Peer-based Assessment Mission to Montenegro
on the
Domestic handling of war crimes
(by Maurizio Salustro)

This report is the result of the peer-based visit to Montenegro that took place between 22 and 24 of October 2014.

The expert thanks Montenegrin Authorities for their full cooperation.

All responsibility for the report and whatever errors or misinterpretations it may contain belong with the expert.

Executive summary

The result of the meetings and the analysis of the documentation available show that the Montenegrin Prosecution so far has failed to organize its investigative efforts in the field of war crimes. There is a lack of pro-active attitude in trying to identify possible suspects.
No case was opened on the Prosecution's initiative and the absence of new cases, show that the SP's office has developed no strategy regarding war crimes but it just remains reactive to criminal reports whenever filed by individuals or institutions of any sort.
Also the cooperation with foreign prosecution offices and the ICTY, is based just on informal generic requests to pass any valuable information regarding possible Montenegrin suspects. The evidence in the possession of those prosecution offices or the ICTY was never formally and specifically requested.
Trial strategies are arguable both from the point of view of the evaluation of the evidence and the identification of the applicable law.
Montenegrin courts have dealt with very few war crime cases; however, they showed a rather formalistic approach when it comes to the qualification of the acts described in the indictments. The line of reasoning justifying the adopted solutions to legal problems is disputable and sometimes clearly wrong.
Judges and prosecutors that have dealt so far with war crime investigation, prosecution and trials had received training on that matter.
International law, mainly treaty-law, is mentioned in indictments and judgements; however, basic notions seem to be not clear at all[1]. Furthermore, a mention of concrete sources and authorities is very rare, which makes hard to asses if courts refer to the ICTY jurisprudence.

[1] For example, in the Bukovica case, the Bijelo Polje High Court (judgment dated 3/10/2010) states that in crimes against humanity *"the act is committed only during the armed conflict"* and it defines widespread attacks as ones that *"are not spontaneous and are not located in a specific narrow area"* (on the contrary, see the judgment of the Appeals Chamber in the Tadic case, Kunarac, paragraph 94, and Blaskic, paragraph 101).

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1) Introduction

1. The declared goal of the mission is to assess the capacity of the Montenegrin Prosecution and Courts to handle war crime cases impartially and in line with international standards.
The expert decided to divide the analysis of the situation into two chapters, one devoted to the Prosecution and the other to the Courts. Under the former the following topics will be considered: on-going investigations, new investigations, old investigations (with a focus also on the prosecution phase), and cooperation with neighbouring countries and with the ICTY. The latter will contain an analysis of the final decisions reached by Montenegrin Courts in war crime cases.
Finally, three additional topics will be considered: witness protection, compensation of victims of war crimes, and training.

2) Prosecution

2. In 2008, both the office of the Special Prosecutor (SP) and Special Departments in the High Courts (HCs) were established to deal with investigations, prosecutions and trials in organised crime, corruption, terrorism, and war crime cases.
In 2011, the new Criminal Procedure Code (CPC) entered into force. It provides for a Prosecution lead investigation[2].

2.1) On-going investigations

3. According to the information received by the Montenegrin authorities, currently there are 8 on-going pre-investigations[3].

4. In 5 of those cases, the reported criminal offence was committed abroad and there are no potential Montenegrin suspects; consequently, local prosecutors will just collect evidence and transfer it to the competent foreign prosecution office.
More in details:

- 2 cases concern crimes committed during the 2nd world war (1945); one was reported by a Slovenian NGO, while the other one was triggered by a public statement made by a Montenegrin Parliamentarian;
- 1 case, reported by an individual, regards the killing of a victim that happened in Croatia in 1991;
- 1 case, again reported by an individual, concerns crimes committed in 1999 during the NATO bombing, in Kosovo; and
- 1 case, also reported by an individual, deals with crimes committed in 1992 and linked to the famous "Deportation case" (see below).

5. In the last three pre-investigations, there are potential Montenegrin suspects:

- 1 case was transferred by a Bosnian prosecutor; it was specified that the collection of additional evidence is necessary;

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[2] Under the old CPC investigations were carried out by the Investigative Judge.
[3] This is the phase that precedes the issuing by the Prosecutor of an order on the conduct of an investigation.

