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# Ten Lessons from Serbia's Experience in War Crimes Issues

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## Introduction

Ethnically characterized conflicts in the former Yugoslavia – in which approximately 140,000 lives were lost and four million people became displaced[1] – lasted, with some interruptions, for almost a decade.

For the first time since the trials at Nuremberg and Tokyo, the international community established in 1993 an international war crimes tribunal (the ICTY[2]) to try those responsible for war crimes committed on the territory of the former Yugoslavia. The co-operation between Serbia and the ICTY has experienced some difficulties during its first ten years, passing through more and less successful phases, but in the end seeing full co-operation.

Domestic war crimes trials in Serbia have been carried out in parallel with the ICTY for more than a decade. This national practice is still developing.

The experience acquired through this unique and complex practice is relevant to and should, in certain respects, be studied and made use of in the process of co-operation between the International Criminal Court (ICC) and national legal systems. It can shed light on the full implementation of the complementarity principle.

This Policy Brief presents ten lessons from the Serbian experience for the successful establishment of institutions responsible for war crimes issues post-conflict.

## Lesson 1: The existence of political will to deal with war crimes issues is the most basic precondition

Sufficient political will is the most basic precondition to establishing post-conflict national systems capable of organizing war crimes trials and achieving full co-operation with international judicial institutions. In a nutshell, the political elite of the affected country must be interested in the actual commencement of this process. This is of the utmost importance as the entire process must start with a political decision to create the conditions necessary for co-operation with external criminal jurisdictions and initiation of domestic trials.

Serbia's experience in this regard is illustrative. Before the political changes occurred in the country, there were an insignificant number of trials against perpetrators of war crimes.[3] Following political changes in October 2000 and the enactment of the special Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes (2003), the Office of the War Crimes Prosecutor and War Crimes Chamber of Belgrade District Court were established, which resulted in a significant increase in the number of proceedings against perpetrators of such criminal offenses.[4]

At the same time, the new Serbian political leadership had declared as core political objectives the full co-operation with an external criminal court (the ICTY) and the establishment of war crimes responsibility before domestic courts. This led to significant results. Today Serbia has no remaining fugitives indicted by the ICTY,[5] while all other technical means of co-operation with the Tribunal function efficiently and in a timely manner.[6]

1 See http://ictj.org/publication/transitional-justice-former-yugoslavia (accessed on 25 November 2011).

2 The International Criminal Tribunal for the former Yugoslavia (ICTY) established by UN Security Council resolution 827 on 25 May 1993.

3 Until 2003, a total of nine proceedings were instituted before various regular courts.

4 Numbers in total: prosecuted persons: 383, defendants: 143, victims: 2,598. Final judgments: cases: 28, convicted persons: 71, acquitted persons: 11, years in prison: 845.5 (as of 2 January 2012). These data have been downloaded from the website of the War Crimes Prosecutor (http://www.tuzilastvorz.org.rs/html_trz/pocetna_cir.htm, accessed on 2 January 2012).

5 From July 2011, the Republic of Serbia has no remaining fugitives. All accused (the 45 asked from Serbia) were transferred to the ICTY.

6 "Serbia has given timely and adequate responses to OTP requests

The existence of political will should not be confused with illegitimate political pressure to obtain convictions. This is exactly the danger of war crimes trials carried out in the legal systems of countries in transition. War crimes convictions are often seen as the most powerful manifestation of a society's readiness to come to terms with the past. This approach, if taken to extremes, can create a paradoxical situation in which confronting crimes could be carried out by means of new and illegal acts that would, in the case of court proceedings, violate the right to a fair trial, and as a further consequence undermine the independence of the judiciary.

**Lesson 2: Securing the ongoing support of the international community**

Further to political will at the national level, it is also essential to have the necessary level of support from the international community. National institutions tasked with dealing with war crimes are often subjected to difficult and sensitive domestic conditions in post-conflict societies. Various forms of support from the outside, primarily political and financial aid, will facilitate the proceedings in an environment that could be, particularly at initial stages of the process, very unfavourable.

Although there is general support in the international community for strengthening national war crimes justice capacity, it is not always easy to convince major donors (or eminent international stakeholders) that additional funds should be redirected to resolving war crimes issues, primarily due to limited resources. It is necessary to adequately inform foreign and international partners of the importance of aid. Partners must also be advised of potential damage that could be caused to domestic trials by the withholding of aid.

**Lesson 3: Building capacity**

War crimes trials are not typical activities for most courts. Few jurisdictions have previous experience in such cases. As a result national systems face the issues and cases of war crimes quite unprepared.

