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MISSION IN KOSOVO**

**Department of Human Rights and Rule of Law
Legal Systems Monitoring Section**

**Kosovo's War Crimes Trials:
A Review**

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GLOSSARY

ADoJ	Administrative Department of Justice
AJC	Advisory Judicial Commission
DOJ	Department of Justice
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EJC	Emergency Justice System
FRY	Federal Republic of Yugoslavia
FRY CC	Federal Republic of Yugoslavia Criminal Code
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
HRRoL	Department of Human Rights and Rule of Law
ICCPR	International Covenant on Civil and Political Rights
ICTY	International Criminal Tribunal for the former Yugoslavia
ICTR	International Criminal Tribunal for Rwanda
JAC	Joint Advisory Council on Judicial Appointments
JIU	Judicial Inspection Unit
KFOR	Kosovo Force
KWECC	Kosovo War and Ethnic Crimes Court
LSMS	Legal Systems Monitoring Section
NATO	North Alliance Treaty Organisation
OSCE	Organization for Security and Co-operation in Europe
SRSG	Special Representative of the Secretary-General
TAC	Technical Advisory Committee on Judiciary and Prosecution Service
UNMIK	United Nations Interim Administration Mission in Kosovo

UN SCR	United Nations Security Council Resolution
1 st Geneva Convention	Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, 12 August 1949
2 nd Geneva Convention	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of the Armed Forces at Sea, 12 August 1949
4 th Geneva Convention	Geneva Convention relative to the Protection of Civilian Persons in Time of War, 12 August 1949
Protocol 1	Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts, 8 June 1977
Protocol 2	Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of Non-International Armed Conflicts, 8 June 1977
Genocide Convention	Convention on the Prevention and Punishment of the Crime of Genocide, 9 December 1948

EXECUTIVE SUMMARY

I. MANDATE

The Legal Systems Monitoring Section (LSMS) is part of the Human Rights and Rule of Law Department of United Nations Interim Administration Mission in Kosovo (UNMIK) Pillar III (Organization for Security and Co-operation in Europe – OSCE). For the past two years, LSMS has exercised its mandate to monitor the justice system in Kosovo towards promoting its compliance with domestic and international human rights standards, and towards recommending sustainable solutions to ensure that these standards are met. The LSMS monitoring functions have been fulfilled from an objective standpoint, pursuing an overall strategy that has mainly targeted two essential aspects: first, the legal framework must be compliant with human rights standards, and, second, the courts must consistently apply and observe the guarantees and standards provided for in the applicable legislation.

II. PUBLIC REPORTING

Pursuing its mandate, LSMS has consistently prepared and released public reports¹ on the criminal justice system, which have aimed at assisting the relevant authorities in the area of justice in their task of reforming and ensuring the compliance of the judicial system with standards of fair trial and due process. In a sustainable effort to develop its reporting capacities, the LSMS reports are placing an emphasis on issues and areas of concern, which are symptomatic for the judicial system in its entirety. Accordingly, LSMS currently focuses and reports on general trends that represent violations of international human rights instruments or breaches of the rule of law. These trends or systemic issues of concern are analysed exhaustively, so that any eventual recommendation, once implemented, would lead to an effective and comprehensive reform of the respective area and not just to provisional solutions.

LSMS has so far issued two types of public reports: periodic reports (the bi-annual Reviews of the Criminal Justice System) and special reports. The latter category has addressed specific areas on which LSMS focused its capacities and that mandated, at a particular time, the emphasis and scrutiny of both the public and the professional legal community, local and international, present in Kosovo.

III. SCOPE

This special report presents a comprehensive overview of all the cases in which acts of war crimes and genocide against the civilian population, as defined by the applicable law in Kosovo, have been charged or prosecuted by the court system established under the United Nations Interim Administration Mission in Kosovo (UNMIK) after June 1999. It represents the first complete survey of prosecutions for violations of international humanitarian law that have taken place in this court system. These trials are of crucial

¹ Reports are available on the OSCE web-site: www.osce.org/kosovo/documents/reports/justice

importance for the evolution of the society in Kosovo towards reconciliation and acknowledgement of the truth. However, public information about the manner in which these trials have been conducted and about the verdicts has so far been scarce and inconsistent, leaving both the public and most part of the local and international legal community with an incomplete image of the materials and processes of these cases.

The report comes, therefore, to fill in the lack of information and analysis related to the war crimes trials in Kosovo. The scope of this overview is twofold. First, it sets out a thorough account of the judicial proceedings that have been conducted. Second, it examines and analyses the indictments, trials, verdicts, and appellate judgements. The analysis is based on the applicable law in Kosovo that is relevant for the subject matter of the cases, but it also places the trials and judgements in the broader context of other international humanitarian law jurisprudence, as developed by various national jurisdictions and by the international criminal courts for Rwanda (ICTR) and Former Yugoslavia (ICTY).

IV. CONCLUDING REMARKS

The findings and analysis provided in this report lead to a set of conclusions with respect to the performance of the judiciary in Kosovo in the war crimes prosecutions and trials. These conclusions refer both to the judicial officials involved in these cases and also to the judicial system and its administrators. With respect to the latter, the conclusions have a recommending nature and are aimed at ensuring that proper support and resources are allocated to the courts dealing with such cases. By addressing these issues, war crimes jurisprudence in Kosovo may attain higher levels of professionalism, coherence and overall legal quality, and thus fulfil its ultimate scope of promoting truth and reconciliation in Kosovo.

- **The indictment** in any criminal case represents the legal instrument putting an accused on notice as to the charges against him or her, and the factual bases for those charges; therefore, indictments should be clearly and specifically drawn. Not only does a well-organised and specific indictment enable an accused to prepare his or her defence more effectively, it is also critical to a successful prosecution. The importance of clearly structured indictments is especially important in complex cases alleging numerous different victims and criminal acts over a substantial period of time, such as is the situation in many war crimes prosecutions.
- **Trial court verdicts** in war crimes cases should reflect high standards of jurisprudence. The verdicts in cases of this nature are expected to be structurally consistent and accompanied by solid legal reasoning. The universal character of these crimes and the public attention that they usually attract means that the verdicts are regarded as a body of legal opinions, which, by virtue of their quality, may form sound jurisprudence aimed at guiding or providing reference during subsequent similar trials or to legal professionals interested in researching such cases. Furthermore, considering that the court panels hearing these cases have mostly been composed of international judges, the standards of legal writing and argumentation should be even higher.

- The **Supreme Court** has, in any legal system, a leading role in ensuring and promoting the highest standards of legal interpretation and legal reasoning, with the ultimate scope of guiding the practice of all the other courts in its jurisdiction. Providing in-depth analysis and citations to relevant cases or other authorities in Supreme Court decisions would help local judges, prosecutors, and attorneys increase their capacity for understanding the legal issues involved in war crimes trials. It would also render the judgements more persuasive. Lastly, such judgements could help establish the basis for a dynamic, critical, independent jurisprudence of Kosovo courts.
- In order for the prosecutors and judges involved in investigating and trying war crimes cases to be able to provide sound and in-depth legal analysis, accompanied by extensive research into relevant practice at international level, there is a strong need for appropriate **allocation of resources** to these cases. Such prosecutors and judges should be provided with a professional team of legal researchers and analysts, capable of a substantial legal contribution to the written indictments and verdicts in these cases.
- Most of the war crimes verdicts in Kosovo have been based on arguments related to credibility of witnesses, stemming from discrepancies among statements given by the same witnesses at various stages of the investigation or trial. Due to this significant emphasis on the consistency of the witnesses' statements, and also taking into account the length of the proceedings in these cases, courts in Kosovo should adopt, in all war crimes cases, the solution of **verbatim records**. This way, statements and remarks made at various phases of the trial would be accurately reflected in the official record of the case, eliminating any subsequent arguments on whether discrepancies between statements are due to recording inaccuracies or to the substance of the statement itself.

SECTION I. METHODOLOGY AND INSTITUTIONAL BACKGROUND

I. METHODOLOGY

The present report is based on information collected during direct monitoring by LSMS of all war crimes cases investigated and tried by the courts in Kosovo. LSMS was in a position to review all the court files in these cases and also to effectively sit in and observe all the proceedings conducted during the main trial phase and also during the appeal procedures in front of the Supreme Court. The legal analysis of the materials and processes in these cases is based on the actual indictments, trial verdicts and Supreme Court decisions, which have been available to LSMS.

Throughout this report, the cases that are the subject of analysis are generically referred to as “war crimes cases”. This generic denomination is intended only to be descriptive, as it covers not only cases of war crimes against civilian population, as defined in the applicable law in Kosovo (Art. 142 Criminal Code of Federal Republic of Yugoslavia - FRY CC), but also other cases that have been charged under Chapter 16 of FRY CC on “Criminal Acts against Humanity and International Law”. Furthermore, this report will also include in its overview cases where individual counts of murder or other offences, such as destruction of property, plunder, theft, bodily injuries, were prosecuted outside the framework of Chapter 16 FRY CC. These latter cases are relevant for the manner in which the courts have assessed the factual circumstances during the armed conflict and the manner in which this assessment lead to different mechanisms and grounds for drawing up the indictments.

The cases reviewed in this report involve acts that are alleged or proven to have occurred between May 1998 and June 1999 in the course of the armed conflict then on-going in Kosovo. Prosecutions for those offences began on 5 November 1999, when the first indictment was issued, and continues to the present. The courts handling these criminal trials have been composed either of members of the local judiciary and prosecution or international judges and prosecutors appointed to office within the Kosovo judicial system. For a better understanding of the various compositions of the court panels involved in trying war crimes cases, this report will provide a brief background on the evolution of the court system in Kosovo under UNMIK’s administration, with an emphasis on the determining factor and the role of international judges’ and prosecutors’ involvement in such cases.

In terms of the case assessment method used in the following sections, this report will first present a description of the procedural stages of all the cases under analysis, and then will proceed to assess the substantial legal aspects related to the investigation, prosecution, trial and re-trial. The analysis will focus on individual cases that have raised the most relevant issues in terms of identifying and defining elements of criminal responsibility, assessing the evidence of the case, or interpreting the relevant legal provisions applicable to a specific case. It will also provide collective assessments and analysis of features and legal aspects that are common for more than one individual case.

Quotes from the war crimes verdicts or indictments are used throughout the report. Since the local courts in Kosovo do not use a uniformed system of denominating the cases and a common lay out of the verdicts (with numbered section, paragraphs, etc.), these quotes will only be introduced by the name of the case, as given by the defendant's name, without any other explanatory footnote reference.

II. BACKGROUND AND DEVELOPMENT OF THE JUSTICE SYSTEM IN KOSOVO AND ITS RELEVANCE TO WAR CRIMES CASES

When UNMIK arrived in Kosovo in June 1999 after the armed conflict and the NATO bombing campaign, there was no functioning justice system in place. The Joint Advisory Council on Provisional Judicial Appointments (JAC) was established by the Special Representative of the Secretary-General (SRSG) on 28 June 1999 to recommend the provisional appointment of judges and prosecutors for an emergency justice system (EJS). By decision of the SRSG, JAC was dissolved on 7 September 1999 and replaced by the Advisory Judicial Commission (AJC), which began its activity on 27 October 1999. After a selection and appointment procedure, by June 2000, a regular and functional court system with regard to criminal cases had been put in place throughout Kosovo.

Despite the successful reestablishment of the justice system in less than one year and in spite of extensive efforts to further develop the justice system, a series of concerns were still unresolved. The low level of participation of minority community members - particularly Kosovo Serbs – in the justice system, in combination with the long and continuing climate of ethnic conflict, had given rise to much concern of actual or perceived bias towards the Serb community. This became a particularly acute issue with regard to the capacity of the local judiciary to properly and impartially investigate and try cases involving minority community members implicated in crimes committed during the armed conflict, between autumn 1998 and spring 1999.

Aiming at addressing concerns of ethnic bias in such war crimes cases or, more generally, in all inter-ethnic violence cases, and also in response to public unrest and violence in Mitrovicë/Mitrovica in February 2000, the SRSG passed UNMIK Regulation 2000/6 providing for the appointment of an international judge and an international prosecutor to Mitrovicë/Mitrovica.² On 29 May 2000, following pressure from hunger strikers in Mitrovicë/Mitrovica, the majority of whom were Kosovo Serb detainees investigated or awaiting trials for war crimes, the SRSG passed UNMIK Regulation 2000/34 that extended the power to appoint international judges and prosecutors to the whole territory of Kosovo.³

These initial appointments of international personnel to the courts did help to alleviate some concerns with respect to impartiality. However, given the limited number of such

² UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and Prosecutors, 15 February 2000.

³ UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors, 29 May 2000.

international judges and the restricted scope of their powers, the appointments failed to completely address impartiality concerns and resulted in differential treatment of similar cases. Defendants that had been charged with war crimes or ethnically motivated crimes of a similar nature and seriousness were tried before panels of varying composition. Some were composed of all Kosovo Albanian judges, while others included one international judge. Furthermore, district court trial panels composed under the domestic law consisted of two professional judges and three lay judges;⁴ verdicts were by majority and each judge carried an equal vote.⁵ The equal distribution of voting powers to all judges severely reduced the impact that the international judge might have had upon a potential verdict motivated by ethnic bias. In this regard, the role played by the first international judges was insufficient to remedy the lack of an objective appearance of impartiality in trials involving allegations of serious war crimes.

A further and significant step to address these concerns was taken with the promulgation, on 15 December 2000, of UNMIK Regulation 2000/64.⁶ Envisaged as a remedy against suspicions of potential ethnic bias, the Regulation granted competent prosecutors, the accused or defence counsels the right to petition the Administrative Department of Justice (ADoJ)⁷ for the assignment of international judges and prosecutors or a change of venue where this would be “*necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.*” In the absence of a petition, ADoJ/DOJ might also act on its own motion.⁸ In both circumstances, the ADoJ/DOJ would file a recommendation to the SRSG, who would then decide on assigning a prosecutor or a panel of majority international judges to a specific case.

