>in absentia</i> )	1 <i>in absentia</i>	6
Sibenik County Court	5	4	0	6
Sisak County Court	2	4 (1 <i>in absentia</i> )	0	4
Slavonski Brod County Court	0	2	0	2
Split County Court	8 (4 <i>in absentia</i> )	0	0	1
Vukovar County Court	2 (1 <i>in absentia</i> )	18 (8 <i>in absentia</i> )	1	5
Virovitica County Court	0	1	0	1
Varazdin County Court	4	0	0	1
Zadar County Court	1	27 (20 <i>in absentia</i> )	1 <i>in absentia</i>	10
Zagreb County Court	0	1	0	1
<b>TOTAL</b>	<b>26 (7 <i>in absentia</i>)</b>	<b>88 (44 <i>in absentia</i>)</b>	<b>3 (2 <i>in absentia</i>)</b>	<b>46</b>

#### DECIDED APPEALS IN 2006: 56

Court	Croat	Serb	Other	Cases
Bjelovar County Court	0	4 (2 <i>conf'd</i> ; 2 <i>rev'd</i> )	0	3
Karlovac County Court	0	1 ( <i>conf'd</i> )	0	1
Gospic County Court	0	1 ( <i>rev'd</i> )	0	1
Osijek County Court	0	10 (9 <i>rev'd</i> ) ( <i>in absentia</i> ) (1 <i>conf'd</i> )	1 ( <i>rev'd</i> ) ( <i>in absentia</i> )	2
Sibenik County Court	1 ( <i>conf'd</i> )	3 (1 <i>rev'd</i> ) (2 <i>conf'd</i> )	0	4
Sisak County Court	0	1 ( <i>conf'd</i> )	0	1
Slavonski Brod County Court	0	1 ( <i>conf'd</i> )	0	1
Vukovar County Court	1 ( <i>rev'd</i> )	12 ( <i>conf'd</i> ) (3 <i>in absentia</i> )	1 ( <i>rev'd</i> )	3
Zadar County Court	0	17 (14 <i>conf'd</i> ) (3 <i>rev'd</i> ) (15 <i>in absentia</i> )	1 ( <i>conf'd</i> ) ( <i>in absentia</i> )	6
Zagreb County Court	0	1 ( <i>conf'd</i> )	0	1
<b>TOTAL</b>	<b>2</b>	<b>51 (27 <i>in absentia</i>)</b>	<b>3 (2 <i>in absentia</i>)</b>	<b>23</b>

The verdicts issued by the Supreme Court were issued within the following time periods following the submission of an appeal:

- 1 to 6 months: 4 cases involving 9 individuals (Sisak 1; Vukovar 6; Karlovac 1; Zagreb 1)
- 6 months to 1 year: 1 case involving 1 individual (Osijek 1)
- 18 months to 2 years: 5 cases involving 6 individuals (Gospic 1; Zadar 3; Sibenik1; Bjelovar 1)
- 25 months to 2 ½ years : 3 cases involving 7 individuals (Zadar 4; Sibenik 1; Bjelovar 2)
- 31 months to 3 ½ years: 2 cases involving 4 individuals (Zadar 4)
- 43 to 47 months: 5 cases involving 15 individuals (Slavonski Brod 1; Bjelovar 1; Vukovar 2; Sibenik 1; Osijek 10)
- 4 years to 52 months: 3 cases involving 14 individual (Sibenik 1, Zadar 7, Vukovar 6)