Capacity development entails several steps. In the first phase, the organization and structure of the institutions that will be in charge of the proceedings must be determined, and it must be decided whether the trials will be conducted by the prosecutors and courts of general jurisdiction or by specialized courts and prosecutors' offices. A similar question comes up in relation to co-operation with an external criminal court. Here as well it must be determined whether the co-operation should be dealt with by organs established for that purpose only, or by already existing institutions that participate in international legal co-operation with other countries and international organizations.

Serbia decided to establish new organs and new organizational units within the existing organs, ultimately achieving results demonstrating that this was the right choice. The co-ordination of proceedings and creation of specialized organs enabled the concentration of resources, better logistical support, and the creation of a uniform court practice in domestic war crimes trials, while at the same time providing for more efficient co-operation with the ICTY.

In the capacity-building process, special attention should be paid to the selection and training of the personnel who will participate in these trials, since judges, prosecutors, defense counsel and other participating professionals will usually not have prior experience in this area.

Finally, one of the most important steps in capacity building is the creation of an adequate legal framework. By this we mean the introduction of appropriate legislative mechanisms within criminal legislation, both substantive and procedural, that allow and facilitate prosecution of core international crimes. As examples of these mechanisms we mention the introduction of plea bargaining, witness protection, seizure and confiscation of proceeds from crime. Legislative intervention is also necessary to facilitate co-operation with an external criminal court. The extensive legislative changes of Serbia in these areas could serve in the future as an example for others.

**Lesson 4: Securing the necessary resources**

There is no doubt that all of the above-mentioned proposals require additional funding, and that revenue must be secured both for domestic judicial institutions responsible for war crimes issues and the departments responsible for co-operation with relevant external criminal jurisdictions.

In order for war crimes proceedings to be conducted successfully, investments are needed, inter alia, in equipment - computers, specially designed courtrooms and other premises, as well as in the tools necessary to establish video links. Additional resources are needed to provide security to particularly vulnerable participants in the proceedings.

Finally, it is necessary to provide resources for adequate compensation to the professionals who have the responsibility to carry out this sometimes high risk work. Their activities are carried out in environments that are frequently characterized by mixed public opinion about

for access to documents and archives, with no responses presently overdue. Similarly, Serbia has promptly and professionally facilitated the OTP's access to witnesses as well as the attendance of witnesses before the Tribunal. Service of summonses was timely, court orders were executed and transfers were organized as required, including for individuals in custody for domestic court proceedings", Report of the ICTY Prosecutor to the United Nations Security Council, December 2011.

the justification for these trials. In Serbia judges, prosecutors and administrative staff participating in war crimes trials are provided with increased earnings.

**Lesson 5: Adequate resource allocation**

During the last decade, Serbia is one of the countries that have received donations linked to war crimes issues. However, on several occasions these donations and resources overlapped and were insufficiently co-ordinated. In addition, sometimes the funds were used for projects that did not have any particular importance at the time, thus diverting much-needed resources from more important needs.

In this sense, one important step that should be taken is to create a mechanism that will allow the proper management of both the domestic resources and the resources coming from abroad. It should be explored whether a mechanism could be established to co-ordinate fundraising and the allocation of resources, in a manner which would include governmental, non-governmental and international stakeholders in its activities.

**Lesson 6: Establishing international co-operation**

There probably exists no national system that is capable of undertaking all of the above-described proposals entirely on its own. In order for these efforts to yield results, it is necessary for the national system to establish good co-operation with international institutions and other national legal systems. The co-operation between Serbia and the ICTY in the exploitation of evidence provides an important example of such co-operation with international institutions. Evidence from the ICTY has been used in a significant number of criminal proceedings conducted before the court in Belgrade. Without this evidence some of the proceedings before the national courts would be much more difficult to conduct in a proper manner.

Moreover, improvement of international co-operation also strengthens the trust between the different systems. The ICTY decided to refer some of its cases to the national courts in Serbia[7] only after it was convinced that the domestic authorities were ready to conduct the proceedings in compliance with appropriate standards of fair trial.

**Lesson 7: Achieving regional co-operation**

One of the important aspects of international co-operation is co-operation on the regional level. In most regional conflicts, the defendants, witnesses and other evidence can be found scattered throughout different countries in a region. Serbia's experience shows that one of the most efficient ways to overcome this difficulty is co-operation between the neighbouring countries. Such co-operation may assist extradition procedures (possibly even the extradition of citizens from their own country, which Serbia has accomplished with the Republic of Montenegro in cases of war crimes and with Montenegro and Croatia in cases of organized crime), easier transfer and/or sharing of evidence, easier access to witnesses in one state to the courts of another state, and other aspects of legal co-operation. Regional agreements among prosecutors for war crimes emerged as a particularly valuable tool in our practice, enabling the transfer of cases between different national prosecutors' offices.[8]

What was stated above about the importance of international co-operation to strengthen confidence between states applies in equal measure to regional co-operation, where it is even more important as it applies to states that have emerged from a period of misunderstanding, hostilities or open conflicts.

