

*“Supporting the Transition Process: Lessons  
Learned and Best Practices in Knowledge  
Transfer”*

**Final Report**



in conjunction with



**UN  
ICTY**



**unieri**

advancing security, serving justice,  
building peace

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Warsaw, The Hague, Turin

September 2009

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## List of Abbreviations and Acronyms

ABA/CEELI	American Bar Association/Central & Eastern European Law Initiative
ADC-ICTY	Association of Defence Counsel (at the ICTY)
BiH	Bosnia and Herzegovina
BIRN	Balkan Investigative Reporters Network
CDRC	Criminal Defence Resource Centre
CLE	Continuing Legal Education
CoE	Council of Europe
DJA	Department of Judicial Affairs (of the UNMiK)
ECHR	European Convention of Human Rights
EDS	Electronic Disclosure System (an evidentiary database of the ICTY OTP)
EU	European Union
EULEX	European Union Rule of Law Mission in Kosovo
HLC	Humanitarian Law Center
IB	Institution Building
IBA	International Bar Association
ICC	International Criminal Court
ICHL	International Criminal and Humanitarian Law
ICITAP	International Criminal Investigative Training Assistance Program
ICMP	International Commission for Missing Persons
ICTJ	International Centre of Transitional Justice
ICTR	International Criminal Tribunal for Rwanda
ICTY	International Criminal Tribunal for the former Yugoslavia
IGO	Inter-Governmental Organization
IHL	International Humanitarian Law
KFOR	Kosovo Protection Force
KJI	Kosovo Judicial Institute
NGO	Non-Governmental Organization
ODIHR	Office for Democratic Institutions and Human Rights (of the OSCE)
OKO	Odsjek Krivične Odbrane (“Criminal Defence Section of the Registry”) (Court of BiH)
OLAD	Office of Legal Aid and Detention Matters (at the ICTY)
OPDAT	Overseas Prosecutorial Development, Assistance & Training (US Dep’t of Justice)
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor (of the ICTY)
PI	Public Information
R.A.I.D.	Review, Assess, Identify, Design – the research methodology of this study
RS	Republika Srpska
SCSL	Special Court for Sierra Leone
SIPA	State Investigation and Protection Agency (in BiH)
UNICRI	United Nations Interregional Crime and Justice Research Institute
UNMIK	United Nations Interim Administration Mission in Kosovo
UNSC	United Nations Security Council
WCPO	War Crimes Prosecutors Office (Belgrade District Court)
YIHR	Youth Initiative for Human Rights (NGO based in Serbia)

## Executive Summary

### **Introduction**

As the International Criminal Tribunal for the former Yugoslavia (ICTY) approaches the end of its “completion strategy”, the impetus to harness its institutional expertise and make it available to legal professionals in the former Yugoslavia handling war crimes (ICHL)<sup>1</sup> cases becomes increasingly important. In order to understand how such “knowledge transfer” can be most effectively undertaken during the remaining life of the ICTY, the Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR)<sup>2</sup>, the ICTY, and the United Nations Interregional Crime and Justice Research Institute (UNICRI)<sup>3</sup> – supported substantially by the T.M.C. Asser Instituut – initiated this project with the overall goal of identifying best practices in the knowledge-transfer arena so as to improve greatly the delivery of future professional-developmental and capacity-building programmes.

To achieve the above-stated aim, the project partners adopted a four-component research process that combined a critical examination of past efforts with a current assessment of the needs of legal professionals in the region. Those two components gave rise to a set of “best practices”, i.e., knowledge-transfer techniques and methodologies with a successful track record in delivering their subject matter. The research also generated several means to improve existing knowledge-transfer practices as well as a number of innovative methodologies. These latter practices do not necessarily boast a record of success – precluding them from being labelled “best practices” – but their inclusion in this report suggests a credible potential for enhancing future knowledge-transfer undertakings. In addition to the established “best practices” and the suggested improvements, the Report includes a wide range of recommendations (Section V). Set out in order of priority, these recommendations match the best practices with the needs identified during the assessment. They describe the context and means of employing the best practices in order to rectify the identified shortcomings.

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<sup>1</sup> The acronym ICHL, as per the definition provided in Annex 1, is employed herein to describe war crimes, crimes against humanity, genocide and the modes of liability found in International Criminal and Humanitarian Law.

<sup>2</sup> The governments of the Netherlands, Switzerland, Germany and the United States of America financially supported the OSCE/ODIHR in this project.

<sup>3</sup> In subsequent text, these three organizations are referred to as “Project Partners”.

A Research Team hired by ODIHR prepared this Final Report on behalf of the organizations of the project partners.<sup>4</sup> The report is the culmination of the aforementioned multi-stage research endeavour, which included an Expert Workshop in The Hague in October of 2008, field interviews in five jurisdictions,<sup>5</sup> an Interim Report and a Regional Workshop in Sarajevo in May of 2009, where the Interim Report and its preliminary findings were discussed with local practitioners.

Given that the judicial system in any jurisdiction is manifestly broad and complex – as are the core international crimes themselves – the Research Team chose to focus its efforts on several distinct functions performed by different actors in the justice system. More specifically, the team identified the following seven areas that were comprehensively explored during the research process:

- Knowledge and application of ICHL in the domestic legal context;
- Investigations and Analysis;
- Prosecutions;
- Defence;
- Trial and Appellate Adjudication;
- Outreach; and
- Victim and Witness Support.

The first of these areas is not given separate treatment in the text but, instead, is woven into the discussion of the other six.

## **II. Review and Analysis of Past Efforts**

The international and local legal community in the region have been actively involved in knowledge-transfer, capacity-building and professional-development activities for several years. While a comprehensive examination of specific, individual knowledge-transfer initiatives is beyond the scope of this research, analysis revealed readily identifiable weaknesses in past approaches, providing no small collection of lessons to be learned. One such affliction resulted when a poorly undertaken needs assessment – usually a perceived lack of understanding of ICHL – was combined with the belief that foreign expertise could rectify the shortcoming. An expert’s busy schedule and the financial constraints of a project usually meant preparation time was insufficient to allow study of the local legal context. Such

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<sup>4</sup> The Research Team consisted of three researchers, Vic Ullom (team leader), William Wiley, and Ljiljana Hellman (replacing Boris Mijatovic).

<sup>5</sup> The jurisdictions that are the subject of this research are Croatia, Serbia, Kosovo (all references to Kosovo refer to Kosovo under UNSC Resolution 1244. The OSCE is status neutral and thus do not take a stance on the issue of Kosovo independence.), Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia.

knowledge-transfer events usually resulted in participants continuing as before, with little guidance on how to employ the content of the foreign expert's presentation with fidelity to their local legal regime.

More thorough needs assessments, when undertaken, exposed significant material and human shortages, a lack of witness protection and support structures, a lack of trust in judicial institutions and their independence, and a host of other structural weaknesses that, although many were not specific to ICHL cases, impacted the processing of those cases in the region's courts. Another weakness of early capacity-building efforts was their lack of a systematic approach, coupled with a tendency to approach knowledge transfer as a one-off event. Knowledge-transfer measures in the ICHL arena tended to tackle a small number of topics with a specific set of participants – usually judges and prosecutors. No effort was made by any institution, local or international, to cover the entire gamut of ICHL-related capacity building. Similarly, there appeared to be little recognition (and corresponding resource allocation) that professional development in this field, like most professional fields, requires a continual updating of knowledge and skills.

Early knowledge-transfer efforts often neglected to account for the complexity of war crimes cases, and the fact that the prosecutor or judge worked on cases alone with little or no support staff. Although certain electronic tools are now in place in limited areas, very few training efforts addressed case-management techniques, caseload management techniques, or other best practices to facilitate the handling of the enormous quantity of evidence typical in complex war crimes cases.

In the outreach field, little has been done in knowledge transfer. So few staff have outreach among their duties that there is literally no one to whom to transfer knowledge. Best practices exist in conducting outreach itself (see Annex 7), but review of knowledge-transfer efforts unearthed only activities targeting “why outreach is important”, not how best to teach it.

Witness support, on the other hand, is increasing its profile as more legal professionals become acquainted with the benefits. Knowledge transfer has a successful track record in the region primarily through the use of study visits. Such visits occurred primarily among victim/witness support units in the region as well as to the ICTY. That apart, research revealed little formal training or professional development being provided to victim/witness-support staff.

## Needs Assessment by Topic

### *Crosscutting Needs*

A small number of identified needs cut across all constituent elements of the justice system, one example being legal-research materials. Where certain local-language materials exist, they are rarely comprehensive or updated. Legal professionals tend either to rely on commentaries, which may be outdated, or choose to limit their advocacy to factual disputes. A second example is access to transcripts of proceedings at the ICTY. Currently, such transcripts exist in searchable fashion only in English and French, thereby hindering access to a wealth of case-specific information for practising legal professionals who do not speak those languages. Interlocutors repeatedly indicated to the Research Team that local language transcriptions of ICTY proceedings would be an indispensable knowledge-transfer tool.

### *Investigations and Analysis*

In some or all of the examined jurisdictions there were three elements to the foundation of the problems being experienced during the investigation of ICHL cases: (1) a considerable divergence of opinion exists on key questions of substantive law; (2) only a small minority of investigators, prosecutors and investigative judges in the said jurisdictions have any experience investigating (and proving) modes of liability other than direct perpetration, and (3) oftentimes insufficient capacity exists to access and manage the frequently large quantities of materials relevant in cases where core international crimes have been alleged.

For prosecutor-led investigations, problems arise at the investigative phase when the presumed perpetrators include persons who are not believed to be involved directly in the physical perpetration of the underlying acts, for instance, where command responsibility, giving orders or some other form of complicity is at issue. The importance of using documentary evidence to demonstrate linkage between the underlying criminal act and mid- as well as higher-level perpetrators appears not to be sufficiently recognized. This is particularly the case where investigative teams are confronted with complex political and military structures. Modern, computer-based analytical tools could assist investigators in the region. They are not currently available, however, due largely to the costs of making local-language versions available, the expense of training users, and the need for continual system maintenance. The Research Team also discerned a need for general updating of investigative techniques, e.g., in the fields of forensics, ballistics and DNA technology.

### *Prosecution*

The work by the research team has found that the primary function of an indictment – putting the defendant on adequate notice of the charges against him or her – can suffer in the complex intersection of international and domestic legal provisions. Professional developmental opportunities should target this phenomenon, as well as the necessity that prosecutors be capable of managing effectively the often large quantities of documentation, witnesses and other materials that characterize most ICHL cases. The Research Team has found that prosecutors in the region are experiencing difficulties in taking advantage of currently-available ICHL resources due to language barriers, cost or simply not being aware about their existence. As with investigators, exposure to electronic research, analytical and case-management tools, made available in the local language and provided to prosecutors along with sufficient training in their use, would be markedly beneficial.

### *Defence*

Most defence lawyers in the region – save for those few that have practiced at the ICTY – are unfamiliar with ICHL as it has been received into their domestic systems. The disappearance of investigative judges, combined with other often radical changes to the criminal-procedure codes in force in the jurisdictions under consideration, is having the effect of placing the onus for the search for exculpatory evidence upon defence counsel – a role for which they are neither professionally nor conceptually well equipped. Defence counsel would benefit from professional-developmental schemes very similar to those that the Research Team believes would assist prosecutors in the jurisdictions subject to this study, for example, additional exposure to the manner in which documentary evidence is used to establish the linkage, or in this case undermining the linkage, between alleged perpetrators and key underlying acts. Additionally, the RT notes the suggestion of several interlocutors that capacity building in the field of negotiating plea and immunity agreements – specific to ICHL cases – would be welcome, particularly in light of similar training already offered to prosecutors and judges. Adequate support from the bar associations of the region for defence counsel undertaking these cases has not been forthcoming.

### *Trial and Appellate Adjudication*

As has been noted above, the vast quantities of documentation, witnesses and expert reports that ICHL cases tend to generate can overwhelm judges, particularly trial judges,



working without adequate assistance, such that capacity-building initiatives targeting complex case and caseload management would be welcome. A second area of interest, brought to the Research Team’s attention by native speakers of the local languages, is the tendency of trial and appellate judgements to be opaque, that is, the reasoning found therein is frequently inaccessible to laymen. Judgement-drafting techniques that emphasize clarity and structure – so long as these techniques are respectful of the relevant procedural law and practice – should prove beneficial. Finally, the judges interviewed by the team frequently noted that they would welcome exposure to the manner in which ICHL is applied elsewhere. The goal of this exposure would be to facilitate understanding of the types and quantities of evidence that have proved sufficient (or insufficient) in other jurisdictions adjudicating ICHL-based cases.

### *Victim and Witness Support*

The region is replete with instances of vulnerable witnesses being exposed to various indignities, from logistical hardships, to lack of information, to confronting the defendant and his or her family en route to the courthouse. With the exception of the specialized chambers in Belgrade and Sarajevo (and even there, the caseload outstrips resources), jurisdictions across the region are struggling to address the needs of witnesses and victims who testify in ICHL cases. The most prominent concern is the absence of proper, institutionalized support structures. Such structures, in addition to being sustainable, must be comprehensive and encompass the before, during and after phases of a given witness’ engagement with the justice system.

### *Outreach<sup>6</sup> and Public Information*

To varying degrees, the court systems in the jurisdictions of the former Yugoslavia do not enjoy the confidence of their constituencies. The public remains poorly informed about (or is otherwise indifferent to) the relevant institutions and their proceedings, particularly in ICHL-related cases, with their legal peculiarities. There is a danger that politicians or the media may exploit public ignorance in pursuit of narrow objectives, alternatively blaming or praising the justice systems’ outcomes according to their agenda. It is the view of the Research Team that outreach is the public-relations answer to the mischaracterization of ICHL proceedings. However, little effort is being made – save by some specialized NGOs

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<sup>6</sup> See the definition of “outreach” provided in Annex 1, and the “Best Practices in Outreach” in Annex 6, particularly as opinions vary as to the scope, priority and activities attributable to outreach.

and IGOs – to undertake outreach in a systematic manner. The difficulties appear to flow from resource constraints, lack of (dedicated) personnel with appropriate skills, and the tendency to be minimalist and reactive in interactions with the public.

### **Best Practices and Lessons Learned in Knowledge Transfer**

Knowledge transfer being a complex issue, it is no surprise that research revealed best practices operating on multiple levels. For purposes of clarity, this report reduces those findings into two basic categories: the general and the specific. Best practices that were of a general nature, applying to the field of capacity building as a whole or to knowledge transfer in the abstract, comprise the first group. For example, the fact that most legal professionals involved in ICHL cases are in large measure self-taught on the specific requirements of ICHL cases led to the best practice that, regardless of any specific knowledge-transfer methodology, capacity-building initiatives should allow for and facilitate this traditional process of self-education. Of course, peer review and expert feedback are also core tenets of professional development, so legal professionals are not advised to rely on independent study exclusively. Other examples of best practices generally applicable include:

1. Knowledge-transfer practitioners carefully consider where in the system an intervention would be most effective in addressing an identified need. Among the factors is the level of intervention, whether it be the individual, the institution or the jurisdiction. At the institutional and jurisdictional level there are often sublevels so, for example, one might consider intervening only in one district or state-wide. Timing of the intervention is also key, whether it be during an individual's legal education or only after a practitioner has a few years of experience. Similarly, the mode of intervention must be considered: Is an identified need best addressed through legislative change, amending a rulebook, training a target group, or through some unique intervention?
2. Knowledge-transfer interventions must account for, and be respectful of, local legal traditions.<sup>7</sup> Interventions should be tailored to be maximally applicable, and new or innovative approaches should be accompanied by sufficient prior research to ascertain their viability in the local jurisdiction. This is especially the case where the complex intersection of ICHL and domestic law is concerned.

The foregoing were examples of knowledge-transfer best practices applicable without regard to any particular methodology. Turning from the general category to the specific, the second category of best practices consists of specific techniques and discreet knowledge-

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<sup>7</sup> This point assumes the local traditions are in compliance with international legal norms.

transfer practices collected from experienced organizers implementing programmes for the region's legal professionals. Included here are traditional knowledge-transfer mechanisms such as seminars, study visits, internships, personnel exchanges and personal contacts. These practices, however, only constitute best practices when undertaken within certain parameters, i.e., by employing practices that maximize their impact. For example, a study visit is a best practice when undertaken in accordance with the following principles:

1. The personality, expertise and authority of the presenters are considered key, and the focus is on short presentations followed by ample time for discussion;
2. Both visitors and their hosts are well prepared in advance of study visits and have clearly defined objectives. By thoroughly consulting the participants, the hosts and the donor to ascertain expectations, the organizer can assist in defining both the target group and the objectives;
3. The visit is specifically tailored to the group and the objectives, to ensure that the presentations are relevant and that the agenda moves the visit towards that objective. The topics to be addressed; places, departments and personnel to visit; and the format of meetings, tours and briefings all require advance identification and agreement. Such tailoring is time and labour intensive; and
4. An exercise at the end of the visit solicits evaluation and feedback generated by the participants and hosts, which is shared with the organizer.

As noted, generating improved knowledge-transfer formats was an important project goal. In the course of the research, the Research Team received no small number of suggestions, i.e., tips and techniques that – when tailored to a particular methodology, audience or situation – facilitate the transfer of knowledge in an effective and resource-wise manner. While these tips did not boast a lengthy record of success (and therefore cannot qualify as best practices), the team nevertheless included them in the Report for their intrinsic benefit. The reader will find them immediately following the best practice to which they apply.

To illustrate some of the more innovative practices collected during the research, the Research Team described, in certain instances, specific tools and mechanisms where they might be employed. Examples of these novel approaches can be found among the recommendations, located in callout boxes for easy reference, or with the best practices that they elucidate. Some of these examples are:

1. Peer-to-Peer Meetings: Closed meetings of colleagues (e.g., trial judges), with an external expert present and acting as a peer rather than discussion leader.
2. Victims' Legal Aid Clinic: A clinical legal-education programme for law schools where students represent victims in reparation proceedings.

3. Embedding, Mentoring and Experts-in-Residence: Locating an external expert inside an office or institution to assist counterparts with individual cases and in capacity building generally.
4. Dealing with Vulnerable and Traumatized Witnesses: A thorough training for (new) staff in victim/witness-support structures who are in contact with vulnerable witnesses and victims.

The best practices research lies at the core of this study, and the above examples are only a portion of the findings. In any event, these practices are effective only when implemented, and it is to implementation that this report turns next.

## Recommendations

The Final Report culminates in a set of prioritized recommendations intended to address the outstanding needs identified during the research phase. The recommendations pair relevant best practices with identified needs but do not take into account the financial, human and material cost implied in undertaking such efforts, despite their manifest importance. The prioritization was determined in large measure from the discussion of the Interim Report's recommendations at a Regional Workshop held in Sarajevo in May 2009. The highest priority recommendations from that event were:

- ***Make Available Transcripts from ICTY Proceedings*** that are searchable, in local languages;
- ***Create a Sustainable Witness Support Apparatus*** with a structure appropriate to each jurisdiction;
- ***Foster Electronic Research and Improved Analytical e-Tools*** with the Case Matrix<sup>8</sup> and training in its use.
- ***Increase the analytical capacity and trained support staff*** for judges, prosecutors and investigators – including both political and military analytical capacity.
- ***Support the Judicial and Prosecutorial Training Academies*** in the creation of a modern, tailored, easily-updatable, ICHL-specific curricula.
- ***Create a Legal-Research Tool of Local Jurisprudence*** in the form of a web-based,<sup>9</sup> searchable digest of ICHL-related decisions from the region's trial, appellate and supreme courts.

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<sup>8</sup> See also page 57 and footnote 85

<sup>9</sup> The resource should be also available periodically on CD-ROM, particularly as it was observed that many judges and prosecutors in BiH entity-level jurisdictions do not have Internet access in their offices.

## FINAL REPORT

### **I. Introduction**

As the International Criminal Tribunal for the former Yugoslavia (ICTY) approaches the end of its “completion strategy”, harnessing the institutional knowledge and expertise developed during its tenure, and making it available to legal practitioners elsewhere, becomes increasingly important. The three organizations involved here understand this imperative, but seek as well to understand how best to conduct such “knowledge transfer”, particularly to legal professionals in the former Yugoslavia still confronting a war crimes caseload.<sup>10</sup> The Office for Democratic Institutions and Human Rights of the Organization for Security and Co-operation in Europe (OSCE/ODIHR),<sup>11</sup> the ICTY and the United Nations Interregional Crime and Justice Research Institute (UNICRI) – supported substantially by the T.M.C. Asser Instituut<sup>12</sup> – initiated this study to assist their own efforts and the efforts of others who endeavour to strengthen the capacity of legal systems in the former Yugoslavia operating at the intersection of domestic and international criminal and humanitarian law (ICHL). In so doing they seek to improve markedly the delivery of future professional-development and knowledge-transfer programmes.

This Final Report is the culmination of a multi-stage research project that included an Expert Workshop in The Hague in October of 2008, over 90 field interviews in five jurisdictions,<sup>13</sup> an Interim Report, where findings and recommendations of the research phase were compiled, and a Regional Workshop in Sarajevo in May of 2009, where the Interim Report was discussed with local practitioners. The structure of the Final Report follows the project’s methodological foundations in that it begins with a review and analysis of past capacity-building efforts in the ICHL arena across the region. That review is followed by an assessment of current knowledge and skills-related needs among the legal professionals dealing with ICHL-related cases. From the successes and failures of previous capacity-

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<sup>10</sup> In further text, the acronym ICHL is employed as per the definition provided in Annex 1, to describe war crimes, crimes against humanity, genocide and the modes of liability found in International Criminal and Humanitarian Law.

<sup>11</sup> The Office for Democratic Institutions and Human Rights (ODIHR) is an institution of the OSCE based in Warsaw. In further text, the acronym OSCE refers to both the OSCE and ODIHR, unless specified.

<sup>12</sup> The T.M.C. Asser Instituut contributed to the development of the conception and design of the project and hosted an Expert Workshop in The Hague to launch the project’s research phase.

<sup>13</sup> The jurisdictions that are the subject of this research are Croatia, Serbia, Kosovo, Bosnia and Herzegovina and the former Yugoslav Republic of Macedonia. All references to Kosovo refer to Kosovo under UNSC Resolution 1244. The OSCE is status neutral and thus do not take a stance on the issue of Kosovo independence.

building initiatives, the authors distil a collection of best practices and means for improving current initiatives. Finally, a set of recommendations is included that matches the identified needs with the identified best practices, listed according to priority.<sup>14</sup>

Judiciaries in transitional and post-conflict countries frequently suffer a variety of ills, many of which will bear to a certain degree on war crimes cases. The Research Team reviewed relevant literature and used the Expert Workshop in The Hague<sup>15</sup> to identify discreet topics that appeared repeatedly to be the target of ICHL-related capacity building and knowledge transfer:

- The knowledge and application of ICHL in the domestic legal context;<sup>16</sup>
- Investigation and Analysis;
- Prosecution;
- Defence;
- Trial and Appellate Adjudication;
- Outreach; and
- Victim/Witness Support<sup>17</sup>

After receiving validation at the Experts Workshop, these seven topics formally became the backdrop against which the methodology described below was applied.

### **A. Research Stages & Methodology<sup>18</sup>**

The project partners adopted a four-component research process (R.A.I.D.) that combined a critical examination of past efforts with a current assessment of the needs of legal professionals in the region. Those two components gave rise to a set of “best practices”, i.e., knowledge-transfer techniques and methodologies with a successful track record in delivering their subject matter. The research also generated several ways to improve existing knowledge-transfer practices, as well a number of innovative methodologies. These latter practices do not necessarily boast a record of success – precluding them from being labelled best practices – but their inclusion in this report suggests a credible potential for enhancing future knowledge-transfer undertakings. In addition to the established best practices and the suggested

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<sup>14</sup> A Research Team hired by ODIHR prepared both the Interim and Final Report on behalf of the partner organizations. The team consisted of three researchers, Vic Ullom (team leader), William Wiley, and Ljiljana Hellman (replacing Boris Mijatovic).

<sup>15</sup> The Expert Workshop, hosted by the T.M. Asser Institute, took place in The Hague in October 2008.

<sup>16</sup> This topic did not receive separate treatment in the Report. Rather, the Research Team wove it into the discussion of investigation, prosecution, defence and adjudication. The team was of the view that the knowledge of ICHL, and the ability to apply it, were critical to, but inseparable from, the six remaining topics.