After the enactment of the above-mentioned Regulation, all cases of war crimes have been held in front of courts composed of majority international judges, while prosecution has mostly been undertaken by international prosecutors.

⁴ Article 23 FRY CPC.

⁵ Article 116 FRY CPC.

⁶ For a further discussion regarding UNMIK Regulation 2000/64, see the second OSCE Review of the Criminal Justice System, 1 September 2000 – 28 February 2001, p. 75 ff.

⁷ Currently, under the structure of UNMIK Pillar I, the Department of Justice (DOJ) is fulfilling the mandate envisaged in UNMIK Regulation 2000/64.

⁸ UNMIK Regulation 2000/64, section 1(2).

SECTION II. CASE SUMMARIES

This section will present a comprehensive account of the course of the proceedings in all the cases that fall within the scope of this report. A total of 17 cases are presented in the report, and they represent all the war crimes trials that had been held up to the end of June 2002. All these cases were directly monitored by OSCE. The cases listed below appear in order of their indictment date.⁹

DRAGAN NIKOLIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Gjilan/Gnjilane

Case history:

First trial

Indictment date: 5 November 1999
Indictment charge: *Murder*, KCC 30
Prosecutor: local
Panel composition: all local
Verdict: convicted of *Murder*, KCC 30

Appellate court proceedings

Prosecutor: local (prosecutor did not appear at oral arguments before the Supreme Court)
Panel composition: all international
Judgement: conviction reversed

Retrial

Prosecutor: international
Panel composition: majority international
Verdict: acquitted

The indictment against *Dragon Nikolic* alleged that on 5 April 1999 he, along with a group of seven other Serb military and police personnel armed with automatic weapons, entered the residence of a Kosovo Albanian family, ordered the family outside, demanded money and weapons, and then took one of the male family members aside and shot the victim to death.

⁹ Kosovo courts do not have a system of clocking in (date-and-time stamping) documents when they are filed. Neither is there a regular procedure for judges to indicate in writing on pleadings what date they are received. The only date a document in a court file normally contains is that indicated by its author. Therefore, the dates given in this section concerning when indictments were filed are based on the dates the prosecutors listed on the documents themselves. This does not necessarily correspond to the date the indictments were received by the court. Also, the date appearing on written verdicts or judgements is the date on which the court rendered its oral decision from the bench, even though the written verdicts are often issued weeks or months later.

The trial of Nikolic took place between 18 May 2000 and 3 July 2000. Nikolic presented a defence of alibi. The panel convicted him as charged and sentenced him to 12 years 6 months imprisonment.

Upon defence appeal, on 9 April 2001 the Supreme Court quashed the conviction and remanded the case back for retrial on the basis of (1) incorrect and insufficient findings of fact, and (2) refusal of the trial court to hear proposed Serb and Croat defence witnesses.

The retrial began on 12 September 2001 in front of a majority international panel. Nikolic maintained his defence of alibi. The panel found him not guilty on 18 April 2002.

LULZIM ADEMI

Defendant's ethnic group: Kosovo Albanian
Court: District Court Mitrovicë/Mitrovica

Case history

Trial

Indictment date: 23 November 1999

Indictment charges: *War Crimes*, FRY CC 142; *Murder*, KCC 30(2); *Illegal weapons possession*, KCC 199(3)

Prosecutor: local

Panel composition: majority local

Verdict: convicted of *War Crimes* and *Illegal weapons possession*; acquitted of *Murder*

Interlocutory appellate proceedings

Panel composition: all local

Decision: trial court's decision to try defendant *in absentia* affirmed

The indictment against *Lulzim Ademi* alleged, as to the war crimes charge, that on four specific dates in April and May 1999, while deployed as a paramilitary, Ademi had participated with paramilitary forces in expelling citizens from their houses, setting fire to houses, and killing 12 people. As to the murder charge, the indictment alleged that on 26 January 1999 the defendant, along with three unknown people, had kidnapped and killed an adult male. As to the unlawful weapons possession charge, the indictment alleged that on 11 July 1999 Ademi possessed, in his residence, two automatic rifles, two handguns, a variety of ammunition, and a grenade.

Ademi was in custody from 11 July 1999 to 24 February 2000, when he escaped from detention. The trial court decided, on 3 July 2000, to try the defendant *in absentia*, pursuant to FRY CPC 300. The defence attorney appealed this ruling, but in a decision on 12 July 2000, the Supreme Court ruled that the trial could proceed in the defendant's absence.

The panel conducted the trial of Ademi between July 3 and August 30, 2000. Ademi's attorneys raised the defences of lack of identification of the defendant, alibi, and

insufficient evidence. On 30 August 2000, the panel found Ademi guilty of war crimes and illegal possession of weapons, and acquitted him of the murder charge. The panel sentenced Ademi to 20 years imprisonment.

Neither the prosecutor nor the defendant appealed the verdict or the sentence. Ademi's whereabouts remain, to date, unknown.

MIROSLAV VUCKOVIC and BOZUR BISEVAC

Defendant Vuckovic's ethnic group: Kosovo Serb

Defendant Bisevac's ethnic group: Kosovo Serb

Court: District Court Mitrovicë/Mitrovica

Case history:

First trial (of Vuckovic and Bisevac)

Indictment date: 29 November 1999

Initial indictment: *Genocide*, FRY CC 141

Prosecutor: local

Panel composition: majority local

Verdict: Vuckovic convicted of *Genocide*

Appellate court proceedings (for Vuckovic)

Prosecutor: local prosecutor superseded by international prosecutor

Panel composition: majority international

Judgement: conviction reversed

Retrial (of Vuckovic)

First amended indictment: *War Crimes*, FRY CC 142

Prosecutor: international

Panel composition: majority international

Trial status: ongoing

The initial indictment against **Miroslav Vuckovic and Bozur Bisevac** alleged that in the period between 22 March 1999 through the beginning of May 1999, the defendants, "with the intention to displace [the] Albanian population with coercion and intention to completely or partly destroy [the] Albanian community", set fire to residences, shot at villagers to force them to flee their homes, and confiscated property. According to the indictment, one elderly villager who was inside her home and unable to flee at the time the defendants set fire to it, burned to death.

The trial began on 6 June 2000. In August 2000 Bisevac escaped from detention, but the panel continued to conduct his trial *in absentia*. On 12 January 2001 UNMIK Regulation 2001/1, prohibiting trials *in absentia* for serious violations of international humanitarian law, came into force, and the court abandoned the prosecution of defendant Bisevac.

During the trial, defendant Vuckovic presented a defence of alibi. On 18 January 2001 the panel found Vuckovic guilty as charged of genocide and sentenced him to 14 years imprisonment.

Upon the defence appeal, the Supreme Court, on 9 April 2001, reversed the verdict on the grounds that (1) the facts established at the trial did not support a conviction for genocide, (2) the trial court had incorrectly assessed the evidence, and (3) the trial court had refused to hear proposed defence witnesses.

The retrial of the case began on 4 January 2002. At the beginning of the retrial the international prosecutor filed an amended indictment charging Vuckovic with war crimes. The trial is ongoing; Vuckovic denies the charges alleged in the indictment, and is presumed innocent until proven guilty.

JUVENILE Z

Juvenile's ethnic group: Kosovo Serb
Court: District Court Mitrovicë/Mitrovica

Case history:

Trial

Indictment date: 23 December 1999

Indictment charge: Genocide, FRY CC 142

Prosecutor: local prosecutor (filed the initial pleading) superseded by international prosecutor

Panel composition: all local

Amended indictment (filed by international prosecutor): *Causing general danger*, KCC 157; *Grave acts against general security*, KCC 164

Decision: adjudicated in need of educational measures

Appellate court proceedings

Prosecutor: local (prosecutor did not appear at Supreme Court proceedings)

Panel composition: all local

Judgement: trial court decision and sentence affirmed

The Proposal for the Pronouncement of Educational Measures (the equivalent, for juvenile offenders, of an indictment), alleged that from the end of March until May 1999, Juvenile Z, a 15 year old Serb male, had, in complicity with an adult and "with the intention of displacement of the Albanians and to destroy them partly or generally", threatened home owners and then burned down approximately 100 houses.

The trial began on 15 August 2000. Evidence included statements made by the juvenile to KFOR investigators. In his first statement to investigators, the juvenile admitted to burning down three houses, and to being present when an adult accomplice burned down 30 more houses. In the second statement to investigators, the juvenile claimed that his previous statement had been induced by a promise that he would be released from detention if he confessed.

On 13 September 2000, the panel adjudged Juvenile Z in need of corrective educational measures. Although both the international public prosecutor and the defence attorney recommended to the court that the juvenile be released from custody, the panel sentenced him to a juvenile correctional facility for 1 to 5 years.

Upon defence appeal, on 8 March 2001 an all local panel of the Supreme Court affirmed the trial court verdict.

ZVEZDAN SIMIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Mitrovicë/Mitrovica

Case history:

Trial

Indictment date: 26 January 2000

Indictment charges: *Murder*, KCC 30; *Illegal weapons possession*, KCC 199

Prosecutor: local

Panel composition: majority local

Verdict: convicted of *Murder*, KCC 30, and *Illegal weapons possession*, KCC 199

Appellate court proceedings

Prosecutor: local

Panel composition: majority international

Judgement: conviction affirmed; prosecutor's appeal for increased sentence granted

The indictment against *Zvezdan Simic* alleged that on 27 September 1998, he was a member of a uniformed group of military and police forces which entered a village and set fire to it in order to frighten the villagers into fleeing. It further alleged that the defendant, along with two other individuals in police uniforms, upon seeing a Kosovo Albanian male and his elderly mother, confronted them and shot them to death. Finally, the indictment stated that on 29 July 1999, the French Gendarmerie searched Simic's residence and found there a large cache of weapons and ammunition.

The trial of Zvezdan Simic took place from 1 through 9 August 2000. Simic relied on a defence of alibi with respect to the murder charge, and, with respect to the weapons charge, claimed that some of the weapons found in his residence belonged to other family members, and that the ones that were his he used only for hunting or for self-defence. The panel found Simic guilty as charged, and sentenced him to 8 years 4 months imprisonment.

On 6 June 2001 a majority international panel of the Supreme Court affirmed the defendant's conviction, and granted the prosecutor's appeal to increase the defendant's sentence to an integrated term of 12 years.

MILOS JOKIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Gjilan/Gnjilane

Case History:

First trial

Indictment date: 25 February 2000
Initial indictment charge: *Genocide*, FRY CC 141
Prosecutor: local
Panel composition: majority local
First amended indictment: allegation of rape included within *Genocide* charge
Verdict: Convicted of *War crimes*, FRY CC 142

Appellate court proceedings

Prosecutor: local
Panel composition: majority international
Judgement: conviction reversed

Retrial

Second amended indictment charge: *War crimes*, FRY CC 142
Prosecutor: international
Panel composition: majority international
Verdict: Acquitted on all counts

Milos Jokic was indicted on one count of genocide on 25 February 2000 in the Gjilan/Gnjilane District Court. The indictment alleged that the following acts of Jokic constituted genocide: (1) On 8 May 1999 Jokic, along with nine paramilitaries, fired automatic weapons into the air, causing panic that ultimately led to the expulsion of 2000 inhabitants of the village of Verban; (2) On 9 May 1999 Jokic used an automatic rifle to kill a Kosovo Albanian male; (3) On 15 April 1999 Jokic ordered a paramilitary group member to execute a Kosovo Albanian male, and (4) On 30 May 1999, Jokic raped a Kosovo Albanian female.

The trial of Jokic took place in Gjilan/Gnjilane District Court, between 15 May and 20 September 2000, before a majority local panel (with one international judge), and with a local public prosecutor. On the first day of trial the prosecutor filed an amended indictment which included an allegation of rape of a Kosovo Albanian female. Jokic presented a defence of alibi. The panel convicted Jokic of war crimes, FRY CC 142, and sentenced him to twenty years imprisonment.

Upon defence appeal, on 26 April 2001 the Supreme Court reversed the conviction on two grounds: (1) The trial court had wrongly and insufficiently established facts, and (2) Serb witnesses who had not attended the first trial needed to be heard. The case was remanded back to the Gjilan/Gnjilane District Court.

A majority international panel and an international prosecutor handled the retrial of the case. The defendant maintained his alibi defence during the retrial. On 3 May 2002, the panel found Jokic not guilty on all counts.

AGIM AJETI and BOZIDAR STOJANOVIC

Defendant Ajeti's ethnic group: Kosovo Roma
Defendant Stojanovic's ethnic group: Kosovo Serb
Court: District Court Gjilan/Gnjilane

Case history:

First trial

Indictment date: 28 February 2000
Initial indictment: *Murder, KCC 30*
Prosecutor: local
Panel composition: majority local
Verdict: convicted of *Murder, KCC 30*

Appellate proceedings

Prosecutor: local
Panel composition: majority international
Judgement: conviction reversed

Retrial (for Stojanovic only)

Prosecutor: international
Panel composition: majority international
Trial status: ongoing

The indictments against ***Agim Ajeti and Bozidar Stojanovic*** alleged that on 15 April 1999 the defendants were members of a group of Serb paramilitaries who entered a village, evicted residents from their homes, and separated the men from the women. The indictments go on to state that the defendants took one Albanian male aside, bayoneted him, then clubbed him to death.

The trial of Ajeti and Stojanovic took place between 7 July and 9 October 2000 (Ajeti was tried *in absentia*, and was represented by defence counsel throughout the proceedings). Both defendants raised a defence of alibi and insufficient evidence. The panel convicted Ajeti and Stojanovic as charged of murder. They sentenced Ajeti to 10 years imprisonment and Stojanovic to 16 years imprisonment.

