

The Vukovar Hospital case from the perspective of a national investigative judge

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Miroslav Alimpić, a Judge of the Novi Sad High Court, was assigned to the War Crimes Chamber of the Belgrade District Court between 2003 and 2007. During this period, he, among other things, led an extensive investigation into the war crimes committed at Ovčara and in Zvornik.

Abstract

Among the increasingly frequent acts of non-compliance with, and grievous violations of, international humanitarian law around the world, especially in non-international armed conflicts, attacks on objects and persons enjoying special protection, and their abuse, as well as the misuse of the distinctive emblems of the Red Cross and Red Crescent, come as no surprise. Although a repressive approach to the problem – through the prosecution and punishment of perpetrators – cannot completely prevent such occurrences, an effective and appropriate judicial stigmatisation can significantly contribute to making them as rare as possible. In this regard, the court proceedings held before the War Crimes Chamber in Belgrade and the International Criminal Tribunal for the former Yugoslavia in The Hague in connection with the events in and around the Vukovar Hospital and Ovčara farm have provided an appropriate judicial response. This is notwithstanding the fact that, at least for now, not all perpetrators have been prosecuted for their acts (or failure to act) at the time of the commission of these grave crimes.

Keywords: Vukovar Hospital, Ovčara, domestic prosecution, wounded and sick, prisoners of war, War Crimes Chamber, Belgrade District Court, ICTY.

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‘Coelo tonantem credidimus Iovem regnare.’

(‘It is only when it thunders that we believe in Jupiter’s rule.’)

Horace (Roman poet)

Even though the recent history of armed conflict around the world unquestionably shows a trend of a significant reduction in the number of inter-state wars, there is a dramatic increase currently in the number of so-called ‘civil wars’ (or non-international armed conflicts). By the first half of the twentieth century, inter-state conflicts were the prevalent form, while the second half of the twentieth century and the beginning of the twenty-first were characterised by internal conflicts with a greater or lesser degree of other countries’ involvement. A disturbing feature of these non-international armed conflicts is that they are typically accompanied by a far greater number of civilian casualties and more extensive material destruction than preceding inter-state wars, leaving the warring parties not only with the long-term consequences of economic underdevelopment and political instability in general, but also with changes in the minds of people at the micro level.

Acts of non-compliance with, and grievous violations of, international humanitarian law (IHL) in non-international armed conflicts are frequent, and attacks on objects and persons enjoying special protection, and their abuse, as well as the misuse of the distinctive emblems of the Red Cross and Red Crescent, come as no surprise. The incident that occurred during the conflict in the former Yugoslavia at the hospital of the city of Vukovar – and at the nearby Ovčara farm – is a striking example of such violations against the sanctity of health care. In this regard, the court proceedings held before the War Crimes Chamber of the Belgrade District Court and the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague in connection with the events in and around the Vukovar Hospital have provided an appropriate judicial response. This is notwithstanding the fact that, at least for now, not all perpetrators have been prosecuted for their acts, or failure to act, at the time these grave crimes were committed, and that a number of legal questions regarding the protection of the wounded and sick in times of conflict remain to be addressed in this case. Although a purely repressive approach to the problem of IHL violations against health care – through the prosecution and punishment of perpetrators – cannot completely prevent such occurrences, effective and appropriate judicial stigmatisation can significantly contribute to reducing their number.¹

After discussing the facts of the Vukovar Hospital case (also referred to as the Ovčara case), this article provides a few broader reflections – from the perspective of a domestic judge – on the need for effective dissemination of IHL and its judicial enforcement as a means to prevent and deter future IHL violations.

1 Such prosecution can be undertaken by permanent or temporary, national, international or ‘hybrid’ judicial authorities, and be complemented by specific treaty provisions by which States Parties agree to punish violators via their criminal legislation systems and courts.

The Vukovar Hospital (Ovčara) case before the War Crimes Chamber of the Belgrade District Court

The Vukovar Hospital case is an emblematic one for many reasons. It is a case that illustrates an attack against persons having sought refuge in a hospital facility; it is a case which was dealt with both by an international criminal tribunal (the ICTY in The Hague) and by domestic courts in Serbia; it is a case in which both senior commanders and direct perpetrators were brought to justice; and finally, it is also a case in which a number of questions remain to be addressed, and a number of perpetrators brought to justice still. The following sections summarise the facts of the case and the circumstances of the domestic trial.

The facts of the case

As per the Belgrade District Court's judgment of 12 March 2009,² a non-international armed conflict existed on the territory of the Republic of Croatia,³ opposing on one side, the Yugoslav People's Army (Jugoslavenska Narodna Armija, JNA) – which was the legal army of a state that, at the time, still (formally) existed with its incorporated Territorial Defence and volunteer units – and, on the other, the Croatian armed forces – made up of units of the National Guard (Zbor Narodne Garde, ZNG), militias and volunteer units. The fighting in the Croatian town of Vukovar practically ceased on 18 November 1991.

The hospital in the city of Vukovar had remained operational throughout even the fiercest fighting. Despite the very difficult circumstances, the hospital staff provided medical assistance to the sick and wounded, both civilians and fighters, including several wounded JNA troops. When the Serbian forces captured the city, a large number of civilians (women, children and the elderly) also took shelter in the hospital, in the hope that they would be evacuated. Given that it was not safe, especially for the sick and wounded, to remain in the hospital or even in Vukovar, a decision was taken to evacuate this medical facility. A promise to that effect was made to the Croatian government on 18 November 1991, in Zagreb, according to which the JNA would safely evacuate the hospital in the presence of international observers.

On the day of the evacuation, an order was issued for triage and separation of civilians, the wounded, and medical personnel and their families from those suspected of having committed criminal offences.⁴ The able-bodied men of fighting

2 District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Mirosljub Vujović et al.*, Case No. K.V.4/2006, 12 March 2009.

3 Croatia at that time was still formally part of the former Yugoslavia. The international legal recognition of Croatia as an independent state began only in January 1992. The Court also noted that the former Yugoslavia acceded to and ratified the four Geneva Conventions in 1950 and the First and Second Additional Protocols to the Geneva Conventions in 1978.