<sup>17</sup> Although closely related to victim/witness support, witness protection is not included in this study. It was the view of the project team that addressing the topic of witness protection adequately required a separate research initiative.

<sup>18</sup> See annex 3 for further details on the methodology and research stages of the project.



improvements, the report includes a wide range of recommendations (Section V). Set out in order of priority, these recommendations match the best practices with the needs identified during the assessment. They describe the context and means of employing the best practices in order to rectify the identified shortcomings.

## **B. Additional Background**

A fundamental premise of this study is that sufficient differences exist between ICHL-related crimes and what are referred to as “classic” crimes, such that the former merit special consideration in capacity-building initiatives. Yet this perspective is not necessarily obvious. While interviewing in the former Yugoslavia, project researchers were frequently told by practitioners that they treat war crimes cases the same way they treat every other crime. Of course, one would not expect either preferential or discriminatory treatment by state authorities towards individuals suspected of involvement in war crimes. The point is that, due to their specificities, war crimes stand apart from “classic” crimes in ways that justify specific capacity-building approaches, in particular:

Substantive law: ICHL is not typically a priority in traditional legal education; most legal professionals will not have had significant exposure to it prior to working on their first case. Sorting out the “international” aspects of the substantive law that are domestically applicable is no straightforward exercise, as section D below illustrates.

Complexity: Not every ICHL case is necessarily complex, and certainly not all “classic” crimes are straightforward by comparison. However, given the context, the law, the scope, the actors, the quantum of evidence, the necessity (often) for inter-institutional and interstate co-operation, the need (often) for witness protection and support, the time elapsed since the underlying acts took place, and the fact that the accused are frequently not the physical perpetrators of the underlying act, such cases tend to be more complicated than “classic” criminal cases. Particularly complex is the necessity of securing, as well as effectively presenting (or defending against), evidence linking the underlying act(s) to mid- and high-level perpetrators.

Potential for politicization: By their nature, war crimes cases frequently reflect political and military outcomes, or even inter-ethnic relations, giving rise to allegations of “victor’s justice” or ethnic bias. Political leaders and the public, undoubtedly with the help of the media and interest groups, will have formed specific notions about the groups and individuals that they believe have perpetrated such offences. These notions translate into expectations, indeed pressures, directed towards the justice system.<sup>19</sup>

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<sup>19</sup> As noted, the issue of societal and political pressures is not a focus of this report, but is mentioned here to illustrate the salient differences between a typical ICHL and a typical “classic” crime. It is worth noting that such a societal climate is one of the key motivations for bolstering outreach activities. Successful outreach is meant to decrease politicization while increasing confidence in the judiciary.

Victims: Victims of ICHL-related crimes are also specific in comparison to those of “classic” crimes. In addition to the gravity of the harm inflicted upon them, they will frequently have been targeted due to their nationality, gender or religion. Often, they will have been targeted or have suffered *en masse*. Victims may form groups that can have significant influence over public perceptions of the effectiveness of justice institutions.

Accused/Suspect: Unlike “classic” crimes, although not exclusively so, persons suspected of ICHL-related crimes frequently hold positions of power, typically of political and military authority. Suspects in such cases will at times have a public profile, a support base and access to instruments of the state, such as the police and military forces, which might be used to undermine the exercise of justice. Also, accused or suspects often enjoy national and collegial solidarity behind them.

These factors, at times operating in concert, suggest approaches to capacity building that account for the unique character of the crime, the law and the context. It is also true that successful efforts at strengthening capacity, particularly when skills based, benefit the justice system beyond ICHL-related crimes, positively affecting other categories of complex and sensitive cases.<sup>20</sup>

Another issue concerns the target of the study. A primary focus here is on building the skills of legal professionals working with international crimes. But a second category of practitioners – capacity builders themselves (trainers and organizers of events, etc.) – has as much to do with the research. In so much as legal professionals require regular updating of their skills, so too those who plan, sponsor, organize and deliver such activities require modernization of their techniques and upgrades in their methodology. This study is as much about legal practitioners and how they learn as it is about trainers and organizers and how they educate.

The well-documented material and human-resource shortages within the prosecutorial, investigative, witness support, outreach and adjudicatory structures of the region already render it difficult to address contemporary crimes, let alone those perpetrated a decade or longer ago. But, with certain notable exceptions, these considerations lie outside the scope of this report and the project. Here, the focus is primarily upon questions of skills, knowledge and, in particular, substantive law and its application in ICHL cases.

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<sup>20</sup> Certain crimes, for example trafficking in human beings or other categories of organized crime, often bear characteristics similar to those of war crimes. It follows that capacity building efforts in ICHL can reinforce capacity building in those areas, and vice versa.



## II. Review and Analysis of Past Efforts

### A. General Commentary

With wide-reaching goals, the international and local legal communities have undertaken a multitude of knowledge-transfer, capacity-building and professional-development activities in the sphere of ICHL over the past decade. Yet there is a perception – providing in part the impetus for this project – that the results of these initiatives are inconsistent, and the reasons for such inconsistency are not immediately clear. Knowledge transfer was successful in some areas and on some topics, but less so in others. Regardless of the outcome, feedback given by participants in questionnaires was usually positive, but, the fact that such evaluations were generally conducted immediately upon completion of the event meant they were ill-suited to the identification of lasting impact. Genuine efforts to assess whether a given training methodology or a particular approach to knowledge transfer actually achieved its learning objectives, enabling the participants to actually apply the knowledge they received, must necessarily take both a longer and deeper view. And while a comprehensive examination of specific, individual knowledge-transfer events is beyond the scope of this research, the analysis that follows identifies both positive and negative aspects of the various approaches applied in the region.

### B. Analysis

#### *The Constituent Elements of the Justice System*<sup>21</sup>

Analysis undertaken with the benefit of hindsight revealed a number of readily identifiable weaknesses in early capacity-building efforts provided to core legal professionals. A frequent difficulty resulted when a poorly undertaken needs assessment – usually a perceived lack of understanding of ICHL – was combined with the belief that foreign expertise could rectify the shortcoming. Given the expert’s understandably busy schedule and a project’s financial constraints, preparation time rarely allowed for sufficient study of the local legal context. In such a setting, the foreign expert could do little but present the core tenets of ICHL together with the basics of the developing jurisprudence at international tribunals. The focus of the ICTY on “the most senior leaders” had generated a wealth of compelling jurisprudence in areas such as command

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<sup>21</sup> Judges, prosecutors, defence counsel and investigators/analysts.

responsibility and various forms of criminal liability, including “joint criminal enterprise”. These were legal concepts that had not been articulated in the domestic legal code, or at least not in the manner that the ICTY was employing them. Typically, at such events, a domestic legal expert would follow the foreign expert and describe the ICHL-based provisions that had been incorporated into the domestic code at the time of the alleged crimes. With regard to jurisprudence, practitioners were generally told that, while developments at the ICTY and elsewhere were interesting, the domestic legal regime did not entertain foreign jurisprudence and, in any event, the domestic criminal code in effect at the time contained the only applicable law. Such training events resulted in participants continuing as before, with little guidance on how to employ the content of the foreign expert’s presentation with fidelity to their local legal regime.

Clearly not all ICHL-related training in the early days suffered from the above mentioned shortcomings, yet interlocutors repeatedly described instances to the Research Team where material presented at training events could not be reconciled with the local legal framework.<sup>22</sup> It was not until the needs became better identified that the character of capacity-building events evolved from training towards more public professional debate on the contours of ICHL, whether the manner that the ICTY and other tribunals were employing it was applicable and, particularly, whether the more complicated theories of liability could be applied domestically.

A second shift in capacity building came with the understanding that the problems facing domestic legal professionals were much larger and more complex than simple unfamiliarity with ICHL. More thorough needs assessments exposed significant material and human shortages, lack of witness protection and support structures, dubious legal cultural norms, a lack of trust in judicial institutions and their independence, and a host of other structural weaknesses that, although not all specific to ICHL cases, impacted the processing of those cases in the region’s courts.<sup>23</sup> The extent to which any of these lacunae, or their sum total, would result in unacceptable judicial outcomes was not immediately clear, but the lesson for capacity building was that the needs of legal professionals were complex, interconnected with the needs of the justice system overall, and steeped in the local legal culture.

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<sup>22</sup> The Research Team was told that the same mistake was repeated later when experts from the Court of BiH provided training to cantonal level members of the judiciary, who are applying a different code.

<sup>23</sup> Certainly, there were other problems confronting domestic judiciaries as well. As mentioned, these considerations, for the most part, lie outside the scope of this report, but the authors are well aware that their existence also impacted capacity building to varying degrees.

As the closure of the ICTY was determined and cases began returning to the region, the United Nations Security Council expressly called on the international community to strengthen further the capacities of the local jurisdictions. Although many of its initiatives were already underway, the ICTY responded by bolstering programmes designed to enhance personal and professional contacts between its practitioners and those of the region. Internship programmes, for example, started to focus increasingly on bringing young legal professionals from the region to the Tribunal for several months of practical, mutually beneficial work experience. The ICTY Outreach section began facilitating study visits to The Hague where, as noted in more detail below, personal contacts flourished in a model that provided local practitioners' insight into the functioning of the Tribunal. Fellowships and "job-shadowing" visits contributed to these exchanges and, by a recent accounting, nearly 1,000 people have passed through the institution in some form or another.<sup>24</sup>

Although difficult to assess specifically, the personal contacts and professional relationships that developed over the years between ICTY professionals and their counterparts in the region clearly served a number of knowledge- and capacity-building ends. Anecdotal exchanges brought to the attention of the Research Team included clarification of legal points, learning to conduct legal research on the international level, assistance in tracking down evidentiary material, advice on prosecutorial strategy, and exchange of information concerning incidents, to name but a few. It was clear to the team that both parties stood to benefit from exposure to the other's perspective and experience. And such contacts were not limited to those between the ICTY and professionals from the region. As relations between the states improved – helped in part by political initiatives aimed at fostering regional co-operation in war crimes cases<sup>25</sup> – exchanges of professional experience at the regional level steadily increased. Several interlocutors pressed upon the Research Team the continuing need for, and substantial

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<sup>24</sup> Interview with ICTY official in February 2009, notes on file with the authors.

<sup>25</sup> The most significant effort taken in this area was the so-called *Palić* Process – a series of meetings with relevant judicial and political authorities from the region on judicial co-operation in war crimes proceedings, initiated by the OSCE in 2004. Those meetings helped trigger certain improvements in regional co-operation that resulted in a number of bilateral agreements on information and evidence sharing among the prosecutors in the region, (e.g. February 2005, Memorandum on Agreement on Regionalization and Promotion of Co-operation in Fighting All Forms of Grave Crimes, between the Serbian and the Croatian Prosecutors Offices; April 2005, Memorandum on Co-operation between the BiH and the Serbian Prosecutors' Offices; 2005 and 2006, a series of memoranda of co-operation in prosecuting war crimes, crimes against humanity and genocide, between Croatia, Serbia and Montenegro).

benefit from, such regional interactions to facilitate information, best practices and, most concretely, evidence-sharing.<sup>26</sup>

Another weakness of early capacity-building efforts was their lack of a systematic approach, coupled with a tendency to approach knowledge transfer as a one-off event. As is often the case with donor-driven capacity building, funding cycles dictated the scope of a training scheme and its methodology as much as actual needs or quality pedagogical approaches. Knowledge-transfer measures in the ICHL arena largely reflected this dynamic by tackling a small number of topics with a specific set of participants – usually judges and prosecutors. Defence was often disregarded entirely, and investigators were provided with little ICHL-specific tools or training. No effort was made by any institution – local or international – to cover the entire range of ICHL-related capacity building for legal professionals with no prior experience with ICHL. Similarly lacking was an awareness that professional development in this field (with a corresponding resource allocation) requires a constant updating of knowledge and skills.

In fairness to those who offer capacity building to defence counsel, due to the right of the accused to the counsel of their choice, the target group for capacity building is difficult to identify. Moreover, well-known or high-profile defence counsel often called upon by high-profile accused, appear reluctant to participate in events as trainees. Still, unlike judges and prosecutors from the region, a significant number of defence lawyers actually received on-the-job training by working – defending clients – in the ICTY. Some of these would have received a foundational training course for new counsel organized by the Office of Legal Aid and Detention Matters (OLAD) and/or the Association of Defence Counsel (ADC-ICTY).<sup>27</sup>

More recently, weaknesses in prior efforts have been countered – although not alleviated altogether – with the emergence of judicial and prosecutorial training academies,<sup>28</sup> as well as with “continuing legal education” (CLE) requirements now in effect in most jurisdictions. The academies’ central role in formalizing the professional

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<sup>26</sup> Examples of cross-border contacts include Serbian court guards visiting counterparts in BiH; the Bar Association of the former Yugoslav Republic of Macedonia visiting OKO, and the Belgrade War Crimes Chamber and the Ministry of Justice organizing a meeting in Belgrade for judges from the region, including two from the ICTY. Such visits have also been beneficial in the witness-support area, where staff in the newly created units in Croatia and Serbia visited their counterparts in the Court of BiH.

<sup>27</sup> Note that neither of these training initiatives is still operating.

<sup>28</sup> Throughout the region, judges and prosecutors are frequently trained together, in one institution.

development of judges and prosecutors has been a welcome move away from ad hoc, purely donor-driven training. They combine local ownership of the education process with local subject matter expertise. The involvement of such institutions in ICHL knowledge transfer, however, is not a panacea for systemized knowledge transfer in the ICHL arena. On the one hand, the academies provide a centralized, legally mandated institution with responsibility for legal education that includes ICHL. On the other, however, their comprehensive mandate means ICHL training must take its place among other priorities.<sup>29</sup> Capacity building in ICHL requires a layered process, with each examination of the substantive law building upon the previous one, and it must access a broad range of actors – such as victim- and witness-support personnel, investigators, defence counsel and outreach professionals – none of whom are under such an academy’s purview.

Additional lessons garnered from early knowledge-transfer efforts are that they often neglected to account for the complexity of war crimes cases, and that the prosecutor or judge often worked on cases alone with little or no support staff. Although certain electronic tools are now in place in limited areas, very few training efforts – particularly concerted ones – address case-management techniques, caseload-management techniques or other best practices to facilitate the handling of the enormous quantity of evidence typical in complex war crimes cases.<sup>30</sup>

Early efforts in knowledge transfer would also have benefited from including practical training materials, such as templates, handbooks and forms that could be employed by the participants upon their return to the office. The production of manuals, guides, bench books and similar literature is not commonplace in the region, and what is available usually consists of translation of texts based on international practice — again with little effort to ensure applicability to the specific legal context of national judiciaries.<sup>31</sup> In light of the developing interregional war crimes expertise, materials of

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<sup>29</sup> Academies must not only provide comprehensive coverage across the wide range of training topics, but also across all judicial and prosecutorial participants. The Research Team is aware of past occasions where, for example, persons not dealing with war crimes have participated in war crime training with limited interest but in order to receive the required credits, while practitioners involved in ICHL cases who would have benefited have not participated.

<sup>30</sup> Although not the focus of this report, at least two events with trial management as a topic were included as part of an event focusing on judgement drafting at the War Crimes Chamber in the Court of BiH.

<sup>31</sup> A notable exception is the *Ekspertski vodič kroz Haški tribunal/Expert guide through the ICTY*. This publication provided Serbian legal professionals a guide to ICTY jurisprudence, adapted to local legal terminology and the local legal framework.

this type developed today could not only be based on emerging local practice, but could benefit a larger group of practitioners region-wide.<sup>32</sup>

### *Outreach*

Outreach and public-information professionals were only rarely the target of early capacity-building initiatives in the ICHL sphere. This was due primarily to the lack of personnel, particularly specialized personnel, undertaking outreach, as well as the low priority given to their efforts. More recently, however, Bosnia and Herzegovina (BiH) and Serbia have become the exception. In Serbia, for example, tackling the lack of comprehension in the legal community about the value of outreach, OSCE and the Youth Initiative for Human Rights (YIHR) sponsored a seminar that gathered senior judicial figures from Croatia, BiH and Serbia, as well as representatives of the ICTY and the Special Court for Sierra Leone, as panellists. The OSCE also sponsored numerous publications, documentaries and public-opinion surveys,<sup>33</sup> a number of public panels and a particularly successful series of outreach events. The War Crimes Prosecutor's Office in Belgrade and the OSCE Mission to Serbia arranged study visits for Serbian journalists to the ICTY in 2005, and then to judicial institutions in BiH and Croatia. While the lasting impact of these specific efforts is difficult to assess, it was clear to the Research Team that the climate in which domestic ICHL cases are being processed in Serbia is improving somewhat. While innumerable factors influence the social atmosphere, some of the positive shift must be considered as attributable to these and other outreach efforts.

### *Victim/Witness Support*

Capacity-building efforts targeting victim/witness-support services began only recently, concomitant with the creation of formalized support structures. In 2006, victim/witness-support services began in both Serbia and BiH in the specialized chambers of the Belgrade District and the Court of BiH, respectively. A former ICTY victim/witness-services officer brought with her the Tribunal's institutional expertise,

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<sup>32</sup> Apart from the OKO Reporter and ad hoc reports of organizations on specific issues, no legal reviews exist covering national jurisprudence with a focus on war crimes. Practitioners must rely on their own initiative and resources to research, obtain, read and analyse decisions issued by other courts.

<sup>33</sup> Examples include: "Hag medju nama" (The Hague Among Us), October 2005 – in co-operation with the Humanitarian Law Center; A Perception Study of Justice Operators in Serbia – in co-operation with the Solidaridad-Impunity Watch (the Serbian branch of the Netherlands-based international NGO); Public opinion research on the general public's attitude toward the ICTY (2005, 2006, 2007 and 2009) – in co-operation with the NGO Belgrade Centre for Human Rights.



thus playing an important role in the early stages of the Victim-Support Unit in the Court of BiH. In Serbia, the OSCE organized training on various witness-related themes for members of the judiciary, court guards, defence attorneys and court staff to support the inception of the country's victim/witness-support unit. In Croatia, fragmented witness-support services were provided for the first time in 2006. Since then, support programmes have been continuously extended but are still not available in a comprehensive form to all courts, including two of the specialized War Crimes Courts (Rijeka, Split).<sup>34</sup>

Knowledge-transfer mechanisms in the victim/witness-support arena are not numerous, but the clear preference is for study visits. The OSCE and the United States Embassy (separately) organized such visits for Serbia's victim/witness-support officers to the ICTY and the Court of BiH. For their part, ICTY officials visited the support structures in the region, providing practical, first-hand advice from the Tribunal's perspective. Participants in these visits found them useful, with many considering them as the first – and in some cases only – formal training they received in their new profession. Similarly, Croatia's victim/witness-support staff visited both Serbia and the Court of BiH's witness-support units in 2007, again praising the opportunity to absorb best practices from more experienced offices. While it is clear that the field of witness support requires a level of specialized knowledge, according to an official at the ICTY “the needs of victim/witness-support practitioners in the region do not concern lack of knowledge, only lack of resources”.<sup>35</sup>

Capacity-building efforts in this field were not limited to staff working in victim/witness-support units. Stories of re-traumatization of vulnerable victims/witnesses in various courts in the region prompted a series of training for judges, prosecutors and a few that included defence counsel, such as in Serbia and Kosovo<sup>36</sup> in 2006, in an effort to raise awareness among these legal professionals, who contact such witnesses. Throughout 2008, the OSCE Mission in BiH organized a series of meetings between judges, prosecutors, civil society organizations and members of the press at the local level, designed to provoke debate on the multifarious issues facing traumatized witnesses and victims in the ICHL context.

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<sup>34</sup> The OSCE Office in Zagreb began a project to sponsor this extension of the service in July, 2009.

<sup>35</sup> Interview with ICTY official, 13 October 2008, notes on file with the authors.

<sup>36</sup> All references to Kosovo refer to Kosovo under UNSC Resolution 1244.

Although no formal support structures exist in Skopje's courts, an OSCE/OPDAT/ICTY training regime there placed witness-support and witness-protection concerns high on the agenda, where legal professionals confronted these topics both in seminars and study visits to the Tribunal and the Court of BiH.

Such sensitization initiatives have raised awareness among legal professionals, the media and the public. Still, the significant inroads made region-wide in the victim/witness-support arena are only the first steps in a long process aimed at achieving the level of support appropriate for the serious cases in which the victims/witnesses are expected to testify.



### III. Needs Assessment

#### A. General Commentary

This section examines the identified needs of the investigative, prosecutorial, defence, judicial, victim/witness support and outreach elements of the justice systems in the various jurisdictions that are the subject of this study. It is worth noting here that a small number of identified needs cut across all constituent elements of the system. For example, due either to language barriers or cost, or simply through ignorance of their existence, many legal professionals do not access the sizeable quantity of relevant ICHL resource materials.

A case in point is transcripts from ICTY proceedings, which contain a wealth of useful information for the region's legal professionals, notably including the testimonies of important witnesses. Currently, the transcripts exist only in the Tribunal's official languages – English and French – accessible on the ICTY website in searchable format. Audio recordings exist in all of the relevant languages, but they are not searchable in the way transcripts are. Furthermore, copies of the audio recordings have to be produced manually at the ICTY and can only be provided upon request. The region's legal professionals have repeatedly emphasized the benefit to be gained from ICTY transcripts being available in their own language. This point is further supported by the large number of requests received by the Tribunal to provide Bosnian/Croatian/Serbian (BCS) audio recordings of witness testimony in the absence of BCS transcripts. Transcription of the entire audio repository has not been feasible due to resource constraints, so the majority of such material remains unavailable to those practitioners from the region who do not speak English or French. Concerning other legal resources, certain local-language materials exist but, with rare exception, they are infrequently comprehensive or updated. Additional exposure to electronic research, analytical and case-organizational tools in the local language, accompanied by sufficient training in their use, would be greatly beneficial.

## **B. Constituent Elements of the Justice System**

### *Investigations and Analysis*<sup>37</sup>

In the jurisdictions examined by the Research Team, the problems being experienced during the investigation of ICHL-related cases is threefold: (1) considerable divergence of opinion exists in all of the jurisdictions (except Serbia and, perhaps, the former Yugoslav Republic of Macedonia) on key questions of substantive law;<sup>38</sup> (2) only a small minority of investigators, prosecutors and investigative judges in the said jurisdictions have experience investigating (and proving) modes of liability other than direct perpetration and certain forms of accomplice liability; and (3) oftentimes insufficient capacity exists to access and manage the large quantities and specific nature of ICHL-related evidence.

With rare exceptions, the legal professionals with whom the Research Team spoke expressed the view that the police forces in their respective jurisdictions were professionally ill-equipped to support the investigation of complex offences such as war crimes.<sup>39</sup> Police investigators were said to have little or no understanding of the relevant substantive law and its requirements, and this project's interlocutors frequently claimed that the police were wanting in even basic investigative skills such as interviewing traumatized and vulnerable witnesses, among others.<sup>40</sup>

A further professional requirement said to be lacking was specific expertise in investigating old cases, where the alleged crime took place more than a decade before the investigation and the trail of evidence has since dissipated. In the view of the interlocutors, these and other professional deficiencies were leading prosecutors to draft indictments on the basis of questionable evidence, giving rise, in turn, to problems during trial, with witnesses recanting earlier testimony. In addition, in some cases,

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<sup>37</sup> The various jurisdictions, as noted elsewhere in this report, are in the midst of revising their criminal investigative procedures. The roles of investigative judges, prosecutors and police investigators already vary significantly.

<sup>38</sup> For a discussion of the manner in which ICHL is being implemented in each of the jurisdictions under discussion, see Annex 5.

<sup>39</sup> The Research Team often did not receive formal access to the relevant police officials – although access to investigative judges and prosecutors was obtained without difficulty. The team casts no aspersions however; such occurrences may have had any number of causes, including time constraints. The remarks in this section are based largely upon the statements offered to the Research Team by other actors in the justice system, primarily defence counsel, prosecutors and judges.