- case was transferred by a Croatian prosecutor; also in this case the collection of additional evidence is necessary;
- the third case was initiated based on a complaint filed by an NGO in 2009; allegedly, 24 Serbian victims were killed by Bosnian Muslims in the territory of Bosnia and Herzegovina (BiH); the suspicion is that Montenegrin citizens (around 78) residing in BiH, were involved in the killings; there is already a case before a Bosnian court.

6. There are no investigations on-going.

2.2) New pre-investigations/investigations

7. The expert was told that there are no further pre-investigations on-going or new ones in sight; consequently, apart from the possible outcome of the three mentioned pre-investigations, no new investigations are expected to be opened
The SP informed that it will ask neighbouring prosecution offices to pass on any information regarding possible Montenegrin suspects. According to the SP, this was constantly done in the past. Recently, a Serbian prosecutor came to Montenegro for a rogatory commission and the SP's office took the opportunity to ask him again if his office had any information/evidence of interest for the local prosecution concerning war crimes.
Moreover, not long ago the SP's office took the initiative to pay a visit to the Bosnian war crime prosecution in Sarajevo expressly to check if there was any case of interest for the office. The name of certain Montenegrins came up during the checking with the Bosnian colleagues, however, it was later found out that those people were not residents of Montenegro.

8. The SP explained that no formal request, either generic or specific, aimed at collecting information/evidence on Montenegrin citizens possibly involved in war crimes was ever sent to any neighbouring country's prosecution office. All requests for information were made orally, in an informal way. In other words, Montenegrin prosecutors constantly asked, during each and every periodical meeting and regional conference, their foreign colleagues to transfer any information/evidence concerning possible Montenegrin perpetrators. The SP concluded that without any data or information it cannot do more.

9. Concerning possible information/evidence in the possession of the ICTY Prosecution, the expert was told that the Chief ICTY Prosecutor, whom local prosecutors met many times, even recently, never told them that his office had information/evidence against Montenegrins. The assumption being that had he had something he would have explicitly told them. In any case, on the occasion of any meeting, the request for information from the local prosecutors was always implicit.
Again, it was clarified that no formal request of any sort was ever sent to the ICTY.
The expert was informed that there is a "contact prosecutor", who has a password that allows direct access to the ICTY database. However, that prosecutor was not in the meeting with the expert. Those who were present were not sure if she had gone or not to the ICTY to look for evidence or if she had ever used the password to search the ICTY database from her office. They are convinced that she did.

The expert was also informed that local prosecutors went many times to the ICTY and even attended trial hearings.

2.3) Old investigations and prosecutions

10.The only old investigations are those that resulted in indictments and trials, with the only addition of two cases known as "Lora" and "Nemetin". In the former, the investigation was opened based on a statement given by an individual to a newspaper and followed up by the prosecution office. In the latter, the investigation was triggered by a statement given by the President of the War Veterans Association and picked up by the local prosecution office. In both cases, the evidence collected was delivered to the competent foreign prosecution office, respectively Serbian and Croatian.

2.3.1) Old investigations resulted in indictments

Morinj case

11.In 2007, a Croatian prosecutor transferred evidence regarding around 160 Croatian prisoners, half of them civilians, held and ill-treated in a camp, the so called "Morinj camp", established and operated by the Yugoslav National Army (YNA) between 1991 and 1992.
The SP said that this was the result of the above mentioned constant generic requests for information.

12.The investigation was carried out under the old CPC. Since victims/witnesses were Croatians a request for International Legal Assistance (ILA) was filed. Both the Montenegrin Investigative Judge (IJ) and Prosecutor were present when the Croatian Judge interviewed the witnesses.

13.In August 2008 six former YNA reservists were indicted for war crimes against civilians and prisoners of war. In the indictment, detention on remand was proposed for all the accused. The measures were imposed and executed with only one exception (one accused was tried in absentia).
In 2012, criminal proceedings ended with four final convictions, spanning from 2 to 4 years imprisonment, and two acquittals.