Upon defence appeal, the Supreme Court, on 29 November 2001, reversed the convictions on the following grounds: (1) the trial court did not sufficiently establish the facts; (2) defence witnesses living in Serbia were not called (here the Supreme Court cited ECHR article 6(3)); (3) documentation presented by the defence was not admitted; (4) the trial court failed to clarify contradictions in testimony of witnesses and of the defendants. The Supreme Court also implied, without stating, that UNMIK Regulation 2001/1 now prohibited defendant Ajeti from being tried *in absentia*.

On 30 May 2002 a majority international trial panel decided that it would not retry Ajeti *in absentia*. The same panel began the trial of Stojanovic, and the proceedings are ongoing. Stojanovic denies the charges, and is presumed innocent until proven guilty.

ZORAN STANOJEVIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Prishtinë/Priština

Case History:

Trial

Indictment date: 9 May 2000

Initial indictment charge: *Murder*, KCC article 30(1) (one count)

Prosecutor: indictment filed by local prosecutor; trial proceedings conducted by international prosecutor

Panel composition: majority international

Additional indictment: *Attempted murder*, KCC 30(1) and FRY CC 19 (two counts)

Verdict: guilty as charged

Appellate proceedings

Prosecutor: international

Panel composition: majority international

Judgement: verdict and sentence affirmed

The indictment against *Zoran Stanojevic* alleged that on 15 January 1999, he was a member of a group of FRY Ministry of Interior police officers who participated in the shooting of civilians as they were attempting to flee from the village of Racak/Recak.

The trial, initially scheduled in July 2000, was postponed because witnesses did not appear. The trial finally began before a majority international panel on 6 January 2001. On 6 February 2001 an attorney representing two injured parties, acting as a private prosecutor, filed an indictment charging Stanojevic with two additional counts of attempted murder (these two counts arose out of the same incident as the initial indictment). The court consolidated the two indictments for trial.

Stanojevic presented primarily a defence of alibi. However, his defence attorney also argued that, even assuming the prosecution witnesses were credible, the case should have been charged as war crimes instead of murder, and that Stanojevic, as a low ranking soldier, was not liable for crimes committed by the state.

On 18 June 2001 the panel found the defendant guilty as charged of one count of murder and two counts of attempted murder, and sentenced him to 15 years imprisonment.

On 18 January 2002, a majority international panel of the Supreme Court affirmed the verdict and sentence.

**IGOR SIMIC, DRAGAN JOVANOVIC, SRDJAN AND VLASTIMIR ALEKSIC,
TOMISLAV VUCKOVIC, and BRANISLAV POPOVIC**

Defendants' ethnic group: all Kosovo Serb
Court: District Court Mitrovicë/Mitrovica

Case history (for Igor Simic only):

Trial

Indictment date: 20 June 2000
Indictment charge: *Genocide*, FRY CC 141
Prosecutor: initially local, superseded by international
Panel composition: majority local
Disposition: Prosecution abandoned by international prosecutor

An indictment dated 20 June 2000 charged *Igor Simic, Dragan Jovanovic, Srdjan Aleksic, Tomislav Vuckovic, Vlastimir Aleksic, and Branislav Popovic* with genocide. The indictment alleged that, with the intent "to completely or partially destroy or displace the Albanian community out of Mitrovica (sic), and by this out of Kosovo" (1) on 14 April 1999 all six defendants, while armed and wearing camouflage uniforms, killed 26 Kosovo Albanian civilians; (2) between March and May 1999, defendants Jovanovic and Vuckovic had forcibly evicted Kosovo Albanians from their homes and business, and had then looted and burned the properties; (3) on 22 May 1999, defendant Jovanovic had evicted civilians, confiscated valuables from them, and then had set their houses on fire; and (4) on 15 June 1999 Jovanovic, along with two other unknown accomplices, had shot and killed an Albanian couple in their home, and then had set their house on fire.

In August 2000 defendants Dragan Jovanovic, Srdjan and Vlastimir Aleksic, Tomislav Vuckovic, and Branislav Popovic escaped from the Mitrovicë/Mitrovica Detention Centre. They were not tried, either in person or *in absentia*.

On 5 December 2000 the trial of Simic began before a majority local panel and with an international prosecutor. Simic raised the defence of alibi. On 10 April 2001 the international prosecutor filed a statement notifying the panel that he was abandoning the prosecution. The international prosecutor's notice to the panel asserted that the evidence was not sufficient to prove that Simic had committed any prosecutable crime on 14 April 1999.

CEDOMIR JOVANOVIC and ANDJELKO KOLASINAC

Defendant Jovanovic's ethnic group: Kosovo Serb
Defendant Kolasinac's ethnic group: Kosovo Serb
Court: District Court Prizren

Case history:

First trial

Indictment date: 7 August 2000

Indictment charge: *War Crimes*, FRY CC 142

Prosecutor: local (filed indictment) superseded by international

Panel composition: all international

Verdict: Defendant Jovanovic found guilty of *War Crimes*, FRY CC 142;

Defendant Kolasinac found guilty of *Giving Help to the Offender after the Commission of the Criminal Act*, KCC 174(1) and (3)

Appellate court proceedings

Panel composition: majority international

Prosecutor: local

Judgement: Verdict and sentence in case of defendant Jovanovic affirmed

Verdict in case of defendant Kolasinac reversed

Retrial (of defendant Kolasinac)

Trial status: trial not yet begun

An indictment dated 7 August 2000 charged ***Cedomir Jovanovic, Andjelko Kolasinac, Nenad Matic, Vakoslav Simic, Arsenije Vitoshevic, Stanislav Levic, Radosav Misic, and Novica Krsic*** with war crimes against the civilian population.

Concerning Kolasinac, the indictment alleged that between July 1998 and May 1999 while acting as President of the Municipal Assembly and Head of the Civil Defence Unit, he (1) failed to prevent unlawful acts of killing, kidnappings, burnings, and deportations by military and police forces; (2) took part in massacres in three villages; (3) conducted registration drives of civilians for the purpose of conducting future deportations of Kosovo Albanians; (4) was responsible for deportations and expulsions of civilians; (5) organised forced labour contingents of Kosovo Albanians; (6) engaged in maltreatment of a villager by beating him and appropriating his truck; and (7) requested Serb military and police forces come to assist in protecting the Serbs in his community, knowing that the requested forces would commit criminal acts.

Concerning Jovanovic, the indictment alleged that, while acting as a member of the paramilitary group, he (1) participated in a massacre of 62 civilians on 25 March 1999 (2) ordered deportations of civilians, and then burned and looted their houses; and (3) beat Albanians on a bus and killed a child.

Six of the original eight defendants escaped from custody, leaving only Kolasinac and Jovanovic to face trial.

The trial began on 2 May 2001 before an all international panel and with an international prosecutor. Kolasinac presented a defence of insufficient evidence, lack of intent to commit war crimes, and lack of legal or factual authority over police and military forces that committed the alleged war crimes. Jovanovic raised a defence of alibi. On 14 June 2001, the panel convicted Jovanovic as charged and sentenced him to 20 years imprisonment. On the same date, the panel convicted Kolasinac of Giving Help to the Offender after the Commission of a Criminal Act, and sentenced him to 5 years imprisonment.

On 2 November 2001, a majority international panel of the Supreme Court affirmed the conviction of Jovanovic, and reversed the conviction of Kolasinac. The Supreme Court agreed with the appeal of the local public prosecutor that the trial panel had erred by (1) wrongly assessing testimony on the issue of forced labour; (2) wrongly assessing evidence concerning “the order that [the defendant] gave and/or received from other police or military authorities” on the issue of looting and destruction of property; and (3) wrongly assessing the consequences of two registration drives initiated by the defendant, and wrongly evaluating their possible connection to criminal acts.

The retrial of Kolasinac has not yet begun. Kolasinac denies the charges, and is presumed innocent until proven guilty.

RADOVAN APOSTOLOVIC, BOZUR BISEVAC, MICKA KRAGOVIC, BOGOLJUB JEVTIC, and LJUBISA SIMIC

Defendants’ ethnic group: all Kosovo Serb
Court: District Court Mitrovicë/Mitrovica

Case history

Trial

Indictment date: 8 September 2000

Initial indictment charge: *War Crimes*, FRY CC 142

Prosecutor: initially local, superseded by international

Panel composition: majority international

First amended indictment (against Radovan Apostolovic only): *Causing General Danger by Burning*, KCC 157 (one count); *Damaging Another Person’s Object*, KCC 145 (one count); *Aggravated Theft*, KCC 135 (one count)

Second amended indictment: (against Radovan Apostolovic only): *Aggravated Theft*, KCC 135 (one count)

Verdict: defendant Apostolovic acquitted

An indictment dated 8 September 2000 charged ***Radovan Apostolovic, Bozur Bisevac, Micka Kragovic, Bogoljub Jevtic, and Ljubisa Simic*** with one count of war crimes against the civilian population. The indictment alleged that in March and April 1999, the five defendants, all dressed in various military, police and paramilitary uniforms, looted property of Kosovo Albanians who had fled out of fear of the Serb military and police forces. Specifically, the indictment stated that the defendants stole a large quantity of candles, one ton of potatoes, two vehicles, tractors, a cow, and miscellaneous personal property from a warehouse and from residences, and then had burned down the houses of the victims.

Defendants Bisevac, Kragovic, Jevtic, and Simic escaped from custody in the Mitrovicë/Mitrovica prison shortly before the local prosecutor filed the initial indictment. These four were not tried, either in person or *in absentia*.

The trial against defendant Apostolovic began on 10 April 2001. Apostolovic's defence was that of alibi. On 13 July 2001 the international prosecutor amended the indictment, abandoning the war crimes charge and alleging instead Causing General Danger by Burning, Damaging Another's Object, and Aggravated Theft. On 28 January 2002, the international prosecutor again amended the indictment, this time alleging only that the defendant committed the crime of Aggravated Theft. On that same day the panel found Apostolovic not guilty.

SAVA MATIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Prizren

Case history

First trial

Indictment date: 11 September 2000
Indictment charge: *War Crimes*, FRY CC 142
Prosecutor: local
Panel composition: majority international
Verdict: *Light bodily injury*, KCC 39(2)

Appellate court proceedings

Prosecutor: local (prosecutor did not appear at Supreme Court proceedings)
Panel composition: all international
Judgement: conviction reversed

Retrial

Prosecutor: local
Panel composition: all international
Verdict: acquitted

The indictment against *Sava Matic* stated that between 23 March and 12 June 1999, he had obeyed orders to attack unprotected civilian populations and to commit various other [unspecified] acts of torture, terror, hostage taking, illegal detention, involvement in forced labour, property destruction, and robbery. Further, the indictment alleged that on 26 March 1999 Matic obeyed orders to take part in the killing of 42 civilians from one village, and to participate in beatings and physical and psychological ill-treatment of people from another village.

The trial began on 22 January 2001. Matic's defence was that of alibi. He admitted that he had been mobilised and assigned to guard the bus station, the hotel, and the main street during the NATO bombing, but denied knowledge of or participation in the crimes alleged.

On 29 January 2001, the trial panel found the defendant guilty of light bodily injury in connection with an incident that occurred on 23 April 1999 (this incident had not been

alleged in the indictment). The panel specifically found insufficient evidence to convict Matic of the war crimes charged in the indictment.

Both the prosecutor and the defence appealed the verdict. On 13 June 2001, the Supreme Court rejected the defence appeal and affirmed the prosecutor's appeal, sending the case back for retrial on the original war crimes charge. The Supreme Court had two bases for its reversal. First, it found that the trial court had erred in convicting the defendant of a crime that had different elements than the crime alleged in the indictment. Second, the Supreme Court found that the trial court had wrongfully and insufficiently established the facts.

The retrial began on 22 November 2001. Matic maintained his defence of alibi. On 27 March 2002 an all-international panel found Matic not guilty.

MOMCILO TRAJKOVIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Gjilan/Gnjilane

Case history:

First trial

Indictment dated: 3 April 2000

Initial indictment charges: *Attempted Murder*, KCC 30 and FRY CC 19 (one count); *Illegal Weapons Possession*, KCC 199

Prosecutor: local

Panel composition: majority local

Second indictment charges: *War Crimes*, FRY CC 142 (joined to Initial indictment)

Verdict: Convicted of *Crimes against humanity* (under FRY CC 142); *Attempted Murder*; *Illegal Weapons Possession*

Appellate court proceedings

Prosecutor: local, superseded by international

Panel composition: majority international

Judgement: conviction reversed

Retrial

Prosecutor: international

Panel composition: majority international

Trial status: ongoing

The initial indictment against *Momcilo Trajkovic* alleged attempted murder arising out of an incident that occurred on 27 June 1999, and illegal weapons possession arising out of a search of the defendant's house conducted on 7 September 1999. The second indictment, for war crimes against the civilian population, alleged that on 14 separate dates between April and May 1999, while serving as Chief of Police in Kamenicë/Kamenica, Trajkovic ordered police forces under his command to commit acts of killing, maltreatment, displacement, hostage taking, looting, and expulsion. The second indictment further

alleged that Trajkovic compiled lists of individuals involved in political, social and humanitarian activities, and that he gave these lists to police in order to have the individuals killed.

The trial of Trajkovic took place between 23 November 2000 and 6 March 2001, before a majority local panel that included one international judge. Trajkovic presented a two-pronged defence. First, he asserted that he was not present at, nor did he order, the crimes alleged. Second, he argued that since he was not a commander of a military unit, nor a member the military, he could not be legally responsible for committing war crimes within the meaning of the statute. The panel found the defendant guilty of war crimes, FRY CC 142 (which the presiding international judge construed as the customary international law offence of crimes against humanity), attempted murder, KCC 30 and FRY CC 19, and illegal weapons possession, KCC 199. The defendant's sentence was 20 years imprisonment.