<sup>40</sup> This view was supported by at least one newly hired police investigator, who stated that she and her colleagues would benefit greatly from training on elements of ICHL crimes, as well as on how to take statements from victims to support the required elements. The officer also sought to learn how to approach vulnerable witnesses and gain their trust.

police staff appeared (according to one trial judge) to themselves be manifestly complicit in the crimes alleged by the prosecutor.<sup>41</sup>

Turning to the investigative capacity of the prosecutors and (in the jurisdictions where they still exist) investigative judges, a number of the personnel holding these positions clearly had a firm grasp of the fundamentals of a successful investigation of ICHL-based crimes. As a general rule, prosecutors and investigative judges displayed the most confidence in their abilities where the requirements of an investigation into ICHL-related crimes overlapped with the expertise that must be demonstrated in the investigation of domestic crimes of a non-international nature, i.e., “classic” crimes. For instance, there have been a number of cases dealt with by Croatian authorities where murder, as a war crime, has been alleged to have taken place in and around Vukovar in 1991 and 1992. As far as the Research Team has been able to determine, the relevant Croatian prosecutors and investigative judges have approached these allegations in a piecemeal basis, as they would with “classic” murders, i.e., as if they were dealing with multiple killings with no nexus to a state of armed conflict. Although convictions of direct perpetrators were secured, evidence relating to the perpetrator’s direct superior was often ignored or not followed up sufficiently.

Several prosecutors and investigative judges with whom the Research Team met understood the importance of documentary evidence generated contemporaneously by the suspect and the organization of which the suspect was a part at the time of the commission of the alleged crimes. But region-wide, investigators tended to rely almost exclusively on witness-based evidence to make their case, rendering it vulnerable to human error. The practical and conceptual ability to put together pieces of documentary evidence – combined with witness evidence – to build a complex case against a mid-level perpetrator case was thought to be wanting.

Legal professionals were quick to add that their investigations would greatly benefit from dedicated analytical personnel, particularly for political and military structures, something that appeared not to exist in any of the jurisdictions that were the subject of this study.<sup>42</sup> Also, modern, computer-based analytical tools, such as Analyst’s Notebook, have been successfully utilized in international tribunals to aid

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<sup>41</sup> The Research Team has observed that, even after the police vetting process in BiH, there have been instances of serving police officers being indicted for war crimes.

<sup>42</sup> It should, however, be noted that, at least in Serbia, dedicated military and political analysts were not deemed necessary when said expertise could be made available on an expert-witness basis during investigation and trial.

analytical capacity and may provide some degree of assistance for investigators across the region if language and technical obstacles were to be overcome. The correction of these serious shortcomings in analytical capacity should be viewed as a priority for the region's legal community.

### *Prosecutions*

The prosecutors interviewed by the Research Team claimed in every instance that their offices did not possess sufficient human and material resources to deal with their current caseloads, let alone any large influx of new ICHL-related cases (as may be the case in BiH). And, while the mandate of the Research Team calls for an examination of deficiencies in individual human capacity, not quantitative human and material shortfalls, the team nonetheless notes that existing material and staff shortages will have to be addressed — alongside efforts aimed at bolstering the capacities of existing legal professionals.

Where the non-investigative activities of prosecutors are concerned, the Research Team observed the need for capacity building in case management. There appears to be an across-the-board absence of suitable case-management tools.<sup>43</sup> As far as the team has been able to determine, these deficiencies come together with prosecutors' uncertainty concerning the requirements of the relevant law, as well as most prosecutors' limited experience in dealing with complex ICHL cases. These problems are, in turn, exacerbated in old and cold cases — typical of those in the region — where witness fatigue and the passage of time influence the selection of evidence by prosecutors and investigative judges.

A second area the Research Team observed that would benefit from co-operative knowledge-transfer initiatives for prosecutors is the drafting of ICHL-based indictments within the local procedural framework. The primary function of an indictment — putting the defendant on adequate notice of the charges against him or her to allow for a proper defence — can suffer in the complex intersection of international and domestic legal

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<sup>43</sup> The Research Team found that, while caseload-management tools were available to officials in the Belgrade District Court as well as the Zagreb Country Court, case-management tools were for the most part nowhere to be found. A case-management tool (i.e., the Case Matrix) is available to counsel and judges at the Court of BiH, although the team did not find that this or a similar case-management tool was available to prosecutors, defence counsel and judges practising elsewhere. Where the Case Matrix is concerned, a BCS version will be available to legal professionals in the region at no cost to practitioners from November 2009. Prosecutorial offices (and chambers) would benefit from expert advice on the array of potential management tools, their functionality, their cost and their compatibility with existing tools.

provisions. For example, it has been noted that practitioners in Serbia generally agree on the scope of the law, but there did not appear to the Research Team to be any consensus on the question of how a given offence or mode of liability should be broken down into its constituent parts. The initial indictment in the so-called “Scorpions” case<sup>44</sup> has many positive features. For instance, Article 142(1) of the 1976 Socialist Federal Republic of Yugoslavia Penal Code is linked explicitly to the provisions of international law and, in particular, to Article 3 common to the 1949 Geneva Conventions. Additionally, the modes of liability relevant to each of the five persons accused are more or less clearly set forth in the indictment.<sup>45</sup> Neither the alleged offence nor the modes of liability constitute in any way a departure from the commonly accepted interpretation in Serbian legal circles of the relevant provisions of the 1976 code. Nonetheless, the indictment in question nowhere proffers a clear indication through the pleading of pertinent material facts of what the prosecution considers to be the legal requirements or “elements” of the alleged crime or of those of “ordering” as a mode of liability. While it is apparent that the Scorpions indictment – in line with Serbian procedural law – must include a complete recitation of all alleged facts, the Research Team observes that it is not the alleged facts themselves that put a defendant on notice. Rather, proper notice includes a demonstration that those facts operate to satisfy the necessary requirements, i.e., the elements that constitute the alleged crime.

### *Defence*

Despite the oft-cited criticisms of defence counsel in the literature, the Research Team has been left with a somewhat more positive impression. This is not to suggest that the defence counsel interviewed did not highlight their experience of innumerable difficulties in the execution of their duties. The practitioners interviewed by the team were of the view that, save for the few who had appeared in The Hague, most lawyers in the region were unfamiliar with ICHL as it has been received into their domestic systems. This situation was compounded, in their view, by the fact that most trial judges, with the exception of those from specialized courts, also had limited familiarity with ICHL. Consequently, even if defence counsel were to assist the bench by making reference at trial to the manner in which similar law is applied in foreign jurisdictions

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<sup>44</sup> Republic of Serbia, War Crimes Prosecutor’s Office, Case No. KTRZ-no. 3/05, dated 10 July 2005.

<sup>45</sup> Four of these accused are alleged to have been present during the perpetration of the underlying acts (in this case, the killing of a number of prisoners). A fifth accused is alleged to have ordered the killings.

and international tribunals, these references would not be welcome and might be misconstrued. There appears little incentive at the moment for defence counsel to familiarize themselves with international praxis. However, one interlocutor with extensive ICTY experience suggested that a slow and careful injection of foreign jurisprudence into defence arguments would, over time, bear fruit.

Where defence representation is concerned, the Research Team is aware that, with the exception of the Court of BiH, defence counsel are not required to undergo specific training or to possess specific experience in order to represent persons accused of war crimes. The region's bar associations are becoming more active on this front. In Croatia in late 2008, for example, the Croatian Bar Association, together with the Ministry of Justice, compiled a list of attorneys willing to be appointed by courts as counsel in war crimes cases. Listed attorneys either had experience or willingness to be trained. But improvement is needed to ensure that ICHL foundations are in place for those lawyers accepting such cases. In this context, the Research Team notes the rapid disappearance of investigative judges from the jurisdictions being examined in this study. In particular, the disappearance of investigative judges, combined with other oftentimes radical changes to criminal-procedure codes in force in the jurisdictions under consideration, is having the effect of placing the onus for the search for exculpatory evidence upon defence counsel – a role for which they are neither professionally nor conceptually well equipped.<sup>46</sup> In addition, the current structure of compensation for the representation of indigent clients, where counsel is compensated at a flat rate for submissions and appearances but not for preparation time, does little to encourage diligence, a particular concern for the complex nature of ICHL-related crimes.

The same holds true for the defence during trial and appellate proceedings. Counsel would benefit from professional-development schemes very similar to those for prosecutors. These could include, for example, additional exposure to the use of documentary evidence to establish – or in this case to undermine – the linkage between alleged perpetrators and key underlying acts. The Research Team also noted the suggestion by several interlocutors that capacity building for defence counsel in the field of negotiating plea and immunity agreements in ICHL cases would be welcome, particularly in light of similar training already provided to prosecutors and judges.

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<sup>46</sup> And in BiH at least, also “legally” ill-equipped. The code does not endow defence counsel with a status that foresees defence-led, independent investigations.

### *Trial and Appellate Adjudication*

The Research Team met with a number of trial and appellate judges, including Supreme Court justices, in each of the jurisdictions subject to this study. The consensus view of the interlocutors was that sitting judges in the interviewees' jurisdictions would benefit from professional-advancement initiatives in the ICHL field, in particular from a more detailed examination of the relationship of the local substantive law to international criminal law and practice. The judges with whom the team spoke indicated that they would take special interest in any examination of the manner in which foreign jurisdictions (in particular the one of the ICTY) meet the evidentiary requirements of a given element or mode of liability. As noted, the occasional reference to international case law can be found in trial and appellate judgements, a development both welcome and to be encouraged. However, the paucity of such references and their limited scope illustrate the need for improvement.<sup>47</sup>

The Research Team received substantial comment from interlocutors – particularly laymen, but not exclusively so – concerning the accessibility of the legal reasoning in the judgements rendered across the region. Senior judicial interlocutors suggested that judgements drafted in sophisticated grammar and “legalese” are a tradition in the region, and are generally unclear to laypersons. However, they also acknowledged that some colleagues mask insufficient analysis and poor legal reasoning with opaque language. The team admits its own difficulty in comprehending the reasoning in certain verdicts it read, although it was unclear what role translation might have played. In any event, clear, concise and “accessible” verdicts – length notwithstanding – are an indispensable attribute of the rule of law. ICTY judgements are known generally for their clear structure and readability, and some recent positive interactions indicate that knowledge transfer from the ICTY may inspire local jurisdictions to adopt certain drafting methods.

Another area where trial judges in the region, in particular, might benefit from ICHL-related capacity-building initiatives is in the management of complex cases. As has been noted, the vast quantities of material, exhibits, witnesses and expert reports ICHL cases generate the risk of overwhelming judges working without adequate

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<sup>47</sup> A couple of examples available in English that might support this assertion include the Supreme Court of the Republika Srpska, Appellate Judgement in the case of Dragoje Radanović, dated 22 March 2007; and Cantonal Court Novi Travnik, Trial Judgement in the case of Mato Miletić, dated 29 March 2005.



assistance. Being able to take advantage of and having undergone training in the use of the electronic tools available for such purposes would provide benefits ranging from the proper organization of evidence to assisting in structuring the final verdict. In a region where case backlogs reach very high numbers, and particularly in BiH, where the volume of ICHL cases is only set to increase, caseload management is an increasingly important skill, the development of which would clearly benefit from further best practices and/or electronic tools.<sup>48</sup>

### *Victim/Witness Support*

Prosecutors repeatedly cited witnesses' reluctance to testify as the key challenge in their work. In the course of its research, the Research Team learned of instances where traumatized witnesses were compelled to testify in multiple trials after having given multiple pre-trial statements,<sup>49</sup> where witnesses from villages took the same public transport to a trial as the defendant's family, and where supporters of a defendant stood immediately behind a witness during her testimony in a case involving rape.<sup>50 51</sup>

In most jurisdictions, Centres for Social Work are responsible for providing or co-ordinating support for vulnerable witnesses. However, interlocutors described these centres as not having the organizational structures, specific training or human and material resources to meet these responsibilities. In certain pilot courts in Croatia, in the War Crimes Chamber in Belgrade and the Court of BiH, witness-support structures exist. Either alone or with assistance from volunteers or NGOs, such as the Humanitarian Law Center in Belgrade, these structures are providing assistance to witnesses and victims who come before the courts. These efforts suffer from significant resource limitations relative to their caseload.

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<sup>48</sup> To this list of necessities demanding better caseload management, one might add assistance in managing court time appropriately, ensuring the preparation of the parties for hearings, being aware of other similar cases and ascertaining when joinder is appropriate, or whether to relinquish jurisdiction to another court, and the like. While most of these topics are not ICHL specific, the unique context of war crimes cases in the former Yugoslavia means they are relatively prominent vis-à-vis "classic" crimes.

<sup>49</sup> While this example is illustrative of a need for witness support, it often originates from the procedural problem of admissibility of evidence from another or even the same jurisdiction.

<sup>50</sup> The Research Team notes that these incidents did not occur in the Court of BiH or the War Crimes Chamber in Belgrade.

<sup>51</sup> The Research Team is aware that these instances reflect also upon a justice system's ability to protect witnesses, not only to provide them psychological, logistical and similar support. However, witness protection is not taken up in this report, in part because the breadth and depth that would be required to address the topic properly requires a specific effort.



It is clear that there is a need for sustainable support mechanisms for witnesses testifying in war crimes cases; indeed, it is the primary need across the region in this field. It is also clear that one size does not fit all, particularly considering the fact that institutionally housed victim/witness-support programmes follow the subject matter jurisdiction of the court to which they are attached.<sup>52</sup> In the entity courts of BiH, no formal witness-support services exist, although such services have been taken up in places by committed NGOs. In Skopje, no organized service, not even one provided by volunteers or NGOs, is available to witnesses – in ICHL cases or otherwise. In Kosovo a witness-support structure created by the OSCE in 2002 is currently not employed in ICHL cases.

Whichever model for witness support is selected, it must not only be sustainable, but also comprehensive, encompassing the “before, during and after” phases of a witness’ engagement with the judicial system. Current programmes, including that of the ICTY, succeed to a greater or lesser degree in providing support to witnesses prior to and during their testimony. However, after testifying – rare cases of relocation aside – the support offered or available (in the form of post-testimony follow-up calls, visits to witnesses or referrals to NGOs or other local institutions) is limited. For its part, the ICTY has identified the need for more systematic follow-up to further enhance the support.<sup>53</sup> For the region’s existing structures, witness follow-up remains more an aspiration than a practice.

Interlocutors across the region also noted gaps in “prior” witness support. Witness support prior to testifying appeared limited to those measures offered upon a victim/witness’s arrival at the courthouse to testify. Instead, it should begin with the initial contact with the victim/witness during the investigation stage and continue throughout. Transport to and from the courthouse during initial interviews and during

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<sup>52</sup> In Croatia, for example, although originally created exclusively to support witnesses in war crimes cases, recent legislative changes broadened the scope of the (pilot) Witness Support Programme to witnesses of all crimes, regardless of character. Conversely, in the Court of BiH and the Belgrade War Crimes Chamber, where the witness-support apparatus extends to all witnesses, those covered will necessarily testify exclusively in ICHL (or organized crime) cases.

<sup>53</sup> As of February 2009, the ICTY implemented its “Follow-up Policy” for witnesses that aims: (i) to ensure the well-being of witnesses upon their return home, by assessing their situation and taking action in order to minimize any negative impact stemming from their testimony before the ICTY, and to provide the witnesses with a sense of closure; and (ii) to locate resources within and outside the International Tribunal to address the needs of witnesses and create a support network.

the trial was singled out as particularly problematic.<sup>54</sup> Some witnesses were said not even to know why they were being called to testify, a fact explained to the Research Team as due either to the length of time that had passed since initial contact or to the fact that some persons may have been summoned without prior contact with the justice system. Summons provide little information about the case itself and nothing about support services potentially available to witnesses. To the extent that those gaps are the result of resource considerations such as shortages of staff, vehicles and fuel, they lie beyond the scope of this project. However, it is noteworthy that, when asked bear logistical and financial burdens, a significant number of witnesses will choose to abandon the effort, especially when they are psychologically vulnerable.

### *Outreach<sup>55</sup> and Public Information*

To varying degrees, the court systems in jurisdictions of the former Yugoslavia do not enjoy the confidence of their constituencies. Polls like the one conducted by the OSCE Mission to BiH in 2008 or the Spillover Mission to Skopje in 2007 indicate that average citizens have little faith in the ability of the courts to deliver a fair and just result – particularly with regard to war crimes.<sup>56</sup> The situation is much the same elsewhere in the region.<sup>57</sup> It is of little surprise that courts lag behind the government, the legislature and even political parties when it comes to public confidence.<sup>58</sup> The problems for ICHL cases processed in such an atmosphere do not stop here. The additional problem of nationalist rhetoric aimed at any institution that would put on trial one of “ours” injects the spectre of bias into the public’s view of the nature of the courts..

One response to this phenomenon is outreach, and assessment of outreach-related needs revealed two overarching themes. With the likely exception of Serbia, there appeared to be little understanding on the part of the region’s practitioners as to 1)

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<sup>54</sup> According to interlocutors, witnesses are generally reimbursed for the cost of a bus or train ticket from their home to the city where the court is located. How they travel from their home to the bus/train, and from the station to the court, is at their own expense.

<sup>55</sup> The reader is reminded to view the definition of “outreach” provided in Annex 1, particularly as opinions vary as to the scope, priority and activities attributable to outreach.

<sup>56</sup> Unpublished public opinion research carried out for OSCE Mission to BiH, July 2008.

<sup>57</sup> E.g., Kosovo, *see* OMiK: “Background Report: Human Rights, Ethnic Relations and Democracy in Kosovo,” Summer 2007 – Summer 2008, pgs 3-6. *See also* UNDP: “Early Warning Report: Kosovo,” January-June 2008, available at <[http://www.kosovo.undp.org/repository/docs/EWR20\\_eng\\_press.pdf](http://www.kosovo.undp.org/repository/docs/EWR20_eng_press.pdf)>, pgs 17 and 47.

<sup>58</sup> “*Public Opinion Survey Prior to the Rule of Law Public Information Campaign, Key Findings*,” OSCE Mission to Skopje. Survey conducted by “Strategic Marketing and Media,” 2007.

what outreach is exactly; and 2) why it is important. Only a few judicial bodies are engaged in activities properly characterized as outreach, a reflection of the low priority afforded to it in a resource-constrained judicial system, combined with disagreement about who, if anyone, should undertake outreach activities. Even interlocutors appearing to understand the benefits of outreach lamented their inability to do it, citing limited resources.

Resource constraints are clearly to blame, in part, for the modest engagement in outreach. Few institutions have sufficient staff resources for existing needs, and a lack of understanding of the importance of outreach leads to inappropriate resource allocation. The public continues to be poorly informed or indifferent about the structure of the institutions and their proceedings, particularly in ICHL-related cases, with their legal peculiarities. Politicians and media have been known to step into and exploit this gap, alternatively blaming or praising the outcomes of the justice systems according to their respective agendas.

With the above noted, the Research Team did appreciate an increasing understanding within court bodies of the need to improve communications with the public and that convincing steps in that direction have been made. Many, if not most courts, for example, now operate websites, on which the public can access schedules, staff profiles, rules, judgements and similar information in the public domain. Court spokespersons (often judges) appear in the media both on their own initiative and in reaction to events.<sup>59</sup> Journalists and the public are generally allowed to visit courthouses and attend hearings freely – although instances of requirements for “permission in advance” persist in some areas.<sup>60</sup> These are important public-information measures that no doubt serve their purpose, but they are not outreach. Outreach is pro-active, seeking opportunities to raise the profile of the court and to build confidence in its institutional capacities, its competence and its decisions. A significant increase in outreach activities is required to overcome the weak public perception of the region’s ICHL-related judicial competence.

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<sup>59</sup> Spokespersons for the prosecution services are less frequently visible, when they exist, again with the exception of Serbia.

<sup>60</sup> The reader should note that traditional courtrooms in the region are very small, often no larger than an office. Space limitations are often the explanation given for excluding or limiting the presence of the public.

## **IV. Best Practices & Lessons Learned**

### **A. General Commentary**

The preceding two sections set out the unaddressed professional requirements for those engaged with ICHL-related cases in the region's courts, as well as a general assessment of efforts undertaken to date to tackle these needs. This section builds upon that research by encapsulating what the previous decade of knowledge-transfer and capacity-building experience in the region has to offer in terms of best practices and lessons learned. The intention is to digest the collective experience of those experts, trainers, organizers, practitioners, observers and administrators involved in capacity building in the region and to bring both the well-known and the innovative to light.

As noted previously, the Research Team identified best practices in ICHL knowledge transfer operating at multiple levels.<sup>61</sup> For clarity, the authors have reduced this spectrum to two primary categories. The broadest level includes practices applicable to knowledge transfer in general, without regard to any particular methodology, technique or intervention. For example, it is an identified best practice at the broadest level to ensure co-ordination among members of the donor community (see below) when sponsoring ICHL-related training events. This and the other generally applicable best practices are set forth in Section B below.

The second level of best practices consists of specific methodologies or techniques, such as seminars, electronic tools or study visits. These are operational, serving as vehicles for knowledge transfer. As will be seen, however, these methods are only "best practices" when undertaken within certain parameters or when following context- and practice-specific tips and techniques.<sup>62</sup> Section C, below, contains a description of four such practices, followed immediately by the additional tips and techniques that make them most effective. Where research generated suggestions as to how even these best practices might be improved, a discussion of such enhancements follows thereafter.

### **B. Best Practices Generally Applicable to Knowledge Transfer**

The practices below apply to capacity building and knowledge transfer quite

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<sup>61</sup> See the definition of Best Practice in the Terminology Annex (1).

<sup>62</sup> This might include, for example, ensuring that translations are of sufficiently high quality and provided in advance of an event, or that participants are selected according to transparent criteria.

apart from any particular tool or methodology chosen. They derive primarily from the experience of experts, organizers and donors operating at the policy level. While their general nature means some of them will appear obvious, particularly to those who have been involved in capacity-building efforts for some time, it also means they are ill-suited to prioritization. Therefore, the best practices below are set out in no particular order.

- Knowledge-transfer efforts are most successful when the domestic stakeholders own the process. Local ownership of the process translates into ownership of the results and avoids the perception of imposition by foreign actors.
- Maximizing the “spillover effect” of ICHL-related capacity-building activities to other arenas, e.g., fighting organized crime, and vice versa, improves the efficiency of resource use. Similarly, donors get more for their money and participants receive more for their time when knowledge-transfer efforts serve to complement ongoing legal and institutional reforms.
- Most legal professionals involved in ICHL cases are, to a large measure, self-taught. Best capacity-building practices allow for and facilitate the process of self-education. That noted, self-education undertaken in isolation is insufficient; feedback from experts and peers is an important component of professional development.
- In post-conflict and transitional-justice societies, knowledge-transfer activities are often ad hoc, donor driven and not co-ordinated. Varying mandates, funding cycles, jurisdictions, agendas, political interests, misunderstandings, personality conflicts and a host of additional variables frequently conspire to undermine co-ordination efforts. A co-ordinative body, led as much as possible by key domestic decision makers, is vital to successful knowledge transfer.
- Maintaining diversity (gender, national, ethnic, etc.) in all aspects of knowledge transfer – from planning to implementation, and from participants to trainers – assists with objectivity and inclusivity.
- Quality needs assessment is the *sine qua non* of all knowledge transfer. Unless

the need is properly identified, activities aimed at addressing the need will be in vain. In a complex system such as criminal justice, and a complex arena such as ICHL, accurate assessments are not easily produced. Quality assessments collect input from as many relevant sources as feasible, including the potential recipients.

- Best knowledge-transfer practitioners carefully consider where in the system an intervention would be most effective in addressing an identified need. Among the factors is the level of intervention, i.e., the individual, the institution or the jurisdiction. Within the last two of these are often sublevels, so at the jurisdictional level one might choose between intervening only in one district or state-wide. The timing of the intervention is also key, whether it be during a practitioner's legal education or only after he or she has a few years of experience. Also vital is the mode of intervention: Is an identified need best addressed through legislative change, the amendment of a rulebook, the training of a target group, or through some entirely unique intervention?
- Effective knowledge-transfer methodology takes time to be developed and implemented and is best viewed as a process rather than an event. Adult learning models recognize that time is required to internalize the transferred content – ideally by practicing it in a controlled environment – and that this is best followed by individualized and immediate feedback.<sup>63</sup> ICHL programmes that break complex ICHL content into stages or levels are most successful. Each step in the process builds upon the knowledge transferred in the previous one – moving from introductory to intermediate and on to advanced levels. Co-ordination among education providers can greatly assist in this regard, through the sharing of feedback, for instance, so that a relevant knowledge-transfer activity delivered by a different provider can build upon previous knowledge-transfer events.<sup>64</sup>

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<sup>63</sup> For a considered treatment of adult learning methodologies see, “Building Blocks for Building Skills: An Inventory of Adult Learning Models and Innovation,” Prepared by the Council for Adult and Experiential Learning (CAEL) for the U.S. Department of Labor, June 2006. Available at: <[http://www.cael.org/pdf/publication\\_pdf/BuildingBlocksforBuildingSkills.pdf](http://www.cael.org/pdf/publication_pdf/BuildingBlocksforBuildingSkills.pdf)>.

