

Plausible Deniability

The Challenges in Prosecuting Paramilitary Violence in the Former Yugoslavia

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1. Introduction

From Syria to Sudan and Ukraine, paramilitary and so-called ‘irregular units’ are ubiquitous in contemporary conflicts. Research shows they regularly participate in violating international law (Alvarez 2006; Haer 2015). In the aftermath, courts must find ways to hold as many perpetrators as possible accountable. To date, for crimes in the former Yugoslavia, prosecutions for paramilitary violence were largely conducted against direct perpetrators: those pulling the trigger, or torturing detainees. What has been lacking is establishing the criminal responsibility of senior state officials: those that established, armed, trained, and deployed units to expel unwanted populations. After briefly defining paramilitaries, this chapter explains and analyses some of the characteristics of units in the service of Slobodan Milošević’s regime. It reviews obstacles those characteristics presented for criminal proceedings at the International Criminal Tribunal for the former Yugoslavia (ICTY) in The Hague (Kerr 2004), as well as in domestic courts¹ in bringing *some* of those responsible for paramilitary crimes to justice. *Some*, not *all* perpetrators, because the number of potential suspects is simply too great (BIRN 2016).²

Some paramilitary units act as the violent arm of governments, deployed covertly, to pursue the state’s political goals through illegitimate means while at the same time shielding the state of any responsibility for crimes the units commit. States hide that

¹ This refers to national judicial institutions with jurisdiction over genocide, crimes against humanity, and war crimes in Croatia, Bosnia and Herzegovina, Serbia, and Kosovo. The Court of Bosnia and Herzegovina (often called ‘State Court’) will be regarded as domestic, even though for a decade, it was heavily internationalized, and as such often described as a hybrid court, merging elements of international and domestic procedures and staff into one institution.

² According to this article, the Prosecutor’s Office of Bosnia and Herzegovina is working ‘on 346 of the most complex war-crime cases against 3,383 individuals’. Justice Report (2016). According to the ICTY and MICT Chief Prosecutor Serge Brammertz, five thousand individuals still need to be tried; see Riedlmayer (2017).

involvement in criminal acts because being labelled a perpetrator may harm how they are perceived externally and internally, which may then result in negative consequences (Ron 2003; Alvarez 2006). Often, the crimes committed by paramilitaries are particularly brutal, and effective, in expelling unwanted populations (Petrović 2015). When judges convict only individuals who pulled the trigger, as they have largely done thus far for the paramilitary violence in the former Yugoslavia, the acts of officials and state institutions in unleashing paramilitary violence remain unpunished. The state then remains shielded from having a tarnished reputation in the international community, or paying large amounts in victim compensation.

Slobodan Milošević, who emerged as the Serbian nationalist leader in the late 1980s, was aiming to alter the borders of a crumbling Yugoslavia, and fulfil the desire of many Serbs to live in one state.³ As the disputed territories in newly independent Croatia and Bosnia and Herzegovina (hereinafter Bosnia) were populated by a mix of Croats, Bosnian Muslims, Serbs, and others, seizing territory for an ethnically exclusivist state-building project was achieved through violence (Tromp 2016, 34). Milošević's regime stemmed from Yugoslav party and state institutions, and relied heavily on the Yugoslav People's Army (JNA) (Hadzic 2002), employed media for nationalist propaganda, rigged elections, associated itself with organized crime, and ruthlessly removed political opponents. It pursued the political project of a new Yugoslavia, a *de facto* enlarged Serbia, through and with the cooperation of local Serb leaders in Croatia and Bosnia (Donia 2014). Those leaders established para-states, the *Republika Srpska Krajina* (RSK), and the *Republika Srpska* (RS), both with a distinct set of local institutions that were funded, and supported, by the Milošević regime.

In 1991 and 1992, Croatia and Bosnia became independent, cutting formal ties with Belgrade. From then on, RSK and RS presented distinct actors, even though without Belgrade, they would be unable to exist.⁴ Kosovo was different—it was formally a province within Serbia, not an independent republic in Yugoslavia, and many Serbian forces active there in the late 1990s were officially in the chain of command leading right up to the highest levels of government in Belgrade, including Milošević, the then-president of rump Yugoslavia. Scholarly research, testimony of participants, and court records speak clearly of the importance of Serbia's State Security Administration (SDB) of the Ministry of Internal Affairs (MUP) for the entire structure put in place to seize and consolidate territory. The key tool for seizing territories and expelling populations were the paramilitary units put in place by the MUP and SDB. The units established and utilized by the SDB were not the only ones operating, but they were the most significant, most powerful, and longest lasting. They were feared by the civilians for their cruelty in attacks on towns like Vukovar, Bijeljina, and Zvornik (Biondich 2011).

³ On Slobodan Milošević's regime and its downfall, see, for example, LeBor (2003), Sell (2002), and Bujosevic & Radovanovic (2003).

⁴ ICTY, *Prosecutor v Hadžić*, Case No. IT-04-75. Report and testimony of prosecution financial expert Morten Torkildsen show that the Republic of Serbian Krajina and Republika Srpska 'were more or less funded exclusively from Belgrade'. See Second Expert Report of Morten Torkildsen.

Some of the most notorious massacres during the 1991–1999 wars in Croatia, Bosnia, and Kosovo were committed by paramilitary units. These units performed a lot of the ‘dirty work’ while maintaining a veneer of detachment from the Milošević regime, which made it possible for state officials to claim the units were acting independently (Ron 2000; Gow & Zverzhanovski 2013). Plausible deniability is at the core of paramilitary violence used by Milošević and his proxies in an attempt to change the borders and the population distribution in crumbling Yugoslavia, and seize territory (Gow & Zverzhanovski 2013, 126). War crimes were not incidental to that campaign, but part of a strategy (Gow 2003). Paramilitary units, often in concert with the army and the police, participated in what is widely referred to as ‘ethnic cleansing’.⁵