Bukovica case

14.In December 2007, the Prosecution filed a request to open an investigation with the IJ in Bijelo Polje, concerning alleged repeated ill-treatments inflicted by YNA and Police on Muslim civilians in the area of Bukovica. The case had been initiated upon a complaint submitted by an NGO, the Sandzak Committee for Human Rights from Novi Pazar.
In March 2010, the investigation carried out by the IJ was completed. In April 2010, the Prosecution filed an indictment for crimes against humanity against 7 accused, reservists of the YNA and the Montenegrin Police.

15.In the indictment it is specified that, during the international armed conflict in BiH between 1992 and 1995, the accused as members of the border battalion of the YNA and members of the Ministry of Interiors (MoI):

a) treated the citizens of Muslim ethnicity in an inhumane manner;
b) committed acts of torture and violence and beat them while asking them to hand over weapons and questioning them if they participated in combats on the side of the Green Berets, whether they provided the Green Berets with food and whether they were hiding members of the Green Berets in their houses in Bukovica;
c) and by so doing caused intense suffering to those civilians, seriously endangered their health and violated their physical integrity, performed acts of intimidation;
d) created an atmosphere conducive to forced evictions from the villages in that area, which drove a part of the Muslim population to move to the area of Sarajevo, Goražde and Pljevlja.

Also, it is indicated that on three occasions (two events are dated February 1993 and one April 1992) some of the accused maltreated and beat up some victims.
Finally, in the indictment, detention on remand was proposed for all the accused. The measures were imposed and executed.

16.In March 2012, the Appellate Court (AC) found that *"the first instance court acquitted the defendants from the charges on erroneous grounds"*[4] and, while correcting that decision, acquitted the defendants *"because the act they were charged with, as described in the indictment, is not a criminal offence"* (article 373, sub-paragraph 1). This decision became final.

Deportation case

17.In October 2005, close relatives of some victims sued the state for compensation. This triggered the request of the Prosecution to the IJ, filed on 18 October 2005, to open an investigation regarding the arrests and handovers of Bosnian Muslims (around 66) and Bosnian Serbs (around 33), who had left the zone of the conflict and sought refuge in different areas of Montenegro, to the authorities of the Serbian Republic of Bosnia. The investigation was opened only in February 2006 and completed in June 2008. Then in November 2008, three more suspects were added to the list.
In January 2009 the Prosecution filed an indictment against nine officials of the MoI (some of them retired and some still in service). In the indictment, detention on remand was proposed for all the accused. Some of them were detained in Serbia pending extradition; before the extradition procedure in Serbia was finalized the accused were acquitted and released from detention.

18.The accused were charged with war crimes against the civilian population for unlawful deportation perpetrated in May 1992.
After a first acquittal and a re-trial, the Podgorica HC on 22 November 2012 acquitted all the accused because it was not proved that they had committed the criminal offence they were charged with. On 17 May 2013, the decision was upheld by the AC.

[4] The first instance court (Bijelo Polje HC, 3/10/2010) acquitted the accused for lack of proof that they had committed the criminal offence they were charged with.

Kaluderski laz case

19.On 30 July 2008, the Prosecution filed an indictment against 8 accused for war crimes against the civilian population allegedly committed in 1999 during the Kosovo conflict in the territory of the municipality of Rožaje. The case was initiated based on a criminal report filed by the chairman of the Montenegrin Committee of Lawyers for Protection of Human Rights.
In 2013, the Bijelo Polje HC acquitted all the accused. An appeal is pending.

Klapuh case

20.This is an old case that was adjudicated by the HC in Podgorica in 1993. It regards the murder of the Klapuh family. 4 accused were charged with war crime and the 5th for assistance to the perpetrators. All the accused were convicted but the latter, all Bosnian, were tried in absentia.
According to the information received, the accused were indicted for war crimes but convicted by the HC for ordinary murders; only the Supreme Court re-qualified the acts as war crimes.