**Lesson 8: Co-ordinating the activities of domestic institutions**

Co-operation at the national level means relying on a variety of methods in co-ordinating the different governmental bodies involved in the prosecution of war crimes. In order for the prosecution of war crimes and co-operation with international institutions to be effective, all available resources need to be utilized and harmonized.

This was particularly important for the co-operation of Serbia with an external criminal court (the ICTY). Serbia chose a model of establishing departments with the single function of co-operating with the ICTY. These bodies are the National Council for Cooperation with the ICTY (in charge of all aspects of co-operation except for the search for fugitives) and the Action Team (in charge of the search for fugitives). In order to facilitate the activities of the National Council and Action Team, Serbia consolidated departments that already existed.

Some of the countries in the former Yugoslavia did not establish new departments for co-operation with the ICTY, but decided to give this task to institutions that already existed. It is clear that different organizational models of co-operation entail a diversity of advantages and disadvantages. The model established by Serbia has, most certainly, justified the expectations and facilitated

7 The ICTY transferred three war crimes cases in the investigative phase to the national judiciary (known as the Zvornik, Škorpioni and Ovčara cases). The ICTY also referred a case to the national judiciary according to Rule 11bis of the ICTY Rules of Procedure and Evidence: the case against Vladimir Kovačević, also known as 'Rambo'.

8 The possibility of case transfers is of particular importance when it is not possible to extradite the accused or in cases where most of the evidence is located outside the country in which the criminal proceedings were being conducted. The number of exchanged cases of the Serbian War Crimes Prosecutor's Office (as of 2 January 2012): with Croatia: 54; with Bosnia and Herzegovina: 8; with Montenegro: 5; with Eulex/UNMIK: 19. The data have been downloaded from the website of the War Crimes Prosecutor: http://www.tuzilastvorz.org.rs/html_trz/pocetna_cir.htm (accessed on 2 January 2012).

the accomplishment of Serbia's objective, namely full co-operation with the ICTY.

Regardless of the model that is chosen for this kind of activity, domestic co-ordination and co-operation remain crucially important.

**Lesson 9: Drawing on the experiences of others**

Although international criminal law is a relatively new branch of international law, and although the courts in post-conflict situations ordinarily face such cases for the first time in their practice, it does not mean that each time solutions need to be crafted from scratch. In today's world there are many decisions, legal opinions, cases, international law provisions, and national statutes that may be of great help in this area. Concepts such as 'command responsibility', 'international and non-international armed conflict', 'combatant', 'civilian' or 'systematic attack directed against any civilian population' have been discussed by a number of judges and their opinions, mostly coherent on these issues, can be found in various collections, chiefly among them the freely available online ICC Legal Tools Database.[9]

Reliance on and an analysis of the experience of others can significantly contribute to war crimes trials at the national level. National courts tend to render decisions that often rely more on international than national law in these circumstances. It is necessary that in this area, more so than others, the opinions of colleagues who have already addressed similar questions be taken into account. Failure to do so can lead to incomplete and insufficiently professional decisions by domestic courts.

**Lesson 10: Gaining public support**

Finally, gaining public support represents one of the most important steps towards the full realization of the goals of transitional justice.

In Serbia there was no clear plan of action in this respect. As a consequence the public was not adequately informed – and was sometimes actually misinformed – about the goals and activities of the ICTY and the domestic authorities. This served to generate even greater mistrust in an environment that was already wary of such legal activity.

9 See http://www.legal-tools.org.

The Serbian example demonstrates that special attention must be paid to relations with the general public, to acquainting the public with the reasons why war crimes proceedings are being conducted, and to public accessibility to information related to the course of the proceedings. For this purpose, the existence of unbiased reporting, devoid of daily political "messaging", which is easily seen through by the public, is of the outmost importance. It is also necessary that attention be given to working with the media, current and future decision makers, victims, and associations of war veterans.

The public must at all times have access, through transparent and easily accessible sources, to accurate, precise and impartial information about the crimes committed, their perpetrators and victims, the course of ongoing court proceedings, and co-operation with external courts.

**Conclusion**

By implementing lessons learned from Serbia's experience in the processing of war crimes cases, other national criminal justice systems may acquire improved judicial capacity, as well as more professional judges, prosecutors, defense counsel and administrative staff, able to participate in both domestic war crimes proceedings and in co-operation with external courts. All of this contributes to strengthening the rule of law and helps establish a legal system that, should the need arise in the future, will not fail in the way witnessed during the last decade of the twentieth century.

Serbia has accomplished significant results in its co-operation with the Tribunal and with the courts of other countries, as well as in the conduct of war crimes trials before its domestic courts. The experiences of Serbia and other countries that had the misfortune to face similar circumstances could be of help to other societies that may encounter similar challenges in the future.

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