Instances of paramilitary violence were most frequent in Bosnia, and the loss of life most staggering.⁶ Paramilitary units were involved in the violence from the outset of the war. All of the warring parties mobilized irregular units (Ferguson 2015), but the majority operated on the ‘Serbian side’—as many as fifty-six (Bassiouni 1994). Dozens of units fought for the goals set forth by the Serbian leadership in Belgrade, and advanced by leaders like Milan Martić and Radovan Karadžić (Donia 2014).⁷ Some of the well-known units were Željko Ražnatović Arkan’s Serbian Volunteer Guard, referred to also as Arkan’s Tigers (Stewart 2007); Franko Simatović’s Red Berets; Vojislav Šešelj’s men, referred to often as Šešeljevci or simply Chetniks; the Scorpions, led by Slobodan Medić Boca; and Milan Lukić’s Avengers, also referred to as the White Eagles. These units, operating in pursuit of the Serbian project, as Gow (2003) calls it, are those this chapter analyses as: a) they were engaged in several theatres of war throughout the decade, b) they committed a number of crimes, including murder, torture, rape, persecution of civilians, and looting, and c) they were the subject of a greater number of criminal proceedings than other paramilitaries, and can serve to analyse challenges in the prosecution efforts.⁸

The ICTY was the first international criminal tribunal after Nuremberg, and it struggled with prosecuting complex cases, especially in the early days. A particular problem has been countering challenges to the prosecution of high officials for paramilitary crimes, stemming from the covert nature of the ties with those units. No high-level Serbian official was ever convicted for the violence paramilitaries committed in Croatia and Bosnia, and the lack of convictions shows that plausible deniability has worked exactly the way it was intended to. In the courtroom, it shielded state officials, and by extension the state itself, from responsibility for crimes these units committed after being established, trained, paid, and controlled

⁵ ‘Ethnic cleansing’ is a term that is widely used in literature to describe acts by authorities and armed actors aiming to change the population distribution through murder, expulsion, rape, and pillage. Given that the term is so ubiquitous, it will be used here as well, although its usage is not without problems. More on the term as it appears in Bosnian/Croatian/Serbian (hereinafter ‘BCS’, the acronym used for the three languages at the ICTY), see Petrović (2006).

⁶ For data on demography and human losses, see Tabeau (2009).

⁷ ICTY, *Prosecutor v Karadžić*, Case No. IT-95-5/18, Trial Chamber, Judgment, 24 March 2016.

⁸ Incidents of paramilitary violence have been documented throughout the 1990s, from Croatia, through Bosnia, and Kosovo, in particular in towns and villages, such as Vukovar, Bijeljina, Zvornik, Višegrad, Štrpci, Sjeverin, Srebrenica, and Podujevo.

from Belgrade. The ICTY case against Jovica Stanišić and Franko Simatović, heads of Serbia's State Security Administration in the Ministry of Internal Affairs, illustrates this perfectly. These men established the units, and deployed them, for the benefit of Milošević's regime (Horncastle 2016). The case focused on the units of the Red Berets, the Scorpions, and Arkan's men.⁹ However, judges ruled that during the war the two accused did not 'specifically direct' their actions to commit crimes.¹⁰ The case is currently being retried at the Mechanism for International Criminal Tribunals (MICT) in The Hague.¹¹

Twenty-four years after it has been established by the UN Security Council, the ICTY closed at the end of 2017 and left its four remaining cases to the MICT. It is worth noting that the ICTY has a reasonably solid record of holding perpetrators accountable for some of the most brutal crimes (Trahan & Vukušić 2018 forthcoming). Domestic courts have been holding trials in these countries for over a decade, with mixed results. Although criticized (Clark 2009), these courts have provided some justice to the victims, and have been broadly assessed as conducting fair trials (Orentlicher 2008; Trahan & Vukušić 2018). In total, at the ICTY and the domestic courts in the region, there have been 348 verdicts. At the Tribunal, eighty-nine individuals have been sentenced, and in local courts, another 646.¹² No centralized database provides information about how many cases, and how many individual suspects, have been prosecuted as members of paramilitary units, but it is likely that no more than 20 per cent of all defendants were members of paramilitaries.¹³ All in all, only a small number of paramilitary perpetrators were held accountable. The vast amount of evidence gathered through trials is now used for studying various aspects of the wars in the former Yugoslavia (Wilson 2011; Vukušić 2013) as much of the evidence is made available to researchers.¹⁴

2. Paramilitaries and Plausible Deniability

Questions of structure and organization, allegiance and connections, control, motivation, and legitimacy became particularly relevant in criminal trials relating to crimes committed by members of paramilitaries. Defining paramilitary forces is key for any substantial discussion about them, yet finding one definition that adequately and accurately describes the myriad units is anything but easy. Paramilitaries are in no way exclusively a modern phenomenon (Sahara 2006, 13; Malešević 2008, 99), and

⁹ ICTY, *Prosecutor v Stanišić and Simatović*, Case No. IT-03-69, Appeal Chamber, Judgment, 9 December 2015.

¹⁰ On these cases and 'specific direction' see Acquavia (2014) and Milanovic (2015).

¹¹ MICT, *Prosecutor v Stanišić and Simatović*, Case No. MICT-15-96. The indictment was filed before the ICTY on 10 July 2008, and this remains the indictment for the MICT retrial.

¹² Ristić (n.d.). *War Crimes Map*. http://www.balkaninsight.com/en/page/war-crimes-verdict-map#content12_2710 (Accessed 27 February 2018).

¹³ Interview with journalist Marija Ristić of Balkan Insight, project manager for the War Crimes Verdict Map project, through email, Saturday 27 May 2017, on file with the author.

¹⁴ ICTY archives are accessible in the ICTY Court Records Database. <http://icr.icty.org/default.aspx> (Accessed 27 February 2018).

they appeared in different forms in Latin America (Mazzei 2009), Northern Ireland (Ferguson et al. 2008), Darfur (HRW 2005; Flint 2009), the former Yugoslavia (Vivod 2013; Milicevic 2006; Schlichte 2009), Indonesia (Anderson 2001), and elsewhere. Terms like 'militia', 'militant group', 'insurgents', 'rebels', and 'mercenaries' (Davies 2000) are often used for units that can be also described as 'paramilitaries'. 'Irregular units' is another catch-all term for these forces (Petrović 2006). These units may fight against government forces, with government forces against a domestic insurgency, or act as proxies for a foreign government pursuing strategic or political goals in the state in question. They may be under command of regular forces in the field or act independently. As these relationships change over time and depend on circumstances both within and outside of the theatre of war, understanding paramilitaries and proving control by government institutions is often the most difficult part of a criminal case.