4 It was established during the proceedings that, close to the end of the fighting in Vukovar, members of the former JNA military security had operational information that a number of members of the Croatian armed forces would also seek refuge in the Vukovar Hospital and try to disguise themselves as wounded and sick patients, or hospital staff, to avoid capture or possible prosecution. After the JNA entered the

age whom the military security suspected of having taken part in the fighting and possibly in the commission of certain crimes were singled out and, on 20 November 1991, transported in six buses to the Ovčara farm and barracks, southeast of Vukovar.⁵ Members of the Vukovar Territorial Defence and volunteer units began to abuse the prisoners immediately upon their arrival, and continued to do so in the hangar where they were put up. The few JNA soldiers who were securing the prisoners were unable, or simply did not dare, to stand up to the aggressive and far more numerous assailants. When, a while later, orders were received for all JNA soldiers to withdraw from the Ovčara farm, the prisoners were left at the mercy of the members of the Territorial Defence and volunteers, who proceeded, during the course of the evening, to take them out in small groups to already dug-out pits, executing at least 200 of them.

As established by the Court, immediately before the fighting stopped, when it was certain that the hospital would be evacuated, the hospital staff, with the approval of their director Dr. Vesna Bosanac, had allowed a number of members of the Croatian armed forces, who at the time happened to be in the hospital, to feign injuries and pretend to be undergoing medical treatment by putting on bandages, plaster casts and the like as well as to disguise themselves as hospital staff.

The Court established these facts on the basis of, among other things, clear testimonies given by several witnesses of the injured party, including those rescued from Ovčara, who, during the trial, gave detailed descriptions of their involvement in the armed conflict, the reasons why they took refuge in the hospital and the way they disguised themselves. The autopsy reports of all 200 victims also indicated that for forty-one victims on whose bodies some kind of a ‘medical dressing’⁶ was found during autopsy, there was no medical reason for these parts of the body to be covered in such a way. In fifty other autopsied cases, however, they confirmed finding signs of previous injuries. The forensic specialists also concluded that in thirty-one of the autopsied cases, civilian clothes were found besides the hospital pyjamas, in ten cases the victims were wearing only pyjamas, and in one case a part of a hospital staff uniform was found on the victim’s body. It must also be noted that some of the witnesses said that the victims included women too, which was also confirmed by autopsy reports. Forensics found that one of the women was at an advanced stage of pregnancy, while another one was well advanced in years, which undoubtedly indicated that they were civilians.

Some defendants and witnesses testified that there were also some foreign nationals among the prisoners brought to Ovčara, which was corroborated by the

hospital, this was confirmed in interviews with the hospital’s physicians and upon inspection of the hospital records of its staff and the lists of the wounded and sick.

5 At the same time, the hospital staff as well as the relatives of some of those who were bussed away intervened with Major Šljivančanin from the JNA to have their co-workers/relatives released, claiming they had not taken part in any fighting, which resulted in Major Šljivančanin ordering the release of some twenty of them.

6 The term ‘dressing’ also included splints, circular plasters, slings and cervical collars.

fact that out of the 200 bodies exhumed from Ovčara, 193 were positively identified, while the Court found that the bodies of a certain number of prisoners who were executed in front of the hangar have never been found at all. For these reasons, the Court allowed for the possibility that a number of foreign mercenaries were also among the prisoners held at Ovčara.

Taking the above elements into account, there can be no doubt that among the victims of the massacre at Ovčara were both members of the Croatian armed forces and civilian patients of the hospital, either genuinely sick or feigning injuries or disease (and having sought refuge in the hospital), as well as possibly foreign mercenaries.

The status of victims – a presumption of POW status

Having considered all aspects of the event, the Court qualified the case as a war crime against ‘prisoners of war’ (POWs). It is worth mentioning here that although under IHL, the status of ‘prisoner of war’ does not exist in non-international armed conflict, the conflicting parties may agree to treat such detained persons as POWs, and consequently apply to them provisions related to POWs. On 18 November 1991, the command of the First Military District issued an order to that effect, indicating that the JNA agreed that captured members of the armed forces of Croatia were to be considered POWs to whom the Third Geneva Convention was to be applied. It was clear from the evidence presented that both sides did negotiate and reach agreement on these issues, and that both sides regarded the persons in question as POWs.

There was no doubt that a significant number of the victims of the Ovčara massacre were members of the armed forces of Croatia (Croatian National Guard, police, volunteers and other individuals accompanying these troops but not being part of their formal structure) – an inference that was also based on the List of the General Staff Medical Services of the Republic of Croatia. In the course of the proceedings, the defendants recognised some of the victims as combatants fighting for the opposite side, while it also became evident from the attitude of the civilian authorities that these were actually POWs, as the surrender of ‘prisoners’ (members of the National Guard and ‘Ustashes’) was sought. Other evidence presented at the trial also pointed to the same conclusion.⁷ This shows that the conflicting parties were engaged in negotiating the terms of surrender and discussed the status of persons about to surrender, which unquestionably indicated that they were treated as POWs. Furthermore, when talking about the victims, the defendants, witnesses

7 As a case in point, the order issued by the command of the First Military District on 18 November 1991 shows that the JNA agreed that members of the armed forces of Croatia were to be considered prisoners of war to whom the Third Geneva Convention was to be applied. In this context, a note from the combat log of the Guards Motorized Brigade of 18 November 1991 is especially interesting and was read out at the trial: ‘The Commander of Operational Group South spoke with a HDZ representative (Trustee) in Vukovar on the terms for the surrender of the Ustasha forces in Vukovar. Unconditional surrender agreed and safety guaranteed to the Ustasha forces in accordance with the Geneva Convention.’

and cooperating witnesses all referred to them as POWs, on the basis of which the Court concluded that their appreciation of the situation and their awareness that the victims were members of the other side influenced their perception of the victims as POWs, regardless of the fact that two women and a number of wounded troops were also among the victims.

Possible civilian victims?