<sup>64</sup> To illustrate, building the capacity of legal professionals with little previous exposure to ICHL would begin with substantive legal topics, including, for example, how the Geneva Conventions have been written into the domestic code and how the ECHR affects ICHL cases procedurally. Initial training would be followed by an opportunity to apply the law in a realistic setting, either via moot court, an internship or

- Where legal professionals are specifically concerned, the knowledge-transfer process ideally takes into account and builds upon the jurist’s existing experience, employing mechanisms that are directly relevant to the participant’s actual or anticipated tasks.
- Knowledge-transfer interventions that account for and are respectful of local legal traditions are best, so long as those traditions are in compliance with international legal norms. Interventions should be tailored to be maximally applicable, and new or innovative approaches should be accompanied by sufficient prior research to ascertain their viability in the local jurisdiction. Where new practices may not be specifically foreseen in the domestic legal framework, one should ascertain whether such practices are prohibited.
- Organizers, donors and sponsors must be able to inform themselves of an intervention’s ultimate impact according to pre-identified indicators. Ideally, both the impact analysis and lessons learned from the process are gathered and utilized to improve subsequent interventions. Such feedback is more effective when shared among different education providers in a co-ordinated manner, so as to enhance future related activities provided by others.
- Interventions will ideally have built-in mechanisms to ensure their applicability and utility after the project cycle (i.e., funding) ends, where appropriate. Agreeing upon the mechanism for sustainability and allocating resources for its development are best done from the outset.

The above list is not exhaustive, but it does contain key best practices that, where implemented, operate at the policy level to benefit capacity-building and knowledge-transfer efforts in the ICHL context. Where these are broadly applicable, the discussion next turns to lessons and practices geared towards specific techniques and knowledge-transfer mechanisms.

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working on actual cases with a “mentor”. More advanced training, employing a different methodology, would follow, for example a study visit, followed by another opportunity to apply the knowledge, and so forth. The programme would be cumulative and increasingly advanced, allowing for specialization in the later stages. The Research Team is convinced that implementing such a programmatic approach would generate a quantum leap in the effectiveness of ICHL capacity building in the region.



### **C. Best Practices: Methodologies, Mechanisms and Techniques**

The general “toolkit” of knowledge transfer contains a range of techniques and mechanisms, a fact borne out by observing most secondary-school classrooms. Where the transfer concerns adults - and specifically ICHL legal practitioners specifically – the assortment of available tools is narrower. Research showed that almost 90 per cent of all knowledge transfer is undertaken using one of only four methods.<sup>65</sup> This section examines each of those four on its merits. Then, using the collected experience of practitioners who regularly implement them, the section sets out a list of techniques and tips that serve to enhance the effectiveness of each of these methods when implemented. At the end of the discussion of each best practice, the Research Team provides a short narrative of suggestions, also drawn from the research, which could operate to enhance the best practices. An example is provided that incorporates the best practices and suggestions, as appropriate.

#### **1. Knowledge-Transfer Events**

Few interlocutors could point to a more efficient way of transferring ICHL-related knowledge than by means of a well-conducted workshop, training event or seminar, but there anecdotal accounts also abounded about time wasted in inapplicable presentations or lengthy group discussions on tangential matters. Whether poorly or properly designed, such forums still represent the region’s most common knowledge-transfer method. When the tips and techniques listed below are taken into account, workshops, roundtables and seminars can be an effective best practice in successfully delivering knowledge and know-how to participants:

1. Lectures, if employed at all, are best kept at a minimum. Typically, legal professionals in the region do not take notes at such events.
2. Adult-learning methodologies appropriate for legal professionals include practical exercises such as moot courts (mock trials) and hypothetical scenarios. Presentations that include examples taken from the participants’ actual or expected work, appropriately redacted where necessary, help participants digest the

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<sup>65</sup> The four most common knowledge-transfer methods are the seminar, the study visit, the professional exchange (including internships) and personal contacts/networking.

material.<sup>66</sup> Selected finalized cases and their supporting materials provide relevant material for mock trials.

3. One-off training events are of limited use and are best employed for a specific audience, with, for example, colleagues from the same office or department collectively examining a particularly advanced, problematic or discreet topic.

4. Trainers/Experts.<sup>67</sup>

- a. The personality and authority of the presenters is key. The best presenters are knowledgeable of the subject matter, experienced in group dynamics, and capable of stimulating discussion without giving the impression of condescension .
- b. Trainers and presenters must be at the same or at a higher experience level than most, if not all, trainees and must be well informed on local law and local legal practice.
- c. It is important to budget for sufficient preparation time for experts and presenters (particularly if they are foreign) to allow them to become well-acquainted with domestic legal practices.
- d. Senior judges with significant experience hearing ICHL-related cases, particularly local judges, are often well-suited to lead peer-to-peer discussions concerning the obstacles and pitfalls involved in trying complex cases within a domestic legal context. The same can generally be said for senior prosecutors and investigators.

5. Participants:

- a. Unless specialization already exists among practitioners, the identification of participants can be an exercise in balance and diplomacy. On one hand, the sending institution shoulders the burden of identifying relevant staff; on the other, the needs assessment might have identified a specific target group. Tactful negotiations and creativity will assist in bringing the appropriate participants to the event.

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<sup>66</sup> The Research Team noted during its research the innovative methodology employed by the UNDP in this regard. See UNDP Bosnia and Herzegovina, “*Final Project Review Report*,” May 2008, concerning the project titled: “Support to the Establishment of the War Crimes Chamber (WCC) in BiH – Training of Legal Professionals.”

<sup>67</sup> The use of a Roster of Experts, i.e., a list of “good” trainers who would be invited back for future events – has generated considerable discussion between the Research Team and interlocutors. The logic of such a practice is clear, but so are its pitfalls. One must be prudent in managing any such list by considering, *inter alia*: 1. Who decides which trainers will be on the list, and which will not, and according to what criteria?; 2. Who maintains the list – maintaining up-to-date contact information? If someone is removed from the list, may he or she be reinstated, and how?; and 3. How can trainers get their first opportunity to be on the list? In the view of the Research Team, such rosters are best kept informally.

- b. Peer-to-peer training is best for judges, with a leader setting the parameters of the debate or presenting a proposed solution to a given, common problem and leading a discussion between equals. Practical and concrete issues arising at trial, as opposed to arcane theoretical points, are ideal for this forum. Best practices include trial and appellate judges learning together at a jurisdictional level, but separately at a regional level. In both instances it is helpful to have a judge from the ICTY and/or a respected international expert in the margins.
- c. A tradition of training prosecutors and judges together (without defence lawyers) prevails in the region. Observers often criticize this practice as fostering a too-close relationship between two of the parties in a three-party system. It is acceptable to mix groups, particularly judges, prosecutors and defence lawyers, where moot courts, hypothetical scenarios and role-playing are employed. Conversely, these professional groups ought not to be mixed when problems specific to a given profession are on the agenda or where actual cases are to be discussed. Where needed, inviting a guest speaker from the other profession can ensure that the perspective of that group is represented.
- d. Generally, neophytes and more experienced personnel ought not to find themselves as equal participants in the same training scheme. Experience shows that both groups will be uncomfortable asking questions in front of the other – thereby hindering discussion.
- e. The training of defence lawyers is a particular challenge due to the right the accused to his or her choice of counsel – rendering it difficult to identify a target group in advance. Various jurisdictions in the region, often in co-ordination with the relevant bar association, are developing lists of independent and state-appointed (službena dužnost) lawyers who have received some level of ICHL training. A certification course that provides the necessary foundations of ICHL practice in the local jurisdiction is an emerging best practice.<sup>68</sup>
- f. Defence counsel may also receive training through their bar association, especially where the association in question forms a sub-group or “section” specializing in ICHL. As has been done in certain jurisdictions (e.g., Croatia), the Bar should consider negotiating a memorandum of understanding with the local judicial training academy, or other training entity in order to take advantage of trainers and materials already developed, tailoring them to a defence perspective.<sup>69</sup>

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<sup>68</sup> OKO offers a certification course for lawyers seeking to appear at the Court of BiH.

<sup>69</sup> The authors are cognizant of the fact that a classic legal education qualifies lawyers to undertake any and all types of cases. However, in light of the seriousness and the complexity of war crimes cases, the authors also suggest that rules are reviewed as to whether a certification or experience requirement (as OKO has in the Court of BiH) should not be mandated elsewhere in war crimes cases.

A number of suggestions bear consideration with regard to enhancements collected by the Research Team during the research phase. For example, within resource constraints, training institutions should systematically update and modernize both their methodology and training materials. Providing professional development opportunities for instructors, such as “training of trainers” courses, is important both for keeping abreast of modern pedagogy and for updating content, i.e., both knowledge and skills-based development. The training institution should include these courses/opportunities in its long-term planning. When the trainers are foreign, they should adapt their presentations to the local legal context and ensure that their advice is both appropriate and applicable. This advice applies *a fortiori* in the ICHL context, especially when discussing the manner in which foreign jurisprudence and evidence collected outside of the jurisdiction might be used. In addition to the ICTY and other tribunals, the International Committee of the Red Cross, with its specific mandate in IHL, is a valuable source of ICHL trainers and experts.

The expanding pool of potential trainers from the region, and particularly those that have practiced international criminal law, should be utilized more efficiently. Alone or with an international expert, such trainers are an invaluable resource and will invariably help to close the gap between international expertise and local professionals. The above-noted “train the trainers” programmes can assist such experts in delivering their knowledge through a pedagogically sound approach.

“*Stručni saradnici*” (translated as “legal officers” or “legal advisors”) are a very important but often neglected target group for knowledge-transfer activities. *Stručni saradnici* often draft judgements, interview witnesses and conduct important research. A large number of them go on to become judges, prosecutors and defence lawyers. Training such staff on the use of electronic databases (e.g., ICTY Court Records Online, the ICTY Appeals Chamber Case Law Tool and the Case Matrix)<sup>70</sup> might well have more impact upon the broader administration of justice than the training of the senior staff.

Similarly, “*Pripravnici*” (often translated as “legal trainees”) exist in nearly every chambers and prosecutor’s office in the region, depending on resources and jurisdiction. In light of the short-term nature of their appointments (two years, usually rotating between departments), *pripravnici* are not often the target of knowledge-

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<sup>70</sup> See the recommendation on electronic, analytical and research tools in Section V below.

transfer events at the international or domestic levels. However, knowledge-transfer resources are well spent on this group because this cadre of young legal professionals includes future judges, lawyers and prosecutors.

To improve participation, appellate and senior-level legal professionals should be offered “advanced” ICHL courses, even when they have little previous ICHL experience; they will be more inclined to attend such events. Also helpful is the provision of the CVs of the trainers or experts in advance, allowing invitees to make an informed choice about their participation.

» **Best Practice**      Peer to Peer meetings (collegium):

*What:* A closed meeting of colleagues, usually from the same office, court or jurisdiction, with an external expert in the margins.<sup>71</sup>

*How:* The top-ranking domestic colleague acts as moderator. The goal is to harmonize practice, identify best practices, overcome common obstacles, and clarify difficult legal points.<sup>72</sup> Confidential issues can be raised and specific cases discussed, where appropriate. Guests from other jurisdictions or institutions are brought in as appropriate. The structure offers many advantages: It is highly cost-effective, is respectful of the local hierarchy, makes available outside expertise (e.g., ICTY or ICRC), and facilitates local resolution of local concerns.

*Who:* judges, prosecutors and investigators.

## 2. Study visits

Study visits to the ICTY and within the region have become an increasingly common knowledge-transfer practice over the past several years. A typical visit to the Tribunal would include a small group of practitioners from the region – prosecutors or judges, and sometimes both – that spends three or four days receiving briefings from staff, attending meetings with counterparts, discussing points of law, touring the facility and/or observing a trial. Research revealed near unanimous praise for study visits as a useful knowledge-transfer tool. These visits to the ICTY served a valid outreach

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<sup>71</sup> With modification, this practice is also effective across jurisdictions (i.e., regionally) when obstacles common to the profession appear.

<sup>72</sup> The agenda should be developed locally, but could include access to and use of evidence gathered by the ICTY, organizational tips in complex cases, witness protection and support, adjudicated facts, crime-scene reconstruction in ICHL cases, status conferences, plea-bargaining, judgement drafting, leading investigations (new role) and a host of other salient ICHL-related issues.

function, that is, visitors saw the human faces behind the Tribunal, saw their offices, the mix of men and women and the various ethnic backgrounds and nationalities of its staff. Visitors noted the professional approach the staff of the ICTY took to investigations, prosecutions and judging – an approach devoid of ethnic or national prejudice. The inherent objectivity of the institution (usually) left the impression that the rule of law stands above narrow national interests.

Additional considerations merit the inclusion of study visits among the list of best practices in knowledge transfer, not least the opportunity to observe a functioning institution in practice that provokes comparisons with one's own. Participants from weak or dysfunctional institutions are often unaware of the procedures that should be in place to facilitate an effective operation. Security procedures, communication protocols, case-flow practices, archiving, IT, logistics and research facilities are on display during visits to The Hague and can impact visitors as much as discussions of troublesome legal topics or issues affecting institutional co-operation. The briefings also assist with issue and topic identification for future knowledge-transfer interventions. As one participant who had participated in a study visit told the Research Team, "I didn't know what I didn't know, until I saw it at the Tribunal."

The best practices set forth below derive primarily from the experience of visits undertaken at the ICTY by practitioners from former Socialist Federal Republic of Yugoslavia jurisdictions. However, these practices apply equally to visits to the International Criminal Court (ICC) or to individual countries that have created war crimes departments, e.g., Norway and Canada,<sup>73</sup> as well as to neighbouring countries in the region where specialized structures are in place.

1. Such visits are most successful when both visitors and their hosts are well prepared in advance for the visit and have clearly defined objectives. By thoroughly consulting the participants, the hosts and the donor to ascertain expectations, the organizer can assist in defining both the target group and the objectives.
2. The visit must be specifically tailored to the group and objectives to ensure that the presentations are relevant and that the agenda moves the visit towards that objective. The topics to be addressed; places, departments and personnel to

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<sup>73</sup> Canada's programme is described at: <[http://www.justice.gc.ca/eng/news-nouv/nr-cp/2007/doc\\_32020.html](http://www.justice.gc.ca/eng/news-nouv/nr-cp/2007/doc_32020.html)>. Visited on 17 Feb 2009.

visit; and the format of meetings, tours and briefings all require advance identification and agreement. Such tailoring is labour and resource intensive, requiring, for example, the translation of PowerPoint slides in advance, the harmonization of speakers' presentations, and the facilitation of complex logistical and financial arrangements.

3. As discussed with seminars and workshops above, the personality, expertise and authority of the presenters is key. Short presentations, followed by ample time for discussion, work best.
4. Evaluation and feedback generated by the participants and hosts, and shared with the organizer, have proven to be worthwhile exercises at the end of each visit.

#### 5. Participants:

- a. It has proven beneficial to include practitioners from all levels –e.g., appellate level judges, prosecutors, and the often-neglected defence counsel – in study visits. While certain items in the agenda, such as a visit to the detention unit, can be undertaken together, separate meetings with professional counterparts facilitate personal contacts.
- b. While broad participation in such visits has its benefits, interlocutors noted that follow-up visits, i.e., second and third visits with specific individuals, also produced positive results. During such follow-up visits, personal contacts made during the initial visits were strengthened. Familiarity with the surroundings and one's peers allowed a deeper exploration of topics addressed in more general terms during the initial visit.
- c. It is best when the size of the group is kept relatively small, in order to facilitate the engagement of each individual participant.

In order to enhance the effectiveness of study visits, participants should be selected according to transparent criteria developed co-operatively between the sending, receiving and sponsoring institutions. To be avoided is the practice of institutional leadership selecting favoured associates for visits, independent of any consideration of whether the associates in question would benefit. Such practices, even when intended to distribute opportunities in an institution equally, distort the purpose and value of study visits, inhibit the development of needed personal contacts with relevant officials, and



undermine the potential value of the visit for the sending, receiving and sponsoring institutions. While the length of the visit is often restricted by time and budget, consideration should be given to combining study visits with work visits. Such dual-purpose visits would provide participants with the opportunity to internalize knowledge and gain a deeper understanding of their counterpart’s professional role.<sup>74</sup>

As with seminars, participants in study visits should, upon their return to work, impart the substance and lessons learned during their visit to colleagues who did not participate. Such information-sharing should be a condition of participation, and superiors should ensure that it takes place. The evaluations and feedback generated by participants and hosts at the end of the visit should be shared with others who may be interested in organizing future visits or follow-up events. Distribution of this information will help avoid duplication and allow future visits to build upon the lessons learned in previous ones.

Consideration should also be given to providing law students the opportunity to visit international and domestic war crimes tribunals as a way of enhancing their core legal education, including participation in “job shadowing”. As with all participants in study visits, selection of law students should be transparent and, in this case, also be based on merit (scholarship).

» **Best Practice:**                    Enhanced Study Visits – Job Shadowing

*What:* Extending the traditional study visit and assigning the participant to work alongside a counterpart in the host institution.

*How:* As noted above, study visits themselves are a best practice in knowledge transfer when key principles are observed. With the additional job-shadowing segment – lasting from a few days to a week – the traditional study visit is enhanced with more direct personal contact, exposure to concrete tasks and a deeper examination of issues confronting both the “shadower” and the “shadowee”. While such visits require additional planning, time, financial resources and amenable stakeholders on both sides, there is significant added value for the participant.

*Participants:* Victim/witness-support staff, registry staff, investigators, prosecutors’ offices (certain stages) and chambers (certain stages, particularly during trial).

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<sup>74</sup> See Best Practice text box: “Enhanced Study Visits – Job Shadowing”, this page

### 3. Fellowships, Internships and Personnel Exchanges

Bringing individuals aboard at an institution or chambers on a temporary basis has proven an effective and mutually beneficial knowledge-transfer tool. A programme in the region exists at the Court of BiH, and the ICTY has operated successful programmes for several years in the Chambers, Office of the Prosecutor and Registry. At The Hague, participants have been drawn from the ranks of judges, prosecutors, law students, scholars and specialist practitioners from all over the world. A participant typically stays from two to six months, during which he or she gets first-hand experience working within the Tribunal on actual ICHL cases. Their engagement tends not, for understandable reasons, to be at the strategic level, and the hosting institution may on certain occasions limit the participant's access to confidential materials, but the experience as a whole has proven markedly beneficial in knowledge-transfer terms.

Upon arrival, the participant is generally provided with an induction course that includes topics ranging from the institution's policies to the available tools and office processes.<sup>75</sup> In the cases of personnel exchanges or fellowships, the individual may work on his or her own case or research project but have access to resources, materials and the assistance of a judge or prosecutor from the hosting institution as desired. Interns, once settled in and assigned a mentor/supervisor, work at tasks appropriate to their skill level and interests. A typical tasking includes legal research, drafting filings or memoranda and summarizing witness statements or testimony.

Research produced a set of techniques that maximize knowledge transfer in such programmes:

1. Motivation is a key criterion in selecting participants and is more important than knowledge of ICHL (because unmotivated staff members are a supervisory burden). Prior experience is helpful, but not critical in selection, as tasks are distributed according to the participant's skills and experience. Moreover, participants in such programmes are best recruited with a process similar to that of regular staff, i.e., through a transparent application procedure. Casting as

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<sup>75</sup> Beneficial topics include, *inter alia*: introduction to co-workers, tour of the building, dress code, organogram, the mission or mandate, office machines and technical equipment, where to get assistance, working hours, emergency procedures, organizational policies and project timeframes.

wide a net as possible will gather the highest quality and most diverse pool of candidates.<sup>76</sup>

2. Working as part of a team generally provides a better knowledge-transfer environment than working in isolation. The ideal number of participants in a team should be calculated according to workload and supervisory capacity. Balancing the numbers ensures that participants are not left without tasks and that supervisors are not overburdened.
3. Providing both short- and long-term tasks helps ensure that participants are always engaged.
4. Participants work best when they feel vested in the outcome. The best supervisors accomplish this by providing tasks that require appropriate professional responsibility and that are important to the team's objectives.
5. The importance of supervision is difficult to overstate, and supervisors are to be carefully chosen because they are often the decisive factor in the success of an exchange or internship programme. The best supervisors meet with the participants on a regular basis, on a bi-weekly basis at minimum. The best supervisors are those who make themselves available to the participants; provide constructive, timely feedback; answer their questions; and treat them as valuable members of the team. To be avoided are supervisors that treat participants merely as temporary assistance.
6. Participants normally enjoy participating in professional-development opportunities that are available to regular staff and it has proven helpful to encourage them to do so.
7. Experience has shown it better to provide proper training and familiarization early in the participant's stay – when it is most beneficial.

There were not many suggestions for enhancing exchange programmes and internships, most probably because the practices are relatively well-established. It was noted that selecting the appropriate length for such programmes could be difficult. Research suggested that – where resources allow – a minimum period of four months,

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<sup>76</sup> This holds true even when targeting specific groups, such as young practitioners from the region. The net should be cast as widely as possible within the region.

and preferably six, is necessary for participants to acquaint themselves fully and take maximum advantage of the time spent in their host institution. Scheduling overlap between departing and arriving participants provides the latter with the opportunity to ask questions of the former, thereby improving the speed and quality of their introduction.

To maximize knowledge-transfer benefits, successful participants who are not already employed should be provided with recommendation letters and contacts in order to increase their opportunities to be hired by institutions engaged in ICHL.

» ***Best Practice:***      *Enhanced Internships*

*What:*    Soon-to-graduate or recently graduated jurists assisting experienced legal professionals in their work.

*How:*    Enhanced internships build upon the traditional internship model in two ways: First, pre-placement training prepares interns for their experience, allowing them to hit the ground running. Advanced preparation decreases the burden on the hosting professional and increases the professional value of the intern. The pre-placement training should further serve as a screening mechanism to ensure that only highly motivated interns are selected. Second, after spending three to four months at the ICTY – or with another international(ized) court or tribunal – interns spend three to four months in a domestic institution. This additional internship phase allows the further transfer of knowledge gleaned at the Tribunal, or elsewhere, to local counterparts. Alternatively, new hires in a court, defence counsel or prosecution office could undertake the internship prior to taking up their post.

*Who:*    Soon-to-graduate or recently graduated jurists with interest in the ICHL sphere, and/or recently hired legal professionals.

#### **4. Personal Contacts and Networking**

As previously noted, a significant number of personal contacts have developed over the tenure of the Tribunal and as a result from its work in the region. It is important to note that knowledge and information has flowed – and continues to flow – both ways as these contacts have grown deeper and more numerous. For example, in-country visits by investigators and prosecutors from the Tribunal working on a case often put them into contact with their professional counterparts and such exchanges were mutually

beneficial. Similarly, study visits by individuals and groups touring the Tribunal to meet with and be briefed by its staff have led to personal contacts that, with time, have developed into co-operative professional relationships. In a society that puts tremendous stock in personal contacts, such networks can be an effective method of knowledge transfer – with some professionals, the only effective method. For those individuals fortunate enough to benefit from such contacts, they have proved a ready source of professional development.

Equally important is the steadily improving atmosphere in relations between jurisdictions, and concomitantly, relations between individual legal professionals in the region. Interlocutors described in strikingly positive terms their increasing co-operation with counterparts working elsewhere on similar cases. This is not to say that legal and practical obstacles like jurisdictional disputes, parallel investigations, the “extradition issue”,<sup>77</sup> and the like do not, at times, limit direct personal contacts in specific cases. However, knowledge-transfer organizers should rely increasingly on regional expertise and the development of such networks in their capacity-building planning, despite the fact that, until recently, lingering ethnic tensions posed obstacles to initiatives of this type.