The defendant appealed this verdict; on 13 July 2001 the Kosovo Public Prosecutor responded by filing a request with the Supreme Court to affirm the conviction. However, in a brief and in arguments before a majority international panel of the Supreme Court, an international prosecutor admitted error and requested that the case be reversed and remanded for retrial. The Supreme Court did just that in a decision issued on 30 November 2001, basing the reversal on (1) lack of evidence of the defendant's criminal liability and (2) on the trial court's failure to call witnesses proposed by the defence.

The retrial began in front of a majority international panel on 27 May 2002, and is ongoing. The defendant denies the charges, and is presumed innocent until proven guilty.

BOGOLJUB MISIC and STOJAN JOVANOVIC

Defendant Mistic's ethnic group: Kosovo Serb
Defendant Jovanovic's ethnic group: Kosovo Serb
Court: District Court Mitrovicë/Mitrovica

Case history

Trial

Indictment date: 1 February 2001

Prosecutor: international

Panel composition: majority international

Indictment: *Participating in a gathering that commits violence*, KCC 200(1); *Unlawful detention*, SCC 63(4); *Grave bodily injury*, KCC 38(1)

Verdict: both defendants acquitted on all counts

The indictment against *Bogoljub Mistic and Stojan Jovanovic* alleged that on 4 September 1998 the defendants were among a group of Serbian police and military personnel that entered a village and forced eighty-five Kosovo Albanian men into a shed. At the entrance to the shed, the indictment alleged that the Serbs beat the Albanians up

and that, in particular, Misic and Jovanovic beat the Albanians with a rubber hydraulic pipe. Inside the shed, the Serbs forced the Albanians to hand over valuables in their possession.

The incident allegedly occurred in the municipality of Prizren, but the venue of the trial was changed, pursuant to UNMIK Regulation 2000/64, to Mitrovicë/Mitrovica. The trial began on 16 October 2001. Misic and Jovanovic raised a defence of alibi and insufficient identification evidence. On 2 November 2001, the panel delivered a verdict in which it found there was sufficient evidence that the events alleged in the indictment took place as described by the victims, but that there was insufficient evidence of the defendants' identification and participation in the crimes. The panel therefore acquitted both defendants.

ALEXANDER MLLADENOVIC¹⁰

Defendant's ethnic group: Kosovo Serb
Court: District Court Prishtinë/Priština

Case history

Trial

Indictment date: 2 February 2001

Initial indictment: *Causing general danger*, KCC 157(1) and (2) (three acts alleged); *Damaging another's object*, KCC 145 (three acts alleged); *Robbery*, KCC 137 (two acts alleged); *Aggravated theft*, KCC 135 (two acts alleged)

Prosecutor: international

Panel composition: all international

First amended indictment: *War Crimes*, FRY CC 142

Verdict: acquitted (written verdict not yet issued by court)

The initial indictment against *Alexander Mlladenovic* alleged, as to the causing general danger charges, that on 4 April and 4 June 1999, the defendant, acting with a group of uniformed and armed military, paramilitary, and police personnel, set fire to several Albanian Kosovar residences, and that on 31 May 1999 he and others attempted to set fire to a single residence. As to the robbery charges, the indictment alleged that on 4 and 22 April 1999, the defendant took money by force from three Albanians. Finally, as to the aggravated theft charge, the indictment stated that on 24 March and 5 June 1999, the defendant, along with others, stole personal property from a restaurant and from a residence.

The trial began on 14 June 2001, and a few weeks later, on 5 July 2001, the international prosecutor (different from the one who had filed the initial indictment) submitted an amended indictment. This amended indictment charged Mlladenovic with war crimes

¹⁰ The spelling of the defendant's name with a double "l" is reproduced as presented in all official courts documents in this case.

(the acts alleged as supporting the war crimes charge were the same as those recited in the initial charging document). Mlladenovic's defence was one of general denial.

On 23 November 2001 the panel acquitted the defendant. To date, the international presiding judge has not issued a written verdict.

VESELIN BISOVIC

Defendant's ethnic group: Kosovo Serb
Court: District Court Peja/Pec

Case history

Trial

Indictment date: 11 November 2001
Indictment charge: *War Crimes*, FRY CC 142
Prosecutor: international
Panel composition: all international
Trial status: trial ongoing

The indictment against **Veselin Besovic** alleges that, on 29 May, 5 and 6 July, August, 8 October, and 9 December 1998, and on 26 and 28 March, 3 and 4 April, and 14 May 1999, Besovic was a member of armed and uniformed Serb forces who used intimidation and terror to drive Albanians from their homes and who tortured and killed Albanians, burned their houses, pillaged or destroyed their property, and in general caused immense suffering among Kosovo Albanian civilians.

Besovic's trial began in May 2002, and is ongoing. The defendant denies the charges, and is presumed innocent until proven guilty.

SASA GRKOVIC

Defendant's ethnic group Kosovo Serb

Case history

Indictment date: 19 February 2002
Indictment charges: *War Crimes*, FRY CC 142
Trial status: trial not yet begun¹¹

The indictment against **Sasa Grkovic** alleges that on 25, 26, 27, and 28 March 1999, Grkovic, while a member of an armed group of uniformed Serb personnel, participated in the destruction of houses and property and in the forcible eviction of villagers. The indictment further alleges that Grkovic, as a member of a group of armed and uniformed Serbs, took part in three separate massacres of large numbers of Kosovo Albanian civilians as well as the murder of a group of four Albanian men.

¹¹ The report presents the status of war crimes trials as of June 2002. On 4 September 2002, Sasa Grkovic was acquitted of all charges by a panel of Prizren District Court.

Sasa Grkovic denies the charges alleged in the indictment, and is presumed innocent until proven guilty.

SECTION III. THE APPLICABLE LAW AND THE RELEVANT AUTHORITIES

The present section is intended as a summary of the applicable legislation in Kosovo for cases of war crimes, and it will look at both the provisions dealing with the substance of the respective offences and the procedural mechanisms available for prosecuting and trying these cases. Furthermore, reference will be made to relevant authorities on war crimes and international humanitarian law, as such authorities have proven to be highly beneficial for similar cases that have been tried under other national or international jurisdictions.

I. THE APPLICABLE LAW

Substantive crimes

Three major offences against international humanitarian law are war crimes, crimes against humanity, and genocide. This report does not intend to present a complete analysis of these crimes under international customary law or the statutes of international tribunals, but a basic knowledge of what they comprise will help to put Kosovo's applicable law in perspective.

War crimes can be defined differently in different national or international jurisdictions; however, it essentially comprises violations of the Geneva Conventions, their Protocols, or of the laws and customs of war.¹²

Genocide involves acts such as killing or causing serious bodily or mental harm to members of a national, ethnical, racial, or religious group done with the intent to destroy the group in whole or in part.¹³

Crimes against humanity includes such acts as murder, extermination, torture, or persecution committed in a widespread and systematic manner. There is no requirement that crimes against humanity be committed in connection with an armed conflict.¹⁴

Turning to the applicable law in Kosovo, genocide is punishable under FRY CC 141. A commentator on this statute has noted that "the basis for determining the characteristics of genocide are the provisions of the [1948] Convention for the Prevention and

¹² The four Geneva Conventions of 12 August 1949 and their Protocols of 8 June 1977 provide an exhaustive definition of war crimes from an international law perspective. Similar definitions can also be found in the Statutes of the ICTY and ICTR. For a definition of war crimes and the legislation applicable in Kosovo, see the Annex of this report.

¹³ For a definition of genocide under international law, see the Convention on the Prevention and Punishment of the Crime of Genocide of 9 December 1948 (corresponding definitions can be found in the Statutes of the ICTY and ICTR). For the definition of genocide under the applicable law in Kosovo, see the Annex of this report.

¹⁴ The elements of crimes against humanity have been set out most recently by the ICTY in the case of *Prosecutor vs. Krnojelac*, IT-97-25, paragraph 53; it is also defined in the Rome Statute of the International Criminal Court, Article 7.

Punishment of the Crime of Genocide”¹⁵, a convention which Yugoslavia ratified in 1950¹⁶. FRY CC 141 follows the language of the Genocide Convention almost verbatim, with, however, a critical exception. “Forcible dislocation of the population”, listed in FRY CC 141 as a means of committing genocide, is not present in the Genocide Convention.

Of the three statutes in the FRY Criminal Code that apply to war crimes against a civilian population¹⁷, two offences, War Crimes Against the Civilian Population, FRY CC 142¹⁸, and War Crimes Against the Wounded and Sick, FRY CC 143¹⁹, represent codifications of the Grave Breaches articles²⁰ contained in the 1949 Geneva Conventions. A commentator has viewed both FRY CC 142 and 143 as imposing criminal liability for violations of the 1949 Geneva Conventions and of Additional Protocols I and II to the Geneva Conventions.²¹ The ICTY, in the *Tadic* decision, also cited FRY CC 142 and 143 as examples of national legislation designed to implement the 1949 Geneva Conventions.²² FRY CC 142 and 143 proscribe either ordering or committing the predicate criminal acts.

The third war crimes statute that can apply to civilian victims is Organising a Group and Instigating the Commission of Genocide and War Crimes, FRY CC 145. This last statute, a commentator suggests, was inspired both by the Genocide Convention and by the Charter of the International Military Tribunal of 1945 establishing the Nürnberg War Crimes Tribunal (hereafter Nürnberg Charter).²³ FRY CC 145 incorporates provisions from the Genocide Convention relating to incitement of genocide²⁴, as well as provisions from the Nürnberg Charter creating liability for organisers and inciters of war crimes.²⁵ Under FRY CC 145, “organising a group” for the purpose of committing the genocide and war crimes as set out in FRY CC 141-144 is punishable, as is becoming a member of such a group.

The crime of Making Use of Forbidden Means of Warfare, FRY CC 148, which, like FRY CC 142 and 143, applies in time of war or armed conflict, forbids the use “means or practices of warfare prohibited by the rules of international law”. A logical interpretation of “means or practices of warfare prohibited by the rules of international law” is

¹⁵ Franjo Bacic et al., *Commentary on the Criminal Law of the Federal Republic of Yugoslavia*, 5th edition, Belgrade, 1999.

¹⁶ Office Gazette of the Presidium of the National Assembly of the Federal National Republic of Yugoslavia, no. 2/50.

¹⁷ A fourth statute, War Crimes Against Prisoners of War, FRY CC 144, does not apply to civilian victims.

¹⁸ Originally enacted as Article 125 of the 1951 Criminal Code of the SFRY.

¹⁹ Originally enacted as Article 126 of the 1951 Criminal Code of the SFRY.

²⁰ 1st Geneva Convention Articles 49 and 50; 2nd Geneva Convention Articles 50 and 51; 4th Geneva Convention Articles 146 and 147.

²¹ Franjo Bacic et al., *supra*; *Prosecutor vs. Tadic*, IT-94-1, Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, 2 October 1995, paragraph 132 (hereafter *Tadic Decision*).

²² *Tadic Decision*, IT-94-1, paragraph 132.

²³ Franjo Bacic et al., *supra*.

²⁴ Genocide Convention Article 3(c).

²⁵ Charter of the International Military Tribunal of 1945, Article 6.

violations of the laws and customs of war within the meaning of the Nürnberg Charter Article 6 and the ICTY Statute Article 3.

No statutory equivalent exists under FRY or Kosovo criminal law for the customary international law offence of crimes against humanity.

Finally, in several cases involving actions taking place in the context of war or armed conflict in Kosovo, prosecutors and courts have applied statutes for traditional criminal offenses that are not specifically related to war crimes or violations of international humanitarian law. “Ordinary” crimes which prosecutors have charged, or which courts have applied, in these cases include Murder, KCC 30; Grave Bodily Injury, KCC 38; Light Bodily Injury, KCC 39; Participating in a Gathering that Commits Violence, KCC 200; Unlawful Detention, SCC 63; Causing General Danger, KCC 157; and Grave Acts Against General Security, KCC 164.

Law on criminal responsibility

Applicable law in Kosovo provides bases of criminal liability similar to other western legal systems. Courts can impose criminal responsibility on persons for individual acts or omissions²⁶, acts of preparation²⁷, attempts²⁸, complicity²⁹, incitement³⁰, and aiding.³¹

Moreover, under FRY CC 26, individuals creating or using various forms of groups, gangs, or associations to commit crimes are liable for all criminal acts committed by such groups, regardless of the extent of their participation. Commentators note that this statute creates liability on the part of the organiser or user for all foreseeable criminal acts of the group.³² This theory of liability resembles the international criminal law doctrine of common purpose or joint criminal enterprise³³ that has been often invoked in war crimes trials in international tribunals.³⁴

Since war crimes cases often involve military style organisations with hierarchical command structures, there is often an issue of whether a lower level officer or official can be held responsible for a crime he or she committed upon an order from a higher level

²⁶ FRY CC 11.

²⁷ FRY CC 18.

²⁸ FRY CC 19.

²⁹ FRY CC 22.

³⁰ FRY CC 23.

³¹ FRY CC 24.

³² Ljubisa Lazarevic, commentary on FRY CC 26, *Savremena Administracija*, Belgrade, 1999; Franjo Bacic, commentary on FRY CC 26, *Savremena Administracija*, Belgrade, 1978.

³³ The ICTY has discussed the common purpose (or joint criminal enterprise) doctrine at length in the following cases: *Prosecutor v Tadic*, ICTY 94-1-A, Appeals Chamber Judgement of 15 July 1999, paragraphs 186-228 (hereafter *Tadic*, Appeal Chamber Judgement); *Prosecutor v Brdanin and Talic*, Decision on Form of Further Amended Indictment and Prosecution Application to Amend, IT-99-36-PT, June 26 2001, paragraphs 22-51.