The Court also considered whether in addition to the criminal act of ‘war crime against POWs’, the defendants possibly perpetrated any other related offence taking into account the already mentioned fact that, among the victims, there were clearly also civilians (either ‘real’ patients of the hospital, or civilians feigning injuries or sickness). Both the Socialist Federal Republic of Yugoslavia (SFRY) Criminal Code and the Federal Republic of Yugoslavia (FRY) Criminal Code contain provisions on war crimes committed against the wounded and sick,⁸ as well as war crimes committed against the civilian population.⁹

The Belgrade Appellate Court in particular sought to address this issue, before concluding that it was necessary to apply the principle of *apparent* or *quasi ideal concurrence* in a situation of *alternativity*, since a single act has caused a number of criminal offences that have elements of several different crimes but still constitute a single criminal act that incorporates all other crimes. Thus, even though the acts of the defendants featured some elements of the offences of war crime against the wounded and sick and war crime against the civilian population, the acts of the defendants were still centred on the dominant offence of a war crime against POWs, because it was established that most of the victims had or were entitled to POW status, and that the defendants committed the crimes against them acting in the belief that they were indeed dealing with POWs.

8 See Art. 143 of the FRY Criminal Code: ‘Whoever, in violation of the rules of international law at the time of war or armed conflict, orders murders, tortures, inhuman treatment of the wounded, sick, the [sic] shipwrecked persons or medical personnel, including therein biological experiments, causing of great sufferings or serious injury to the [sic] bodily integrity or health; or whoever orders unlawful and arbitrary destruction or large-scale appropriation of material and stocks of medical facilities or units which is not justified by military needs, or whoever commits some of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.’

9 See Art. 142 of the FRY Criminal Code: ‘Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, biological experiments, immense suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror, taking hostages, imposing collective punishment, unlawful bringing in concentration camps and other illegal arrests and detention, deprivation of rights to fair and impartial trial; forcible service in the armed forces of [the] enemy’s army or in its intelligence service or administration; forcible labour, starvation of the population, property confiscation, pillaging, illegal and self-willed destruction and stealing on [a] large scale of a [sic] property that is not justified by military needs, taking an illegal and disproportionate contribution or requisition, devaluation of domestic currency or the unlawful issuance of currency, or who commits one of the foregoing acts, shall be punished by imprisonment for not less than five years or by the death penalty.’

Outstanding questions regarding the protection of the wounded and sick

During the entire proceedings, the Court heard evidence from a number of witnesses and victims who had knowledge of what was happening in the hospital just before the cessation of the fighting in Vukovar. When trying to establish the facts, the Court did not deal with any other developments in and around the hospital, nor did it attempt to establish whether some other serious violations of IHL had also been committed elsewhere.

However, some indisputable facts related to the Vukovar Hospital, its personnel and patients were established by both the Belgrade District Court and the ICTY. There is no doubt, for instance, that the hospital in Vukovar was a civilian medical facility that operated long before the onset of the armed conflict and employed civilian staff – physicians, nurses and paramedics. After the outbreak of the armed conflict, the hospital, in addition to regular medical services to civilian patients, started to increasingly provide medical assistance to wounded members of the Croatian armed forces and even took care of a small number of JNA soldiers, injured in combat or indiscriminate shelling of the city, including the hospital itself.

For reasons of the safety of both patients and staff, most of the hospital's activities were moved to a shelter in the basement, where the wounded were placed and operated on. As fighting intensified, most medical interventions were related to war surgery. Due to the shelter's limited capacity, the wounded were moved after operations to a makeshift hospital ward set up in the Borovo Commerce building. Meanwhile, the hospital building was badly damaged by numerous missiles, as was confirmed by a host of witnesses and was clearly visible in the photographs and video footage from that time. The hospital was also hit by a 250 kg aircraft bomb, which passed clean through all five floors and landed in the basement, fortunately without exploding.

When establishing the responsibility for the Ovčara crimes, the Belgrade District Court did not specifically address possible violations of IHL with regard to persons and objects enjoying special protection, such as medical personnel and medical units,¹⁰ but the data collected in these criminal proceedings still provide a sufficient basis for a more detailed study of this aspect of the event. Such data would certainly give rise to a number of questions, including (i) whether the hospital was purely a military target; (ii) whether it was the object of indiscriminate attacks;¹¹ (iii) whether there were criminal elements in the actions taken against the hospital's medical personnel by JNA officers and soldiers; (iv) whether there was any other

10 Under IHL, the wounded and sick must be found, collected and evacuated and must also be given medical care and assistance as soon as possible. For a full analysis of the protection of the wounded and sick under IHL and international human rights law, see the article by Alexander Breitegger in Part I of this issue of the *Review*.

11 See in particular Jean-Marie Henckaerts and Louise Doswald-Beck (eds), *Customary International Humanitarian Law*, Vol. 1: *Rules*, Cambridge University Press, Cambridge, 2005 (hereinafter ICRC Customary Law Study), Rule 13: 'Attacks by bombardment by any method or means which treats as a single military objective a number of clearly separated and distinct military objectives located in a city, town, village or other area containing a similar concentration of civilians or civilian objects are prohibited.'

weapon in the hospital other than those seized from the wounded and the light firearms carried by the military medical personnel; (v) whether any members of a military unit of the Croatian armed forces who were not wounded and were not part of any hospital security detail were also hiding in the hospital; and (vi) whether JNA aircraft were shot at from this medical facility,¹² as well as a number of issues regarding the implementation of triage in the given circumstances, but also the already mentioned attempts by the hospital staff to change the status of some of the fighters to *hors de combat* (wounded) in a situation where they faced imminent capture.¹³ These remain outstanding questions to be explored.

Circumstances of the domestic trial and history of the proceedings

Following the 1991–1995 conflicts in the former Yugoslavia, some of the countries in the region decided that, according to their needs and capacities, they would initiate trials for the crimes committed in the course of the conflicts; such trials were to take place in several large, regular courts, where they would be dealt with by special judicial panels. The Republic of Serbia, however, adopted a different, ‘centralised’ solution, involving a specially trained police unit from the Ministry of the Interior (Department for War Crimes), a Parliament-elected Prosecutor for War Crimes, and a War Crimes Chamber (popularly known as the ‘Special Court’), which was established within the Belgrade District Court and was made up of investigating judges and presiding judges of the judicial panels. These judicial bodies, created by a law passed in June 2003, were to prosecute war crimes committed in Serbia, Bosnia and Croatia in the course of the 1992–1995 conflict.