The term '*para*' in 'paramilitary' describes something akin to a military, but not quite. A broad but helpful definition of paramilitarism emphasizes two components: loyalty and autonomy, relative to the state.

A paramilitary force is a uniformed group, usually armed, neither purely military nor police-like in format or function but often possessing significant characteristics of both. It may serve as an agent or as an adversary of the state; it may or may not perform internal security functions and it may or may not have a wartime role as an adjunct to the regular army. (Scobell & Hammit 1998, 2)

The types of units this chapter analyses can be classified as 'pro-government' militias (PGMs), and 'state-sponsored' (Ahram 2014, 489). For the purposes of this chapter, the definition of a pro-government paramilitary unit is that it does *not* form part of the regular armed forces but possesses a certain command structure and hierarchy. It is an armed group with a political goal, and it is either pro-government or sponsored by the government (national or subnational). In addition, it possesses distinctive features that make it recognizable, such as a particular insignia.¹⁵ This chapter uses this definition given that it most accurately lists all key elements of paramilitaries acting on the side of the Milošević regime, and is broad enough to encompass unit variations. These pro-government units can be 'semi-official PGMs that enjoy quasi-legal status but are separate from the regular forces and identified as a distinctive organization' and 'informal PGMs that are supported by or act on the side of the government but stand further from the state's legal bureaucracy' (Ahram 2016, 209).

Scholarly literature shows that paramilitarism is a dynamic phenomenon, and actors and organizations that create it are complex and diverse (Zohar 2016, 442). The nature and intensity of government cooperation and level of institutionalization vary, as well as the proximity and co-operation with regular forces in the field and local authorities (Ahram 2016, 212). There is elasticity and fluidity in their

¹⁵ This definition draws heavily on Carey et al. (2013). The pro-government Militias Database (PGMD) website is available at <http://www.sowi.uni-mannheim.de/militias-public/data/> (Accessed 27 February 2017).

status and relationship with the sponsoring regime. Therefore, loyalty to the regime and unit autonomy are not fixed, and may fluctuate over time. Command and control apparatus, structures, strategies, and tactics also differ (Zohar 2016, 442). Importantly, units are not always established by state agencies to act as proxies—some are local initiatives, and there are both top-down and bottom-up pressures influencing them.

A number of authors studying paramilitaries apply a functionalist approach and argue that paramilitaries are used because they are useful and effective as a tool of ethnic cleansing (Alvarez 2006). In fact, their existence may be understood as the state outsourcing illegal and illegitimate violence. State officials ordering, controlling, and supporting paramilitary violence have an interest in denying ties to units that commit crimes in order to insulate themselves and shift blame to others. By distancing themselves and resorting to covert operations and units that are formally detached from state institutions, they avoid political condemnation and potential criminal prosecution (Campbell & Brenner 2000). That is how paramilitaries are used for plausible deniability (Campbell & Brenner 2000; Alvarez 2006; Ahram 2016, 219). The state utilizes units in an effort to protect itself by claiming it has nothing to do with them, diminishing the gravity of the violence or outright denouncing crimes as a conspiracy, or by attributing violence to ‘volunteers’, renegade, uncontrollable forces, and citizens that in the chaos of war resorted to spontaneous acts of revenge.¹⁶

3. Nature and Characteristics of Paramilitaries in the Former Yugoslavia

Institutional agency and the actions of Serbian state officials were key in the emergence of paramilitary units (Anastasijević 2006). Paramilitaries in the service of the Serbian regime had both internal and external functions. Externally, they had the function of seizing territory. In the early days of the conflict, Arkan’s unit, the Red Berets, and others acted in co-operation with regular forces, which, in 1991 and early 1992, was the Yugoslav People’s Army (JNA). Later, once the JNA disintegrated, they acted in co-operation, and occasional subordination, to the nascent armies of the local Serbs in the para-states (RSK, RS). In Kosovo, they worked with Serbia’s police and Yugoslav army units. Paramilitaries served as a force to be deployed quickly and across borders, without bureaucratic delays and oversight, with the added benefit of being open to doing what the regular forces may not be willing or able to do (Švarn 2010). Moreover, paramilitaries were useful as auxiliary forces as the number of regular troops dwindled. In Serbia, that was one of the primary reasons behind the decision to mobilize them (Biserko 2012). Internally, units were used to support the regime, intimidate the opposition and critical press, and secure

¹⁶ Variations of this argument have been frequently presented in a number of ICTY trials, by defence counsel and/or the accused. For one example, see ICTY, *Prosecutor v Karadžić* (n 7) Testimony of witness Jovan Kevac. Transcript, 29 January 2014.

business interests closely tied to organized crime. These units were utilized by the regime to provide security for political elites in *Republika Srpska* and Serbia. The Special Operations Unit (JSO), which was established under that name after the war in Bosnia and formally placed within the State Security Administration of the Serbian Ministry of Internal Affairs, has been called Milošević's 'Praetorian Guard' (Popolo 2010, 199). The JSO members were used by the regime for assassinations of opposition leaders and journalists critical of Milošević's rule.¹⁷ In 2003, JSO members assassinated Serbia's reformist prime minister Zoran Đinđić (Gow & Zverzhanovski 2013, 162).

Another factor that influenced unit deployment and the dynamics of violence were local circumstances and relationships, just as it has been observed in other instances of paramilitary violence (Kalyvas 2006). For example, a history of deployment of paramilitaries in a particular territory significantly influences the likelihood of their repeated emergence (Ahram 2016, 211). That was just one of the conditions that enabled extensive paramilitary engagement in the region (Petrović 2006). In the former Yugoslavia, there were other key factors that fuelled paramilitarism: existing connections between organized crime and state security, the opportunity to plunder natural resources and property in the conquered lands (Zohar 2016, 440), as well as smuggling (Bovenkerk 2003). Arkan was the commander of the Serbian Volunteer Guard, often referred to as the 'Tigers'. He had a background in crime and working for the Yugoslav State Security in the 1980s, eliminating those considered enemies of the state (Petrović 2015). Arkan was mobilized by the State Security to lead men in an effort to cleanse territory, and in return, he was given the opportunity to engage in a variety of criminal activities as compensation for his 'services' (Vasić & Švarn 2001). The nexus of violence and organized crime was enhanced by the inclusion of convicted criminals in the early units (Totten 2009). Another factor that influenced paramilitary engagement was the availability of young men, many of whom were unemployed, members of football fans' clubs in Belgrade (Vasić & Švarn 2001).