³⁴ *Tadic*, Appeal Chamber Judgement, at paragraphs 230 and 231; *Prosecutor v Kvočka et al.*, IT-98-30/1-T, Trial Chamber decision of 2 November 2001, paragraphs 265-321 and 413-419; *Prosecutor v Krstić*, IT-98-33, Trial Chamber decision 2 August 2001, paragraphs 601 and 633;

officer. FRY CC 239, Responsibility for Criminal Offences Committed by Superior Orders, is directed to this situation, stating that subordinates are not liable for crimes they commit “pursuant to order of a superior given in the line of official duty, unless the order has been directed toward committing a war crime or any other grave criminal offence, or if it was obvious that the carrying out of the order constitutes a criminal offence.”³⁵

The converse situation - the liability of the higher level official who orders the commission of a war crime - is covered in the wording of FRY CC 142 itself, which states that “Whoever...orders ...or commits [one of the enumerated acts]” shall be punished under the statute. However, the superior official’s responsibility stops there, under the local statutory law; there is no statutory equivalent for the international law doctrine of superior or command responsibility³⁶, setting out the criminal liability of the superior official for the criminal acts or omissions of the subordinates.³⁷ Nevertheless, the command responsibility doctrine can arguably be applied by virtue of Yugoslavia’s adherence to Protocol 1 to the Geneva Conventions. Articles 86 and 87 of Protocol 1 codify the principles of superior responsibility and military command responsibility, respectively. Yugoslavia passed a Law of Ratification of the Geneva Protocols³⁸ and thus, pursuant to Article 210 of the 1974 SFRY Constitution, these Protocols can both be directly applied by the courts.

Procedural law

The rules of criminal procedure set out in the FRY Criminal Procedure Code (FRY CPC) apply to war crimes prosecutions as they do to ordinary criminal cases. Up until January 2001, this included FRY CPC 300(3) and (4), which permitted trials in the absence of the defendant (trials *in absentia*). However, on 12 January 2001, an UNMIK regulation has prohibited trials *in absentia* for serious violations of international humanitarian law.³⁹

A relevant aspect for the manner of investigating and trying war crimes cases in Kosovo has been the constant transformation and evolution of the legal framework. Procedural mechanisms that were not available during the initial attempts of the local judiciary to try war crimes cases have later been made available through various UNMIK regulations.

UNMIK Regulation 2001/20 On The Protection Of Injured Parties And Witnesses In Criminal Proceedings, UNMIK Regulation 2001/21 On Co-operative Witnesses, UNMIK Regulation 2002/7 On The Use In Criminal Proceedings Of Written Records Of

³⁵ This is plainly directed toward the argument presented by some war crimes defendants that they were “just following orders”.

³⁶ Command responsibility (also known as superior responsibility) is defined and discussed at length the ICTY case *Prosecutor v Delalic et al.*, IT-96-21, Trial Chamber decision of 16 November 1998, paragraphs 331- 399.

³⁷ For further insight into the theory of superior or command responsibility, see Section IV of this report.

³⁸ Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, *Medunarodni Ugovori*, at 1083, 26 December 1978.

³⁹ UNMIK Regulation 2001/1, On The Prohibition Of Trials In Absentia For Serious Violations Of International Humanitarian Law, 12 January 2001.

Interviews Conducted By Law Enforcement Authorities, have all filled in gaps in the applicable law in areas that are most relevant for a proper and successful investigation and prosecution: protection of witnesses and injured parties, use of statements given to law enforcement authorities, etc.

II. AUTHORITIES ON WAR CRIMES AND INTERNATIONAL HUMANITARIAN LAW

Sources of guiding and persuasive legal authority on FRY war crimes and genocide statutes are scarce. There are some commentaries on the FRY Criminal Code that provide short analyses of the war crimes and genocide statutes.⁴⁰ Franjo Bacic, in a commentary on FRY CC 142, cites decisions dating from the 1950s by the Supreme Court of Croatia, the Supreme Court of Bosnia-Herzegovina, and the Supreme Court of Serbia.⁴¹, but practitioners do not have ready access to copies of these decisions. Therefore, on the level of national legal authority and jurisprudence, guidance in interpretation and application of war crimes law is extremely limited.

However, for those practitioners with a command of English, a wealth of jurisprudence, analysis, and commentary concerning war crimes and international humanitarian law is available from international bodies and tribunals. Of seminal importance, of course, are the judgements of the post World War II Nürnberg and Tokyo Tribunals. More recently, the ICTY and ICTR have issued decisions that, while interpreting and applying their respective statutes, offer valuable clarification and insight to jurists seeking guidance in the application of national war crimes legislation. In addition, the commentaries of the International Law Commission of the United Nations concerning the *Draft Code of Crimes Against the Peace and Security of Mankind, 1996*, can serve as persuasive authority on the interpretation of war crimes legislation.

Furthermore, a number of national courts have, in the past two decades, addressed war crimes issues in a variety of contexts. Germany⁴², France⁴³, the United States⁴⁴, Denmark⁴⁵, and the Netherlands⁴⁶ are some of the countries whose courts have issued decisions dealing with war crimes and international humanitarian law. Not all of these cases are available in English; however, the presence in Kosovo of international judges with a command of a variety of languages creates an opportunity for the dissemination of principles found in that jurisprudence.

⁴⁰ See, for example, Franjo Bacic et al., *supra*.

⁴¹ Supreme Court of Croatia verdict number KZ-2787/57; Supreme Court of Bosnia-Herzegovina verdict number KZ-663-53; Supreme Court of Serbia verdict number KZ-2539/56 (all as cited in Franjo Bacic, *supra*).

⁴² Düsseldorf Supreme Court, *Nikola Jorgic* case, 30 April 1999, 3StR 215/98; Bavarian Appeals Court, *Novislav Djajic* case, 23 May 1997, 3 St 20/96.

⁴³ *Klaus Barbie*, 78 International Law Reports vol. 78 (1985).

⁴⁴ *U.S. vs. Karadzic*, 70 F.3d 232 (2d Cir. 1995).

⁴⁵ *The Prosecution v. Saric*, unpublished (Den.H.Ct. 1994).

⁴⁶ *Public Prosecutor v. Menten*, 75 International Law Reports 1987.

SECTION IV. CASE ANALYSIS

I. CHARGING

Substantive crimes

Both overcharging and undercharging have characterised war crimes prosecutions in the first fourteen months of the UNMIK judicial administration. Nine indictments and two investigation requests filed by local prosecutors reflect the difficulty they had in accurately analysing available, admissible evidence and deciding on what criminal charges to proceed with. A comparison of the factual allegations in the indictments with the crimes charged demonstrates that local prosecutors often did not clearly understand the elements of the criminal offences they laid out, nor did they effectively assess how the evidence at their disposal could support the elements of the crime.

Local prosecutors charged genocide in four cases—Vuckovic/Bisevac, Juvenile Z, Jokic, and Simic et al.—during the first year of the UNMIK judicial administration. (In a fifth case, Kostic, allegations of genocide were the basis for a judicial investigation that did not result in an indictment). None of the four cases resulted in a conviction for genocide. Although a trial panel initially convicted Vuckovic as charged, a majority international panel of the Supreme Court reversed that conviction on the grounds that it was not supported by the facts. In Jokic, although the prosecutor submitted the case to the trial panel on a genocide charge, the panel rendered a verdict of war crimes.⁴⁷ The international prosecutor assigned to Juvenile Z's case amended the genocide charge to Causing General Danger and Grave Acts against General Security. Finally, in Igor Simic, the international prosecutor ultimately abandoned the genocide prosecution for lack of evidence.

In all these four cases, the initial genocide charges were, in light of the trial evidence, inflated, not grounded by serious legal considerations and solid analysis. The charging documents in all cases, as well as the evidence presented at the trials, did not adequately address the issue of the defendants' intent to commit genocide. Furthermore, even where the prosecution was able to show that an individual defendant had the required intent to "destroy the group in whole or in part", this would still not be enough to realistically argue and prove a case of genocide. As the ICTY said in the Jelusic case, "it will be very difficult in practice to provide proof of the genocidal intent of an individual if the crimes committed are not widespread and if the crime charged is not backed by an organisation or a system".⁴⁸ This means that further evidence towards a systematic and organised operation, of which the defendant(s) would be part of, is required. Such evidence could only be collected and supported by extensive work of research and analysis from historical, legal and sociological perspectives, neither of which had been done or available at the time when the Kosovo courts had brought charges of genocide. As one of

⁴⁷ The Supreme Court later reversed the war crimes conviction; that judgement did not discuss the issue of whether the trial court could, *sua sponte*, convict the defendant of war crimes, FRY CC 142, when the indictment had alleged Genocide, FRY CC 141.

⁴⁸ *Prosecutor vs. Jelusic*, IT-95-10, Trial Chamber I, Judgement, 14 December 1999, paragraph 101.

the most serious and complex crimes under international law, prosecuting a case of genocide requires extensive logistical and human resources, which, even at the present moment, are not entirely available in the Kosovo local courts.

Another example of overcharging occurred in the *Apostolovic et al.* case, in which a local prosecutor indicted the defendant for war crimes under FRY CC 142. At trial, there was not sufficient credible evidence either of the criminal acts or of the perpetrator's identification to sustain that charge. The international prosecutor (who superseded the local prosecutor for purposes of handling the trial) abandoned the original war crimes count, and, by the end of the trial, the amended indictment alleged only aggravated theft, (of which the defendant was acquitted).

Paradoxically, undercharging cases has also been a problem. Local prosecutors charged defendants in four cases with murder in factual situations that supported indictments for more serious crimes. The main cause of undercharging these cases seems to have been the manner in which the existence of an armed conflict in Kosovo has been interpreted by the prosecution and the courts.

It has been generally recognised that the period of the NATO campaign in Kosovo, from March 1999 to June 1999, was a period of armed conflict and thus, crimes and violations of international humanitarian law committed in this period should not pose any difficulties in being categorised as war crimes. The period preceding the NATO campaign, especially the timeframe beginning in March 1998 and throughout the winter of 1999, has been interpreted inconsistently by various actors. The prosecutors that brought the initial indictments in the war crimes cases in Kosovo were reluctant to define the period of March 1998- March 1999 as a period of armed conflict, although numerous official and public documents supported the theory of an armed conflict. A series of Reports and Resolutions to and of the UN Security Council, issued starting with the spring of 1998, mention the situation of conflict and humanitarian crisis in Kosovo, and even characterise it expressly as an armed conflict.⁴⁹ Along the same lines of argument, the OSCE two-volume special report "*Kosovo/Kosova As seen, As Told*" speaks about the period of 1998 as a period of armed conflict and grave breaches of humanitarian law.⁵⁰

Nevertheless, confusion over the nature of the situation in Kosovo in 1998 and 1999 lead to inadequate charging in some of the war crimes cases analysed in this report.

An international prosecutor went forward with an indictment charging several "ordinary" crimes (causing general danger, damaging another's object, robbery, and theft) that occurred in a factual context supporting war crimes charges, since the crimes allegedly occurred in the context of the armed conflict of April, May, and early June 1999.

⁴⁹ UN SCR 1199/23 September 1998, UN SCR 1160/31 March 1998, Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998) of the Security Council issued on 4 September 1998, Report of the Secretary-General Prepared Pursuant to Resolution 1160 (1998) of the Security Council issued on 3 October 1998.

⁵⁰ See further "*Kosovo/Kosova As Seen, As Told*", Part I, available on the OSCE web-site at the address: www.osce.org/kosovo/documents/reports/hr

The criminal acts in two of the four murder cases, Zvezdan Simic and Zoran Stanojevic, occurred during an earlier period of armed conflict, which existed between the KLA and Serbian forces throughout 1998 and the winter of 1999. In both these cases, the prosecution alleged that the defendants, while acting as members of uniformed and armed Serbian military or police forces, committed criminal acts of murder, arson, and displacement of persons. In contrast, the most recent indictment of the cases under review—filed by an international prosecutor—specifically charges the defendant⁵¹ with war crimes, FRY CC 142, for actions committed during the period May through December 1998.

The two remaining cases in which local prosecutors charged murder, rather than war crimes, are Ajeti/Stojanovic and Nikolic. The crimes charged arose out of incidents occurring in April 1999. In both cases, the defendants were alleged to be acting as part of a group of uniformed, armed men, either military, police, or paramilitaries, who evicted civilians from their homes and committed murders. Both were taken over by an international prosecutor after the Supreme Court had reversed the cases on appeal (on grounds unrelated to the charging). However, in neither case did the international prosecutor amend the indictment to charge war crimes instead of murder.

The initial indictment in the Mlladenovic case shows that the problem of undercharging was not restricted to local prosecutors. There, the first international prosecutor handling the case charged only “ordinary” crimes—causing general danger, damaging another’s object, robbery, and aggravated theft—even though the criminal acts occurred during a well-recognised period of armed conflict in Kosovo (April, May, and early June 1999), and even though the defendant was alleged to be acting in concert with Serb forces. However, by the time the trial had started, a new international prosecutor had taken over the case, and filed a well-structured amended indictment charging war crimes, based on the same facts as alleged in the initial charging document.

Organisation and Drafting of Indictments

Since the indictment is the legal instrument putting an accused on notice as to the charges against him or her, and the factual bases for those charges, indictments should be clearly and specifically drawn. Not only does a well-organised and specific indictment enable an accused to prepare his or her defence more effectively, it is also critical to a successful prosecution. The importance of organised, clearly structured indictments is especially important in complex cases alleging numerous different victims and criminal acts over a substantial period of time, such as is the situation in many war crimes prosecutions.