The Belgrade prosecution and the War Crimes Chamber began work in the autumn of 2003, in the specific circumstances of growing social awareness of the necessity of conducting war-crimes trials more than ten years after the first armed conflict, when part of the public started to seriously talk about facing the truth and the need for reconciliation. This was also the point at which the ICTY had been operational for ten years and the time of the assassination of Serbia’s prime minister and the subsequent imposition of a six-week state of emergency in the Republic of Serbia. One part of the Serbian public was still showing a lack of appreciation for, and disapproval of, the possibility that some obvious serious violations of IHL,

12 This possibility was brought up during the trial at the ICTY by the defence of the ‘Vukovar Three’ case (see following section), which alleged that members of police units attached to the Croat armed forces were in the hospital shooting at JNA aircraft from its roof, which reportedly stripped the hospital of its status as a civilian object enjoying special protection and, in this way, made it a legitimate military target.

13 The Belgrade District Court did not address in any specific detail, for instance, the issue of possible perfidy in relation to the fact that members of the Croatian forces disguised themselves by taking off their uniforms and putting on civilian clothes or those of the hospital staff and by ‘feigning injuries’, as the defence put it, because the Court did not deem this to be its task. Perfidy is defined in Art. 37 of Additional Protocol I to the Geneva Conventions as ‘acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence’. See also ICRC Customary Law Study, Rule 65: ‘Killing, injuring or capturing an adversary by resort to perfidy is prohibited’; this includes ‘simulation of being disabled by injuries or sickness because an enemy who is thus disabled is considered *hors de combat* and may not be attacked but must be collected and cared for.’

which were committed in the former Yugoslavia, should be tried in Serbian courts. At that time, the investigating and presiding judges of the new Court were often berated by the representatives of certain political parties and referred to in distinctly negative terms in parliamentary debates.

At the same time, many international observers and representatives of non-governmental organisations who followed the work of the newly established judicial bodies in Serbia were full of praise for the expertise and way of working that the Court had shown in the first months of its operation. It was the Ovčara case that was singled out and referred to in a positive context in the 2005 Progress Report from the European Union, which evaluated the readiness of Serbia and Montenegro to join the European Union: ‘domestic courts have continued to be cooperative and are doing good work in trying some low-profile cases (notably the Ovčara case)’.¹⁴ The document, nevertheless, also expressed some reservations, pointing out that ‘the overall political climate is such that there is no guarantee that any high-profile war crimes trials could be conducted in a fair and transparent manner’.¹⁵ The subsequent continuation of the trial and conviction in this case, as well as the opening of other criminal proceedings before the War Crimes Chamber in Belgrade, have shown that such a cautious approach to the prosecution of serious violations of IHL in Serbia was not justified after all.

In these circumstances, just before the adoption of the law creating these judicial bodies in the summer of 2003, and after the police collected information in the pre-trial investigation and the documents were submitted by the ICTY, the District Court in Novi Sad began an investigation against four people suspected of war crimes against prisoners of war¹⁶ at Ovčara, near the city of Vukovar. The initial results of the investigation resulted in the gradual increase of the number of defendants charged with ordering and executing these crimes.

In the autumn of 2003, the Ovčara case was the first case taken over from the District Court in Novi Sad by the prosecution and the War Crimes Chamber of the Belgrade District Court. On 4 December 2003, having completed the first part of the investigation, the Serbian Prosecutor of War Crimes charged a total of eight persons with a criminal act of war crime against prisoners of war at Ovčara.¹⁷ When in May 2004 the Prosecutor completed the second part of the investigation, he indicted twelve more persons for the same offence. Another three indictments followed at a later date after extraditions from Montenegro, Norway and Great Britain.

In the course of the trial, the Court, in addition to bringing all the defendants to the witness stand, examined more than a hundred witnesses who had knowledge not only of the crime in question but also of the broader circumstances surrounding the event. Extensive forensic evidence was presented in a number

14 European Commission, *Serbia and Montenegro – 2005 Progress Report*, SEC (2005) 1428, Brussels, 9 November 2005, p. 23, available at: http://ec.europa.eu/enlargement/archives/pdf/key_documents/2005/package/sec_1428_final_progress_report_cs_en.pdf.

15 *Ibid.*

16 The reference to ‘prisoners of war’ in this context of *non*-international armed conflict is explained below.

17 For an explanation of the legal qualification of the acts, see below.

of different areas, with forensic experts explaining their findings and opinions before the Court. In addition to this, numerous documents were read at the trial in support of the evidence, together with photographs, sketches and videos, all of which were entered into the court records and added to the body of evidence in these criminal proceedings. For the first time ever, a video link with Zagreb was established, allowing some witnesses to provide their testimonies by means of video conferencing. Besides numerous media representatives, the trial in Belgrade was also followed by representatives of the Organization for Security and Cooperation in Europe (OSCE) mission, several embassies, the Republic of Croatia government and a number of non-governmental organisations from the region, as well as by the relatives and friends of the Croatian victims.

On 12 December 2005, a First Instance verdict was passed,¹⁸ but on 14 December 2006 it was overturned by the Serbian Supreme Court, which ordered a new trial before the Court of First Instance. During the retrial, all the defendants were re-examined and all the evidence presented again as in the previous trial, while some additional expertise was done and new evidence brought by order of the Appellate Court in order to further clarify some contentious points. A new verdict was pronounced on 12 March 2009.¹⁹

Acting on the appeals of the prosecution and the defence, the Appellate Court in Belgrade (given the provisions of the Law on the Organisation of Courts of 2008, which envisages that this court rules in second-instance appeals) only partially reversed, in June 2010, the First Instance verdict by reducing the sentence of one defendant from twenty to fifteen years in prison and increasing the sentence of another from nine to eleven years.²⁰ The rest of the First Instance verdict was confirmed, thus legally terminating the criminal proceedings in this case.

By noting, however, that war-crimes offences never expire, the court did not rule out the possibility of a new trial against some newly discovered perpetrators of this crime.²¹ When announcing the verdict, the presiding judge even made a point of noting that not all of the culprits of the execution at the Ovčara farm were in the dock at this particular time. Subsequent events proved his point when another

18 District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Mirosljub Vujović et al.*, Case No. K. V. 1/2003, Judgment, 12 December 2005. Fourteen people were sentenced to prison – eight defendants to maximum prison terms of twenty years, four to prison terms of fifteen years, and three to prison sentences of twelve, nine and five years respectively. Two defendants were acquitted by the same verdict, while a defendant who was tried separately because of his illness received an eight-year prison sentence.