Research of the best practices in generating personal contacts revealed little apart from the need to create the circumstances where counterparts come into contact, e.g., at training events or during visits. Thus, the few techniques listed below have a record of facilitating the organic emergence of personal contacts when implemented during knowledge-transfer events or study visits:

- Facilitators are to be carefully chosen and capable of creating an atmosphere where participants feel free to speak up and to approach others. When others do take the floor, the facilitator ensures that each speaker identifies him or herself.
- For smaller events, facilitating introductions at the outset gives each participant the opportunity to speak. This “ice-breaking” is necessary, but it is best when

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<sup>77</sup> The “extradition issue” refers to the constitutional prohibition on extraditing citizens that exists in the constitutions of former Yugoslavia’s successor states. The prohibition hinders progress on war crimes cases because suspects who are citizens of neighbouring countries (and who might be arrested there) cannot be compelled to stand trial in the country where the crime occurred. Judicial co-operation has allowed, in some instances, a trial to take place in the suspect’s country of citizenship, although transferring evidence and witnesses can be burdensome. Removal of the prohibition on extradition is seen by most observers as a critical step forward in regional confidence building.

such measures are commensurate with the collective comfort level of the participants.

- Employing break-out groups during a regional event ensures that the participants are mixed and that they interact with one another.
- When language barriers are present, it is helpful to identify available translators during breaks and at meals, and inform participants accordingly, to facilitate informal conversation.
- During breaks and in the margins, organizers, leaders and facilitators can make a conscious effort to link (introduce) professional counterparts. To maximize contacts in the margins (at meals, after hours) knowledge-transfer events are best held at a location away from the office or a city centre.
- Prior to the closing of the event, circulate a list of names and voluntarily composed contact information. Have participants leave a business card at the time of their registration.
- Ensure that correctly spelled nametags of a sufficient size are available during larger events. Include the participant's title and jurisdiction on the nametags.
- Networking on the defence side is largely ad hoc, occurring most frequently when defence teams consist of both international and domestic counsel or during training events targeting defence.

Personal contacts can be developed on any number of occasions and over many levels of hierarchy. Experience from the region has shown that study visits, personnel exchanges, training events, conferences and one-on-one meetings are just a few of the forums where such contacts develop. Maintaining them may be more difficult, especially where distance and language barriers intervene, but efforts to that end have clearly borne fruit in ICHL- related capacity building and knowledge transfer. Findings suggested that bar associations should expend more effort in fostering personal contacts across the region, perhaps by organizing periodic meetings.

## 5. Other Best Practices

Knowledge transfer that employs several techniques in succession has proven particularly effective, especially for introducing ICHL to practitioners not previously exposed to it. When well choreographed, each approach builds upon the knowledge and skills introduced in the preceding approach, cementing it through practice before moving on. The following is an example of a comprehensive, introductory-level<sup>78</sup> training course for new staff working in ICHL.

»*Example:*     Comprehensive Induction Course:

*What:*   A knowledge-transfer programme for new staff working in ICHL-related fields.

*How:*   Over a period of approximately four months, participants are guided through each phase of a case in which a core international crime has been alleged – from pre-investigation<sup>79</sup> through trial, to the drafting of a final judgement on appeal.<sup>80</sup> The group gathers for one day every two weeks (or as appropriate) to conduct a mock-trial phase or practice a specific skill, as well as to receive new instruction. At each meeting, participants work in teams and are given an assignment to present at the next meeting, as well as the skills (training) or tools (e.g., electronic analysis) to carry them out. Trainers – both foreign and domestic – with experience and skills for each phase employ authentic, redacted materials and video snippets to transfer the relevant skills. Similarly, applicable legal points – substantive and procedural, domestic and international – are elucidated at each phase. The topics should be tailored to the participants’ work. Typical subjects include detention standards, documentary and witness<sup>81</sup> evidence in investigations (including interviewing, protecting, supporting and using evidence from ICTY and foreign jurisdictions), indictment drafting, crime-scene investigations, pre-trial hearings and judgement drafting. Guided small-group and mock-trial exercises scheduled throughout the programme ensure that participants practice the skills and employ the tools.

*Who:*   Legal practitioners of all sorts, apprentices, analysts and advisors who will begin working on ICHL cases.

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<sup>78</sup> “Introductory-level” refers to legal professionals that have not previously been involved in an ICHL case and is not indicative of rank or years of experience.

<sup>79</sup> The investigation phase can include visits to exhumation sites or forensic laboratories with examination of the salient issues on site, as well as training on accessing the EDS.

<sup>80</sup> For example, the “ICTY Manual on Developed Practices” contains an excellent section on judgement drafting in war crimes cases that could likely be used as training material.

<sup>81</sup> Each topic can be delved into to the depth that time allows, or tailored to the participants. For example, witness-support/protection training could examine psychological assessment, expert vs. eyewitness, protective measures, questioning/cross-examination, eye contact and body language, etc.





Another knowledge-transfer practice gaining traction among capacity builders is offering “in-residence” experts to host institutions or offices. Providing such an expert has multiple advantages, the first of which is the direct assistance to their hosts/counterparts on specific, individual cases. An added advantage is in identifying professional and institutional weaknesses from the inside, with a view to crafting tailored capacity-building solutions. These “embedded” experts can be nationals or internationals,<sup>82</sup> but they must have extensive and recognized ICHL experience. In addition to expertise in the field of ICHL, the expert, whether international or national, must possess exceptional interpersonal skills, the highest ethical standards and absolute discretion. The personal qualities of the visiting expert are a key factor for success because those selected must avoid intervention and never be seen as directing their counterparts. In addition, they must be able to assess needs in order to facilitate bespoke knowledge-transfer events. The unqualified support of the head of the institution is also necessary.

» ***Best Practice:***      Expertise in residence

The United States Department of Justice-based International Criminal Investigative Training Assistance Program (ICITAP) regularly places experts within investigative structures in the region, where they both assist in concrete cases and organize capacity-building events. The European Union has successfully embedded experts, for instance, in the specialized prosecution office for organized crime in Skopje. In both the European Union and ICITAP examples, the mentor’s lack of the necessary language skills were compensated for through the provision of full-time, vetted translators.

The best practices presented above were chosen from the many experiences of practitioners and capacity builders operating in the former Yugoslavia. They share a number of common characteristics, the most important of which is demonstrated effectiveness in transferring knowledge from those with expertise to beneficiaries. The practices have a proven track record, and the additional suggestions offer the potential

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<sup>82</sup> A foreign expert need not necessarily have language skills, as translation can be provided (at additional cost) with vetted, full-time interpreters.

to further increase their effect. The following chapter sets out recommendations on how these same best practices can be most effectively applied to address the ICHL-related needs of the region's legal professionals.

## V. Recommendations

### A. General Commentary

The final substantive area of this report contains recommendations aimed at strengthening the existing capacity of legal professionals involved in the region's war crimes proceedings. These were compiled primarily during the research phase of the project and were offered to stakeholders and experts on multiple occasions, with the content then adjusted based on the feedback received. The recommendations are set out in two broad categories: 1) General recommendations – applicable across professions or institutions; and 2) Recommendations by topic. A small number of recommendations pertain to only one jurisdiction, and are denoted as such in the text or by footnote.

The bulk of the recommendations target the ICHL-related knowledge and skills of practitioners, but the Final Report departs from that specific focus in three areas: analytical capacity, victim/witness support and outreach. Current staffing levels preclude serious knowledge transfer in these areas of the nature addressed in this report. Therefore, a necessary preliminary recommendation is that staffing levels be increased or positions created in those areas, and that new staff complete a comprehensive training programme as part of their induction. Until that happens, capacity building targeting those three areas will be of limited value.

Within each of the two categories, the recommendations are provided in general order of priority. Prioritization was determined during the Regional Workshop in Sarajevo in May 2009, where the Project Partners sought the views of the participants in order to frame consultations on potential follow-on activities. The prioritization below should not be strictly construed, however, and further discussion of relative priorities should remain at the forefront in planning subsequent initiatives.

A considerable number of factors were taken into consideration in generating the recommendations, with the most important clearly being the existing professional needs in the region, as described in Section III, and the best practices and lessons learned from Section IV. The perspectives of those interviewed and those who participated in The Hague and Sarajevo workshops were clearly influential. Finally, careful consideration was given both to the place and the appropriate target level for knowledge-transfer activities within a jurisdiction or topic, as well as the sustainability of any particular recommendation. However, two factors were not considered, despite

their manifest importance:

1. The financial, human and material cost; and
2. Except in rare instances, the agency or organization that should undertake, coordinate or sponsor such efforts.

These two factors require considerable additional research, consultation and coordination among the potential implementers, both domestic and international, of these recommendations.

## **B. General Recommendations – High Priority**

### ***Transcripts from ICTY Proceedings***

*Transcripts* of ICTY proceedings exist currently in English and French and are available on the ICTY website.<sup>83</sup> Audio recordings exist in all of the relevant languages, but are not searchable and can only be obtained upon request, as copies have to be produced manually in the ICTY. Consequently, the wealth of relevant information contained in the transcripts is at the moment not available for effective use by the national jurisdictions in the region. Making transcripts available in local languages, via a text-searchable tool, is imperative. Said transcripts have the status of official versions to assist their use in proceedings in the region.

### ***Sustainable Witness Support Apparatus***

*Structure:* The primary need for supporting victims/witnesses in ICHL proceedings is the creation of a sustainable support apparatus.<sup>84</sup> As noted, the specificities of each jurisdiction preclude a generalized recommendation as to the structure, composition and mandate of such apparatus except to (re)emphasize that it provides support prior to, during and after a witness/victim comes into contact with the justice system. Research showed that jurisdictions with existing support structures are struggling to meet demand and should therefore be provided additional personnel as soon as practicable.

### ***Electronic Research and Analytical Tools***

*Case Matrix:* Complex war crimes cases often generate thousands of pages of documentary evidence, involve large numbers of witnesses, and produce innumerable exhibits, briefs and expert reports. Modern legal professionals cope with this quantity of information by employing a variety of electronic tools. Some of these tools, for example “ICC Legal Tools” and its primary component, the Case Matrix,<sup>85</sup> serve the dual purpose of conveying ICHL knowledge while assisting in case management. Case Matrix users match the evidence to the required elements of an offence and/or mode of

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<sup>83</sup> <<http://www.icty.org/>>.

<sup>84</sup> In BiH specifically, the government should consider a tender process for the provision of victim/witness-support services according to the best practices set out in this report and elsewhere. The contours of the service (i.e., its geographical scope and structure) can be included in the tender or be left to the bidders within the ‘best practice’ parameters.

<sup>85</sup> More detailed information is available about Case Matrix at <<http://www.icc-cpi.int/Menu/ICC/Legal+Texts+and+Tools/Legal+Tools/>>. Note that a BCS version of this tool is scheduled to be available in November 2009.

liability and, with a click, access relevant jurisprudence to view what other courts have accepted (or not) as sufficiently probative on that element. Users can map the evidence they have on a certain point in a matrix, which the tool provides specifically for that purpose. Stated otherwise, the tool assists users in their evidentiary and, in some instances, legal analysis, while simultaneously assisting in their organization of case-relevant material.

***Increase in analytical capacity and trained support staff***

*Analytical capacity* – including both political and military analytical capacity –was repeatedly noted as a key weakness among investigators and prosecutors across all jurisdictions. Support is necessary to carry out legal research; to make the best use of archives, documentary evidence and expert reports; to analyze political, military and paramilitary structures; to assist with witnesses and statements, etc. Additional staff should be added to bolster the capacity of prosecutors and investigators working on ICHL-related cases. For many of the same reasons, legal officers are necessary to support judges hearing ICHL-related cases. New analytical staff should receive comprehensive ICHL training along the lines of that described in Section 4C(5) above,<sup>86</sup> including in the use of electronic tools and databases, take part in study visits to the Court of BiH, Belgrade War Crimes Chamber and the ICTY and, if feasible, participation in “in-house training” at the ICTY and elsewhere in line with the recommendations below.

***Support to Judicial and Prosecutorial Training Academies (Centres)***

*Curriculum & Training:* A modern, tailored, easily-updatable, ICHL-specific curricula is required to train practitioners from introductory through advanced levels. It should incorporate, as appropriate, the ICTY “Manual on Developed Practices”. A core curriculum containing elements common to all courts in the region can be created alongside modules that are specifically tailored to each region’s legal framework – to variations in investigative procedures, for example. The training should be held periodically for judges, prosecutors, investigators and support staff using the methodology and best practices identified in this Report.

***Interacting with Vulnerable Witnesses***

*Witnesses:* To address recurring issues involving witnesses and victims making their way through the local justice systems, training specifically geared to legal professionals who contact such persons is needed. An event similar to the one below but geared to each jurisdiction should be carried out in conjunction with the witness/victim-support apparatus, where available:

» **Example:** Interacting with Witnesses and Victims

*What:* Training for ICHL practitioners who contact witnesses and victims.

*How:* Participants are exposed to the primary issues surrounding interviewing witnesses and victims of war-related crimes. Techniques for appropriately questioning traumatized witnesses and victims are taught and then practiced in a controlled environment. Participants learn skills-based techniques for pre-trial interviewing and examination/questioning during

<sup>86</sup> “Comprehensive Induction Course” for new staff.

trial. Trainees practice with a mock witness in front of peers and/or a video camera, implementing learned techniques and reacting to issues that emerge. Both experts and peers provide feedback. Specific training topics include:

1. General interviewing approaches and best practices;
2. Protection of witnesses:
  - a. Assessment of needs for protection;
  - b. Legal framework;
  - c. Accessing protective measures (e.g., voice distortion, pseudonyms);
3. Scope of direct examination, cross-examination and redirect, where applicable;
4. Types of questions and when to employ them (open, closed, leading, etc.);
5. Techniques for questioning eyewitnesses, experts and hostile witnesses;
6. Appropriately and effectively questioning traumatized witnesses;
7. Witness support and how to access it; and
8. Recognizing and dealing with secondary trauma.

*Who:* prosecutors, investigators/police, judges and defence counsel.

*Legal-Research Tool for Local Jurisprudence:* A web-based,<sup>87</sup> searchable source of ICHL-related decisions from the region's trial, appellate and supreme courts is sorely needed.<sup>88</sup> Ideally, such a mechanism would be integrated with a translation of the existing Appeals Chamber Case-Law Research Tool (ACCLRT)<sup>89</sup> of the ICTY or with the Case Matrix itself. Such a tool would require regular maintenance and, therefore, certain staff and resources to keep it both operational and of a sufficiently high quality. It should therefore be attached to a court, university, institute or NGO with regular funding and demonstrated expertise. Until such a tool comes online, the Case Matrix and a translated version of the ACCLRT should be provided to all judges, defence, investigators and prosecutors working on ICHL cases, with training on their use.

#### General Recommendations Continued – Mid-level Priority

##### ***Additional Support to Judicial and Prosecutorial Training Academies (Centres)***

*Advanced training in ICHL:* Advanced training is needed for prosecutors, investigators, judges and defence counsel, tailored to each jurisdiction's legal framework. An appropriate event format, such as the one in the example below, should suffice so long as it is supplemented by events that cover complex modes of liability, such as complicity and command responsibility, i.e., where the defendant is not the alleged physical perpetrator of the underlying acts. Regardless of format, improving the usage of documentary evidence in establishing linkage should also be included among the topics. How to submit Requests for Assistance (RFAs) to the ICTY, including the types of documents that exist in the ICTY and their status or significance; the

<sup>87</sup> The resource should also be available periodically on CD-ROM, particularly as it was observed that many judges and prosecutors in BiH entity level jurisdictions do not have Internet access in their offices.

<sup>88</sup> Of existing publications, the "OKO Reporter" comes the closest to serving this function.

<sup>89</sup> <<http://www.icty.org/sid/9991>>.

interrelation of various documents; how to refer to the various texts, for example judgements; and how to submit requests for interviewing detained persons, would be a helpful inclusion for all practitioners. In this vein, legal professionals should be made aware of the “ICTY Court Records Online” database, its availability in local languages, and how to access its contents.

» **Example:** Advanced ICHL – Building (or Defending) a Linkage Case

*What:* Training on conducting mid-level perpetrator cases.

*How:* A co-facilitated training for advanced practitioners. Participants are provided with a brief review of the state of the law in mid-level perpetrator cases typical of the conflicts in the former Yugoslavia. Participants receive copies of actual evidentiary material – appropriately redacted – from the ICTY or their own jurisdiction. Working in teams, the participants are expected to sort through the materials provided, some of which are relevant and some of which are not, and assemble a prosecution or defence case. Discussion follows each step. Over the course of the event participants: 1. identify relevant material; 2. identify the elements of the crime, if any, supported by the material; 3. select the exhibits they would present at trial; 4. draft an indictment (for prosecutors); and 5. (for prosecutors and defence) explain their theory of the case in mock opening arguments.

*Who:* investigators, investigative judges, prosecutors, and defence counsel.

*Training Trainers:* There is a need to bolster the training capacity and expertise of existing ICHL trainers to improve their delivery of the above curriculum, especially in line with the best practices in this report.<sup>90</sup> The pedagogy of skills transfer with regard to electronic research and analytical tools should be included in their education. Skills enhancement for trainers should be conducted as a matter of course.

*Assistance:* Training academies and centres would benefit from assistance in implementing the best practices identified in this report concerning methodology, priorities and topics. Assistance could come in the form of (temporary) additional staff focused exclusively on implementing best practices, the creation of an administrative subdivision within the academies focusing on ICHL training matters, or adding staff trained in legal research with modern e-tools and other current legal-research methods relevant for ICHL, to assist legal professionals preparing for cases.

### ***Legal Materials***

*Commentaries:* To overcome the dearth of up-to-date legal reference materials in the region, it is important to provide legal professionals with an updated, locally authored ICHL commentary. Commentaries of this type are considered the most authoritative source of legal interpretation in the region. They carry substantial weight in the legal community and generally guide practice within their subject matter. Ensuring that such

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<sup>90</sup> A further assessment of the pioneering UNDP programme in this vein is warranted.



commentaries contain accurate and updated ICTY jurisprudence – alongside local practice – would ensure their place among effective knowledge-transfer tools. Similarly, translation (where necessary) and distribution of existing, internationally authored texts on ICHL should be considered,<sup>91</sup> with the aforementioned caveat as to their applicability.<sup>92</sup>

### ***Personnel Exchanges***

In-house training at the ICTY and elsewhere should be provided for legal professionals from the region, particularly legal officers (*stručni saradnici*), analysts, legal apprentices (*pripravnici*) and other support staff.<sup>93</sup> Formats should include visiting ‘professionalships’, enhanced internships and job-shadowing study visits in line with the best practices set out in Section 4 above. Training on electronic-analytical and research tools should be included as part of the induction or in-service training. Consideration should be given to continuing (or expanding) such programmes at the Court of BiH, the Serbian War Crimes Chamber, elsewhere in the region and internationally as the ICTY’s programmes wind down.

## **C. Recommendations By Topic (Prioritized within each topic)**

### ***Investigators***

Research revealed the need for a wide range of training targeting legal professionals responsible for investigating ICHL-related crimes in the region. Basic/introductory training in the foundations of ICHL is needed primarily for investigators from police structures. Investigating judges and prosecutors who carry out the function of investigator in such cases would benefit from advanced ICHL training, particularly covering the modes of liability pertinent to mid-level perpetrators (*See best-practice example “Advanced ICHL” above*). Both groups of investigators would benefit from the “Interacting with Witnesses and Victims” training described above on page 58 as well as a familiarity session on drafting and addressing RFAs to the ICTY. Trainers providing the expertise in these events should be included in the training-of-trainers component (see “Support to Training Academies” above).

The updating of investigative techniques and technology is necessary for all legal professionals involved in ICHL cases, but this is particularly the case for investigators. Topics should include DNA, forensics, crime-scene analysis, interviewing and exhumations. Workshops that include tips and techniques for investigating old cases, as well as courses in the use of electronic analytical tools such as Case Map, are also necessary for investigators.

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<sup>91</sup> For example, “The Law of Command Responsibility” by G. Mettraux (2009), which is being translated and should be available in autumn 2009 funded by BiH Soros Foundation. A second practice casebook, *The practice of the International Criminal Tribunals for the former Yugoslavia and Rwanda*, by John RWD Jones, 1999, has been translated into Croatian. Guides such as the “Expert Guide Through the ICTY” described in footnote 31 should also be considered.

<sup>92</sup> See page 21, and text accompanying footnote 31.

<sup>93</sup> The recently launched “Joint European Commission and ICTY Training Project for National Prosecutors and Young Professionals from the Former Yugoslavia” is set to cover the need for said activities with respect to the prosecution. See <<http://www.icty.org/sid/10176>>.

## ***Judges/Adjudication***

*Regional Appellate Judges Meetings:* These are peer-to-peer meetings employing the format described on page 44, with ICTY judges participating.<sup>94</sup> As noted, the agenda should be developed locally and include topics suggested by participants. Potential topics identified in this research include judgement drafting, the intersection of international and domestic law with regard to cases involving mid-level perpetrators, the utility of foreign (particularly ICTY, but also regional) jurisprudence, a judge's role in outreach and using electronic legal-research tools.

*Regional Trial Judges Meetings:* These are peer-to-peer meetings employing the format described on page 44 above, with ICTY trial judges participating. Topics suggested by the research include mutual assistance in procurement of evidence; admissibility of evidence; usage of ICTY-garnered evidence; facts adjudicated elsewhere;<sup>95</sup> a judge's role in witness support;<sup>96</sup> a judge's role in outreach; best practices in case and caseload management (including e-tools); and the creation of bench guides for specific topics,<sup>97</sup> such as witness protection measures, pre-trial conferences, crime-scene visitation and crime scene reconstruction.<sup>98</sup>

Consideration should also be given to mixed panels of trial and appellate judges, with topics adjusted accordingly.

## ***Prosecution***

*Regional prosecutors meetings:* These are peer-to-peer meetings, with senior ICTY prosecutors participating, with a view to complementing ongoing efforts of the OTP vis-à-vis prosecutors in the region.<sup>99</sup> Research for this report suggested topics should include: leading war crimes investigations, new legal frameworks facilitating inter-jurisdictional co-operation and evidence sharing, the benefits and pitfalls of adopting a team-based prosecution approach, best practices in case and caseload management (including e-Tools), mutual assistance in procurement of evidence, and admissibility of evidence garnered at the ICTY and in other jurisdictions.

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<sup>94</sup> Advantage should be taken so long as this resource is available, however this is not to suggest that current and former ICTY judges are the only possible resource. The key qualifications are substantial ICHL experience and the demeanour to assist less-experienced colleagues without condescension.

<sup>95</sup> The Research Team notes that a *lex specialis* exists in BiH addressing this topic.

<sup>96</sup> While most judges appeared to comprehend fully their role in witness protection and support, others appeared to believe that such responsibility lies elsewhere.

<sup>97</sup> See page 89, and the text accompanying footnote 141, for an example guide covering video conferencing in Croatia.

<sup>98</sup> For BiH specifically, a series of peer-to-peer meetings addressing pertinent issues with regard to "strategy" implementation would be beneficial. Example topics could include dealing with the anticipated caseload, substantive legal hurdles, complexity criteria, and usage of ICTY-garnered evidence, and adjudicated facts. One prosecutor and one judge, respectively, from the BiH Court and from the ICTY should be invited as observers. Ideally, meetings between the Chief Prosecutor of the BiH Prosecutors Office and the entity prosecutors should take place regularly, such as every three months, with the purpose of exchanging experiences, stratagems and perspectives.

<sup>99</sup> The OTP of the ICTY has, together with the war crimes prosecution department of the Court of BiH, created structures for regular consultation between those entities.

*External Expertise:* External expertise would be provided to support prosecutors appearing in ICHL cases. The expert(s) would serve as collegial, professional resources on ICHL matters, offering individualized support in specific cases. In addition to case-specific assistance, the expert(s) would assist in the organization and implementation of advanced training, electronic-tools and database training, and in the identification of additional professional-development needs.

## ***Defence***

*Defence Counsel Conferences:* Defence counsel in the region appearing on behalf of persons accused of having perpetrated a war crime should gather annually or semi-annually for an intensive, multi-day conference. Hosting the event could be Criminal Defence Section of the Registry of the Court of BiH (OKO),<sup>100</sup> as it already hosts a similar event, or a local bar association, like-minded institute or NGO. Presentations should be organized on a variety of relevant topics viewed from a defence perspective. Opportunities for networking and personal contacts should be woven into the agenda, which should include seminar, informal luncheons and a marketplace where experts and private industry discuss and exchange, for example, legal materials, skills courses, and electronic tools. A certification course in international criminal law could also be made available during the event, as could intermediate and advanced ICHL courses. A wide range of skills workshops could be held, such as, for example, questioning and cross-examination techniques, including those for working with traumatized/vulnerable witnesses,<sup>101</sup> conducting war crimes investigations from the defence perspective, effectively employing documentary evidence, and discovering exculpatory evidence in old cases. Also important is understanding the mechanisms for seeking assistance from the ICTY (RFAs), (e.g., Rule 75h requests and requests for interviewing detained persons);<sup>102</sup> negotiating immunity and plea agreements in ICHL cases; elucidating professional-ethical concerns; and becoming adept at electronic resource, research and analytical tools (e.g., Case Matrix, ACCLRT, CaseMap, and case management software). The training events should qualify towards an annual requirement of continuing legal education.