**APPENDIX IX**  
**War Crimes Comparative Data from 2002-2006:**

	2006	2005	2004	2003	2002
<b>Arrests</b>	27 (13 Serbs, 13 Croats)	10 (8 Serbs, 2 Croats)	30 (25 Serbs, 5 Croats)	37 (31 Serbs, 5 Croats, 1 Hungarian)	35 (28 Serbs, 6 Croats, 1 Macedonian)
<b>Releases</b>	4 (3 Serbs, 1 Croat)	6 (all Serbs)	32 (29 Serbs, 3 Croats)	30 (25 Serbs, 5 Croats)	51 (29 Serbs, 20 Croats, 1 Bosniak, 1 Macedonian)
<b>Indictments</b>	69 (60 Serbs, 8 Croats, 1 Albanian)	23 (all Serbs)	3 (all Serbs)	53 (48 Serbs, 4 Croats, 1 Hungarian)	32 (19 Serbs, 13 Croats)
<b>Trials monitored</b>	23 trials (9 County Courts)	18 trials (11 County Courts)	34 trials (10 County Courts)	34 trials (11 County Courts)	34 trials (12 County Courts)
<b>Individuals monitored</b>	90 individuals (64 Serbs, 17 Croats, 8 Ruthenians, 1 Roma, )	77 individuals (46 Serbs, 21 Croats, 5 Ruthenians, 1 Roma, 4 of unknown ethnic origin)	108 individuals (83 Serbs, 13 Croats, 7 Ruthenians, 1 Hungarian, 1 Roma, 3 of unknown ethnic origin)	101 individuals (85 Serbs, 14 Croats, 1 Bosniak, 1 Roma)	115 individuals (90 Serbs, 22 Croats, 2 Bosniaks, 1 Hungarian)
<b>Trials conducted in absentia</b>	2 trials (9 Serbs)	1 trial (1 Serb)	3 trials (16 Serbs)	8 trials (27 Serbs, 1 Croat, and 1 Bosniak)	3 trials (28 Serbs, 1 Hungarian)
<b>Overall conviction rate</b>	80 % (based on 20 verdicts)	67 % (based on 18 verdicts)	71 % (based on 42 verdicts)	90 % (based on 41 verdicts)	67 % (based on 77 verdicts)
<b>Individual convictions</b>	50 % of Serbs, 50 % of Croats	85 % of Serbs, 20 % of Croats	75 % of Serbs, 25 % of Croats	94 % of Serbs, 71 % of Croats	83 % of Serbs, 18 % of Croats
<b>Serbs convicted in absentia</b>	Approximately 37.5 %	36 %	50 %	90 %	60 %
<b>Sentences lower than the legally prescribed minimum of 5 years</b>	6.25 % of sentences	10 % of sentences	53 % of sentences	5 % of sentences	25 % of sentences
<b>Average sentences prescribed</b>	8.5 years (based on 16 convictions)	8.5 years (based on 18 convictions)	5.5 years (based on 42 convictions)	9 years (based on 37 convictions)	9.5 years (based on 52 convictions)

<b>Rate of exoneration upon re-trial of previously convicted individuals</b>	69 %	55 %	66 %	33 %	55 %
<b>Appeals monitored</b>	46 cases (88 Serbs, 26 Croats, 2 Bosniaks, 1 Hungarian)	48 cases (92 Serbs, 18 Croats, 3 Bosniaks, 2 Hungarians, 1 Montenegrin)	40 cases (74 Serbs, 28 Croats, 3 Bosniaks, 1 Hungarian, 1 Roma)	35 cases (53 Serbs, 26 Croats, 2 Bosniaks, 1 Hungarian, 1 Roma)	33 cases (65 Serbs, 15 Croats)
<b>Appeals concluded</b>	23 cases (51 Serbs, 2 Croats, 2 Bosniaks, 1 Hungarian)	13 cases (21 Serbs, 2 Croats, 1 Bosniak, 1 Hungarian, 1 Montenegrin).	13 cases (9 Serbs, 17 Croats, 1 Bosniak, 1 Roma)	15 cases (22 Serbs, 5 Croats, 1 Hungarian)	9 cases (18 Serbs, 2 Croats)
<b>Supreme Court reversal rate of County Court Decisions</b>	35 % (based on 56 verdicts)	65 % (based on 26 verdicts)	55 % (based on 13 verdicts)	50 % (based on 15 verdicts)	95 % (based on 9 verdicts)