19 District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Mirosljub Vujović et al.*, Case No. K. V. 4/2006, Judgment, 12 March 2009. Thirteen defendants were found guilty and sentenced to prison terms. Seven of them received maximum prison terms of twenty years, one defendant was sentenced to fifteen years in prison, one to thirteen, one female defendant to nine years, one defendant to six years and two defendants to five years in prison each. At the same time, five defendants were acquitted of all charges by the same verdict.

20 Appellate Court in Belgrade, Case No. KZ1 PO2-1/2010, 23, Second Instance Verdict, June 2010.

21 Particularly interesting in this respect was the following sentence from the Court's verdict: 'These crimes, however, are never rendered obsolete, and if not now, it is expected that the future will provide the answers.' This holds particularly true in the light of the fact that the *Mrksić et al.* trial has now been completed before the ICTY in The Hague (see below section), and there is now a real possibility that the defendants in this case may be interrogated by the judicial authorities of the Republic of Serbia in some other criminal proceedings, whether directly or through international legal assistance.

suspect in the Ovčara massacre was later identified, located in Serbia and arrested as evidence indicated that he was a direct perpetrator of the crime. Criminal proceedings against him are ongoing before the Court in Belgrade, making him the twenty-fourth suspect against whom criminal proceedings have been initiated in Serbia for the same offence.

The Vukovar Hospital case before the ICTY

The events at Ovčara were the subject of review not only by the War Crimes Chamber in Belgrade, but also by the ICTY Prosecutor's Office, which already in November 1995 had filed an initial indictment (which later underwent several changes) against the so-called 'Vukovar Three' – senior JNA officers Colonel Mile Mrkšić,²² Major Veselin Šljivančanin²³ and Captain Miroslav Radić²⁴ – for planning, instigating, ordering or otherwise aiding and abetting the crimes of persecution on political, racial or religious grounds, extermination, murder, torture, inhumane acts, and cruel treatment.

The ICTY trial proceedings began in October 2005 and lasted until September 2007, when, according to the Trial Chamber judgment, Mile Mrkšić was sentenced to twenty years and Veselin Šljivančanin to five years in prison, and Miroslav Radić was acquitted of all charges.²⁵ Although the ICTY did not characterise the conflict in Croatia, it did similarly consider the victims at Ovčara as benefiting from POW status.²⁶

The Trial Chamber found Mile Mrkšić responsible for aiding and abetting the criminal offences of murder, torture and cruel treatment. The ICTY found that Mrkšić, despite knowing how extremely hostile members of the Territorial Defence and paramilitary forces were, still ordered the withdrawal of the JNA military guard keeping watch over the prisoners of war at Ovčara, and in this way virtually handed them over to the Territorial Defence forces despite being fully aware that in doing so, he was exposing them to a high risk of serious violence and death. According to the Trial Chamber, Mrkšić's failure to act in any other way – although he had the

22 Colonel Mrkšić was alleged to have ordered or permitted JNA soldiers under his command to 'deliver custody of detainees taken from the Vukovar hospital to other Serb forces', who allegedly committed the crimes mentioned in the indictment. See ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Judgment, 27 September 2007, para. 2.

23 Major Šljivančanin was charged with having 'personally directed the removal and selection of about 400 non-Serbs from Vukovar Hospital on 20 November 1991, knowing or having reason to know they would be murdered', and to have 'ordered or permitted JNA soldiers under his command to deliver custody of these detainees to other Serb forces knowing or having reason to know that they would be murdered, and to have been present at Ovčara farm on 20 November 1991', when the criminal acts were committed. See ICTY, *Prosecutor v. Mrkšić et al.*, above note 17, para. 4.

24 Captain Radić was alleged to have, among other things, personally participated 'in the removal and selection of about 400 non-Serbs from Vukovar Hospital on 20 November 1991, knowing or having reason to know they would be murdered'. See ICTY, *Prosecutor v. Mrkšić et al.*, above note 17, para. 3.

25 ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-T, Trial Judgment, 27 September 2007.

26 For a detailed analysis and discussion on this point, see Giulia Pinzauti, 'Protecting Prisoners of War: The Mrkšić et al. Appeal Judgment', in *Journal of International Criminal Justice*, Vol. 8, No. 1, 2010, pp. 199–219.

means to do so by possibly giving the order to reinforce the military guards at Ovčara or to improve in any way the measures for securing the POWs – made it possible for the direct perpetrators, members of the Territorial Defence of Vukovar and paramilitary forces to take revenge on the prisoners of war.

Regarding Šljivančanin's accountability, the Trial Chamber found that the allegations in the indictment had not been proved and that there was no evidence to suggest that the defendant ordered any forces to commit any of the offences specified in the indictment. However, the Trial Chamber found that Šljivančanin knew about the abuse of prisoners at Ovčara, that he was aware that the number of military officers providing security to these prisoners was insufficient and that they often failed to discharge their duties in an appropriate way, and, finally, that he did not take any of the measures available to him to try to prevent the abuse of the prisoners despite being aware of the grave crimes being committed against them. For these reasons, the Trial Chamber found Šljivančanin responsible for aiding and abetting the crimes of torture and cruel treatment, but found no evidence of his responsibility for other crimes. However, the Chamber also found that the military police security detail guarding the prisoners was withdrawn in the evening on the orders of Colonel Mrkšić, as a result of which, in the Trial Chamber's opinion, Major Šljivančanin ceased to be responsible for the safety of the prisoners of war since he no longer had command authority over the military police providing the security.

In the case of Miroslav Radić, the Trial Chamber found that on 19 November and in the early morning of 20 November 1991, the defendant was at the hospital, since, in the beginning, the soldiers under his command were in charge of securing the hospital, but that he was not in any way involved in the triage of prisoners in the hospital and that there was no evidence that he was at Ovčara in the first place. For these reasons, he was acquitted of all charges.

In considering the appeals filed by both the ICTY prosecution and the defence, the Appeals Chamber issued, in May 2009, an appellate judgment²⁷ which confirmed the twenty-year prison sentence for Mrkšić and, with regard to Radić, upheld his acquittal. The Appeals Chamber took a different stance on Šljivančanin, finding that his aiding and abetting of the crime of torture as a violation of the laws or customs of war was proved in court, but that the first sentence did not adequately reflect the gravity of the crimes he had committed. Besides this, the Appeals Chamber convicted Šljivančanin for aiding and abetting the crime of murder as a violation of the laws or customs of war and his sentence was substantially lengthened from the original five to seventeen years in prison.