Strpci case

21.This is also an old case that concerns a well-known massacre perpetrated on 27 May 1993 in BiH by Serbs belonging to a military unit of the army of the Republika Serpska. Victims were Montenegrin.
The expert was told that an investigation was opened against a certain Nejboša Ranisavljević. The Federal Court delegated jurisdiction to the HC in Bjelo Polje for reasons of efficiency. During the investigation the accused confessed and mentioned Lukić, the commander of the unit, as a co-perpetrator. In trial he recanted, but in 2002 he was convicted to 15 years imprisonment.
According to the information received, the case is currently actively investigated by Bosnian and Serbian prosecutors. Apparently, there is one potential suspect in Montenegro. The Montenegrin prosecution assists Bosnian and Serbian prosecutors in the investigation they are carrying out.

2.4) Comments

22.From the above factual findings, it is immediately evident that not a single case was opened upon initiative of the Montenegrin Prosecution.

In fairness, it has to be considered that the SP's office started operating only in 2008; consequently, all findings related to the old pre-investigations/investigations cannot be linked to the work of that office. This is not the case for the prosecution regarding the same cases, for the simple reason that trials were held long after the SP's office had become operational.

23.More significant, for an overall assessment of the current capability of the Montenegrin Prosecution in the field of war crimes, are the findings regarding on-going and new investigations/pre-investigations.
The fact that no case was opened on the Prosecution's initiative and the absence of new cases, show that the SP's office has developed no strategy regarding war crimes but it just remains reactive to criminal reports whenever filed by individuals or institutions of any sort. This was openly, and frankly, stated during the meeting when the expert's interlocutors admitted that the office cannot do much *"without information"*. This is true for every prosecutor's office in the world; however, a possible option could be to take a more pro-active approach and plan steps in order to look for that information.

24.During the meetings, it was repeated that the SP's office, though in an informal way, has always requested neighbouring prosecutors to transfer any information/evidence concerning possible Montenegrin perpetrators of war crimes. Nevertheless, it is a matter of fact that no formal request, either generic or specific, was ever sent neither to any foreign prosecution office nor to the ICTY.

25.Some criminal phenomena that took place during the conflicts in the region are well-known, like the so called "weekend fighters". A starting point to develop a strategy in order to detect, investigate and prosecute war crimes possibly committed by Montenegrins could be to create a list of events where the involvement of Montenegrins seems more likely (one could be the attack of Dubrovnik, the looting of civilian houses etc.) and to access all sources of information available (foreign prosecutions, ICTY database, NGOs archives, field interviews, available official documents…) targeting those specific events. In other words, instead of spreading around informal requests for cooperation, a quest for information/evidence could be organized by selecting a number of target events and pro-actively checking them.

26.As for the prosecution phase (indictments and trial conduct), it must be clarified at first that in the expert's opinion, no merit or blame can be attached to the existing judicial institutions (Prosecution and Courts) for very old criminal proceedings, like Kapalo and Strpci cases, that were initiated and finalized long before Montenegro established its current institutional setting.
Also the so called Kaluderski laz case, being still pending at the appeal instance, will not be considered in this report, in order to avoid any possible interference with the course of justice.
In conclusion, only three cases are left: Morinj, Bukovica and Deportation.

27.Concerning the Morinj case, the expert does not have major remarks. Even though some criticisms regarding the Prosecution's failure to use other modes of liability, than direct perpetration, were brought up, in the end this remains the only case that the Prosecution partially won.

28.In the Bukovica case, the Prosecution charged the accused with crimes against humanity (CAH); however, at least in the indictment, the factual grounds to support the existence of a widespread or systematic attack directed against the civilian population are not so clearly

32.The expert was explained that the Prosecution decided to charge the accused only with CAH and not with war crimes (ill-treatment of civilians) because "there was no war in Montenegro".

33.It goes without saying that war crimes are much easier to be proven than CAH because there is no need to demonstrate any systematic attack. Even a single act of violence or maltreatment would suffice to integrate a war crime.

34.As for the presence of a conflict in Montenegro one possible solution could have been to consider that BiH was recognized as an independent state only in April 1992 (and admitted to the UN on 22 May 1992); before that date an armed conflict existed in the area under consideration, which was part of the only existing state (the same line of reasoning is used by the Podgorica HC –judgments of 25/01/2012 and 31/07/2013- to conclude that at the time and place of the facts there was an armed conflict); consequently, all the ill-treatments perpetrated before April 1992 could have been qualified as war crimes.