The units differed in their participation in organized crime, level of training, and possession of quality equipment (with some units resembling special forces) (Horncastle 2016), as well as the ability and willingness to persecute civilian populations. Some units had a clearly defined membership and structure, while others were more fluid. One interesting example were 'Šešelj's men' or 'Chetniks', named after Serbian politician and head of the Radical Party, Vojislav Šešelj, an academic and a lawyer known for his explicitly hateful speeches.¹⁸ The term 'Šešelj's men' or 'Chetniks' was applied generously to many armed men in the field, and it can be argued that Šešelj had little operational control over some of them once they were deployed. What Šešelj was crucial for was recruitment and sending men to the field where they would operate under the command of regular forces. Other individuals were also key for recruitment and mobilization. One of them was Captain Dragan, portrayed as nothing short of a well-trained, ethical, masculine Serb hero who was recruited by the State Security to train the early units (Čolović 2007; 2000).

¹⁷ For more on the JSO and ties to Milošević's regime, see Ristić and Dragojlo (2016).

¹⁸ ICTY, *Prosecutor v Šešelj*, Case No. IT-03-67, Indictment, 7 December 2007; Wilson (2017).

What we know about why individuals joined paramilitaries is that motives were numerous and diverse. They were personal, sometimes fuelled by greed or jealousy (Ahram 2014, 491), or coming from a desire ‘to defend the Serb people’, or to prove oneself as masculine and heroic (Milicevic 2006; Vivod 2013). The desire to join came also from pragmatic reasons like better pay.¹⁹ Social networks were important in recruitment of many units. The Scorpions are a good example, with many members coming from the same town and sharing family ties.²⁰ After the war in Bosnia, a process of transformation was underway. Remaining units were quietly disbanded with their most valuable members recruited into special operations units, most notably the JSO under the leadership of former commander in Arkan’s Tigers and ex-French Foreign Legionnaire Milorad Ulemek Legija, currently serving a long prison sentence for the assassination of Serbian Prime Minister Zoran Đinđić in 2003, and other crimes.²¹

3.1 Ambiguity and control

One of the key obstacles to understanding paramilitary units is their covert nature. Regular forces, the army, and the police normally have the command hierarchy outlined by law and regulations, and the coat of arms and flag of the state they are serving visible on their uniforms. Paramilitaries discussed in this chapter differ: they did not formally and openly serve Serbian institutions, and they tended to have symbols that could represent Serbs in Croatia, Bosnia, Serbia, and Kosovo, and an image of some animal like a tiger, or a wolf. Yet, they were the tool Serbia used to outsource violence, but performed the job discreetly. That *prima facie* ambiguity of exactly whose command the units follow, and how much autonomy they really have, is a useful feature which incentivizes states like Serbia to use them (Gow & Zverzhanovski 2013, 148).

When the war in the former Yugoslavia began, there was a fragmentation of armed forces in the field. The Yugoslav People’s Army (JNA) became the *de facto* Serbian Army (Hadzic 2002). In 1992, parts of the former JNA became the Army of the Krajina Serbs (SVK) and the Bosnian Serb Army (VRS), independent in name only given that they were armed, equipped, and paid for by Belgrade.²² Various kinds of volunteers, members of police reserves, territorial defence units (Marijan 2009), and groups established by local authorities in territories taken by local Serbs in Croatia and Bosnia were engaged in all kinds of operations, including attacks on civilians. In that plethora of forces, grasping the full extent of the control and

¹⁹ Testimony of accused Slobodan Medić Boca, Scorpions unit (Humanitarian Law Centre 2008, 108).

²⁰ The family ties are discussed in the testimonies of several Scorpions members during the trial in Belgrade for the killing of unarmed men after the fall of Srebrenica. Transcripts were published by the Humanitarian Law Centre (in BCS). <http://www.hlc-rdc.org/wp-content/uploads/2012/06/Scorpioni.pdf> (Accessed 28 May 2017).

²¹ See more in Ristić (2015). See also Sell (2002, 378) and Gow & Zverzhanovski (2013, 4).

²² See in particular ‘Second Expert Report of Morten Torkildsen’, created for the ICTY, *Prosecutor v Hadžić* (n 4).

influence of the sponsoring regime on some of the units was difficult. Since then, a significant number of scholars and researchers have found connections between the paramilitaries and the regime, but that ambiguity still serves the interest of the state to distance itself from crimes against civilians.

There is evidence that members of the Scorpions unit had different IDs, identifying them as either members of the SVK, or members of the Serbian State Security (Vasić & Švarm 2001). That is evidence of purposeful ambiguity—the ability of forces to change formal affiliation according to the circumstances. Members of the Scorpions also recalled being instructed to leave all insignia behind before moving into action, in order not to be identified in case of capture.²³ When necessary, they were dispatched to ‘assist’ the VRS, such as during the Srebrenica operations in July 1995. The unit moved across borders of internationally recognized states, and shifted their affiliation to make sure Belgrade was off the hook. When asked in court, the members gave confusing answers to the simple question of who the unit ‘belonged to’.²⁴

3.2 Importance of borders for plausible deniability

An important characteristic of Serbian paramilitaries was that they tailored behaviour based on which side of the Serbian border they were on. They were mindful of who their victims were, targeting Bosnian Muslims as a group with a brutality that was not applied to Muslims who resided in Serbia proper (Ron 2003). Ron develops this argument about borders, claiming that targeted groups suffer greater violations at the edges, or what he calls ‘frontiers’—in this case, disputed territory in Croatia, and Bosnia, than those closer to the centre of the regime (i.e. in Serbia proper). Kosovo was part of Serbia (and Serbia of Yugoslavia), and Milošević was, as the president of Yugoslavia at the time of the greatest violence in that province, formally tied to units operating there. Ron’s explanation rests on an argument about boundaries and law, and how state officials and commanders shape their behaviour based on borders, in order to avoid taking responsibility for the behaviour of their troops. In sum, leaders and commanders are much less restrained when acting where they have the luxury of plausible deniability, i.e. in territories that are not formally under their jurisdiction.