*External expertise* should be made available to support defence counsel appearing in ICHL cases.<sup>103</sup> As with similar support suggested for prosecutors (see above), defence experts would serve as a collegial, professional resources on ICHL matters, offering individualized support in specific cases. In addition to case-specific assistance, the experts would assist in the organization and implementation of training, and electronic tool and database training in particular, as well as in the identification of additional

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<sup>100</sup> OKO currently organizes an annual event of a similar nature. This best practice is a combination of OKO's conference and that of the California Attorneys for Criminal Justice, along with the California Public Defenders Association, an event that focuses on defending in capital crimes cases in the United States.

<sup>101</sup> See "Interacting with Witnesses and Victims" training on page 58..

<sup>102</sup> In accordance with current international practice, only judicial and state authorities can request assistance from the OTP or the Registry of the Tribunal. Thus, in most countries, defence counsel should work with the judicial authorities in accordance with the national/local criminal procedures.

<sup>103</sup> In Kosovo, the CDRC (see footnote 138 on page 87) seems an appropriate host for external expertise.

professional-development needs. Experts could be based in local bar associations, NGOs or independent offices, as appropriate.<sup>104</sup>

*Support to Bar Associations* for the creation of internal training capacity/curricula in ICHL. Negotiation of a memorandum of understanding with the relevant judicial training academy or centre concerning curriculum, facilities and trainers should save resources. Bar associations should utilize the curriculum to conduct periodic certification courses with a defence-oriented ICHL content, particularly for “službena dužnost” (state appointed) lawyers, but also others accepting ICHL-related cases.<sup>105</sup> The course should cover fundamental-to-advanced levels and include: electronic analytical and legal tools and databases, such as Case Matrix; accessing ICTY evidence by drafting RFAs and Rule 75h requests and requests to interview detainees; conducting ICHL investigations (where appropriate), particularly in searching for exculpatory documentary evidence; and, finally, witness contact and questioning training – including best practices for dealing with traumatized witnesses.

*Create or enhance ICHL-specialized subcommittees* within the bar associations to focus on overarching issues of concern to defence counsel. For example, consider working towards the restructuring of compensation for state-appointed counsel in complex ICHL cases.

#### ***Additional Victim/Witness Support***

*Staff Training - initial:* Together with the development of sustainable structures, an inception/induction programme is essential for all new staff. A curriculum that includes the practical application of the best practices set out in Annex 6 and elsewhere in this report will be required. In addition to their primary role in tendering psycho-social support to traumatized witnesses, staff should understand the role of the victim/witness-support unit within the legal system and the legal framework surrounding testifying witnesses in general. Below is an example of such initial staff training.

» **Example:**     Dealing with Vulnerable and Traumatized Witnesses

*What:*     Induction training for (new) witness/victim-support staff.

*How:*     A practice-based training that covers witness vulnerability and trauma issues from a modern-practice perspective. Psychologists and trauma counsellors guide participants in recognizing and responding appropriately to signs of “post traumatic stress disorder” and related phenomena in witnesses expected to testify at trial. Participants learn techniques for interacting supportively with such witnesses, including specific measures prior to, during and after testimony. Participants also learn when and how to

<sup>104</sup> For BiH specifically, external expertise is more likely suited to assisting lawyers working in the entity level courts in light of OKO’s existing mandate at the State Court. Whether OKO could host an entity-level expert, however, raises questions concerning the organization’s jurisdiction, mandate and transition to be resolved.

<sup>105</sup> The Research Team notes that the Ministry of Justice and the Croatian Bar Association have already compiled a list of defence counsel willing to be court appointed to indigent war crimes defendants and indicated that they would train these lawyers.

intervene on behalf of witnesses and which matters it is appropriate to discuss. If appropriate under the existing legal regime, participants learn how to explain the often-complex legal processes the witness may be involved in and the witness' legal rights in the judicial process. Identifying "secondary trauma" and learning methods for coping with its deleterious effects is also a core training module. Mock witnesses assist the participants to practice the techniques in front of peers and to react to issues that emerge. Both experts and peers offer feedback.

*Who:* Staff and volunteers working in victim support structures.

*Continuing Professional Development:* Study visits to the ICTY and elsewhere in the region will prove invaluable to personnel and volunteers, as evidenced by those support services created in Croatia and Serbia in the recent past. Periodic peer-to-peer meetings with witness-support colleagues in the region have also served well as a format for exchanging best practices and fostering personal contacts, in turn assisting newcomers in overcoming obstacles common in the field. Also important for those seeking to build victim/witness-support capacity is the practice of self-teaching which has been substantially enhanced by making victim/witness-support-relevant materials available to practitioners in a language they understand. Translation of additional texts should be considered.<sup>106</sup>

*Training of Trainers:* In light of the substantial training requirements in this field, a regime of training for trainers is necessary. Such trainers will be called to deliver on two fronts: First to provide "interacting with witnesses and victims" training in each jurisdiction for all legal professionals who contact witnesses and victims;<sup>107</sup> And second, to provide both induction and in-service training for staff and volunteers in the victim/witness-support units mentioned herein:

» **Example:** Training Trainers in Witness Support

*What:* A "training of trainers" programme to develop training capacity among witness support staff.

*How:* Trainer/participants will receive guidance on the pedagogy of adult education in the witness-support arena, which will include, *inter alia*, the development of curricula and training materials, evaluating participants and

<sup>106</sup> Many helpful texts exist. A few examples are:

1) World Health Organization. *Guidelines for medico-legal care for victims of sexual violence*. 2003. <[http://www.who.int/violence\\_injury\\_prevention/publications/violence/med\\_leg\\_guidelines/en/](http://www.who.int/violence_injury_prevention/publications/violence/med_leg_guidelines/en/)>.

2) Brewin CR, et.al. "Brief Screening Instrument for Post-traumatic Stress Disorder," *British Journal of Psychiatry*. 2002, 181.

3) Nicola Henry, "Witness to Rape: The Limits and Potential of International War Crimes Trials for Victims of Wartime Sexual Violence," *International Journal of Transitional Justice*, 2009 3(1):114-134.

4) Sarah Hustache, et.al. "Evaluation of psychological support for victims of sexual violence in a conflict setting: results from Brazzaville, Congo," *International Journal of Mental Health Systems*, 2009; 3: 7, online April 1, 2009 at <http://www.pubmedcentral.nih.gov/articlerender.fcgi?artid=2669041>.

<sup>107</sup> See text box page 58 for a description.



delivering constructive feedback, teaching the signs and symptoms of “secondary trauma”, and configuring mock witness exercises. Participants practice delivering training in front of peers and/or video and receive coaching and feedback.

*Who:* A small number of identified potential trainers in victim/witness support.

*Compensation:* Where not available, direct support to victims should be provided through legal-aid programmes. Law schools offer a particularly valid forum because such assistance can be coupled with knowledge transfer to students in a clinical legal-education setting. Such clinical programmes can be operated with little cost, while the benefits to both student and client are clear, not to mention the broader contribution to social justice.

» **Example:** Victim’s Legal Aid Clinic

*What:* Clinical Legal-Education Programme for Law Schools.

*How:* Operated as an ongoing course, i.e., an optional component of the law curriculum. A professor/lawyer leads students in representing actual victims *pro bono* in civil compensation proceedings in war crimes-related cases. Students research the law and draft claims and submissions, and attend court hearings together with the lawyer/professor in compliance with local Bar regulations.

*Who:* Law students interested in ICHL and/or victim compensation.

### ***Outreach and Public Information***

*Institutional Awareness:* Transferring knowledge in the outreach sphere has its own specificities, resulting from differing interpretations of what outreach is, why it is important, and who should do it.<sup>108</sup> Knowledge-transfer efforts must first establish a shared understanding of outreach and its purpose. Individual court and branch leadership, relevant ministry of justice officials and existing public information (PI) staff must from the outset comprehend the importance of outreach and its unique role over and above that of PI. Once this is understood, outreach duties should be added to those of PI staff where such staff exist. Where PI/outreach staff do not exist, they should be added where feasible. Including outreach in institutional strategies and long-term planning, and developing policies for judges, prosecutors and other officials to inform outreach practices within their area of responsibility is the critical next step after budgetary and human resources have been secured.

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<sup>108</sup> It bears mentioning that judges and prosecutors are properly included among those involved in outreach, either because personnel resources require it or because of their (ethical) responsibility to promote public confidence in the work of their office.

» **Example:** Film Screening & Discussion

*What:* Screening of documentary films on outreach, followed by discussion.

*How:* Participants view a film, for example “Justice Requires Outreach”<sup>109</sup> or “Justice in the Region”,<sup>110</sup> and discuss its contents. The event addresses the potential impact that well conducted outreach activities can have. These include enhancing overall understanding of rule of law, fair process, impartiality and accountability; correcting unreasonable public expectations regarding war crimes trials; demonstrating institutional transparency; deconstructing notions that war crimes are a “natural” accompaniment to war; increasing the willingness of victims and witnesses to testify; swinging public opinion away from the apathy, fatigue<sup>111</sup> and even hostility for war crimes prosecutions that exist in many areas; raising public awareness of the facts adjudicated during proceedings; and increasing the public sense of participation and inclusion in the process.<sup>112</sup> Participants are encouraged to bolster outreach activities in their jurisdiction.

*Who:* court presidents, spokespersons, chief prosecutors, members of Parliament, ministry of justice officials, appropriate NGOs.

*Outreach Staff Development & Continuing Education:* Outreach activities themselves can and should be of a diverse nature, tailored appropriately to the social circumstances of the jurisdiction.<sup>113</sup> The skill set of the outreach practitioner must be equally diverse. Commercially available “public communications” or “public information officer” courses can be contracted in most capital cities in the region, and certainly abroad.<sup>114</sup> Often, such courses have participants draft press releases, speak in front of cameras, conduct or arrange interviews, organize media events and other similar activities. A high-quality trainer and methodology in line with the best practices outlined elsewhere in this report can provide the core skills. It is important that those in outreach, however, do not limit themselves to traditional forums (e.g., media), but approach the work creatively, considering how best to fulfil their outreach goals within their socio-political context. A second wave of staff training should focus on comprehending ICHL as a subset of criminal law. The comprehensive induction course described in the text box on page 53, specifically targeted to outreach and PI staff and addressing outreach and PI

<sup>109</sup> A documentary-style film produced by the OSCE Mission to BiH demonstrating the positive impact of outreach activities in ICHL cases.

<sup>110</sup> A documentary-style film produced jointly by the War Crimes Prosecutor’s Office in Serbia and the OSCE Mission to Serbia that follows Serbian journalists visiting the judicial institutions of BiH and Croatia in 2005 and 2006.

<sup>111</sup> See “War-Crime Trials ‘Bore’ Public in Bosnia, Published by BIRN, available at <<http://www.bim.ba/en/155/10/17022/?tpl=58>>. Last visited 2 March 2009.

<sup>112</sup> Many argue that, because the courts are creating a historical record, those determined events should form part of the public discourse. The public should know what acts have been proven, not just who was found guilty and their sentence.

<sup>113</sup> See Annex 6 “Best Practices in Outreach”.

<sup>114</sup> See e.g., the “Conference of Court Public Information Officers,” <<http://www.ccpio.org/index.htm>> offering one such course.



issues that emerge at each stage of a case, would be of significant benefit in this vein. Further training covering the ethical and legal parameters of outreach and PI is also a necessity. And, as with every profession, regular professional-development opportunities should be integrated into the career path. Periodic study visits by outreach staff to the Court of BiH, ICTY and Belgrade War Crimes Chambers/Prosecutor's Offices, including meetings with counterparts at these locations to exchange best practices, are recommended.

*External Expertise:* Courts should give serious consideration to hosting, on a temporary basis, a visiting expert to assist in developing the institution's outreach strategy, advising on appropriate techniques and materials, and identifying further training needs for staff. Organizing and conducting training might also be within the expert's remit.

The above recommendations may not exhaust the potential for co-operative interventions by the local and international legal community, but two factors set them well apart from previous efforts: First, they are based squarely on extensive research of best practices; and, second, they were subject to thorough consultation with experts and practitioners, both from the region and abroad. Their implementation should bring about substantial progress in the region's ICHL – related caseload.

## **VI. Concluding Remarks**

This report has examined, from a knowledge-transfer perspective, the intersection of international law and ICTY practice with local law and local practice. It has studied the manner in which legal professionals from the former Yugoslavia learned the trade of defending, prosecuting, investigating and adjudicating ICHL-related crimes and done so by scrutinizing past efforts – and the lessons they offer – with a view to finding mechanisms that will maximize the impact of future ICHL-based knowledge transfer. While focusing on building the skills of legal professionals, the report has also addressed a second category of practitioners – organizers and sponsors of knowledge-transfer efforts. These professionals also require regular updating of their skills. It is clear from modern adult pedagogical practice that much more is involved in passing along knowledge than sophisticated *ex cathedra* presentations. This report has sought to distil those modern techniques from lessons garnered through past practice and from the ideas and innovations as practiced by international criminal-law practitioners and trainers.

The ICTY has amassed an enormous quantity of information, knowledge and expertise during its tenure. Now that its closure is on the horizon, harnessing that knowledge and expertise, which comprises many of the same topics confronting the region's legal professionals today, is of paramount importance. The successes and failures of past initiatives hold many lessons for those whose task is to ensure that the relevant knowledge and experience is transferred to those in the region who can best use it.

There undoubtedly remains much to be done region-wide, as remaining war crimes cases are numerous and their high profile places them on the judicial centre stage in most jurisdictions of the former Yugoslavia. The needs assessment undertaken here generated no shortage of significant weaknesses that should be addressed through a co-operative undertaking of the above recommendations. Ensuring that the tremendous quantity of information, knowledge and expertise that tribunals like the ICTY amass during their tenure is transferred to those domestic jurisdictions who can best use it is a challenge, but one that can be met. It is, indeed, the next stage of the development of international law; what is coming to be known as “proactive complementarity” – sharing the expertise that has been developed on the international level, both actively and systematically, with the domestic jurisdictions involved in confronting these crimes. The methodology undertaken here, and the findings and recommendations it has produced, should be seen as a potential framework for undertaking this complementarity.

International tribunals need not, and should not, undertake this process alone. Indeed, a particularly good “best practice” is a closely co-ordinated, co-operative effort among organizations with complementary mandates – like the OSCE, UNICRI, and ICTY – working in concert with the local legal community.

## **VIII. Annexes**

- 1. Terminology Employed in the Report**
- 2. List of Interviewees**
- 3. Research Steps**
- 4. Overview of Past Knowledge-Transfer Activities by Jurisdiction/Topic**
- 5. Substantive Law Applicable by Jurisdiction**
- 6. Best Practices in Witness Support**
- 7. Best Practices in Outreach**

## Terminology

Capacity building related to international criminal and humanitarian law is a multifaceted subject, and one's perspective of it is likely to differ according to one's role, familiarity or background. Initiatives must take into account any number of local peculiarities, including the differences between common and civil law systems and differences in legal culture, languages and existing approaches to legal education. In the interest of clarity, the reader is asked to take note of the following capacity-building and knowledge-transfer lexicon employed in this text:

### *Definitions:*

1. "International Criminal and Humanitarian Law:" (ICHL) The phrase as employed here encompasses international law related to crimes of an international character, including those with a nexus to armed conflict, i.e., violations of International Humanitarian Law (IHL), as well as Genocide and Crimes Against Humanity. On occasion, the authors also employ the phrase "war crimes". When used, it is to be understood as a substitute for the acronym ICHL and not in its more limited definition.
2. "Knowledge Transfer" – The definition of each word is taken in turn:
  - a) "Knowledge" – as employed herein – is the comprehension and skill required to apply the body of law applicable in ICHL cases and other skills and know-how related to the investigation, prosecution, defence and adjudication of ICHL cases. It includes expertise in related areas like outreach and victim/witness-support, as well as information about circumstances, individuals, processes and incidents.
  - b) "Transfer" is exchanging, delivering, teaching, mentoring, instructing, communicating, coaching and similar modes of passing knowledge and skills, as defined above, to those who would benefit from it. It includes both one-way and two-way transfers.
3. "Capacity Building": Strengthening the ability of a jurisdiction to carry out its functions by improving the "knowledge" and the skills of the relevant actors to use it.
4. "Institution Building:" Strengthening the ability of institutions to carry out their functions by upgrading their infrastructures, regulatory or legal frameworks, decision-making processes, management capacities, internal procedures, training mechanisms, communication networks, etc.

5. “Specific to ICHL cases:” As employed in this text, specific aspects of ICHL cases are those that distinguish ICHL cases from “classic” crimes. These include aspects without which ICHL cases cannot be processed effectively. For example, knowledge of the Geneva Conventions is specific to ICHL cases, whereas knowledge of pre-trial-detention standards is not — the latter being equally important for “classic” crimes. This study focuses on criminal-justice aspects specific to ICHL cases, leaving aside, to the extent feasible, aspects applicable to crimes generally.
6. “Legal Professionals”: This phrase refers to prosecutors, lawyers and judges collectively, but also encompasses other jurists playing a role in the criminal-justice system, such as legal officers (“Stručni saradnici”). Where appropriate, the phrase includes investigators and police officers.
7. “Outreach”: As employed in this report, outreach comprises pro-active initiatives intended to explain the work of and instil confidence in the court or a branch of the court (for example the registry) or the prosecution. Outreach activities are undertaken by or on behalf of the court, branch or prosecution and seek to foster relationships with the region’s public, specific communities and the media. Outreach, together with Public Information (PI), is generally considered under the broader category of Public Relations or “External Communications”. Outreach duties tend to fall to personnel in an institution’s Public Relations apparatus. To the extent that differences must be drawn for conceptual clarity, PI is defined herein as passing on information that a court or branch is required to pass on for freedom of information purposes or to demonstrate institutional transparency. Outreach, on the other hand, is where an activity is purposely intended to favourably influence general public opinion or the opinion of specific, targeted groups.
8. “Best Practices”: These are techniques, strategies, mechanisms, methodologies and approaches operating at multiple levels that have a proven record of success in knowledge transfer.
9. “Recommendations”: These are specific undertakings suggested by the authors to rectify identified shortcomings.

**List of Interviewees**

**BiH:**

Ms. Azra Miletić, President of Court of BiH Appeals Panel, Sarajevo  
Mr. Mladen Jurišić, Judge, President of the Court, Mostar Cantonal Court  
Mr. Hamo Kebo, Judge, President of Criminal Department, Mostar Cantonal Court  
Ms. Tanja Tankošić, Witness Support Unit, Court of BiH, Sarajevo  
Ms. Barbra Carlin, Resident Legal Advisor, U.S. Department of Justice, Sarajevo  
Ms. Minka Kreho, Judge, Court of BiH, Sarajevo  
Mr. Ibro Bulić, National Prosecutor, Court of BiH, Sarajevo  
Mr. David Schwendiman, Head of War Crimes at State Prosecutor's Office, Sarajevo  
Ms. Nina Kisić, Lawyer, OKO, Sarajevo  
Mr. Edin Ramulić, Project Coordinator, Izvor, Prijedor  
(name withheld on request), SIPA, Witness Protection Official, Sarajevo  
Mr. Zdravko Knežević, Federation Chief Prosecutor, Sarajevo  
Mr. Vojslav Dimitrijević, Judge, Republika Srpska Supreme Court, Banja Luka  
Mr. Branko Mitrović, District Prosecutor for War Crimes, Banja Luka  
Mr. Šahbaz Džihanović, Director, Federation JPTC, Sarajevo  
Ms. Nidžara Ahmetašević, Editor, Balkan Investigative Reporting Network, Sarajevo  
Mr. Damjan Kaurinović, Judge, Brčko Appellate Court  
Ms. Sabina Beganović, Prosecutor, Head of War Crimes Unit, Mostar  
Ms. Vesna Pranjić, Prosecutor, Mostar  
Mr. Hamo Kebo, Judge, Mostar Cantonal Court  
Mr. Slavo Lakić, Deputy Chief Prosecutor, Brčko District  
Ms. Rozalija Džanić, Judge, Tuzla Cantonal Court  
Mr. Jadranko Grčević, President, Brčko District Court  
Ms. Jasna Zečević, Director, Vive Žene, Tuzla  
Ms. Alma Dzaferović, Prosecutor, Tuzla Canton  
Ms. Dalida Demirović, Centre for Civic Initiatives, Mostar  
Ms. Biljana Potparić, Office of the Registrar, Court of BiH, Sarajevo  
Ms. Alma Dedić, Portfolio Manager, UNDP, Sarajevo  
Mr. Almiro Rodrigues, Judge, Court of BiH, Sarajevo  
Mr. Robert Carolan, Judge, Court of BiH, Sarajevo  
Mr. Carol Peralta, Judge, Court of BiH, Sarajevo  
Mr. Kevin Hughes, Legal Officer, Court of BiH, Sarajevo  
Mr. Alfredo Strippoli, Legal Officer, Court of BiH, Sarajevo

**Croatia:**

Mr. Dražen Tripalo, Justice, Supreme Court of the Republic of Croatia  
Mr. Josip Čule, Deputy Chief State Attorney, Zagreb  
Ms. Davorka Radalj, Deputy Municipal State Attorney, Zagreb  
Ms. Verica Orešić Cvitan, Ministry of Justice, Zagreb  
Mr. Damir Brnetić, Professor at the Police Academy, MUP, Zagreb  
Mr. Ivan Veršić, President, Sisak County Court  
Ms. Melita Avedić, Judge, Sisak Country Court  
Ms. Snježana Mrkoci, Judge, Sisak Country Court  
Mr. Ante Nobilo, Lawyer, Zagreb

Ms. Renata Miličević, Judge, County Court Zagreb  
Mr. Leo Andreis, President, Croatian Bar Association, Zagreb  
Mr. Stipe Vrdoljak, Sisak County State Attorney  
Mr. Zorko Kostanjšek, Lawyer, Sisak  
Mr. Domogoj Rupčić, Lawyer, Sisak  
Ms. Dubravka Turkalj Dragosavac, Deputy County Prosecutor of Zagreb  
Ms. Vesna Teršelić, Documenta, Zagreb  
Ms. Katarina Kruhonja, Centre for Peace, Osijek  
Mr. Mladen Stojanović, Centre for Peace, Osijek  
Mr. David Hudson, EC Delegation, Zagreb  
Ms. Jasmina Dolmagić, Deputy County State Attorney, Zagreb

The former Yugoslav Republic of Macedonia:

Ms. Tanja Temelkowska, Executive Director, Judicial and Prosecutorial Training Academy  
Mr. Sedat Redzepagić, Court Spokesperson, Investigative Judge, Skopje Court I  
Ms. Vesna Bosotova, Investigative Judge, Skopje Court I  
Mr. Goran Boševski, Trial Court Judge, Skopje Court I  
Mr. Jovan Ilievski, Public Prosecutor, Skopje  
Mr. Vladimir Rakočević, Lawyer, Skopje  
Mr. Agim Miftari, Justice, Supreme Court, Skopje

Serbia:

Mr. Janko Lazarević, Judge, President of War Crimes Chamber, Supreme Court of Serbia  
Mr. Siniša Vazić, Judge, President of the War Crimes Chamber, Belgrade District Court  
Ms. Marijana Santrac, Senior Legal Specialist, U.S. Embassy, Belgrade  
Mr. Donald Lizotte, Senior Police Advisor, U.S. Department of Justice  
Ms. Sandra Orlović, Deputy Executive Director, Humanitarian Law Center  
Mr. Rajko Jelušić, Lawyer, Belgrade  
Mr. Milan Dilparić, Investigative Judge, War Crimes Department, Belgrade District Court  
Mr. Andrej Nosov, President, Youth Initiative for Human Rights  
Ms. Slavica Peković, Support Officer, Victims/Witnesses Support, Belgrade District Court  
Mr. Novica Peković, Judge, Supreme Court of Serbia  
Mr. Dragoljub Stanković, Deputy War Crimes Prosecutor, Belgrade  
Mr. Bruno Vekarić, Senior Advisor, War Crimes Prosecutor's Office, Belgrade  
Ms. Tatjana Vuković, Judge, War Crimes Chamber, Belgrade District Court  
Mr. Vojin Dimitrijević, Director, Belgrade Center for Human Rights

Kosovo<sup>115</sup>:

Mr. Lavdim Krasniqi, Kosovo Judicial Institute  
Mr. Osman Kryeziu, Prishtina District Prosecutor  
Ms. Nesrin Lushta, Justice, Kosovo Supreme Court  
Mr. Vinod Bollel, (acting) Senior Judge, UNMIK  
Mr. Mehdi Dehari, Judge, District Court in Prishtina  
Mr. Matti Raatikainen, Head of War Crimes Investigation Unit, EULEX  
Ms. Anette Milk, Prosecutor, EULEX  
Mr. Jens Christensen, Prosecutor, EULEX

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<sup>115</sup> Kosovo refers to Kosovo under UNSC Resolution 1244. The OSCE is status neutral and thus do not take a stance on the issue of Kosovo independence.