35.In the Deportation case, the accused were charged with war crimes related to an unlawful deportation of civilian population (citizens of BiH of Muslim and Serbian "nationality"), who were refugees in Montenegro, that took place in May 1992. The incriminatory provisions indicated are article 142, paragraph 1 of the CC of the Federal Republic of Yugoslavia (FRY), common article 3, paragraph 1, item c, of the Geneva Conventions and article 17 of Additional Protocol II.
In the indictment, the only reference to the issue of the existence of an armed conflict in the relevant place is the indication that facts happened "during and *in relation*" to the armed conflict, which did not have the character of an international one, in the territory of BiH. It is then explained that the accused violated the human dignity of civilians because, in execution of the order issued by the MoI of Montenegro "to act as requested by the Minister of Interior of the Serbian Republic BiH", they arrested in Podgorica, Herzeg Novi, Bar, and Ulcinj a number of Bosnian civilian refugees and returned them to BiH by handing them over to Serbian Bosnian officials.

36.In the expert's opinion, the Prosecution should have openly and directly addressed the problem of the applicability of the incriminating provisions in Montenegro.
The situation was similar to that in the Bukovica case but this time the choice of the Prosecution was completely different and the related reasons are not clear. The way the indictment is drafted seems to propose the thesis that during the time of an armed conflict protected persons maintain their status wherever they are, so that any abuse they suffer may result in a war crime provided that there is a nexus with the conflict. However, the Prosecution failed to take a clear stand in this regard, showing the lack of a solid theory concerning the issue of the applicable law.
Furthermore, the Prosecution could have approached the problem of criminal liability of the accused from another perspective. From the judgement of the Podgorica HC dated 22/11/2012, emerges that there is evidence in the sense that it was well known that Bosnian Muslim civilians were returned to BiH in order to be exchanged with Serbian prisoners.

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* It is worth noticing that in the Bukovica indictment the conflict in BiH is characterized as "international", while this is not the case in the Deportation indictment.

After a deep analysis the AC concludes that: 1) CAH was part of customary international law; 2) the latter, through article 16 of the 1992 FRY Constitution, was part of the internal legal system; 3) based on domestic case law as well as on the jurisprudence of neighbouring countries, the current provision incriminating CAH can be applied (article 427 CC).
However, the wording of article 427 CC (*"...anyone who violates rules of international law..."*) makes it a "blanket provision", which needs to be supplemented by another legal provision. To that end, in the indictment article 7 of the Rome Statute is indicated but the Statute was adopted only in 1998. Consequently, the accused are charged for violating, with the acts described in the charges, *"rules of international law which did not exist at the time when the act was committed"*.
The final conclusion of the AC was that the act described in the indictment is not a criminal offence because it does not contain *"all the important elements of essence of the criminal offence"* of CAH under article 427 CC or elements of any other criminal offence prosecuted ex officio. In other words, substantial elements of the criminal offence do not exist in the factual description of the criminal offence.

41.In the Deportation case, as already explained, at the end of a re-trial the Podgorica HC on 22 November 2012 acquitted all the accused because it was not proved that they had committed the criminal offence they were charged with. On 17 May 2013, the decision was upheld by the AC.
The AC deems that the first instance court has correctly established and fully clarified all relevant facts, and further elaborates:

- in the last version of the indictment, common article 3, paragraph 1, item c, and article 17 of Additional Protocol II are quoted as the international provisions violated by the accused; however, it was not specified a) what the outrages upon human dignity and degrading treatments were; and b) in what manner the defendants violated the mentioned article 17, given that the indictment mentions "deportation" when the article makes reference to two different conducts deportation and displacement of civilian population;
- in any case, both notions refer to *"unlawful evacuation of civilians from their territory of residence"*, which does not imply the *"act of returning civilian population to their own state, which was done in this specific case, as civilians of Serbian and Muslim nationality were returned from the Republic of Montenegro to BiH"*;
- article 17 prohibits a displacement of civilian population in the sense that *"they cannot be compelled to leave the territory where they live for reason connected to the conflict"*; in the instant case, *"returning civilian population to the state where they live does not represent a violation of international law"*;
- based on article 369 CPC the court could not change the act of "deportation" with another act (taking hostages, unlawful detention...) without violating the legal limits of the indictment (such a violation is checked ex officio by the second instance court);
- furthermore, the criminal offence at issue is *"committed by violating the norms of international law related to civilian population, which means it is a criminal offence with blanket disposition"*; consequently, article 369 CPC would have been violated even if "norms of international law" referred to in the indictment had been changed;