Two examples of this are the abduction, torture, and murder of civilians, Serbian citizens and residents during late 1992, and early 1993. In both cases, the groups of abducted civilians were largely Muslims, targeted while traveling along the border between Serbia and Bosnia, and taken into Bosnia to be tortured and killed by Milan Lukić’s unit.²⁵ They were taken to Bosnia because the country was then engulfed

²³ Scorpions member Dušan Kosanović Sova, in the documentary *Škorpioni—Spomenar*, min: 37 (in BCS). <https://www.youtube.com/watch?v=nqsDRw04Z6U&feature=share> (Accessed 25 May 2017).

²⁴ Testimony of accused Branislav Medić, Scorpions unit (Humanitarian Law Centre 2008, 187).

²⁵ At the ICTY, Milan Lukić has been convicted for other crimes. ICTY, *Prosecutor v Lukić and Lukić*, Case No. IT-98-32/1, Trial Chamber, Judgment, 20 July 2009; Appeals Chamber, Judgment, 4 December 2012.

in war, while in Serbia, where no comparable fighting was going on, an abduction of a number of citizens, their beating, robbery, and killing could not be attributed simply to the chaos of war. Both the Sjeverin²⁶ and the Štrpci²⁷ massacres, resulted in investigations and proceedings in Serbia and Bosnia after the war.²⁸ Powerful testimonies were provided by eye witnesses about the murder and disposal of the bodies.²⁹ These two cases are examples of the extreme violence victims faced when further away from the centre of the regime, where institutions function and provide some restraint, even if institutions are biased, and where clear chains of command are provided by law.

Given that the war in the former Yugoslavia spread across boundaries of newly independent states, borders are a key component of analysing paramilitary violence. For a criminal trial, borders are important because they determine where jurisdiction and the ability of state institutions to act legally ends.³⁰ At the ICTY, apart from borders, another central issue was determining legitimate assistance to troops in the field, as opposed to illegitimate deployment of covert paramilitaries for ethnic cleansing. This issue was analysed in the case against Slobodan Milošević,³¹ Army General Momčilo Perišić, and the case of Stanišić and Simatović. The Milošević trial ended with the death of the accused (Boas 2007; Waters 2014), the Perišić case ended with a controversial acquittal,³² and the final outcome for the Stanišić and Simatović case is still to be determined.

3.3 Loyalty and autonomy

Paramilitary units must be loyal if they are to be used effectively by the state to commit illegal, illegitimate violence. However, loyalty to the regime as well as autonomy of action changes over time, as interests align or collide. Acts of the government and local authorities influence how paramilitaries behave, and operations by units in the field impact decisions of the regime. When the officials believe they benefit from putting units under tighter control, that is what they do.³³ When units

²⁶ For records on the Sjeverin case in Serbia, see Humanitarian Law Centre (2013).

²⁷ For the Štrpci incident, see Humanitarian Law Centre (2015).

²⁸ That was a result, in no small measure, to pressure by civil society organizations. On the Štrpci trial in Serbia, see Aljazeera Balkans (2017). On the Štrpci trial in Bosnia, see Justice Report (2015). On the Sjeverin trial, see Human Rights Watch (2003).

²⁹ Hasić (2016) and Humanitarian Law Centre (2013).

³⁰ Generally, the regular army can cross borders legally, in particular circumstances. The actions of the police are, on the other hand, legally confined to the territory of the state itself, unless an inter-state agreement stipulates otherwise.

³¹ ICTY, *Prosecutor v Milošević*, Case No. IT-02-54, Indictment (Kosovo), 16 October 2001; Indictment (Bosnia and Herzegovina), 22 November 2002; Indictment (Croatia), 28 July 2004.

³² Perišić's case focused on regular forces, and Serbia's funding and assistance to the SVK and VRS troops. ICTY, *Prosecutor v Perišić*, Case No. IT-04-81, Appeals Chamber, Judgment, 28 February 2013.

³³ Mladić ordered the subordination of paramilitary units to VRS on 28 July 1992. This order followed a report on paramilitary activity by his subordinate, Zdravko Tolimir, emphasizing the fact that paramilitaries are involved in violence against civilians and looting. Both documents are part of the trial record in the Mladić case. ICTY, *Prosecutor v Mladić*, Case No. IT-09-92. Trial Chamber, Judgment, 22 November 2017.

transgressed in Bosnia and Kosovo, for example, the regime and local authorities made them leave.³⁴ Levels of control, loyalty, and autonomy are not easy to measure, but are crucial for understanding why units behave the way they do, and will be a cornerstone to building a case. One sentence uttered by the Scorpions commander Slobodan Medić Boca at his trial in 2006 in Belgrade speaks volumes about his loyalty and allegiance. What he loved in life was ‘the pussy, the rifle, and the state’.³⁵

4. Criminal Prosecutions for Paramilitary Violence

Various court cases addressed paramilitary violence in the former Yugoslavia, and this chapter highlights only a few. Two cases that involve state responsibility, and not the criminal responsibility of individuals, have been heard by the International Court of Justice (ICJ) in The Hague.³⁶ This chapter focuses on criminal cases involving individuals, and looking at the judgments to date, one thing is clear: in the aftermath of paramilitary violence, it appears it is the direct perpetrators that are convicted, and not their sponsors at the high levels of government.

At the ICTY, the relevant cases include the already mentioned high-level accused like Milošević, and Stanišić and Simatović. Milošević was charged with a broad set of crimes, including genocide, crimes against humanity, and the violations of the laws and customs of war.³⁷ Given that he died before the end of the trial, it is but a guess how judges would have ruled and what they would have said on the ties between the regime and the paramilitaries. Stanišić and Simatović were charged with crimes against humanity and violations of the laws and customs of war.³⁸ The judges established that the two had indeed been supporting the Croatian and Bosnian Serbs in their war efforts, as well as arming, training, and supporting a variety of paramilitary units that were committing crimes in the field. Both accused were acquitted by the majority of the trial chamber, based on the very restrictive understanding of ‘specific direction’ within the mode of liability of aiding and abetting. That concept ‘establishes a culpable link between assistance provided by an accused individual and the crimes of principal perpetrators’.³⁹ Meaning, that the trial judges acquitted based on a controversial reasoning; then on appeal, different judges decided that the entire

³⁴ One example comes from Bosnia, where the unit called the Yellow Wasps was pressured to leave, and members arrested but initially only investigated for looting in 1992. Its members were tried for murder in Serbia in 1994, which was rare. See more: ICTY, *Prosecutor v Stanišić and Župljanin*, Case No. IT-08-91. Testimony of witness Biljana Simeunović. Transcript, 17 August 2010. In Kosovo, Scorpions were made to leave, and then returned a few days later. For more, see: ICTY, *Prosecutor v Đorđević*, Case No. IT-05-87/1. Testimony of witness Živko Trajković. Transcript, 28 September 2009.