## OSCE

Mr. James Rodehaver, Director of the Human Rights Department, OSCE Mission to Bosnia and Herzegovina

Ms. Pipina Katsaris, Legal Adviser, Head of the Rule 11*bis* Monitoring Project, OSCE Mission to Bosnia and Herzegovina

Ms. Stephanie Barbour, Legal Adviser on War Crimes, OSCE Mission to Bosnia and Herzegovina

Mr. Donald Bisson, Head of Rule of Law, OSCE Spillover Monitor Mission to Skopje

Mr. Luis Carnasa, Senior Rule of Law Officer, OSCE Spillover Monitor Mission to Skopje

Ms. Mary Wycoff, Head of Rule of Law Unit, OSCE Office in Zagreb

Mr. Ivan Jovanović, War Crimes Advisor, OSCE Mission to Serbia

Mr. Jan Assink, Law Enforcement Department, OSCE Mission to Serbia

Ms. Milena Jojić, Law Enforcement Department, OSCE Mission to Serbia

Mr. David Christopher Decker, Director, Department of Human Rights & Communities, OSCE Mission in Kosovo

Ms. Sebiha Mexhuani, Coordinator, Criminal Monitoring, OSCE Mission in Kosovo

Mr. Harold Dampier, Advisor to the Director of the Kosovo Judicial Institute, OSCE Mission in Kosovo

Various OSCE trial monitors in Zagreb, Skopje, Sarajevo, Belgrade and Pristina

## ICTY:

Mr. Refik Hodzić, Registry Liaison Officer, Sarajevo

Mr. Ken Roberts, Senior Legal Officer, The Hague

Mr. Tony Hawke, Victims & Witnesses Section, The Hague

Ms. Catherine Marchi-Uhel, Head of Chambers, The Hague

Mr. Amir Čengić, Associate Legal Officer, The Hague

Ms. Evelyn Anoya, Legal Co-ordinator, Court Management & Support Services, Registry, Hague

Ms. Magdalena Spalinska, Information Officer, The Hague

Ms. Rebecca Cuthill, Information Assistant, The Hague

Ms. Nerma Jelacić, Spokesperson for Chambers and Registry, The Hague

Mr. Matias Hellman, Legacy Officer, Office of the President, The Hague

## ICTY-affiliated:

Mr. Guenaël Mettraux, Defence Attorney, The Hague

Ms. Colleen Rohan, Defence Attorney, The Hague



## Methodology & Research Steps

### A. Methodology

The institutional sponsors were aware that a purpose-built research methodology was required to accomplish the goals of identifying best practices and generating a comprehensive set of recommendations. The project team settled on “R.A.I.D.” – a four-component process, as follows:

1. Review and assess past capacity-building activity (review)
2. Assess current needs of practitioners (needs assessment)
3. Identify best practices and lessons learned
4. Design more effective practices (recommendations)

The first two of these took place simultaneously: the look backward (review) to harvest the lessons that past knowledge-transfer efforts had to offer, and the examination of the current state of affairs with regard to the ICHL-relevant skills and knowledge of the region’s legal practitioners (needs assessment).

In the third step, those two components gave rise to a multi-layered collection of best practices and lessons learned. The Research Team identified a number of practices that had proven effective at the strategic/policy level as well as several practices operating at the level of specific methodology or techniques. As will be seen, whether any particular practice was included in the list of “best practices” often depended on the manner in which it was employed. For example, a study visit is a best practice in knowledge transfer, but only when it follows certain guidelines or employs specific steps; otherwise such visits can waste both time and resources. Thus, what emerged from this study was not only a set of best practices, but of the “best ways” of implementing said practices. For the sake of simplicity, this compilation is referred to collectively as “best practices” in subsequent text, until Section IV parses the notions in greater detail.

The fourth step in the R.A.I.D. process involved both designing new knowledge-transfer methodologies and enhancing existing ones. A significant number of suggestions for improving existing methods arose from the research, primarily involving ideas, tips and practices that were either in the process of being tested in the region or were described by practitioners as having significant potential.<sup>116</sup> Some of the

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<sup>116</sup> The most crucial element of the research process was the interview phase. Arranged by the OSCE field operations in the region, the Research Team spoke at length with 90 practitioners and capacity-building professionals in the region and at the ICTY (see Annex 2 for the list of interviewees). The team inquired about their interlocutors’ knowledge of ICHL, and their experience of applying ICHL in practice. The tools, capacities, skills and, in limited instances, resources all came under the needs-assessment purview. Furthermore, the Research Team examined the interlocutors’ involvement in, and experience with, capacity building and professional development in general. Questions explored the manner in which practitioners acquired the skills to handle ICHL-related cases, the methodologies that assisted them in that process, how they interacted (or not) with outside expertise, and whether they participated in any particular professional-development programmes, exchange programmes, study visits, etc.

suggestions would lead to a substantial revamping of existing practices, while others would require only small adjustments; others still were simply good ideas employed in another context that could equally apply to ICHL-related knowledge transfer.<sup>117</sup> To the extent the Research Team agreed that these innovations warranted further consideration, they have been included in the text or otherwise incorporated into the recommendations in Section V.

The final step brought the R.A.I.D. process full circle. The Research Team revisited the needs assessment with a view to matching the identified needs with the collected best practices. Where appropriate and within the overall project framework, each identified shortcoming was paired with a corresponding best practice – or series of practices – that in the opinion of the Research Team would, upon implementation, address that need.

## **B. Research Steps**

Upon the finalization of the project methodology by the project design team, the Research Team organized its work in three stages. The table below depicts the interaction between these three stages, the four-component R.A.I.D. process, and the specific steps undertaken in the course of the research.

### **Stage I: Project Inception**

The Research Team conducted two types of secondary data analysis to initiate the process, to (re)familiarize the team both with theoretical considerations and the specifics of past capacity-building efforts, and to generate the preliminary list of research avenues/topics. The team collected agendas, participant lists, project proposals, evaluations and similar materials on the known ICHL-related capacity-building and professional-development activities in the region. Simultaneously, they gathered literature in the form of academic articles, organizational reports and assessments relevant to knowledge transfer, particularly that involving the ICTY. Those materials were catalogued into two searchable databases,<sup>118</sup> and then analyzed using techniques, including computer-assisted quantitative and qualitative analysis. The results informed the selection of the report's seven topics and generated the preliminary assessments within each topic for use in Stage II.

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<sup>117</sup> For example, an identified best practice is transferring knowledge to inexperienced legal professionals via internships and visiting 'professionalships'. An innovative approach now being tried in the region is "enhanced internships", i.e., adding a number of features to the existing internship model to bolster its effectiveness. In this report, the former is an identified best practice, and the latter is offered as a recommendation.

<sup>118</sup> The databases contain all activities and relevant texts known to the OSCE, the ICTY and certain other organizations that provided input. Relevant texts and activities known by others but that have not yet been included are welcome. It is envisioned to make the database available in an online version at the end of this project.

**Table of Research Stages and Methodology**

	<i>Review of Past Activities</i>	<i>Needs Assessment</i>	<i>Best Practices &amp; Lessons Learned</i>	<i>Development of Improved Practices</i>
<b>Stage I</b>	Literature Review	*	*	
	Topic Identification & Preliminary Analysis	*	*	
<b>Preliminary Findings</b>				
<b>Stage II</b>	Expert Workshop: The Hague	*	*	*
	Interviews	*	*	*
<b>Interim Report</b>				
<b>Stage III</b>	Regional Workshop: Sarajevo	*	*	*
<b>Final Report</b>				

**Stage II: Research and Interim Report**

At Stage II, as a check on the methodology, the Research Team presented the seven topics – together with preliminary assessments – to participants at an Experts Workshop in The Hague in October 2008. The team sought and obtained validation both on the identified topics, as such, and the described state of affairs in the region with regard to each topic. The Expert Workshop served as well to generate an initial set of best practices. The experiences and insights shared by the expert participants were translated by the Research Team into material that was later field-tested during the interview stage.

The interview stage took place from November 2008 to February 2009 in the five jurisdictions in the region, as well as at the ICTY. More than 90 practitioners, experts, capacity-building professionals and monitors were interviewed for their views and personal experiences in knowledge transfer. The Research Team also sought suggestions on how such efforts might be improved in the future.

Finally, the Research Team developed a set of specific recommendations to address remaining ICHL-related needs in the subject jurisdictions. The recommendations connected the needs assessment directly to the recommended best practices. For each identified need, a corresponding training programme, intervention, mechanism or tool was identified – be it region-wide or within a given jurisdiction. Stage II culminated in the entirety of the research, findings and recommendations being compiled into an “Interim Report”, which was translated into the languages of the region.

**Stage III: Regional Workshop and Final Report**

In the final step of research, the Research Team shared the Interim Report at a Regional Workshop in Sarajevo in May of 2009. Dozens of practitioners, experts, monitors and organizers gathered to dissect the report’s contents over two days of fruitful discussion. The participants voiced their general support for the report’s findings and made suggestions for finalizing the text. A primary focus was prioritization of the report’s recommendations to guide future capacity-building efforts in the region. The working groups achieved a large measure of consensus and the resultant knowledge-transfer proposals have since been integrated into this text, the Final Report.

### Overview of Past Efforts in Knowledge Transfer

Throughout the project, the Research Team has collected information about knowledge-transfer activities, compiling that data into a searchable electronic database. ODIHR intends to maintain the database and keep the information updated. As was discussed at the Regional Workshop, some professions and some topics received significant attention, and were the subject of repeated interventions, while there was less focus on others. Below is a historical overview by jurisdictions.

#### *Bosnia and Herzegovina*

Prior to the establishment of the War Crimes Department at the Court of BiH, capacity-building training for the judiciary was largely *ad hoc*, with no institution or donor attempting to address the subject systematically, apart, perhaps from the monitoring efforts of the OSCE. The OSCE focus was on fair-trial rights, other human rights and the application of the new criminal procedural codes of Federation and *Republika Srpska* (RS). One of the first direct capacity-building efforts came in 2003, when a seminar for judges and prosecutors addressed applicable law at the ICTY, plea agreements and guilty pleas at the ICTY, and the applicability of those mechanisms in BiH. The first study visit took place also in 2003, when the Brčko District judges travelled to the ICTY. In 2004, the ICTY with the Helsinki Committee of RS organized training for prosecutors and investigators on ICHL-related themes using trainers primarily from the ICTY. It was only in 2005, when the Court of BiH apparatus was being built up, that capacity-building approaches became more systematic.

Indeed, the establishment of the War Crimes Department at the Court of BiH triggered intensive activity in ICHL knowledge transfer. The hybrid structure of the Court of BiH (with national and international judges and prosecutors) was mandated to provide on-the-job training through an exchange of experience and expertise between colleagues.<sup>119</sup> Simultaneously, frequent and intensive study visits to the ICTY were organized for the members of the BiH judiciary, primarily for the Court of BiH judges and prosecutors, but also for legal professionals in certain entities. A handful of training seminars in ICHL, approximately once per year, were organized for entity legal professionals by the judicial and prosecutorial training academies. Most of this training was organized jointly for judges and prosecutors, and only in later phases was training specific to the prosecution offered by capacity-building organizers.<sup>120</sup> From 2006, the focus shifted to developing the capacities – and building strategies – for ICTY case transition and transfer. Victim/witness-support issues also began to take prominence as stories of re-traumatization circulated.

A former ICTY victim/witness-services officer, who brought with her the Tribunal's institutional expertise, played an important role in the early stages of setting

<sup>119</sup> For detailed treatment of this dynamic, see “*Final Report of the International Criminal Law Services (ICLS) experts on the Sustainable Transition of the Registry and the International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina in 2009*,” Submitted on behalf of the International Criminal Law Services by David Tolbert and Aleksandar Kontić, 15 December 2008.

<sup>120</sup> For example, UNDP BiH organized “Training for BiH Prosecutors on the Implementation of the Law on Witness Protection” held in December of 2006, albeit this event was not exclusive to ICHL matters.

up the Victims Support Unit in the Court of BiH. The State Investigation and Protection Agency (SIPA), the newly established agency responsible for the ICHL investigations and witness protection in BiH, saw its first capacity-building activities in 2007, primarily undertaken by international actors, but later via an internal training regime. Specific training for prosecutors on witness protection was first organized in 2006. In 2008, the OSCE sponsored training on plea-bargaining, plea agreements and psycho-social-support techniques, and sponsored study visits to the ICTY's OTP.

Defence counsel received training organized by the Criminal Defence Section of the Registry of the Court of BiH (OKO). OKO offers the only recurrent defence-orientated education in ICHL in the region.

Turning to outreach, capacity-development activities were rare until recently. The OSCE BiH Mission carries out continual advocacy with national counterparts to enhance court transparency, media responsibility and community engagement in ICHL-related cases. Since 2007, the OSCE has organized screenings of "Justice Requires Outreach", a documentary film on the need for outreach in BiH in the ICHL context. Throughout 2008, the OSCE organized a series of meetings between judges, prosecutors, civil society organizations and members of the press at the local level, designed to provoke debates about enhancing transparency, outreach and support to victims and witnesses. In addition, the OSCE supports an NGO that provides assistance to entity-level prosecutor's offices in the area of outreach and witness support and sponsors the production of regular radio news bulletins about war crimes trials produced by the a specialized war crimes reporting agency (BIRN).

### *Croatia*

Although actively prosecuting war crimes cases since 1993, the Croatian judiciary had few, if any, ICHL-specific training events prior to 2004. Then, with the substantial assistance of ICTY Outreach and ABA/CEELI, ICTY experts joined a training programme for Croatian judges and prosecutors who might handle war crimes cases coming back from the ICTY under Rule 11*bis* and Category II. Topics included the classification of crimes under international and local laws, forms of criminal liability, means of proof, investigations, indictment drafting and witness protection.<sup>121</sup> These events were accompanied later by study visits to The Hague. In 2007, the newly established Training Academy, together with the OSCE Mission and the Croatian Supreme Court, devised and implemented two IHL-specific training events that covered fair-trial rights, witness protection, investigations, presiding over the main hearing, video conferences and evidentiary matters. In 2009, national prosecutorial staff participated in a programme supported by the European Commission that allows integration into the OTP/ICTY.

### *The former Yugoslav Republic of Macedonia*

In Skopje, training programmes started much later, beginning only in late 2005, when four case files – all Category II<sup>122</sup> – were set to return to domestic jurisdiction from the ICTY. The OSCE, together with OPDAT, the newly created Judicial Training Academy, and the ICTY, created an 18-month intensive-training programme targeting

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<sup>121</sup> ICTY Press release of 20 May 2004.

<sup>122</sup> "Category II" refers to case files returned to the jurisdiction from which they originated, but without an indictment by the ICTY (as opposed to cases returned under Rule 11*Bis*, where an already confirmed indictment accompanies the returning case, ensuring the case is prosecuted domestically).



all potential actors in the four cases, and covering a broad array of legal and practical ICHL-related topics. A series of study visits to the ICTY began in 2006 for judges and prosecutors, and continued into 2008 with prosecutors alone. In 2007, legal professionals took part in what was by then a regional trend of experience exchange – a study visit to the BiH Court in 2007 and again in 2008.

As in the other jurisdictions in the region, training was organized jointly for judges and prosecutors. Perhaps the most specific event exclusively targeting prosecutors was sponsored by the OSCE Mission to Skopje, “*Workshop with Prosecutors on forms of co-operation in the cases handed over from the ICTY*”, in December of 2007. As with other jurisdictions, ICHL training for investigators occurred only as part of broader institution and capacity-building activities within police structures. A training event in 2007 on investigative techniques touched upon ICHL-relevant topics.

For defence, the bar association, together with the OSCE, organized a series of activities that included basic training in IHL and war crimes defence techniques. That group also organized a visit of defence attorneys from the country to OKO in BiH in 2006. As has been noted elsewhere, determining precisely which lawyers to target for such initiatives is a challenge in light of the right of the accused to counsel of his or her choice.

No formal witness-support services exist in the courts anywhere in the country, nor are NGOs active in the field of supporting witnesses involved with war crimes cases.

### *Serbia*

ICHL-related training in Serbia, organized primarily by the HLC, Inter Bar Association and the ICTY, began in 2001. Methodology included a combination of lectures and work on hypothetical scenarios and problem analysis. This training included judges, prosecutors, investigators (police officers) and defence counsel. Between 2001 and 2003, there were occasional visits by the heads of the Serbian judiciary (e.g., President of the Supreme Court, President of the Belgrade District Court and the Republic Public Prosecutor to the ICTY), as well as to other foreign and international judicial institutions. From 2003, other members of the judiciary began study visits to The Hague – despite the hostile domestic atmosphere to both the Tribunal and war crimes prosecutions in general. During those study visits, the various groups of legal and other professionals were targeted separately by specific programmes. Also in 2003, ICHL-related training in Serbia began more intensive targeting of specific, problematic topics, such as command responsibility,<sup>123</sup> joint criminal enterprise and crimes against humanity. Also, a small number of regional events took place in Serbia on IHL-related matters. Conducted primarily by the HLC, these events involved either direct capacity-building training or roundtables aimed at resolving problematic legal points.

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<sup>123</sup> A series of debates on the issue of command responsibility was organized in Belgrade and Zagreb by the HLC, the ICTY and the OSCE. In the course of those events, it was generally concluded that the domestic legal provisions could accommodate all forms of “command responsibility” as it was known in the ICTY statute and elsewhere in international law, with one exception: The “should have known” mental state is not foreseen in the domestic code and, as such, it remained an open question, with opinions divided on the possibility of direct application of the Geneva Conventions and Additional Protocols in domestic proceedings.

For its part, the OSCE began a programme in 2003 supporting accountability for war crimes in Serbia. Under its aegis, the OSCE organized a broad range of capacity-building activities,<sup>124</sup> regional and international co-operation initiatives, public awareness raising (public outreach campaigns) and trial monitoring.

In 2005, the focus of international interventions in Serbia switched from direct capacity building for those processing war crimes cases towards a broader transitional-justice discussion. Led primarily by the UNDP,<sup>125</sup> ICHL-related prosecutions shared the spotlight with the right to truth, the right to reparations and guarantees of non-recurrence. By 2006, topics further extended into diverse areas such as victim/witness support and protection, as well as outreach and enforcement-related activities. Significant effort was put into the establishment and then the education of a witness-protection apparatus in 2003, and victim support since the creation of the victim/witness-support office in the Belgrade District Court's War Crimes Chamber in 2006. To support these efforts, the OSCE organized training on stress management and dealing with vulnerable and traumatized witnesses for members of the judiciary, support staff and court guards, as well as defence attorneys. The OSCE and the U.S. Embassy (separately) organized study visits for victim/witness-support officers to the ICTY and the Court of BiH.

A cluster of activities targeted the outreach capacities of relevant judicial institutions. Among others, the YIHR and OSCE organized a series of seminars and issued a related publication on the transparency of war crimes proceedings.<sup>126</sup> The OSCE supported the creation and maintenance of the website and magazine of the war crimes prosecution offices, funded the recruitment of outreach staff into the partner institutions,<sup>127</sup> and sponsored numerous publications and documentaries.<sup>128</sup> Although not specifically part of capacity building of outreach personnel, the WCPO and the OSCE Mission to Serbia arranged study visits for journalists to the ICTY in 2005, and followed these with a workshop for journalists reporting on war crimes trials in domestic courts. In 2005 and 2006, study visits for journalists from Serbia to the judicial institutions in BiH and Croatia were notably successful, at least in forming personal contacts, although a lasting impact on media and reporting was difficult to assess.

Few activities targeted war crimes investigators. Among those, the OSCE Mission to Serbia is currently implementing a project entitled "Enhancing the capacity

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<sup>124</sup> Examples include seminars for judges, prosecutors, investigators, witness-protection and witness-support services, and assisting in drafting ICHL-related domestic legislation.

<sup>125</sup> At the end of 2004, UNDP in Serbia started a regional transitional-justice program. A year later, three local NGOs from Serbia (HLC), Croatia (Documenta) and BiH (The Research and Documentation Centre), supported by the ICTJ, initiated a broad consultation on the establishment of a regional truth commission ("RECOM Initiative").

<sup>126</sup> The seminars featured senior judicial figures from Croatia, BiH and Serbia, as well as representatives of the ICTY and the Special Court for Sierra Leone, as panellists.

<sup>127</sup> Public Information Consultant assigned to the National Council for Co-operation with the ICTY; Public Information Assistant assigned to the Serbian War Crimes Prosecutor's Office; Public Information Assistant assigned to the War Crimes Chamber of the Belgrade District Court.

<sup>128</sup> E.g. "Hag medju nama" (The Hague among Us), October 2005, in co-operation with the Humanitarian law Center; "Ekspertski vodič kroz Haški tribunal/Expert guide through the ICTY"; Perception Study of Justice Operators in Serbia – in co-operation with the Solidaridad-Impunity Watch (Serbian branch of the Netherlands based international NGO); Public opinion research on the general public attitude toward the ICTY (2005, 2006, 2007 and 2009), in co-operation with the NGO Belgrade Center for Human Rights.



of the Serbian Ministry of Interior's War Crimes Investigation Service", which includes the organization of conferences, trainings, and the publication of a handbook.<sup>129</sup>

*Kosovo*<sup>130</sup>

The earliest ICHL-related training in the entire region took place in Kosovo, between 1999 and 2000, when national and international judges and prosecutors, as well as defence attorneys, received core training in ICHL, human rights and rule of law standards. The training, then organized by the OSCE Mission in Kosovo, was largely theoretical, covering the entire field of IHL in a lecture-based seminar. The OSCE, ABA/CEELI, the CoE, KFOR, and the DJA,<sup>131</sup> were the primary sponsors of educational events for the judiciary until 2000, when the training apparatus of the Kosovo Judicial Institute (KJI) was born. International judges in Kosovo also received, upon their arrival, induction courses that included basic instruction in the core elements of the national legal system. Beginning in 2001, training moved from the theoretical to the practical, as presenters began addressing the application of ICHL within the local judicial system and within the local penal and procedure code. This focus was kept through 2002 and into 2005.

In 2002, defence attorneys, as well as international judges and prosecutors, joined the local judges in the training. At the same time, judges, prosecutors and defence counsel from Kosovo began to visit the ICTY.<sup>132</sup> Later, study visits were organized to other judiciaries, including the Norwegian and Danish national offices in charge of the prosecution of serious crimes and the Special Court for Sierra Leone. Defence lawyers were also trained at the Criminal Defence Resource Centre, an NGO set up by the OSCE Mission and mandated to provide ICHL case assistance to lawyers (see footnote 106). From 2006, the intensity of training decreased and focus turned to more specific topics such as victim/witness-support and protection (for judges and prosecutors, organized in 2006 by the KJI), or war crimes reporting (for journalists, organized by BIRN and the ICTY in 2007). Concerning investigators, law enforcement training in the whole region was normally included in broader institution and capacity-building activities, such as 2006 training on investigation techniques for police and judiciary investigators. Only occasionally was this training related specifically to war crimes investigations, such as training in forensics organized by the KJI in 2001.