Genocide and war crimes charges frequently arise out of numerous separate criminal offences. It is neither necessary nor customary to charge a separate count of war crimes, for example, for each individual illegal act taken by a defendant over a period of time during an armed conflict. However, for purposes of putting the defendant on notice, and providing the court with a framework as to how the prosecution will proceed,

⁵¹ Veselin Besovic.

indictments must have a clear, organised structure and be specific concerning dates, victims, and identification of property and places.

Local prosecutors filed 13 of the 17 indictments reviewed in this report. Although some of the local prosecutors' indictments satisfactorily specified the dates, details, and victims of the criminal acts alleged, other indictments, especially those involving multiple criminal acts and victims, were vague and over broad. For example, in the Vuckovic indictment, the local prosecutor alleged many different criminal acts without supplying the dates on which they occurred (other than "from March 22 until the beginning of May 1999"). In the Matic case, the initial paragraph of the indictment was so broadly worded that it would have been impossible for the accused to be properly on notice as to what to defend himself against. And in the case of Juvenile Z, the Proposal for Educational Measures (in juvenile cases, the equivalent of an indictment), again alleged only a general time ("from the end of March until May 1999") and contained no supporting statement of facts.

International prosecutors were, in a second phase of war crimes trials, assigned to handle the litigation of indictments already filed by local prosecutors. However, as the presence of international prosecutors has become institutionalised and they began, on their own, to request the opening of investigations and draw the initial indictments by themselves, improvement has occurred in the quality of the pleadings. In the cases of Grkovic and Besovic, for example, the indictments reflect a clear, organised, and systematic approach to pleading that should serve as examples of how to lay out a series of factual allegations in order to provide full notice to defendants. Two indictments by an international prosecutor, those in the Mladenovic and the Besovic cases, also are unique in specifically alleging an essential element of FRY CC 142: the "rules of international law" violated by the defendant (in this case, the First Geneva Convention and Supplementary Protocol I).

II. ABILITY OF THE DEFENCE TO PRESENT EVIDENCE

In the first two years of investigating and prosecuting war crimes cases, no serious effort was made by the local courts or by ADoJ to assist defendants in obtaining the testimony of Serbian defence witnesses. Out of the seven cases reversed on appeal by the Supreme Court, five of the reversals were based, at least in part, on the trial court's failure to call witnesses proposed by the defence.⁵²

This refusal on the part of local judges to call defence witnesses could have stemmed from their lack of training and expertise in the applicable human rights jurisprudence⁵³.

⁵² See table "Supreme Court Judgements" below at page 46.

⁵³ Under ECHR Article 6 § (3), an accused has the right "to examine or have examined witnesses against him and to obtain the attendance and examination of witnesses on his behalf under the same conditions as witnesses against him". This does not give the defence an absolute right to question any witness it wishes to call; national courts can, as a general rule, assess proposed testimony and refuse to call those witnesses not relevant to the issues being tried. *Vidal v. Belgium*, ECHR judgement of 22 April 1992, Series A, no. 235-B, paragraph 33; *Krempovskij v. Lithuania*, ECHR, application no. 37193/97, Admissibility Decision of 20 April 1999. However, failure to call witnesses whose testimony would go to the heart of an accused's

However, there were also major security issues involved in having Serbian witnesses appear in war crimes trials, issues that could not be resolved by local courts without extensive logistical support. For example, witnesses living in Serbia proper who wished to come to Kosovo and testify would need secure transport to and from the Kosovo court. Another option, that of holding trial sessions in Serbia proper, also required support from and co-ordination with ADoJ/DOJ.

International panels of the Supreme Court had based three reversals⁵⁴ on trial courts' failures to call defence witnesses before the courts and DOJ took action. Since June 2001 international panels handling war crimes cases can and have taken appropriate steps to allow the defence to present its case in full. This has sometimes meant trial panels travelling to Belgrade in order to take witness testimony.

III. TRIAL COURT VERDICTS

Five features are common to most of the war crimes trial court verdicts: (1) emphasis on witness credibility issues; (2) absence of appropriate findings on the nature of the defendant's criminal responsibility; (3) failure to distinguish factual issues from legal issues; (4) absence of citations to case law or authority on issues of war crimes jurisprudence or human rights issues; and, (5) making incorrect findings on lesser or other included offences.

The table below provides statistics regarding the availability of written trial verdicts that have been the basis for the following analysis.

<u>Written War Crimes Verdicts and Judgements</u>				
	Local trial panels	Local Supreme Court panels	International trial panels	International Supreme Court panels
Number of written verdicts/ Judgements issued	7	1	10	9

Credibility issues

Trial court panels have focussed most of their attention in written verdicts on issues of witness credibility. The applicable law on trial verdicts, FRY CPC 357(7) requires that a written verdict shall “specifically and completely state which facts and on what grounds it finds to be proven or unproven, providing specifically an assessment of the credibility of contradictory evidence...”

theory of defence—as is the case with alibi witnesses—is not consistent with the concept of a fair trial on which ECHR Article 6 rests. *Vidal* at paragraph 34.

⁵⁴ Nikolic, Vuckovic, and Jokic.

Thus the trial courts' emphasis on credibility issues is based in part on a statutory requirement.

In addition, most accused persons have raised defences of alibi and misidentification, and few trials included presentations of significant physical, photographic, or documentary evidence that could support or discount witnesses' versions of events. Counsel for defendants have not raised legal defences such as necessity⁵⁵ or extreme necessity⁵⁶. In short, because the essential issue in most war crime trials has been whether the defendant was at the scene of the crime, the perceived accuracy of a witness's narration of events or of an identification was of crucial importance for deciding the issue of guilt or innocence.

Criteria for assessing credibility

To date, all or majority international trial panels have issued five written verdicts⁵⁷ in war crimes cases; in two cases⁵⁸ with majority local panels, an international judge has authored the verdict.⁵⁹ The analysis of witness statements that the international judges present in these written verdicts stress the importance they place on consistency in deciding whether an individual is giving true and accurate testimony. The verdicts often go into lengthy detail about each witness's statement and how it is consistent with or differs from statements given to police or to KFOR authorities, to investigative judges, or at previous trials. Many international trial panels have deemed that prosecution witnesses who have given inconsistent statements are unreliable and untruthful.

This is not an approach to accessing credibility that international war crimes tribunals have followed. In one of the leading ICTR cases, *Akayesu*, the majority of those who testified were eye-witnesses to atrocities committed during the Rwanda genocide. Concerning their testimony, the trial chamber noted that the inconsistencies and contradictions that appeared between witnesses' trial testimony and their earlier statements to prosecutors and the defence...

“...[is] alone not a ground for believing that the witnesses gave false testimony. Indeed, an often levied criticism of testimony is its fallibility. Since testimony is based mainly on memory and sight, two human characteristics which often deceive the individual, this criticism is to be expected. Hence, testimony is rarely exact as to the events experienced. To deduce from any resultant contradictions and inaccuracies that there was false testimony, would be akin to criminalising frailties in human perceptions. Moreover, inaccuracies and contradictions between the said statements and the testimony given before the Court are also the result of the time lapse between the two. Memory over time naturally degenerates, hence it would be wrong and unjust for the Chamber to treat forgetfulness as being synonymous with giving false testimony.”⁶⁰

⁵⁵ FRY CC 9.

⁵⁶ FRY CC 10.

⁵⁷ *Nikolic* (retrial), *Jovanovic/Kolasinac*, *Apostolevic*, *Misic/Jovanovic*, and *Stanojevic*.

⁵⁸ *Trajkovic* and *Matic*.

⁵⁹ In three cases—*Matic* (retrial), *Jokic* (retrial), and *Milladenovic*—the international panel has rendered an oral verdict but not yet issued the written version.

⁶⁰ *Prosecutor vs. Akayesu*, ICTR 96-4-T, Trial Chamber Judgement of 2 September 1998, paragraph 140.

In addition, the Akayesu judgement pointed out that in evaluating witness testimony, it took into account that the trauma suffered by witnesses who were victims of, or eye-witnesses to, atrocities, could “affect [the witness’s] ability full or adequately to recount the sequence of events in a judicial context”.⁶¹ The Akayesu judgement went on to note the challenges posed by interpreting the local language used by witnesses into the language of the Tribunal, and the frequent need to put local language words and expressions into temporal and spatial context.⁶² Finally, the Akayesu court stated that it took into account cultural factors affecting the witnesses’ testimony, and that it did not “draw any adverse conclusions regarding the credibility of witnesses based only on their reticence and their sometimes circuitous responses to questions”.⁶³

All of the circumstances mentioned in Akayesu—lapse of time, trauma, language interpretation, fallibility of perception and memory, and cultural differences in communication—have been present in Kosovo’s war crimes trials. However, international panels deciding the cases have not adopted the approach articulated in Akayesu. Instead, many Kosovo trial panels rely, when deciding on credibility, on consistency in all points of the testimony, including descriptions of small details, such as uniform colours and weapon descriptions.

In only one case, Stanojevic, has an international judge addressed at length what circumstances she took into consideration in assessing credibility. This judge cited as potential influences on witness credibility:

- stress, fear, and lapse of time⁶⁴;
- “ethnic hostility and pressure for conviction manifested by the local [Albanian] community...”⁶⁵; and
- “local and international publicity.... It seems that some of the witnesses might have accepted as true such rumours and widespread information, and consciously or not, let such distort their recounting of the critical events.”⁶⁶

The judge also pointed out that a court could not deem a witness unreliable based solely on their ethnicity, but added:

“That is not to say that ethnic hatred has never been a ground for doubting the reliability of any particular witness. Such a conclusion was only made, however, in the light of the circumstances of each individual witness, his or her involvement in the event and interest in the proceedings and such concerns as could be substantiated upon evidence”.⁶⁷

⁶¹ *Akayesu*, supra at paragraph 142 (hereafter *Akayesu*).

⁶² *Akayesu*, supra at paragraphs 145 and 146.

⁶³ *Akayesu*, supra at paragraph 155 and 156.

⁶⁴ Stanojevic at paragraph 152.

⁶⁵ Stanojevic at paragraph 153.

⁶⁶ Stanojevic at paragraph 154.

⁶⁷ Stanojevic at paragraph 156.

The issue the judge in Stanojevic is responding to, whether Kosovo Albanian witnesses in war crimes cases are reliable and credible witnesses, surfaced again in the Nikolic verdict. There, the international judge commented:

“The argument brought forward by the defence, that it relates to the mentality of Kosovar Albanians to rather live up to the expectations of their peers than to the expectations of justice, is understandable as well as the fear of the accused confronted with a trial and investigation experienced as totally hostile... Although this behaviour is understandable, it is not possible to ground a verdict on such evidence.”

It is not clear what the trial judge here meant when she deemed “understandable” the defence argument about “the mentality of Kosovar Albanians to rather live up to the expectations of their peers than to rather live up to the expectations of justice”. It suggests that, in the absence of any expert testimony concerning Kosovar Albanian social organisation or communication patterns, the court drew adverse inferences concerning prosecution witnesses based solely on their ethnicity. Only a few paragraphs earlier, the court had found that, with few exceptions, “all witnesses/injured parties...did not always stick to the truth, some of them in a very important manner, some of them less obviously.”

These two verdicts both allude to the issue of whether and when the court should take into consideration, when assessing a witness’s credibility, his or her status as a victim in an ethnic conflict. The ICTY in *Tadic* spoke on this as follows:

“The reliability of witnesses, including any motive they may have to give false testimony, is an estimation that must be made in the case of each individual witness. It is neither appropriate, nor correct, to conclude that a witness is deemed to be inherently unreliable solely because he was the victim of a crime committed by a person of the same creed, ethnic group, armed force or any other characteristic of the accused. That is not to say that ethnic hatred, even without the exacerbating influences of violent conflict between ethnic groups, can never be a ground for doubting the reliability of any particular witness. Such a conclusion can only be made, however, in the light of the circumstances of each individual witness, his individual testimony, and such concerns as the Defence may substantiate either in cross-examination or through its own evidence-in-chief.”⁶⁸

In cases in which the defence, prosecutor, or a panel member raises the issue of whether a witness may be unreliable based on ethnic hostility or community pressure, it would be well for the court to strictly follow the guidance of the *Tadic* decision. This would mean that the court should articulate why the alleged ethnic bias is or is not supported by evidence of the witness’s individual circumstances and testimony.

Translations

The war crimes trials in Kosovo presided over by international judges are conducted in more than one language. Witnesses testify in Albanian or Serbian, and that is then translated into English in order for the international judges to understand it and for the presiding judge to summarise it for the court record. The quality of language translation and interpretation in Kosovo courts is uneven and often flawed because of interpreters’ failure to understand local dialects (Albanian-English interpreters in Kosovo courts are

⁶⁸ *Prosecutor v Tadic*, IT-97-1, Trial Chamber Judgement of 7 May 1997, paragraph 54.

from Albania, not from Kosovo). Moreover, many of the court interpreters are not professionally trained as interpreters, and do not have previous experience working in courtroom and trial settings.

The problem of inadequate language interpretation in war crimes trials further complicates the issue of deciding whether a witness has testified inconsistently. It is of concern that because an interpreter may translate a witness statement at best, with a different nuance, and at worse, inaccurately or incompletely, judges may consider that witness to be inconsistent and therefore not credible.

Accuracy of recording testimony taken at judicial investigations and trials

A crucial element in deciding whether or not a witness has testified consistently or not is the accuracy and reliability of the mechanism for recording witness statements. In Kosovo courts, during judicial investigative hearings and trials witness testimony is not normally recorded verbatim. Under FRY CPC 80(2), “[o]nly the essentials of the testimony and statements given shall be noted in the record in the narrative form. Questions shall be entered in the record only if this is necessary to understand the answer.”