- the first instance court correctly concluded that war crimes *"can be committed only by a member of an army, political or administrative organization of a party to the conflict, as well as by any person who is in its service, regardless of whether that is a member of armed formations or some other unarmed organizations that with their activity takes side in the conflict"*; finally, it was not established that the accused were the members of any armed unit involved in the conflict in BiH or that they supported any of the parties to the conflict.

42.From the above summaries, it appears that the key arguments for the two mentioned final decisions are:

- the notion of "blanket provision" and the subsequent prohibition for the court to identify the right international incriminating provision because that integrates the factual part of the charges, which cannot be changed by the court;
- the notions of displacement and/or deportation that cannot apply to the action of returning *"civilian population to the state where they live"*, thus no international law was violated when Bosnian civilians were returned to their country;
- the stand of the accused in respect of the armed conflict because war crimes cannot be committed by someone who is completely extraneous to it.

43.The last argument, which represents an unprecedented stand, is clearly wrong.
The court maintains that one of the elements of war crime is that it is *"committed through violation of rules of international law, which are binding for the active participants in a war, armed conflict or occupation by war."* The following inference is that a war crime *"can be committed only by a member of an army, political or administrative organization of a party to the conflict, as well as by any person who is in its service, regardless of whether that is a member of armed formations or some other unarmed organizations that with their activity takes side in the conflict"*.
First of all, the letter of the law is already against such a conclusion (*"Whoever..."*). Secondly, it is well accepted all over the world, in internal and international jurisdictions, that one of the predicated offences (killings, torture, violation of bodily integrity...) committed in time of war, against a protected person, and with a nexus to the armed conflicts constitutes a war crime. The nexus is intended as a "close relation to the hostilities". In the instant case, the accused acted upon the order issued by the MoI of Montenegro *"to act as requested by the Minister of Interior of the Serbian Republic BiH"*. The Podgorica HC wrote in its decision (22/11/2012) that it had been established without any doubt that the victims were civilians, unlawfully arrested and returned to BiH, some of them (those who were Muslim) to be exchanged with Serbian prisoners. In such evidentiary situation the existence of a nexus with the armed conflict cannot be reasonably denied.

44.The "blanket provision" argument deserves more attention.
In the mentioned judgments, the courts repeatedly qualified provisions like article 427 of the current CC and 142 of the old Yugoslavian CC as "blanket provisions", which make reference to rules of international law. From that definition, the courts conclude that the relevant rules of international law must be accurately indicated in the charges and judges cannot correct any possible mistake without violating the principle of identity between decision and charges (article 369 CPC).

45. The structure of the mentioned provisions, and other similar to them, is to foresee a punishment for whomever *"in violation of rules of international law"* commits one or more acts specifically described. In other words, the incriminated conduct is precisely designated through a list of prohibited acts. The reference to the international law, far from adding anything to the factual description of the criminal offence, just creates a condition of "double incrimination". As a matter of fact, the mentioned reference could well be deleted without any impact on the specification of the elements of the crime (principle of specificity).
For an accused to be convicted it is necessary that his/her conduct be criminalized by both the internal (e.g.: article 142 of the old CC) and the international law.
Once the Prosecution has clearly specified the facts the accused is charged with all the rest belongs to the "legal domain", and can certainly be corrected by the court without violating article 369 CPC, which prohibits just changes to the facts brought to the court's attention with the indictment. This is not only self-evident but it is also a well-established jurisprudence of Serbian courts, which for years applied the same old Yugoslavian CPC as Montenegrin courts.
In conclusion, nothing impedes the court to give a different qualification to the facts or to identify the right international provision that criminalizes the same facts.