### *Regional Exchanges*

In 2008, Serbian court guards visited BiH; in 2006, the Bar Association of the former Yugoslav Republic of Macedonia visited OKO, and in 2007 and 2008, the judiciary of that same country visited the Court of BiH; the Belgrade War Crimes Chamber and the Ministry of Justice organized a 2008 meeting in Belgrade of judges from the region, including several from the ICTY. Since 2007, witness-support units in Croatia and Serbia have visited the Court of BiH. A number of meetings between judicial officials from the region, including exchange visits, have been organized, either

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<sup>129</sup> 'Investigator's Handbook - How to Investigate Human Rights Violations', written by Dermot Groome, a Senior Trial Attorney at the ICTY, published by the OSCE in co-operation with the Humanitarian Law Centre.

<sup>130</sup> Kosovo refers to Kosovo under UNSC Resolution 1244. The OSCE is status neutral and thus do not take a stance on the issue of Kosovo independence.

<sup>131</sup> See accompanying "List of Acronyms" for any of these that are unfamiliar.

<sup>132</sup> E.g. 2002 working visit for Kosovo judges, prosecutors and defence counsels to ICTY hosted by the ICTY Outreach Programme; Study visit of leading judicial officials to ICTY organized by UNDP and ICTY in 2007.

by the OSCE through the *Palić*<sup>133</sup> process or by other actors. Since 2007, a *Brijuni* process has begun which focuses on co-operation between prosecutors. ICTY officials participated in each meeting as observers, contributing their experience and expertise to the process.

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<sup>133</sup> See *Palić* process page 19, footnote 25

### Applicable Substantive Law

An analysis of the substantive law applicable jurisdiction-by-jurisdiction revealed how interpretations of this law result in considerably different provisions for individual criminal responsibility. Simply put, there remain considerable differences of opinion among practitioners concerning the scope of the substantive law<sup>134</sup> and the point(s) at which the domestic law in a given jurisdiction overlaps with ICHL. This uncertainty undermines what is in some (but by no means all) instances the development of a nascent ability to respond to the peculiarities of investigating, prosecuting and defending against and judging ICHL-related allegations.<sup>135</sup> To understand the difficulties legal professionals are experiencing, it is necessary to describe briefly the substantive law being employed – and how this substantive law is interpreted.

Until the commencement of the disintegration of the Socialist Federal Republic of Yugoslavia in 1991, the jurisdictions in question were bound by the same penal and procedural codes, both of which were firmly rooted in the continental-European legal tradition. In 1976, the Penal Code of the Socialist Federal Republic of Yugoslavia received a number of international crimes into domestic law. In the course of their respective efforts to address war crimes allegations during the conflicts, the jurisdictions in the region followed rather divergent legal paths (such differences notwithstanding a shared commitment to the principle *nullum crimen sine lege*). This state of affairs created certain confusion within the wider legal systems of each of the said jurisdictions, which in turn has undermined national – and, in particular, regional – efforts to develop the capacity of legal professionals to deal with ICHL-related allegations. The result has been significantly differing levels of professional development within and between states. The confusion has also given rise to a widening of the so called “impunity gap”, which permits mid-level offenders to continue to escape prosecution while domestic courts deal more-or-less effectively with direct perpetrators and the ICTY deals with high-level offenders. This phenomenon is complex and the jurisdictions subject to this study cannot simply be placed into one of two categories, that is, one category for those jurisdictions that conform to the Socialist Federal Republic of Yugoslavia-inspired approach and another for those jurisdictions subscribing to the ICTY-inspired approach.

The Research Team recognizes that this impunity gap owes a great deal to existing socio-political realities within the former Socialist Federal Republic of Yugoslavia. However, there appear to be many prosecutors in the jurisdictions under review who are willing to challenge these socio-political paradigms, but they are not always clear about: (1) the scope of the substantive law as it is currently codified in their jurisdictions; and/or (2) how to work within the existing legal arrangements (whatever they may be) to undertake successful prosecutions.

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<sup>134</sup> Here, the authors refer, in particular, to the differences within each of the jurisdictions studied on the question of the provisions that exist in the domestic penal codes for the application of individual criminal responsibility.

<sup>135</sup> Although well known, it bears mentioning that such problems are not unique to the former Yugoslavia. In the United States and the United Kingdom, for example, apart from certain core principles, legal practitioners frequently clash over the scope of applicability of international legal norms in domestic courts.

### *Bosnia and Herzegovina*

Efforts to determine which legal regime is in effect in BiH are complicated by jurisdictional divisions and lingering political factors. At the time of writing, four distinct jurisdictions are currently handling allegations of ICHL-related crimes, that is, the Federation, the Republika Srpska (RS), Brčko District and the Court of BiH. These jurisdictions are not employing the same substantive law to offences with a nexus to the 1992-1995 armed conflict.

The 2003 BiH Criminal Code (amended) sets forth in a comprehensive manner, in Chapter XVII, the core international crimes of genocide, crimes against humanity and war crimes. The same penal code sets forth, at Article 180, the provisions for individual criminal responsibility found in customary international law. The Research Team found that legal professionals differ markedly on the question of whether the 2003 BiH Criminal Code may be used to prosecute and punish offences perpetrated during the period from 1992 to 1995 in entity courts. These concerns revolve, in the main, around the interpretation of the principle of legality that prevails in BiH (and, indeed, in most civil law jurisdictions). The BiH Constitutional Court considers the fact that the problems created by the application of different criminal codes at state and entity level remain unresolved is due to the lack of a central-level court capable of harmonizing the case-law throughout BiH. In line with that view, the OSCE Mission, in its public report “Moving Towards a Harmonized Application of the Law”, not only recommended training on ICHL for entity-level judges and prosecutors, but also urged the BiH authorities to consider the establishment of a state-level judicial institution that would have the final say in the interpretation and application of the relevant law by all courts in the country. In an evident effort to assuage concerns that such a retroactive application of the 2003 law would violate the principle of legality, Article 4(a) of the BiH Criminal Code permits “the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law”. In short, provision is made for the application in BiH of customary international law, as it was (for instance) during the period from 1992 to 1995.

Taken together, the relevant provisions of the 2003 BiH Criminal Code – in particular Article 180, but also Articles 29 and 31 on Accomplices and Accessories, respectively – ought to preclude the opening of an impunity gap between direct perpetrators and high-level offenders. The said law ought likewise to serve as the foundation for a BiH-wide professional-development programme designed to strengthen the capacity of investigators, prosecutors, defence counsel and judges to address allegations of war crimes. Any such programme would be in a position to draw heavily upon the law applied by the ICTY and, by extension, the experience of current and former ICTY practitioners.

The current difficulty is that the provisions of the 2003 BiH Criminal Code relevant to international criminal law during the period from 1992 to 1995 are not being applied consistently in any jurisdiction other than the Court of BiH. The Federation, the RS and Brčko District courts continue to apply the 1976 Socialist Federal Republic of Yugoslavia Penal Code to cases where war crimes are alleged. The relevant provisions of the Penal Code, if interpreted narrowly, give prosecutors (and, by extension, trial and appellate judges) a much narrower range of modes of liability within which allegations of international offences might be viewed. On the basis of interviews with legal professionals uncertain about the applicability of the 2003 BiH Criminal Code in their

jurisdictions, it became clear that this limited range is not helpful for overcoming the impunity gap through which mid-level offenders escape prosecution.

Seen from the mandate of this project, the point is that the continued reliance throughout BiH (save in the Court of BiH) upon the 1976 Socialist Federal Republic of Yugoslavia penal code creates a situation where the professional-developmental needs of investigators, prosecutors, defence counsel and judges in Brčko, the RS and the Federation differ markedly from the professional-developmental needs of persons working for (or appearing before) the Court of BiH. Future capacity-building schemes directed at legal professionals in the entities should be cognisant of this fact unless and until the legal systems in BiH are harmonized.

### *Croatia*

Croatian legal professionals are in agreement that the substantive law to be employed for offences perpetrated during the period from 1991 to 1995 is the Basic Criminal Code of the Republic of Croatia (1993).<sup>136</sup> The 1993 Basic Criminal Code follows closely the provisions made for war crimes in the 1976 Socialist Federal Republic of Yugoslavia Penal Code; in this respect, the 1993 Basic Criminal Code would appear to serve as an easily understood instrument in cases where the accused is alleged to be the physical author of the underlying act or, conversely, where it is alleged that the suspect is complicit in the perpetration of the underlying act by means of “ordering”. However, the Research Team noted that questions arise within Croatia as to whether the 1993 penal code can be used to prosecute crimes against humanity.

The 1993 Basic Penal Code makes no explicit provision for criminal command and superior responsibility (hereinafter “command responsibility”). Nonetheless, in *Ademi/Norac* (an *11bis* case referred to Croatia by the ICTY), *Glavaš et. al.* and several others, prosecutors have alleged criminal command responsibility as “omission liability” by reference to Articles 28 and 43 of the 1993 law, where provision is made for the perpetration of crimes by omission. These arguments succeeded at trial in *Ademi/Norac* and *Glavaš et. al.*; appeals of both convictions are pending. The trials in the remaining cases were ongoing at the time of writing.

At this point, the question is whether the appeal court will adopt the particular view of the law as that accepted by the trial panel in *Ademi/Norac* and *Glavaš et. al.*

### *The former Yugoslav Republic of Macedonia*

Criminal proceedings arising from the brief armed conflict that took place in 2001 are limited to four cases. The investigations and prosecutions in these cases conform, *inter alia*, to the requirements of the 1996 Criminal Code. The provisions with respect to ICHL follow the 1976 Socialist Federal Republic of Yugoslavia Penal Code closely. For instance, no reference is made, save in the title of the relevant chapter of the penal code (i.e., Chapter 34), to “crimes against humanity”. Rather, genocide and war crimes are explicitly recognized, as is direct perpetration and perpetration by ordering. Command responsibility is not recognized as such, although an argument could presumably be made that it is incorporated inferentially at Articles 13 and 14 of the 1996 law; these articles deal with crimes of omission – with the *mens rea* of intent and negligence, respectively. This matter may need further clarification in order to determine what sort of investment (beyond the considerable efforts already made by the

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<sup>136</sup> The application of the 1993 Code to crimes perpetrated prior to its adoption is the more favourable law for the defendant.



OSCE) might be made to assist the domestic legal system to handle the four cases to which it is committed.

### *Serbia*

The legal foundation for allegations of wartime (from 1991 to 1995 and 1998 and 1999) criminality is not subject to serious dispute within the legal profession, notwithstanding (or perhaps owing to) its narrow provisions for individual criminal responsibility. The Research Team found clear signs of willingness on the part of a number of key actors in the Serbian legal system to undertake such cases, despite socio-political pressures that continue to resist the prosecution and conviction of mid- and higher-level perpetrators, in particular. Perhaps most importantly, efforts to deal with war crimes cases are centralized within the specialized departments of the Belgrade District and Serbian Supreme Courts, with no possibility that other jurisdictions within the country will be permitted to take on cases where war crimes are alleged.

Serbian investigations and legal proceedings dealing with underlying acts that occurred during the period from 1991 to 1999 are in every case rooted in the 1976 Penal Code of the Socialist Federal Republic of Yugoslavia. As has already been suggested, this instrument provides for the prosecution of the crime of genocide and war crimes, but not crimes against humanity. Individual criminal responsibility is clearly provided for in the event of direct perpetration, certain accomplice liability, instigation/incitement and ordering, although legal professionals in Serbia signalled clearly to the Research Team that the situation is less certain with respect to command responsibility, in particular. For the most part, however, the Research Team found general agreement among the relevant practitioners as to what the existing law would permit in the way of prosecutions, and what it would not.

### *Kosovo*<sup>137</sup>

Allegations of criminal acts with a nexus to the internal armed conflict in Kosovo, in particular where the underlying acts took place during the period 1998-1999, are addressed by international prosecution offices and trial chambers, situated in the jurisdiction of Kosovo and applying either the 1976 Socialist Federal Republic of Yugoslavia Code or the 2003 Provisional Criminal Code, whichever is the more lenient. The breadth and depth of the latter law is considerable, that is, it incorporates the core international crimes as well as modes of liability recognized by, *inter alia*, customary international law. The difficulty in assessing professional-developmental needs in Kosovo (for Kosovars) is that Kosovars only recently started playing a role in prosecuting and trying core international crimes, through their participation in the Kosovo Special Prosecution Service and on trial panels presided over by EULEX. Numerous commentators observed that the capacity of Kosovar-based counsel to defend clients accused of international crimes is consistently below the necessary standard.<sup>138</sup>

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<sup>137</sup> Kosovo refers to Kosovo under UNSC Resolution 1244. The OSCE is status neutral and thus do not take a stance on the issue of Kosovo independence. .

<sup>138</sup> With a view to providing immediate legal expertise on international human rights standards in individual cases and strengthening the capacity of local defence lawyers, the OSCE Mission in Kosovo, in collaboration with the Kosovo Bar Association, established the Criminal Defence Resource Centre (CDRC). The CDRC began providing services out of OSCE's offices in April 2001 and received NGO status on 3 May 2001. Currently, CDRC functions within the structure of the Kosovo Bar Association and has one staff member. According to its statute:

*"[T]he CDRC will act as a resource and support centre for the defence, initially focusing its support on the defence of persons suspected or accused of international humanitarian law offences and serious ethnic or politically motivated crimes. The CDRC will also focus on cases involving breaches of*

**Collected Best Practices in Witness Support**<sup>139</sup>

Witness support is often viewed more as a luxury than a necessity, although that perception is changing as the content of its remit becomes better known, as does the state's legal obligation to organize its judicial system and criminal proceedings in order to limit infringements upon the rights of witnesses. Equally emergent are the consequences on the human psyche for witnesses/victims in interacting with the justice system. Court personnel are increasingly cognizant of the toll that testifying in court – in front of the accused and a panel of strangers – takes on a witness. Support structures designed to ease this burden have been created and are developing practices that have proven effective. What follows is an effort at collecting such practices.

*Best Practices*

1. Victim/witness-support structures need to be created, and protocols, operating procedures, and witness handling policies need to be in place prior to the beginning of investigations.
2. Victim/witness-support structures must be created with cognizance of a jurisdiction's legal regime, court structure, fiscal capacity, geography and caseload.
3. In a properly functioning apparatus, support to victims and witnesses includes:
  - “Before” support – from the investigation phase onward:
    - Psycho-social support, including therapy and counselling as needed: This can be undertaken by appropriate state agencies and/or qualified staff from NGOs.
    - Evaluations: As a matter of course, psychological evaluations are best undertaken prior to a victim being interviewed by investigators or prosecutors. Where feasible, it is helpful to have victim/witness-support officers accompany prosecutors and investigators when taking victims' initial statements.
    - The avoidance of unrealistic expectations: Investigators and others contacting witnesses must be aware of the support that can and cannot be provided to witnesses.<sup>140</sup>
    - Information on protective measures: Information obtained from the witness that is potentially relevant to the security and protection of that witness's safety is

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*international standards, including cases involving: unlawful or arbitrary detention; judicial or prosecutorial bias or corruption; third party interference with the independence of the judiciary; and, gross miscarriages of justice.”*

<sup>139</sup> For a detailed treatment of many of these practices and others, see Robin Vincent, “*An Administrative Practices Manual for Internationally Assisted Criminal Justice Institutions*,” New York: International Center for Transitional Justice, 2007.

<sup>140</sup> Witnesses should be helped to understand that the care, attention, security and support provided them in the lead-up to trial will not likely continue afterwards.



brought to the attention of the relevant organ of the court. Similarly, information about potential protective measures is conveyed to the witness.

- Familiarization visits: Support services can arrange a visit to the courthouse and the courtroom prior to the witness giving testimony. By explaining the various roles, procedures, equipment (especially if it will be used in protecting the witness), seating arrangements and similar issues, witness-support staff provide the witness with an opportunity to familiarize him/herself with the surroundings and raise questions.
- Legal procedures: Properly trained victim/witness-support staff explain the procedure of examination the witness will face in the courtroom, even if the party calling the witness has already done so.
- Assistance available during testimony: victim/witness-support staff explain how the witness might seek help from the judge, including taking breaks, if necessary.
- Avoidance of discussing evidence or testimony: Witness support staff are familiar with the applicable legal constraints and avoid discussing the content of the evidence itself.
- Logistics: victim/witness-support staff explain how accommodation, board and transport to the courthouse are provided.

Support “during” testimony:

- Welcome: Staff meet and welcome the witness upon arrival at the courthouse, accompany the witnesses to the waiting area and remain available to answer questions.
- Support: During breaks in testimony, staff provide psychological support, if necessary.

“After” testifying:

- Post-testimony support: This is a critical but often neglected step, in part because the witness has “served his/her purpose” to the state apparatus. Victim-witnesses are left feeling (re)exploited, discouraging other witnesses from coming forward.
- Follow-up: Best practices favour assigning a psychologist or social worker to do follow-up calls to all witnesses and, if necessary, to conduct follow-up visits to vulnerable witnesses upon their return home. A contact telephone number is provided to all witnesses to call for any post-testimony support, including safety and security concerns.
- Police protection: To support witnesses returning home, awareness training for mid- and senior-level police leadership on the issues facing witnesses and the role of police in their post-testimony protection is a necessary step.

4. A court rulebook or “bench-guide” for judges involved in witness support (and possibly protection) measures is a helpful tool, particularly when such matters occur infrequently.<sup>141</sup>

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<sup>141</sup> For an example of such texts, see “*An Outline for the Practical Use of Video Conference for the Crossborder Hearing of Witnesses*”, written by Judge Marin Mrcela, Judge of the Supreme Court of the Republic of Croatia, et. al. for the Croatian Ministry of Justice’s Judicial Academy for use at a Workshop entitled “Video Conference in International Legal Assistance” in September of 2008. Or see the Court of BiH’s “*Book of Rules for Use of Protective Measures*”, issued in 2008.

5. Prosecutors have had success in building trust with potential witnesses by fostering relationships with victim-support NGOs – the latter acting as intermediary until a bilateral relationship is established.

6. Some courts have found it helpful to include a (multi-lingual, if appropriate) brochure with the summons, describing support available to the witness and providing contact information for the victim/witness-support unit.

### **Collected Best Practices in Outreach**

The techniques and strategies of outreach are many and varied. For the profession as a whole, activities are limited only by ethical and legal boundaries on one hand, and by the creativity, skill (and budgets) of the persons involved on the other. Outreach personnel – which include, but are not limited to spokespersons – must be confident of their ability to safeguard the integrity of trial proceedings as they endeavour simultaneously to boost the public’s confidence in the institution. Within those parameters, personnel should know how to develop a comprehensive outreach strategy that differentiates between target groups, employs a diversity of techniques, utilizes modern forms of communication, and engages a range of media. No small measure of political acumen is also necessary. Clearly, such personnel must have a keen interest in the media, understand how to relate to it, and be attuned to the respective editorial policies. Moreover, they must have the ability to frame the public discussion to the benefit of the court, arrange and conduct successful interviews, organize small and large events, follow the public discourse, use modern IT and multimedia tools, and generally understand how best to educate the general public, keeping in mind its divergent communities and groups.<sup>142</sup>

#### *Best Practices*

1. Outreach activities are most successful when built upon a well-considered communications/outreach strategy. The strategy sets out the core principles by which the activities will be guided, the specific goals to be achieved and the messages to be communicated. The strategy further identifies the target audiences and the means and techniques by which messages will be communicated to each audience. It includes both pro-active and reactive elements. Among the goals included in outreach strategies are:

- Making complex issues understandable;
- Creating avenues of regular communication with stakeholders;
- Making the courthouse/institution accessible;
- Differentiating war crimes from “classic” crimes and explaining that war crimes are breaches of the rules governing warfare and, therefore, are distinct from the question of defensive or offensive war, or justification for the war itself; and
- Correcting public misperceptions about the court and its work.

2. Outreach staff assist judges and prosecutors in comprehending their critical role in outreach and facilitate their participation.

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<sup>142</sup> Other valuable qualities include a keen interest in war crimes and developments in the field; a thorough knowledge of the legal system and substantive law, and particularly ICHL; a solid understanding of the political context; high quality drafting skills; high quality public speaking abilities, including a grasp of non-verbal messages; the highest of ethical standards; a sensitivity to victims needs and rights; and an awareness of European Court of Human Rights standards, procedural law and rights of the accused.

3. Successful outreach staff appear regularly in the media in different formats (for example, interviews, panel discussions, or phone-in programmes), different times, different stations and targeting different audiences (for example youth, religious groups). In addition to the traditional media – television, radio and print – modern outreach professionals are increasingly on Internet forums such as podcasts, blogging, and “social sites” – depending on local usage, access, and trends.

- Outreach personnel must avoid becoming themselves the focus of attention. Self-promotion can deflect attention from the institution.
- Judges, prosecutors and spokespersons are not the only protagonists in the justice system. Victim/witness-support officers, detention officers and administrative personnel also have compelling roles worthy of public attention.
- Balancing and/or distributing the gender and ethnic representation of those appearing in the media on behalf of the institution, where appropriate, helps avoid perceptions of institutional bias.

4. Best practices include programmes that address/access the public directly, not only via media:

- Inviting individuals and groups from across the societal spectrum to take courthouse tours, particularly schools/universities, NGOs, political parties/politicians, religious groups, and clubs;
- Organizing “town hall meetings”, where senior judges, prosecutors or outreach staff present briefly the work of the court to a group in a target community and then answer questions or lead a discussion; and
- Arranging for senior judges, prosecutors or outreach staff to speak at events in schools, clubs and organizations.

5. Work with politicians and state officials. Outreach professionals generally consider politicians as a specific target group while being aware that it would be inappropriate for a judge or prosecutor to so engage. Their goal is twofold: first, to instil in politicians an understanding of the impartiality and accountability aspects of the justice system and, second, to assist them in distributing positive messages about the court to their constituencies.

6. Partnerships with civil society assist outreach activities. Carefully selected NGOs<sup>143</sup> can help:

- a. Undertake joint activities, for example a publication or a conference;
- b. Identify additional target groups;
- c. Disseminate information among their members; and
- d. Advocate on behalf of the institution.

7. Successful outreach staff make it easy for journalists to report positive and accurate information by making such information digestible and easily accessible. Some may even offer readily useable texts, where appropriate.

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<sup>143</sup> Civil society partners must be selected carefully. Protecting the integrity of proceedings being of the utmost importance, the relationships with NGOs must be evaluated also in terms of their accountability.

8. By periodically publishing a magazine or newsletter addressing compelling topics, outreach practitioners have a tangible vehicle for delivering their key messages, involving court personnel in the process, and informing their readers of important developments. The periodical might include summaries of recent cases.

9. A fact sheet or briefing package with key factual information, personnel profiles, history and statistics on the court has proven useful as a handout to court visitors and journalists.

10. Making a documentary film about the court or, for example, “life as an investigator”, has offered outreach practitioners a useful mechanism to raise the profile of the court and to underline the importance of the institution’s work. Using video footage from actual trials and interviews with defence, prosecution, judges and/or others with interesting roles in the process contributes to the viewers’ overall understanding, as does using existing documentaries about actual wartime events.

11. Successful outreach practitioners maintain a “contact list” or database of names and addresses to which they send press releases, invitations and advisories.

12. Live-streaming broadcasts of trials on a website, as done at the ICTY, allows the public real-time access to proceedings that might otherwise be inaccessible due to distance or travel costs. Other ways to make the court proceedings available to the public include, for example, delayed broadcasts or the offering of excerpts to media outlets.<sup>144</sup>

13. For journalists or media:

- Sponsoring a study visit to the ICTY or other international tribunal or regional court is helpful, particularly with journalists that are frequently critical. While there, journalists can ask their questions directly to the tribunal’s professionals.
- Similarly, trips for journalists to the crime scene have proven an effective means of raising awareness for them and their audiences.

14. Outreach personnel have successfully demonstrated how the judicial process individualizes guilt by connecting the adjudicated facts with “truth-telling conferences”, or otherwise publicizing facts that are established at trial. Likewise, ensuring that adjudicated facts are available to the Ministry of Education can ensure history textbooks are accurate.

15. For spokespersons:

Many spokespersons receive their introduction to the profession by enrolling in a skills-based “communications” course. Such courses are usually available in most large cities and typically focus on traditional media and presenting messages therein.

The Research Team suggests that a course be evaluated also for its approaches to Internet-based forums in light of their increasing use region-wide.

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<sup>144</sup> The Research Team understands that certain regulatory adjustments may be required for such broadcasts.