The practice in Kosovo courts is, after a witness has answered a series of questions on a subject, for the presiding judge to dictate to the clerk a paraphrase of what the witness has said. This method, commonly used throughout civil law systems, can introduce variations of phrasing, vocabulary, and style into a witness’s original statement. FRY CPC 82(2) states that “[t]he record shall be signed by the person examined”, but this by itself does not necessarily ensure that the summarised statements accurately reflect what the witnesses have said. OSCE has observed that witnesses often do not read the court summaries of their statements before signing, and that investigative judges usually do not insist that the witnesses read before signing.

Tape recording of judicial investigations, and transcription of tapes so made, is possible under FRY CPC 87(1) and (5). To date, however, no investigating or trial panels have used electronic recording in war crimes cases. Shorthand reporters (whether using handwritten or machine shorthand) do not exist in Kosovo. In two war crimes cases, Vuckovic and Apostolovic, the trial court had much of the testimony recorded verbatim by having the court clerk type witness statements into the computer as the witnesses testified. However, this is not a common practice. Considering the gravity of these cases, the courts, which rely heavily on analyses of how consistently a witness has testified over a period of time, should use the most accurate and reliable means available of recording witness statements.

Theories of criminal responsibility in the Kosovo context

Few war crimes cases involve individuals acting in isolation. On the contrary, most allegations of war crimes describe multiple actors committing criminal offences in concert (although seldom are all the actors involved identified and charged). Whether it is an issue of a group of paramilitaries entering a village intending to expel civilians and

burn houses, or whether it is an issue of a military or civilian superior who is alleged to be either ordering, encouraging, or tolerating their subordinates' acts of pillage, inhumanity, and torture, trial courts must evaluate and identify the legal basis of an individual defendant's criminal responsibility.

The applicable law in Kosovo provides for several different kinds of criminal responsibility, among them aiding, complicity, incitement, and using groups to commit criminal acts. Further, the applicable statutory and convention law provides a framework for analysing and ascribing responsibility for subordinates and for superiors alleged to have committed war crimes. However, based on the trial court verdicts in the cases reviewed, panels have not adequately applied the existing statutory and convention law on criminal responsibility to the facts in individual cases.

Only two of the war crimes trial verdicts reviewed discuss in any length the legal nature of the defendant's criminal liability. In one of these cases, Kolasinac, the judge identified command responsibility as an issue in the case, and referred to the jurisprudence of the ICTR on that issue.⁶⁹ The Kolasinac verdict ultimately found that the defendant did not, as President of the Municipal Assembly and as the Head of the municipality's Civil Defence Unit, possess either the *de facto* or *de jure* authority over military or police officers.

In the Trajkovic case, the defendant was a chief of police accused of responsibility for war crimes committed by his subordinates. The international trial judge noted the FRY and Serbian law that arguably gave the defendant legal authority over the subordinates who committed the crimes, and then concluded on the issue of criminal responsibility that

“[t]hese different elements constitute the proof that Momcilo Trajkovic is personally responsible of [sic] the criminal acts committed in the Kamenica area against civilian population, but only for organised actions and not for isolated ones.”

The judge here seems to be recognising some distinction between liability for “organised actions” and liability for “isolated” ones, but never defines what constitutes “organised” and “isolated” actions, and never articulates the different parameters of responsibility between the two. The judge also never specifies whether criminal liability for “organising” criminal acts is based on statutory law or some other source.

The remaining trial verdicts reviewed, both those authored by international panels and those authored by local panels, either describe the defendant's responsibility as that as being in complicity pursuant to FRY CC 22, or they make no mention of the issue at all.

The most striking absence in the trial court verdicts is their failure to recognise or to invoke theories of individual liability based on an accused's participation in a criminal group. FRY CC 26 (Criminal Responsibility and Punishability of the Organisers of Criminal Activity) could apply in these instances, which is analogous to international

⁶⁹ The court's discussion of the issue presumed the applicability of the command responsibility doctrine in Kosovo courts, without mentioning whether it was being applied as customary international law, or by virtue of Articles 86 and 87 of Additional Protocol 1 to the Geneva Conventions.

customary law doctrine of joint criminal enterprise (also known as the common purpose doctrine), as interpreted by the ICTY in cases such as *Tadic*⁷⁰ and *Brdanin and Talic*⁷¹.

Since virtually all of the war crimes cases in Kosovo have involved allegations and evidence of uniformed and armed military groups who, acting in concert, committed criminal acts of property destruction, intimidation, torture, murder, and expulsion of civilians, it is logical that prosecution should proceed on, and the courts should consider, liability under FRY CC 26 and the joint criminal enterprise doctrine. When evidence is clear that an accused intentionally participated as a member of a group engaged in criminal activity, the courts should apply FRY CC 26 and be guided by the authoritative cases on joint criminal enterprise. Failure to consider and, when supported by evidence, apply this doctrine of liability can result in defendants not being held fully accountable for the foreseeable consequences of their criminal acts.

It is not clear whether the failure to allege and consider this basis for criminal liability stems from prosecutors and judges not being familiar with the applicable law and authorities, or whether it is because prosecutors have not provided, and trial judges have not insisted upon, adequate admissible evidence of a joint criminal enterprise. Whatever the reason, by viewing the evidence in the Kosovo war crimes trials only in terms of individual or, at most, complicitous, criminal activity, trial courts risk evaluating the alleged crimes out of context.

Local trial panels in the early war crimes prosecutions sometimes erred in the opposite direction, made sweeping findings concerning what they considered the larger criminal forces at work during the armed conflict in Kosovo. For example, the Jokic court found that the defendant's criminal acts

“were aiming [sic] the mass expulsion of the civilian undefended Albanian population from its land and as a final step the ethnic cleansing of Kosovo.”

And in Ademi the local panel stated that

“It is confirmed also the mass deportation of the civilian population in Kosovo, mainly women children, elders, prohibited according to the international conventions, leaving them hungry without elementary means for living. Also the conduct of the accused were directed towards the bodily integrity of now deceased, executions, murders...and inhuman treatment as taking the money, burning of houses, mass deportation from their homes...”

Such statements were not supported by evidence produced at trials (which were confined to events occurring in the municipalities of Prizren and Mitrovicë/Mitrovica, respectively). The approach in these two cases fails to meet any legal criteria for finding guilt based on participation in a joint criminal enterprise.

However, there has been a large amount of credible evidence admitted in numerous cases to date concerning the displacement of, intimidation toward, and violence against civilians, as well as the deliberate destruction of property. The international judges and

⁷⁰ *Tadic*, Appeal Chamber Judgement at paragraph 186-228.

⁷¹ *Brdanin and Talic* at 22-51.

prosecutors who are now taking responsibility for war crimes trials in Kosovo should be prepared to locate, evaluate and admit evidence which shows the wider context of individual defendants' crimes. They should, moreover, consider such evidence, when appropriate, in light of the applicable law on group criminal activity (FRY CC 26), and in light of the well-established doctrine of joint criminal enterprise. This is essential in order for Kosovo courts to articulate the context in which the crimes occurred, assess the evidence, and fully and fairly administer justice in these complex cases.

Structure and findings in trial verdicts

Considering the importance of the Kosovo war crimes prosecutions for promoting the search for truth and reconciliation in the area, the trial court verdicts should reflect high standards of jurisprudence. The verdicts in cases of this nature are expected to be structurally consistent and accompanied by solid legal reasoning. The universal character of these crimes and the public attention that they usually attract means that the verdicts are regarded as a body of legal opinions, which, by virtue of their quality, may form sound jurisprudence aimed at guiding or providing reference during subsequent similar trials or to legal professionals interested in researching such cases. Furthermore, considering that the court panels hearing these cases have mostly been composed of international judges, the standards of legal writing and argumentation should even be higher.

Apart from the aspects of legal analysis, which are discussed in another section of this report, the structure and organisation of the trial verdicts in the war crimes cases analysed here have sometimes failed to meet the standards mentioned above. The applicable law, namely the FRY CPC Chapter XXII, specifies the types of verdicts that can be pronounced by a court, and it also explains the necessary structural and substantive elements that the different type of verdicts must have. According to the provisions of FRY CPC 357, a verdict should contain an introduction, an enacting clause and an explanation. With regard to the explanation, paragraph 7 of the mentioned Article states that three of its essential elements are the establishment of the existence of the crime, establishment of the criminal responsibility, and the legal assessment of the particular acts or omissions of which the defendant is found responsible. The only situation where the applicable law prescribes that the above-mentioned three elements are not to be assessed is when the court pronounces a verdict rejecting the criminal charges, based on FRY CPC 349. *Per a contrario*, an assessment regarding the existence and legal nature of the crime, and an assessment of the defendant's criminal liability are mandatory elements of a verdict even when the defendant is found not guilty and acquitted. Indeed, the FRY CPC strictly envisages the three special situations in which a defendant can be acquitted (Article 350), but in none of these situations is the court specifically exempted by FRY CPC 357 from providing a legal assessment of the crime, its nature and the criminal responsibility.

When analysing some of the verdicts in the Kosovo war crimes cases, the lack of a unified common understanding of the structure and necessary elements of a verdict is most striking. Most trial verdicts, whether by local or international panels, do not

distinguish between legal and factual issues, and they do not set out the elements of the criminal offences charged and analyse the trial evidence with reference to it. Furthermore, despite the fact that war crimes charges are extremely serious and that they require, as an essential pre-condition, the existence of specific circumstances, trial panels have not addressed issues essential to proving a prima facie case, such as the existence of an armed conflict or the “rules of international law” violated under FRY CC 142.

For example, the Nikolic verdict, authored by an international judge, begins by setting out summaries of each witness’s testimony, and follows this with sections titled “time frame”, “uniform and weapons”, and “credibility”. The Nikolic case involved allegations that the defendant was a member of a group of armed and uniformed Serb police/paramilitaries who entered the victim’s residence and murdered him. However, the trial verdict never specifies whether it finds that the crime occurred at all and it made no specification regarding the substance or nature of the crime. It only indicates that the identification of the defendant was inadequate.

In the Jokic first trial verdict, the court reproduced at great length the statements given by the witnesses and gave a full account of the rest of the evidence heard during the trial, only to conclude, in one short paragraph, that the defendant was guilty of committing war crimes. The verdict contained no factual and legal assessment regarding the existence of an armed conflict, no legal analysis of the defendant’s alleged criminal acts in the perspective of the “rules of international law” required under FRY CC 142, and no reference to any theory regarding criminal responsibility.

A similar absence of a well-structured legal assessment of the crimes committed is found in the Stanojevic verdict.

An example of a better practice exists in the Jovanovic/Misic verdict. There, the court found that the “events in general took place as stated by the witnesses” (the rounding up of Albanian villagers by Serb forces, separation of men from women, and torture and maltreatment of the male villagers), but then determined that the defendants were not identified as participants in the criminal acts.

Only in one verdict, Kolasinac/Jovanovic, has a trial court clearly set out in the structure of its verdict the facts as applied to the elements of the crime.

Absence of cited authorities

Most trial verdicts, including those authored by international judges, analyse legal issues solely with reference to local law (that is, the FRY and Kosovo criminal codes, the FRY criminal procedure code, and UNMIK regulations). Although reference to local law alone is usually sufficient in criminal cases that involve simple, straightforward legal or factual determinations, in war crimes cases the complexity and novelty of the issues presented usually demands citation of a wider range of legal authorities. But, with one exception, local and international judges to date have not, in their written verdicts, based their

decisions on war crimes and international humanitarian law jurisprudence; the same situation applies to international human rights jurisprudence.

Only two trial court verdicts make any reference at all to war crimes case law. In Trajkovic, the international judge cited in passing the ICTY *Tadic*⁷² decision on the definition of the customary international law offence of crimes against humanity. However, this judge erred in finding that crimes against humanity (an offence under customary international law offence and a violation of the ICTY statute) is a separate and distinct offence from war crimes under FRY CC 142.

The Jovanovic/Kolasinac decision is the only example among the trial verdicts under review of adequate reliance on case law and other authorities. Its author cites a variety of judicial and scholarly sources, including, among others, case law of the ICTY and ICTR, commentaries on the FRY criminal code, and a text on crimes against humanity.

Only one of the trial verdicts reviewed referred to international human rights case law. The Stanojevic verdict, although it makes no mention of war crimes jurisprudence, does cite three cases of the ECHR on the issue of whether the presence of the defendant and his attorney can be waived at a crime scene reconstruction.⁷³

Incorrect qualification⁷⁴ of the crime

Four international trial panels have convicted defendants for crimes different from those charged in the indictment.⁷⁵ In one case, Matic, the international trial panel re-qualified the war crimes charge as light bodily injury. In Kolasinac, the court went from war crimes to aiding after the commission of the crime. In both of these cases the Supreme Court found that the trial court erred in re-qualifying the crime charged. A local trial panel in Jokic, after finding no proof of the defendant's intent to destroy an ethnic or national group, then re-qualified the charge as war crimes under FRY CC 142 and found the defendant guilty of that. Although it was a promising sign that the local panel carefully considered the issue of intent in the original genocide indictment, their re-qualification to war crimes, FRY CC 142, was an obvious legal mistake⁷⁶ that the Supreme Court never addressed when they reviewed the case on appeal.

Another fundamentally incorrect re-qualification occurred in the Trajkovic case, in which the international judge confused the statutory charge of war crimes under FRY CC 142 with the customary international law offence of crimes against humanity. The verdict in the case stated that FRY CC 142 represented the FRY law codification of crimes against

⁷² *Tadic*, Appeal Chamber Judgement, supra.

⁷³ Stanojevic at paragraph 15, footnote 3.

⁷⁴ "Qualification" is the term used in several civil law systems to describe the selection of a criminal charge whose elements match the facts established in a specific case. When international panels in the Kosovo war crimes panels have "re-qualified" indictments, they are following a procedure equivalent to identifying included or lesser included offenses.

⁷⁵ See Kolasinac, Matic, Jokic, and Trajkovic.