Acting on the request of Šljivančanin's defence for review of the Appeals Chamber's ruling, the ICTY agreed to allow the presentation of new evidence that was not known at the time of the previous judgment and granted a review hearing regarding the defendant's responsibility for the events at Ovčara. This resulted in the Appeals Chamber quashing the previous sentence and, in December 2010, imposing a final sentence of ten years' imprisonment.

²⁷ ICTY, *Prosecutor v. Mrkšić et al.*, Case No. IT-95-13/1-A, Appeal Judgment, 5 May 2009.

The ICTY thus brought to a close the marathon process of determining the accountability of the accused officers of the former Yugoslav People's Army for the execution of persons taken from Vukovar Hospital on 20 November 1991. Although the subject of the trial was a specific event, the ICTY also had to determine, in the course of the proceedings, the broader context in which events took place by presenting numerous exhibits and pieces of evidence, examining a large number of witnesses and experts, and probing extensive written, audio, photo and video documentation, because only in such a comprehensive manner could it get the full picture of the circumstances preceding and directly contributing to the occurrence of the crime in question.

Modalities of domestic prosecution of war crimes and the challenges of judicial cooperation

In addition to raising questions about the status of persons at the Vukovar Hospital and their protection under IHL, the Ovčara case highlights some of the challenges involved in domestic prosecution of war crimes, in particular as regards judicial cooperation. Criminal proceedings had been initiated in Serbia, where most of the defendants were apprehended, while some others were still on the run and were out of reach of the Serbian authorities, and some witnesses and victims resided mainly in the territory of the Republic of Croatia. It was therefore necessary for the Serbian courts to gather valid court-worthy statements and testimonies that could, to a significant degree, clarify the still numerous contentious issues.

In a situation where there was no significant cooperation in the prosecution of war crimes between Serbia and Croatia and where there was still some mistrust between them, it was reasonable to expect that witnesses and victims from Croatia did not want to testify before courts in Serbia. As an illustration of this, the Croatian side at one point even rejected a suggestion that witnesses from Croatia be transported under Croatian police escort to the nearest border crossing on the territory of Serbia (Backa Palanka); there, an investigating judge from Belgrade would meet and interview them in the local court building, where full security measures would be taken to protect them.

On the other hand, the classic form of international legal aid, in which the injured party and witnesses would be interviewed independently by a Croatian investigating judge, would certainly not have yielded the best results because of the complexity of the event in question: at that point in time, the investigative file was already over 1,000 pages long and preparing a set of questions in advance would not have been sufficient in many cases, since the choice of the next question all too often depends on the answer given previously.

Bearing all this in mind and appreciating the obvious need to strengthen mutual confidence, the investigating judge of the War Crimes Chamber in Belgrade asked to join the deputy prosecutor in charge and attend the hearings of witnesses and victims in Zagreb, so that he could also interrogate them. The first arrival of the investigating authorities from Belgrade and the subsequent establishment of a fair

and professional collaboration with their colleagues from Zagreb made it possible for both sides to reach the critical threshold of mutual trust, which in turn convinced the witnesses that the judicial authorities of the two countries were really cooperating and made them fully accept the fact that their testimonies would contribute to establishing the truth.

This method of interrogating witnesses during the investigation, together with the substantial assistance of some non-governmental organisations, played a crucial part in convincing some of the witnesses from Croatia to come to Belgrade and testify in person at the trial. In the same way, forensics professionals from Zagreb offered their expert opinions directly before the Belgrade District Court; moreover, direct evidence at the trial was also given by witnesses who were interrogated by video link. Besides this, the organised arrival of the families of the victims and their presence at the trial in Belgrade was a further confirmation of the fact that the prosecution of such crimes and the transparent approach to the proceedings contributed to meeting more than just the basic requirement of serving justice. One cannot ignore the contribution that such trials make to reconciliation, dealing with the past and strengthening of or restoring mutual trust. It was precisely for this reason that it was so important to have this kind of case tried in Belgrade, Serbia.

Cooperation between the War Crimes Chamber in Belgrade and the ICTY

Through sustained and institutionalised cooperation with the Prosecution and the War Crimes Chamber in Belgrade, the ICTY was able to use the evidence and findings obtained by the Belgrade District Court. Of particular significance was the help, support and encouragement of the ICTY and, above all, of the Prosecutor's Office, which allowed access to some of the evidence in the criminal proceedings conducted in The Hague against the 'Vukovar Three' – JNA officers Mile Mrkšić, Veselin Šljivančanin and Miroslav Radić. The three were also interviewed in the ICTY Detention Unit in The Hague by an investigating judge from Belgrade in the presence of the deputy war crimes prosecutor in charge.

Although there are some who believe that in the judicial resolution of this crime – in circumstances where the ICTY took over the prosecution of former JNA officers while the Belgrade District Court tried the direct perpetrators of the crime – there was not enough cooperation between the two courts, it appears that such assessments are not fully justified. As this was the first case in which direct communication was established between the judges and prosecutors of these judicial institutions, it is true that a certain amount of mutual distrust was present at the beginning, especially during the first phase of the investigation, conducted in Belgrade. In addition, not all procedural questions related to the use of available evidence and the status of individual participants have been fully resolved. However, at the later stage of the proceedings, cooperation on this case – and in other investigations and trials that the War Crimes Chamber in Belgrade subsequently dealt with – was far more substantial and of significantly better quality, so the results were more concrete and better overall.

The very fact that the subject matter of the trial was practically the same event, albeit with different defendants, unavoidably resulted in the overlapping of some evidence, so that some of the same witnesses and victims were examined and parts of the same body of evidence were used in both the Hague and Belgrade trials. In such circumstances, both courts were in a position to establish and verify all the facts that were essential for a fair and just verdict with much greater certainty.