46. Particularly interesting appears the dissertation regarding the "displacement/deportation" of civilians and the final stand that the action of *"returning civilian population to the state where they live does not represent a violation of international law"*. At first sight, the assertion seems to possess a certain lure; however, the court completely neglects that the arrest and "return" of Bosnian civilians both Muslims and Serbs to BiH, as already highlighted, was not carried out at the spontaneous initiative of the Montenegrin authorities but only upon specific request of the authorities of the Serbian Republic of Bosnia. Considering that, claiming that this was just returning civilians to their state sounds like a cavil. Those civilians had come to Montenegro to seek refuge from the armed conflict in BiH and Montenegrin authorities took action towards them only after the mentioned request. It is undeniable, because factually established by the Podgorica HC in its judgement (22/11/2012), that those civilians were displaced/deported (the exact qualification of the action is irrelevant, since one cannot be deported without being displaced first) and handed over to officials of the Serbian Republic of Bosnia.
From the legal point of view, common article 3 must be applied in this case because the conduct was carried out in time of an armed conflict, with a clear link to it (nexus), and against protected persons (civilians). The fact that the conduct occurred in another country (argument that the court did not use) does not make any difference, since one of the parties to the conflict was able to act through local authorities and achieve its goal, which was to displace/deport those civilians for the ultimate purpose of exchanging prisoners (at least for some of them, who in reality did not survive). All this means that the Montenegrin authorities acted as the extended arm of the Bosnian Serbs, thus making the above mentioned provision applicable to the case.
In such a situation, denying the application of the mentioned article 3 would mean to completely frustrate the aim and the sense of that provision.

3.1) Comments

47.From the procedural point of view, one fact is evident: in all the three considered cases a final decision was reached only after two re-trials and two decisions of the ACs. In total, 12 judicial decisions, without taking into account the remedy of "protection of legality", were needed to finalize 3 criminal proceedings. This already underlines once more a structural general problem of the system, which was addressed in a previous report.

48.In the two cases closely analysed by the expert (Bukovica and Deportation), a decisive importance was given to procedural legal arguments mainly based on the legal provisions quoted by the Prosecution in the indictments.
For the reasons above explained, those arguments are highly disputable and, when considered as a whole, show an attitude to interpret the provision under article 369[8] of the CPC in a very restrictive and formalistic way. As a matter of fact, paragraph 2 of the said provision clearly states that the legal qualification of the facts described in the indictment is the responsibility of the court, which is not only allowed but even obliged to identify the right applicable law.
Furthermore, at least one legal principle applied by the court was obviously wrong (the one regarding the status of war crime perpetrators).
Finally, the argument concerning the *"return of civilians to their country"* seems a nit-picking, when a solid legal doctrine was available and would have led to a completely different solution.

4) Witness Protection

49.The CPC provides for procedural measures of protection for witnesses, which include anonymity. However, so far there have been no anonymous witnesses in war crime cases. Courts have the necessary equipment to implement other protective measures, like distorting faces and/or voices.
Informative brochures on the possibility to protect witnesses are printed and distributed.
An office to support witnesses in war crime cases was set up. It was very active, especially in 2008. Now it is on standby. The Witness Protection Unit (WPU), which is the only permanent structure, in such cases provides transport and protection to witnesses that come from abroad. They are assisted and provided with the informative leaflets.
If a witness appears to be at risk, the competent prosecutor can request for urgent protective measures implemented by the WPU. Urgent measures are temporary because immediately after their implementation, the case is brought to the attention of the Commission for Witness Protection, which will decide on the permanent appropriate measures to be implemented. The commission has 5 members, namely one representative from the Supreme Court, and the State Prosecutor's Office, plus the Head of the WPU, the Head of the correctional service, and a psychologist appointed by the Minister of Labour and Social

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[8] **Identity of the Judgment and Charges (Article 369)**
(1) The judgment shall refer only to the defendant and to the offence the defendant is charged with as specified in the indictment that has been brought, amended or extended at the main hearing.
(2) The court shall not be bound by the Prosecutor's legal qualification of the offence.