³⁵ Transcript of the audio recording, trial at County Court in Belgrade, War Crimes Department, 45.

³⁶ ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v Serbia and Montenegro)*, Judgment, 26 February 2007; ICJ, *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Croatia v Serbia)*, Judgment, 3 February 2015.

³⁷ ICTY, *Prosecutor v Milošević* (n 31).

³⁸ ICTY, *Prosecutor v Stanišić and Simatović* (n 11).

³⁹ ICTY, *Prosecutor v Perišić* (n 32) 2.

case must be retried, because legal and factual errors occurred that cannot be rectified easily.⁴⁰

The prosecutors were more successful in trials of high Serbian officials regarding the crimes in Kosovo. Vlastimir Đorđević, the Serbian assistant minister for internal affairs in the relevant time period, was sentenced to eighteen years imprisonment for, among other things, his use of and lack of punishment of paramilitary violence.⁴¹ The judges ruled that Đorđević was involved in engaging the Scorpions in the province and that after he discovered the crimes they committed, he failed to punish them, and then re-deployed them a few days later. The prosecutors were convincing because there was clearer evidence of authority and control, stemming from the fact that Kosovo, at that time, was part of Serbia, and it was easier to follow who controlled the regular units, and the paramilitaries they co-operated with, in the field.⁴²

One unsuccessful prosecution is the very controversial ICTY *Prosecutor v Vojislav Šešelj* case, one of the longest-running trials in The Hague. Šešelj was not part of the Serbian government in the relevant period but was key for paramilitary involvement and some volunteers in the field stated that they were inspired by Šešelj.⁴³ The Chetniks were involved in gruesome crimes from the start of the war onwards, such as killings after the fall of Vukovar in 1991.⁴⁴ In yet another controversial judgment, in 2016,⁴⁵ the ICTY acquitted Šešelj by majority.⁴⁶ Most recently, the appeals chamber partially overruled the verdict and Šešelj was convicted and sentenced to ten years imprisonment by the judges of the MICT. His conviction, however, was not about paramilitary violence.⁴⁷

Other ICTY examples of cases dealing with paramilitary violence are two trials of direct perpetrators belonging to the same unit, the Avengers: one is of cousins Milan and Sredoje Lukić, and the other, Mitar Vasiljević. All three were convicted, with Milan Lukić sentenced to life imprisonment—a rare punishment in international courts. The three men were members of the same unit, based in Višegrad, eastern Bosnia. They were convicted of crimes of murder and expulsion of civilians, based on acts such as setting two houses full of people on fire in 1992. Among testimonies heard during the trial was one by Zehra Turjačanin, the lone survivor of one of these incidents in the Bikavac neighbourhood.⁴⁸

⁴⁰ ICTY, *Prosecutor v Stanišić and Simatović* (n 11).

⁴¹ ICTY, *Prosecutor v Đorđević* (n 34).

⁴² A case that is about the wider campaign of attacks committed by the Yugoslav Army and the Ministry of Internal Affairs forces is ICTY *Milutinović et al.*, Case No. ICTY-IT-05-87, which is worth studying as another example of prosecuting high officials for crimes committed by troops in the field.

⁴³ ICTY, *Prosecutor v Šešelj* (n 18), Prosecution closing arguments, Transcript, 5 March 2012.

⁴⁴ *Ibid.*, Witness Vilim Karlović testifies about Chetnik units around Vukovar. Transcript, 11 March 2008. See also OTP Final brief, 56.

⁴⁵ *Ibid.*, Trial Chamber, Judgment, 31 March 2016; Milanovic (2016).

⁴⁶ *Ibid.*, Partially Dissenting Opinion of Judge Flavia Lattanzi.

⁴⁷ MICT, *Prosecutor v Šešelj*, Case No. MICT-16-99, Appeals Chamber, Judgment, 11 April 2018.

⁴⁸ ICTY, *Prosecutor v Lukic and Lukic*, Case No. IT-98-32/1, Testimony of witness Zehra Turjačanin. Transcript. 25 September 2008.

For leading the violent campaign that involved, among others, paramilitary crimes, others were convicted, too—not murders and rapists, but politicians and local officials that used the ‘services’ provided by paramilitaries and failed to investigate and punish their crimes. Among them, Martić,⁴⁹ Karadžić⁵⁰ (now on appeal), Krajišnik,⁵¹ Plavšić,⁵² Mićo Stanišić, and Župljanin.⁵³ However, these were all local actors in Croatia and Bosnia—none of them were high-level Serbian officials.

In Serbia, Bosnia, and Croatia, there were a number of trials against lower-level perpetrators, such as members of the Scorpions, or of the Avengers. In Belgrade, Scorpions members were convicted of crimes such as the killing of six captured men after the fall of Srebrenica,⁵⁴ and the killings of civilians, including children, in Podujevo, Kosovo.⁵⁵ In Sarajevo, there was the conviction of Oliver Krsmanović, another member of Milan Lukić’s unit.⁵⁶ In Croatia, another two Scorpions were convicted, Slobodan Davidović,⁵⁷ and Milorad Momić⁵⁸—both for the killings of unarmed men after the fall of Srebrenica.

What these convictions prove is that domestic courts are quite able to try lower-level perpetrators, and that these individuals can be convicted even if the defendants belong to the majority ethnic group in the country, and the trial is politically sensitive. Different pressures face courts when prosecuting defendants who fought on the ‘other side’. An interesting example is the trial of Captain Dragan, in Split, Croatia, where the trial was taking place in a society that was expecting a conviction of this well-known accused.⁵⁹

5. Some Challenges to Prosecution of Paramilitary Violence

What made prosecuting paramilitary violence more difficult than crimes committed by regular forces, the army, or the police is that paramilitaries tend to be less structured and less bureaucratic than regular forces. The units are more likely to be secretive about their operations, and there is less documentary evidence available than in military- and police-related cases. The army and the police have a set legal

⁴⁹ ICTY, *Prosecutor v Martić*, Case No. IT-95-11, Appeals Chamber, Judgment, 8 October 2000.