The chosen solution that the ICTY would try former senior JNA officers for the crime at Ovčara, while the Belgrade Chamber for War Crimes would focus on the direct perpetrators of the same crime, turned out to be the best option in the given circumstances. Regardless of the fact that an exit strategy for the ICTY had long been decided, leaving the Tribunal to simply complete ongoing proceedings and not initiate any new investigations, one cannot state with certainty that there will be no new trials for the Ovčara crime. Bearing in mind the statute of limitations for war crimes and the principle of universal jurisdiction over serious violations of IHL, as well as the extensive documentation that is available to the courts (and allowing for the possibility that the charge sheets in both trials did not necessarily cover all the perpetrators and those responsible for this crime), it is still possible that new criminal proceedings in this case be launched before the War Crimes Chamber in Serbia. One also cannot rule out the possibility that criminal proceedings will be initiated before a court of another state in the region or the world, especially if a suspect in this crime is caught on its territory and the state in question decides to conduct such a trial.

Beyond the Ovčara case: reflections on preventing and prosecuting violations of international humanitarian law

Possibilities of prosecution

Although one cannot really speak about full codification of the law applicable to international armed conflict, there is even less to be said about treaty law of non-international armed conflicts, and the impression is that this area is somewhat unjustly neglected. It is precisely these circumstances that, among other things, necessarily point to the direction in which IHL should continue to develop. What is of exceptional importance in this field is surely the work of the *ad hoc* tribunals for the former Yugoslavia and Rwanda, as well as the establishment and operation of the permanent International Criminal Court, the East Timor hybrid tribunal (the Special Panels of the Dili District Court), the hybrid courts for Kosovo, the Extraordinary Chambers in the Courts of Cambodia and the Special Court for Sierra Leone.

Though the crimes dealt with by these tribunals generally never become obsolete under statutes of limitations, almost all of these institutions are of limited duration because of the time limitation of their work, or because of lack of political will or insufficient funding for their continued operation. Only the permanent International Criminal Court is not in this category, but it would be unrealistic

to expect that it will be able to hold trials for all of the numerous grave violations of IHL around the globe.

In view of this, it is very important not to disregard the national courts of states involved in armed conflict or of countries on whose territories such conflicts take place, provided that they have the capacity and opportunity to try these gravest offences, both by directly applying the rules of IHL and by implementing these laws in their existing national legal systems. After all, it is almost impossible to imagine that any dramatic shift in the judicial resolution of a number of grave violations of IHL could ever be expected to take place without these national courts. For example, in Croatia and Bosnia and Herzegovina alone, criminal charges for war crimes related to the armed conflicts of 1991–1995 have been filed against thousands of people, which is a huge number of war crimes-related events and suspects even if one takes into account the fact that in many such cases there was no real basis for such legal qualifications.

Furthermore, there is also a possibility that, for political reasons, some states found it in their interest to portray some events as occurrences of war crimes for which they filed charges against suspects in pre-trial proceedings, although there was no clear basis for doing so (this is best evidenced by the ratio of the number of reported war crimes and the number of aborted prosecutions and acquittals), leaving a huge number of people suspected of these crimes. This is even more curious considering that trials for serious violations of IHL are very demanding, with complex procedures for presenting evidence and proving guilt that certainly require a substantial level of expertise in the field of investigation, prosecution and trial of these offences. In order to successfully conduct such trials under respective national legislations, it is also necessary to overcome the narrow nationalistic approaches to this issue and to create an appropriate political climate by means of raising awareness and promoting universally accepted human values.

It goes without saying that, had at least some of the violations of international criminal law been prosecuted at the time of the armed conflict, this would have contributed significantly to allowing the societies and states involved to make a clear stand on such criminal offences and would have helped to deter potential offenders.

However, it is much more realistic and commonplace in practice to see such trials take place following a certain time-lapse after the crimes in question are committed and hostilities cease. A society's recognition of the necessity of such trials, coupled with the general public being allowed access to the evidence and facts from them, can make a major contribution to the successful conduct of these trials.

As all this is not sufficient in itself, it is also essential to make appropriate normative interventions in the existing positive legislation, coupled with the enactment of the necessary regulations and the harmonisation of national legislation with international instruments in order to create an appropriate legal framework and place the right tools in the hands of those who are to implement in practice the prosecution and trials of the perpetrators of the gravest crimes. Given the specificities of these offences, particularly in terms of gathering and recording evidence and the interpretation and application of IHL, additional specialisation

and education of all those involved in the process is desirable, especially when it comes to the police officers, prosecutors and judges who are to participate in the proceedings.

International judicial cooperation

Special attention should also be paid to international cooperation in the broad sense of the term, not only with other states, but also with international tribunals and other international organisations and institutions which could be in possession of evidence pertinent to a particular trial or have access to defendants, witnesses or experts who are unavailable to the country conducting the trial. In many cases, the perpetrators of crimes are citizens of one state while the victims and witnesses are citizens of another. There is often a need to conduct some investigation on the territory of another state. Sometimes, especially in complex procedures with multiple defendants and victims, there is a need to locate witnesses, serve summons, possibly implement protective measures, and examine a number of witnesses and victims in the territory of one or more states.

No country is willing to give up part of its sovereignty and allow the investigating authorities of another country to independently conduct certain investigations on its territory. On the other hand, the classical mechanism of providing international legal aid is too slow and inefficient: it typically takes months for the requesting state to, for example, submit an ordinary note to the requested state; if the requested state is expected to respond to the requesting one, the whole process becomes a nightmare for those seeking such information.

Nevertheless, much of the problem can be solved by bilateral or multilateral agreements between the parties, which may agree on faster and more efficient ways of communication. A good basis for achieving more advanced cooperation is the European Convention on Mutual Assistance in Criminal Matters and especially its Second Additional Protocol, which, among other things, prescribes the correct ways of conducting hearings by video conference and the formation of joint investigation teams by two or more states.

When it comes to trials for violations of IHL, the current practice in Serbia shows that the means available to government agencies have not been used to their full extent. The biggest advances have been made in the field of bilateral agreements between states, primarily in the field of cooperation between prosecutors in the region, where interrogations via video link of participants in hearing proceedings are no longer a rarity.

The least used cooperation mechanism has been joint investigation teams; the first of these was set up in early 2007, in Belgrade, under an agreement between the Belgrade District Court and the Tuzla Cantonal Prosecutor's Office, in order to facilitate a very complex and extensive investigation of one of the worst war crimes in the former SFRY. The leader of the team was an investigating judge of the War Crimes Chamber in Belgrade, while members of the team comprised one prosecutor from Serbia and one from Bosnia and Herzegovina, plus two police officers from each of the two countries. As the experience gained in the work of this team was very

positive and the results exceptionally good, it is unclear why this kind of cooperation has not been more extensively pursued in other legal proceedings.