Welfare. In reality, the only effective measure of protection in serious cases would be a re-location of the witness abroad. There are bilateral agreements with neighbouring countries (Serbia, BiH, Macedonia, Bulgaria and Romania).
Also domestic can be protected but there are no special rooms for that purpose. A new law (on the enforcement of penalties) under discussion in the Parliament will provide for that.
Currently there is no witness in the Witness Protection Programme. Actually, the WPU has never dealt with any witness protection case so far.

5) Compensation of victims of war crimes

50.The issue of the compensation of victims of war crimes was not dealt with at a general level by the Montenegrin authorities, who did not adopt any legal instrument (either a law or a by-law) to address it. A reactive policy was implemented and solutions were found on a case by case basis upon civil lawsuits submitted by damaged parties.

51.All the information received by the expert is summarized in the tables below.

Civil complaints for damages accepted and related compensation granted

Court	Cases	Compensation
Podgorica BC	-7 related to the "Morinj camp" -1 related to the "Srpci case" -1 related to the "Deportation case"	A total amount of 172,000 euros was granted.
Bijelo Polje BC	-2 related to the "Srpci case"	A total amount of around 7,000 euros was granted (4,5000 euros in one case and 4,20,000 dinars in another)

In-court settlements

Court	Cases	Compensation
Podgorica BC	-41 related to the "Deportation case"	A total amount of 4,135,000 euros was agreed.

Civil complaints for damages dismissed

Court	Cases
Podgorica BC	-9 related to the "Morinj camp" -2 related to the "Bukovica case" -1 related to the "Kolubarski luz case"
Cetinje Polje BC	-1 related to the "Bukovica case"

Civil complaints withdrawn

Court	Cases
Podgorica BC	-16 related to the "Kolubarski luz case"

Civil complaints still pending

Court	Cases
Podgorica BC	-150 related to the "Morinj camp"

	-16 related to the "Kaluderski laz case" (suspended until the final adjudication in the criminal proceedings) -2 related to the "Deportation case" (claim dismissed –in one just partially dismissed-, appeals pending)
Bijelo Polje BC	-1 related to the "Strpci case" (claim accepted –16.146 euros compensation-, appeal pending)

52.The above indicated figures show that, in spite of the "case by case policy" adopted by the Authorities, civil complaints seem to be more successful than criminal proceedings, at least form the perspective of the victims/injured parties.
The only remark regards the high number of cases that are still pending.

6) Training

53.The Judicial Training Centre, which is part of the Supreme Court, organizes around 80 training per year for continuous in service training for judges and prosecutors, plus 20 initial training for judicial associates.

54.On the matter of war crimes two training per year are usually organized. However, last year only one two-day training was carried out, due to financial reasons.
In September 2014 one training on International best practise and cooperation in investigation and trials on war crime cases was held (2 days; 20 participants).

55.Judges that have tried so far war crime cases had received training but it was organized by different institutions at regional level. The same applies to prosecutors.

56.Prosecutors went several times to the ICTY for visits and even attended hearing there.

57.There are prosecutors' regional conferences organized and attended by ICTY prosecutors and head prosecutors from the region.

7) Conclusions

58.Consistently with the above arguments, the expert proposes the following actions to be taken:

a) elaboration of a Prosecution Strategy with the identification, through the use of any available source of information (foreign prosecutions, ICTY database, NGOs archives, field interviews, available official documents…) a series of events where most likely Montenegrins were involved in the commission of war crimes;

b) specific formal requests to be sent by the domestic Prosecution to the neighbouring countries' prosecution offices and the ICTY in order to verify if those institutions have evidence related to the identified events.

59.As for the courts, no measure can be suggested because judges should be free to evaluate legal and evidential matters to the best of their professional skills. In a democratic

environment nobody can suggest judges what decision they should reach and for what reason. Of course, court judgements can always be criticised but, as long as a judicial decision is not the result of a criminal offence, no pressure can be exercised on judges apart from the always allowed disapproval of lawyers, academicians and civil society each time their decisions appear to be the result of patent legal mistakes, and superficial and unreasonable assessment of the evidence.

The expert
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