⁵⁰ ICTY, *Prosecutor v Karadžić* (n 7).

⁵¹ ICTY, *Prosecutor v Krajišnik*, Case No. IT-00-39, Appeals Chamber, Judgment, 17 March 2009.

⁵² ICTY, *Prosecutor v Plavšić*, Case No. IT-00-39, 40/1, Trial Chamber, Judgment, 27 February 2003.

⁵³ ICTY, *Prosecutor v Stanišić and Župljanin* (n 34), Appeals Chamber, Judgment, 30 June 2016.

⁵⁴ On the Trnovo executions, see the testimony of the man who filmed it. ICTY, *Prosecutor v Tolimir*, Case No. IT-05-88/2, Testimony of Slobodan Stojković, Transcript, 1 December 2010.

⁵⁵ On the Podujevo massacre, see ICTY, *Prosecutor v Dorđević*, Case No. IT-05-87/1, Trial Chamber, Judgment, 23 February 2011, 483.

⁵⁶ Some of these accused, like Oliver Krsmanović, had investigations conducted against them in more than one country in the region, and there was thus a need for co-operation in deciding when and where to prosecute. There were also trials in absentia conducted. On the Krsmanović case in Sarajevo, see Justice Report (2014).

⁵⁷ Trial International, Slobodan Davidovic case summary. <https://trialinternational.org/latest-post/slobodan-davidovic/> (Accessed 30 May 2017).

⁵⁸ Trial International. Milorad Momic case summary. <https://trialinternational.org/latest-post/milorad-momic/> (Accessed 30 May 2017).

⁵⁹ On the case of Dragan Vasiljković, see Milekić (2016).

framework, rules of engagement, and operations; they have extensive communication and a written trace of it: orders and reporting up and down the chain of command.⁶⁰ As difficult as documents may be to obtain (and states may be unwilling to make what exists available), police and military records tend to be more easily accessible. Paramilitaries create and keep fewer documents, and when they communicate with state security agencies about covert operations, those communications will be hidden, destroyed,⁶¹ or if tendered into evidence, made confidential so the public will not have the opportunity to know details. In court, it is generally easier to establish and prove control as a legal requirement for superior responsibility, *de jure* and *de facto*, in regular units than in paramilitaries with no obvious legal framework, and fewer explicit documents available. That is even more pronounced in cases where prosecutors indict high officials for the crimes the units committed. In a regular army, one can establish what the legal framework is, and who are the commanding officers and civilian authorities in charge. After establishing *de jure* command, understanding of the *de facto* control usually follows: who was really in charge?

There may be a lack of a formal and documented administrative link between the government and the units, and a geographical distance between the government officials and the units makes it difficult to prove the link in court. Rarely will the high-ups be close to any crime scene. The fact that there are no convictions of any higher official from Serbia for the crimes of paramilitaries and other crimes committed after the independence of Croatia and Bosnia proves that convictions of officials for paramilitary violence, especially across state lines, is difficult to achieve. Once there is an international border in place, the administrative links are more easily broken, and responsibility becomes much harder to prove in court. Then, the state is shielded as the focus in the search for accountability shifts to local authorities, the proxies, with potentially clearer links to units and physical proximity to them. What a review of the cases shows is that proving links between the regime and the units it uses in the field is challenging, and the legal requirement of control hard to establish beyond a reasonable doubt. That is precisely why these units proved to be very useful to authorities. In sum, plausible deniability seems to have worked so far, at least in the courtroom.

5.1 Types of evidence in prosecuting paramilitary violence

Various types of evidence were used to try to prove the connections between covert units and government officials. One crucial piece of evidence was the so-called 'Kula

⁶⁰ Two expert reports from ICTY and MICT trials are particularly relevant here. The first is titled 'Military aspects of the role of Jovica Stanišić and Franko Simatović in the conflict in Croatia and Bosnia-Herzegovina (BiH) (91–5)', authored by expert Reynaud Theunens, from the ICTY case *Prosecutor v Stanišić and Simatović* (n 11). The other is titled 'The State Security Service of the Republic of Serbia and Its Interaction with Ministries of Internal Affairs in Serb-Controlled Entities 1990–1995', authored by expert Christian Axboe Nielsen, from the MICT retrial *Prosecutor v Stanišić and Simatović*, Case No. MICT-15-96.

⁶¹ Testimony of accused Branislav Medić, Scorpions unit (Humanitarian Law Centre 2008).

video.’ Created in 1997 and tendered into evidence in a number of trials, including the case against Stanišić and Simatović, the video shows political, state security, and police leadership, including long-term leader Slobodan Milošević, present and supportive during a celebration organized by the JSO. In the video, Franko Simatović gives a speech describing the fifty operations in Croatia and Bosnia, and the five thousand members of the unit that were engaged in them, ‘since 1991’. Simatović claims that the State Security Administration established twenty-six training camps in territories the Serbs considered their own and confirms that camps were in areas of Croatia and Bosnia.⁶²

Another video stands out in the context of prosecuting Serb(ian) paramilitaries. It was created by members of the Scorpions unit, a long-lasting group that emerged in Croatia, participated in operations in Bosnia, and then emerged again in Kosovo. The Scorpions were deployed to Bosnia in order to cooperate with the VRS that was engaged in taking over the Srebrenica enclave. In July 1995, the Scorpions had six captured men in their custody. In a widely shared video presented in the ICTY courtroom, the prisoners are in the back of a truck, taken to a secluded area, and shot. The recording of the execution is the key piece of evidence because it puts Serbian citizens in Bosnia as members of the paramilitary unit, and because it shows the cold-blooded murder of six unarmed men. The ‘Scorpions video’ was first shown publicly in the Milošević trial in June 2005, and caused strong reactions in the Serbian public. The effects in Serbia were relatively short-term (Petrović 2014), but the video, created by the members of the unit themselves, remains relevant.⁶³ An abundance of evidence material links Arkan, for example, to local authorities, such as the video showing the member of the Bosnian Serb Presidency, and the only woman ever convicted by the ICTY, Biljana Plavšić, kissing and embracing him, thanking him for his service (Magas & Zanic 2001, 360). Radovan Karadžić gave Arkan a medal.⁶⁴