On the importance of disseminating IHL

In the case of the former Yugoslavia, it should be noted that the country had ratified all the major international instruments in the field of IHL and, for the most part, incorporated these regulations into domestic legislation, particularly in the criminal justice system. The country was also fulfilling its obligations in terms of IHL dissemination. A good example in this regard is the *Instructions on the Application of the International Law of War in the Armed Forces of the SFRY* (hereinafter the Instructions), published in the official military gazette of June 1988, in which the then federal secretary for national defence, General Veljko Kadijević, acting on the orders of the presidency of Yugoslavia, gives more detailed instructions on the conduct of members of the SFRY armed forces.²⁸ Containing some fifteen detailed forms and documents, the Instructions were printed in book form and distributed to all units and institutions of the former Yugoslav People's Army. This order issued by the federal presidency clearly illustrates the way it treated accountability in war:

All unit commanders and each individual member of the Armed Forces is responsible for the application of the rules of the international law of war. An authorised officer shall initiate proceedings for the imposition of statutory sanctions against any person found to be in violation of the rules of the international law of war.²⁹

The presidency also ordered that all members of the armed forces undergo mandatory training in order to get acquainted with the rules of IHL.

For the purposes of this paper, several key points from the Instructions can be singled out as particularly relevant. At its very beginning, this manual points out that the armed forces of the SFRY are made up of the JNA and Territorial Defence, and provides a list of all international agreements and other documents that the SFRY has ratified and recognised. Although the manual essentially and above all refers to international armed conflicts, it also makes references to the application of Additional Protocol II to the Geneva Conventions and the basic rules of humanity in the case of non-international armed conflicts.

If a violation of IHL was established, a Yugoslav army officer was required to order an investigation into the relevant facts and circumstances and the gathering of the necessary evidence. The manual also stipulates that during a bombing campaign against defended positions, all necessary measures must be taken to protect hospitals and collection points for the wounded and sick, and prohibits any

28 See *Propisi o primeni pravila Medjunarodnog ratnog prava u Oružanim snagama SFRJ (Instructions on the Application of the International Law of War in the Armed Forces of the SFRJ)*, PrU-2, Savezni Sekretarijat za Narodnu Odbranu (Pravna Uprava), Belgrade, 1988.

29 In the same sense, see *ibid.*, Rules 20 ff, on individual responsibility and violations of IHL.

form of attack on, among other things, military medical units and facilities as well as on civilian institutions and health service units.

The issue of the wounded and sick is also covered in detail, while the capture of prisoners is described as follows: ‘When they fall into the hands of the enemy, the wounded and sick become prisoners of war to whom, in addition to special provisions governing the protection of the wounded and sick, the provisions of Item 200 of this Instruction shall also apply’ (Item 200 lists which categories of individuals have the status of prisoners of war).

Any attempt to relate this approach to the key provisions of IHL (through ratifying conventions and agreements, and the highly detailed Instructions being made available to all members of the armed forces) with the proportions, magnitude and ‘ingenuity’ of the crimes committed in the former SFRY in 1991–1995 brings forward the chilling question of how many more such crimes would have been committed and how much worse they would have been if the state had not followed and accepted the rules of contemporary IHL. Putting aside possible banal and ironic comments that the Geneva Conventions and their accompanying Protocols, as well as the aforementioned Instructions, may have served to collect dust in military libraries rather than being seriously studied in the field, one would have to conclude that the answer to this question is indeed very complex and requires extensive research in a direction that goes beyond the scope of this particular paper.

Conclusion

It is quite certain that a more detailed study of these events, coupled with proper access to the whole issue, could provide answers to most of the questions posed in this paper. It could also point to some other facts and throw further light on the roles and actions of the participants in these events, which for now are still not fully understood.

Unfortunately, attacks on hospitals, medical personnel and medical transports are no longer a rarity in armed conflicts, even in situations where they are clearly marked, although many institutions and organisations, primarily the International Committee of the Red Cross, have repeatedly appealed to the humanity of the participants of armed conflicts, reminding them of their obligation to respect IHL. In addition to medical staff, the wounded and sick in hospitals and transport vehicles are also directly affected by such attacks, as well as the soldiers and civilians to whom the medical teams cannot provide timely assistance. Field investigations have demonstrated the tragic and inhuman character of such attacks and confirmed that a great many lives have been lost because of violence against those trying to help the wounded and sick. This is certainly an affront to the fundamental ideas of humanity and a serious challenge to the wider international community, which simply must find an effective way to prevent this from happening.

Any attempt to relativise the level of accountability for such grave crimes through the practice of prosecuting and punishing only direct perpetrators

significantly undermines the authority of IHL and shows that there is still ample room for the implementation of the developed forms of some principles belonging to this branch of law, which are incorporated not only into domestic legislation but also in the minds of the people. This pertains to the already accepted direction of further judicial development, where more attention would be focused on so-called ‘crimes of omission’ – that is, crimes of inaction committed by military commanders and politicians. Only once those responsible for failing to act to prevent a crime end up in the dock themselves can we speak of proper accountability for the lack of respect for or application of IHL.

Further promotion of IHL by careful monitoring of the current trends of violations of this branch of law may surely contribute to making this world a better place than it is now, and this goal really deserves the maximum involvement of all relevant actors. It is precisely the activities of the international community in this area, as well as the use of the powerful instruments available to it – in the form of mechanisms of criminal legal prosecution and punishment in both national and international courts, as well as through the courts of state signatories of international treaties – that can make a significant contribution to reducing the number of violations of IHL.

Although opponents of this approach to strengthening the authority of IHL by intensifying criminal prosecution of perpetrators of such crimes might accuse the international community of sabre-rattling, it is undeniable that the certainty of prosecution, either in an international or national court, acts as a general deterrent aimed at dissuading potential perpetrators from getting involved in the commission of these grave criminal offences.

The already mentioned Roman poet Horace was certainly not aware of the timeless character of his verse, which, in lieu of a conclusion, we hereby quote again: *‘Coelo tonantem credidimus Iovem regnare.’*