⁷⁶ Genocide lacks the element of "war, armed conflict, or occupation" essential to prove the charge of war crimes under FRY CC 142.

humanity (crimes against humanity is a customary international law offence that has developed separately in international law from the offence of war crimes). Although the trial court mischaracterised FRY CC 142 as “crimes against humanity”, and read into that statute the elements of a completely separate offence, the international panel of the Supreme Court that reviewed the case on appeal did not identify or discuss the error.

IV. SUPREME COURT JUDGEMENTS

Overview

Supreme Court judgements in Kosovo are a meagre source of war crimes jurisprudence. They are characterised by brevity (the average length of decisions is three to four pages), poor legal reasoning, absence of citations to legal authority, and lack of interpretation concerning the applicable law on war crimes and human rights issues. Because of this, they are not useful tools for providing guidance to the local legal community in the complex field of war crimes and international humanitarian law.

International Supreme Court panels have reversed eight out of eleven convictions it has reviewed in war crimes cases. Of those eight, all of them include as a reason for reversal that the facts were not correctly verified. In six of the eight, the Supreme Court panel cited as error that the trial court did not call witnesses proposed by the defence.

The principal grounds for reversal of the war crimes cases, the “incomplete or insufficient establishing of facts”, as most of the judgements describe it, can mean different things by different Supreme Court panels. Usually, the panels use the term to mean simply that they disagree with the trial court’s decision that the facts at trial were sufficient to prove that the defendant was involved in the commission of the crime. Some panels, such as in Trajkovic and Kolasinac, have used it to mean that that the trial court incorrectly decided whether the defendants were criminally responsible for crimes that did indisputably occur. Often, it also means that the trial court did not permit the defence to call certain witnesses.

The table below presents a statistical overview of the dispositions and reasons used by the Supreme Court in their reversals of war crimes trial decisions.

<u>Supreme Court Judgements</u>		
<u>Case</u>	<u>Decision</u>	<u>Reasons for Reversal</u>
Nikolic	Reversed	1. incorrect & insufficient factual findings 2. failure to call defence witnesses
Vuckovic	Reversed	1. insufficient factual basis for verdict 2. incorrect assessment of evidence 3. failure to call defence witnesses

<u>Supreme Court Judgements</u>		
<u>Case</u>	<u>Decision</u>	<u>Reasons for Reversal</u>
Zvezdan Simic	Verdict affirmed; Sentenced increased	
Jokic	Reversed	1. incomplete establishing of facts 2. failure to call defence witnesses
Ajeti/ Stojanovic	Reversed	1. insufficient establishing of facts 2. failure to call defence witnesses 3. failure to admit defence documentation 4. failure to clarify contradictions in testimony
Stanojevic	Verdict & sentence affirmed	
Jovanovic/ Kolasinac	Jovanovic: Affirmed Kolasinac: Reversed	(Kolasinac reversal) Wrongly assessing evidence on 1. forced labour 2. orders given/received by defendant re: property looting & destruction 3. consequences of registration drives
Matic	Reversed	1. light bodily injury not included within war crimes charge 2. incorrect establishing of facts
Trajkovic	Reversed	1. lack of evidence of criminal liability 2. failure to call defence witnesses

Treatment of Genocide, FRY CC 141

In only one case, Vukovic, has the Supreme Court considered the crime of genocide under FRY CC 141. There, the court found no evidence of an essential element of the crime of genocide, the intent to destroy a national or ethnic group in whole or in part. The court also said *in dicta* that:

“[T]he exactions committed by the Milosevic’s [sic] regime in 1999 cannot be qualified as criminal acts of genocide, since their purpose was not the destruction of the Albanian ethnic group in whole or in part, but its forcefully departure from Kosovo as a result of systematic campaign of terror including murders, rapes, arsons and severe maltreatments. Such criminal acts correspond to the definition of crimes against humanity given by international laws (widespread or systematic plan of attack against civilian population during the war) or can be qualified war crimes as per Article 142 of the CLY.”

This last statement is an interesting example of the court proposing a general rule concerning the application of a statute. The Vuckovic case did not present evidence of genocidal actions of the Milosevic regime as a whole; it was limited to the actions

committed by the accused in the geographical area of Mitrovicë/Mitrovica. An attempt to provide guiding interpretation on points of law on the part of the Supreme Court could have been beneficial, as, in many of its reports⁷⁷, OSCE has encouraged this court to assume a leading role in this respect. However, in this particular case, the Supreme Court did not undertake to interpret the legal nature and meaning of the genocide statute, but, instead, drew general remarks on factual points. Therefore, it was not correct for the Supreme Court panel to express its judgement on an issue - whether any acts of genocide occurred in Kosovo in 1999 - that was not before it.

Vuckovic was an opportunity for the Supreme Court to thoroughly interpret the genocide statute FRY CC 141, and to cite jurisprudence from other courts and tribunals in support of its conclusions that the evidence at trial did not establish the crime of genocide. A well-reasoned opinion on this issue, disseminated throughout the local legal community, would have been useful as a means of increasing understanding of a complex and controversial subject.

Treatment of War Crimes Against the Civilian Population, FRY CC 142

Similarly, the Supreme Court has failed to issue any in-depth judgements discussing the elements of the war crimes statute FRY CC 142, and how to establish criminal responsibility under it. Critical issues under that statute are the “violation of rules of international law”, the existence of a “time of war, armed conflict, or occupation”, and what constitutes ordering the commission of the specific predicate crimes.

In five cases, the Supreme Court has dealt with the war crimes statute FRY CC 142. In three of these cases, Jokic, Jovanovic, and Trajkovic, the trial courts convicted the defendants as charged for war crimes. In the other two cases, Matic and Kolasinac, the cases were submitted to the trial courts on war crimes charges but the panels convicted the defendants of different offences (light bodily injury and aiding after the commission of the offence, respectively). On appeal in all of these cases, international panels reversed the convictions.

The following paragraph, quoted verbatim from the Trajkovic Supreme Court judgement, is an example of the reasoning process international panels have used in analysing the legal and factual sufficiency of a war crimes conviction.

Supreme Court found that factual state is wrongly verified concerning all the charges, since there is no direct evidence of final one that the accused acted personally or gave the orders that brought to crimes alleged or that he might be held responsible for duties of command responsibilities in connection with the above mentioned crimes, and there is no evidence that shows his aware intention in the case of attempted murder and neither unjustified conclusion of throwing out the window.

By referring to whether the defendant “gave the orders that brought to crimes alleged or that he might be held responsible for duties of command responsibilities in connection with the above mentioned crimes”, the Supreme Court is alluding, possibly, to the legal

⁷⁷ See the OSCE reports available on the OSCE web-site: www.osce.org/kosovo/documents/reports/justice

doctrine of command responsibility. This is a doctrine of criminal responsibility elaborated in the post World War II Nürnberg and Tokyo cases, in the ICTY and ICTR statutes, and in the cases of the ICTR and ICTY.⁷⁸ This report has already addressed the manner of applying theories of joint criminal or command responsibility in trial court verdicts, and the same arguments and analysis applies to the Supreme Court verdicts as well.

None of the other Supreme Court cases treating the war crimes statute FRY CC 142 offer any further clarity or guidance on what constitutes the elements of war crimes.

Treatment of criminal liability

Criminal liability is a legal issue. It is a determination of whether an accused's actions render him or her legally accountable under principles of criminal law. However, the Supreme Court judgements in war crimes cases do not separate the issue of an accused's criminal responsibility from the factual issues of the case. As the Trajkovic judgement quoted above illustrates, the Supreme Court panels consider the issue of criminal responsibility part of the "factual state" that the trial court must establish. This mingling of factual and legal issues makes it difficult for lower courts and for practitioners to correctly identify the errors they have made.

Furthermore, most war crimes cases involve challenging issues of criminal responsibility. Defendants in such cases are, as a rule, alleged to be acting in concert with others—whether as leaders or members of military, paramilitary, or police groups, or as civilians with significant *de facto* or *de jure* authority over subordinates. The courts, therefore, must decide whether the accused are individually liable (as perpetrators, aiders, accomplices, inciters, or for attempts), or whether the accused are liable for having created or used a group to commit a crime.⁷⁹ In cases where evidence suggests, or the defendant claims, that he or she was "just following orders" as a simple soldier (as Stanojevic did in his alternative theory of defence) the court would need to decide whether FRY CC 239 (concerning the liability of subordinates for following orders) applies.

None of the Supreme Court cases have attempted to set the parameters for the different statutory grounds of criminal liability. In two judgements, Kolasinac and Trajkovic, which presented novel questions about the responsibility of supervisors for crimes committed by subordinates, the Court did not address the issue of superior responsibility, either under the "order" clause of FRY CC 142, or under FRY CC 26 for liability as a creator or user of a criminal association. Again, this failure of the Supreme Court to clearly identify and analyse a critical issue in serious, complex cases, reflects on the credibility of the Court's jurisprudence.

⁷⁸ *Akayesu* at paragraphs 487 – 491; *Prosecutor v Aleksovski*, IT-95-14/1, Trial Chamber decision dated 25 June 1999, paragraphs 66 - 81; *Prosecutor v Delalic, Mucic, Delic, and Landzo*, IT-96-21, Trial Chamber decision dated 16 November 1998, paragraphs 330-395.

⁷⁹ FRY CC 26.

Absence of cited authority

The Supreme Court judgements reviewed do not refer to any guiding or persuasive authority outside the FRY criminal and criminal procedure statutes and the UNMIK Regulations. None of the judgements cites any case from national courts or from an international war crimes tribunal; none of the judgements cites any commentary on FRY law or scholarly work; none of the judgements cites international conventions or analogous statutory law from other countries.

There are only two citations to binding authority beyond the FRY and Kosovo codes and UNMIK Regulations. In Trajkovic, the Court stated that “European Convention on Human Rights is applicable according to the UNMIK Regulation 1999/24 and 2000/59”, and then proceeds to issue instructions to the lower court concerning how to re-evaluate the issue of the defendant’s detention. In Stojanovic, the Court cited, without discussing, ECHR Article 6/3(d) on the issue of hearing defence witnesses.

Providing in-depth analysis and citations to relevant cases or other authorities in Supreme Court decisions would help local judges, prosecutors, and attorneys increase their capacity for understanding the legal issues involved in war crimes trials. It would also render the judgements more persuasive. Lastly, such judgements could help establish the basis for a dynamic, critical, independent jurisprudence of Kosovo courts.

SECTION V. STATISTICS ON WAR CRIMES CASES

War Crimes Cases				
□ Based on statistics available to LSMS on 01 July 2002.				
Status		<u>Genocide</u>	<u>War Crimes</u>	<u>Murder</u>
Under Investigation		0	4	0
Investigation Dropped		1	0	0
Indicted		10	17	6
Indictment Abandoned		2	0	0
First Trial Verdict	Guilty	3*	5*	6
	Not Guilty	0	7	0
Retrial Verdict	Guilty	0	1	3
	Not Guilty	2	1	1
Trial Ongoing		0	0	0
Retrial Ongoing		0	2	1
Escapee		5	4	0
Fugitive		0	2	1

-
- Two defendants were initially indicted for genocide but were convicted of lesser offences.
 - Two defendants were initially indicted for war crimes but were convicted of lesser offences.

Trial Verdicts in Chronological Order

Date	Defendant	Panel Composition	Verdict
3 July 2000	Nikolic (first trial)	Local	Guilty
9 August 2000	Simic	Local	Guilty
30 August 2000	Ademi	Local	Guilty
13 September 2000	Juvenile Z	Local	Guilty
20 September 2000	Jokic (first trial)	Local	Guilty
9 October 2000	Ajeti	Local	Guilty
	Stojanovic		Guilty
18 January 2001	Vuckovic	Local	Guilty
	Bisevic		Guilty
29 January 2001	Matic (first trial)	International	Guilty (of a lesser charge)
6 March 2001	Trajkovic	Local	Guilty
10 April 2001	Simic et al.	Local	Prosecution abandoned
14 June 2001	Jovanovic	International	Guilty
	Kolasinac		Guilty (of a lesser charge)
18 June 2001	Stanojevic	International	Guilty
2 November 2001	Misic	International	Not Guilty
	Jovanovic		Not Guilty
23 November 2001	Mladenovic	International	Not Guilty
28 January 2002	Apostolovic	International	Not Guilty
27 March 2002	Matic (retrial)	International	Not Guilty
18 April 2002	Nickolic (retrial)	International	Not Guilty
3 May 2002	Jokic (retrial)	International	Not Guilty

Supreme Court Judgements in Chronological Order

DATE	DEFENDANT	PANEL COMPOSITION	JUDGEMENT
8 March 2001	Juvenile Z	Local	Affirmed
9 April 2001	Nikolic	International	Reversed
9 April 2001	Vuckovic	International	Reversed
26 April 2001	Jokic	International	Reversed
6 June 2001	Zvezdan Simic	International	Affirmed
13 June 2001	Matic	International	Reversed
29 November 2001	Jovanovic	International	Affirmed
	Kolasinac		Reversed
29 November 2001	Ajeti	International	Reversed
	Stojanovic		Reversed
30 November 2001	Trajkovic	International	Reversed
18 January 2002	Stanojevic	International	Affirmed

Relevant Statutes of the FRY Criminal Code

FRY CC 141. Genocide

Whoever, with the intention of destroying a national, ethnic, racial or religious group in whole or in part, orders the commission of killings or the inflicting of serious bodily injuries or serious disturbance of physical or mental health of the group members, or a forcible dislocation of the population, or that the group be inflicted conditions of life calculated to bring about its physical destruction in whole or in part, or that measures be imposed intended to prevent births within the group, or that children of the group be forcibly transferred to another group, or whoever with the same intent commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.

FRY CC 142. War Crime Against Civilian Population

Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on large scale of a property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the

unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.