Key witnesses in many of the important leadership cases were insiders like the Serb leader in Croatia, Milan Babić, who pleaded guilty at the ICTY and later committed suicide in the Detention Unit in The Hague.⁶⁵ Protected witness B-129 was a secretary in Arkan’s headquarters in Belgrade, and spoke at length about the contacts and co-operation between Arkan’s men and the State Security.⁶⁶ Scorpions member Goran Stoparić appeared numerous times in front of the judges to speak about what he had witnessed in the field.⁶⁷ Another piece of evidence can be singled out: a

⁶² ICTY, *Prosecutor v Stanišić and Simatović* (n 11), ‘Kula video’, exhibit number P61, is discussed in court, by the defence, in their closing arguments. Transcript, 29 January 2013.

⁶³ Humanitarian Law Centre (2008). See also Vukušić (2018).

⁶⁴ ICTY, *Prosecutor v Stanišić and Simatović* (n 11), Witness Borislav Pelević discussing Arkan being decorated by Radovan Karadžić in the name of Republika Srpska authorities, in 1996. Transcript, 25 January 2012.

⁶⁵ ICTY, *Prosecutor v Babić*, Case No. IT-03-72, Trial Chamber, Sentencing Judgment, 29 June 2004.

⁶⁶ ICTY, *Prosecutor v Milošević* (n 31), Protected witness B-129, a secretary in the Serbian Voluntary Guard, testified about the ties between Arkan’s unit and the Serbian State Security. Transcript, 16 April 2003. See more in Armatta (2010).

⁶⁷ ICTY, *Prosecutor v Stanišić and Simatović* (n 11), Witness Goran Stoparić, former member of the Scorpions, testifying about the links with the Serbian State Security. Transcript, 14 December 2010.

testimony and documents confirming that payments to Red Berets members were made in envelopes with a Ministry of Internal Affairs letterhead and salary slip.⁶⁸

6. Conclusion

The review of key cases concerning paramilitary violence in the former Yugoslavia shows that courts and tribunals most often convict direct perpetrators but not high officials who establish units, fund them, support them, train them, and direct their actions. During the war, several paramilitaries were used as an efficient tool of ethnic cleansing deployed by Milošević's regime, successfully providing plausible deniability to leaders, and keeping them out of prison in the aftermath of the war. The Serbian political project benefited from their use, and those punished for the crimes are largely those that killed and maimed, and not those that put the units in place, benefited from them, and later failed to investigate and punish their actions. Once an international border existed between Belgrade and the units, an administrative separation and proxies such as authorities of local Serbs led by Milan Martić and Radovan Karadžić were established, convictions of Serbian state officials became unlikely, also given the geographical distance between them and the crimes committed by paramilitaries. In court, plausible deniability for the use of covert paramilitaries works: it protects individuals from conviction. By extension, it also protects the state.

Insider testimony, videos, and documents can illuminate connections between the regime and the units, providing insight into how paramilitaries work, and who controls them. They answer questions about unit deployment, the equipment units received, the training, and payment for their 'services'—all relevant information in a criminal trial. Those insights are invaluable for prosecution efforts. Given the covert nature of these operations, and their illegitimate goals like expulsions of civilian populations, it is unlikely there will be many explicit orders with instructions to kill, rape, or murder that contain signatures on official government stationary. By now, officials are smarter than that and in situations that involve such orders, they use euphemisms, coded words, and indirect expressions.

Insiders were the key in linking the units to the state and Milošević's regime, and understanding the role of state officials. This brings forth security and potential threats to witnesses.⁶⁹ In post-conflict environments, politicians, paramilitary leaders, and members often remain in positions of power, and may find testimonies potentially dangerous. Former paramilitary members may feel that speaking out tarnishes their reputation, or exposes them to prosecution. If a potential witness is surrounded by former comrades, it may be hard to persuade him to speak openly about crimes committed by those close to him. If ties to organized crime exist, the

⁶⁸ Ibid., Exhibit P524 (Witness JF-048, *Prosecutor v Milosevic*, Transcript, 9 January 2003), discussed in *Prosecutor v Stanišić and Simatović*, Trial Chamber, Judgment, part 2, para 1440.

⁶⁹ ICTY, *Prosecutor v Šešelj* (n 18). This trial was one where witness intimidation caused serious problems. OTP Closing brief, 5 February 2012, part 2, paras 201–2.

threat is even greater. Crucial insights were provided by those in or close to the circles of power: Captain Dragan testifying in the Milošević trial, Arkan's secretary, or high-level military insiders such as Aleksandar Vasiljević and Manojlo Milovanović, and those who were themselves members of units, such as former Scorpion, Goran Stoparić.

Justice is slow, and some potential defendants were killed before standing trial. Arkan was shot in 2000 in a Belgrade hotel, and none of the members of his unit were ever prosecuted, even though there are photographs by Ron Haviv identifying a number of them committing crimes in Bijeljina in the early days of the war.⁷⁰ They remain free, and some have been killed in the streets of Belgrade.⁷¹

For those leaders currently engaged in wars, funding, and utilizing various proxies and paramilitary units for illegitimate violence, the message is clear: the likelihood of a prison sentence down the line is still low. For now, international and domestic judicial institutions are failing in deterring future offenders as they do not punish leaders who use covert forces to massacre, expel, and rob civilians. The current retrial of Stanišić and Simatović in The Hague might influence where the limits of plausible deniability are in relation to the use of covert units. So: all eyes on MICT, Courtroom 1.

⁷⁰ ICTY, *Prosecutor v Stanišić and Simatović* (n 11), Witness Jovan Dimitrijević testifying about the image photographer Ron Haviv took during the attack on Bijeljina, in the spring of 1992. In the image, we see member of the Serbian Volunteer Guard, Srđan Golubović, kicking wounded civilians who are lying on the ground. Transcript, 19 January 2012.

⁷¹ On the murder of Rade Rakonjac, former Arkan bodyguard, see Balkan Insight (2014).