

JUSTICE AT RISK: WAR CRIMES TRIALS IN CROATIA, BOSNIA AND HERZEGOVINA, AND SERBIA AND MONTENEGRO

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SUMMARY

The armed conflicts in the former Yugoslavia during the 1990s were characterized by widespread violations of human rights and humanitarian law. The International Criminal Tribunal for the former Yugoslavia (ICTY) will have adjudicated only a relatively small number of cases involving the most serious crimes by the time it ceases operating. All other war crimes cases¹—whether initiated domestically or referred back from the ICTY—will have to be tried by national courts in the states of the former Yugoslavia.

Human Rights Watch has carried out extensive monitoring of domestic war crimes trials in the states of the former Yugoslavia. The monitoring indicates that, as a rule, the ordinary national courts of Bosnia and Herzegovina (particularly in Republika Srpska, one of the two “entities” in Bosnia and Herzegovina), Croatia, and Serbia and Montenegro are not currently equipped to hear war crimes cases—which are often politically and emotionally charged, as well as legally complex—in a fair manner. Key obstacles include: bias on the part of judges and prosecutors, poor case preparation by prosecutors, inadequate cooperation from the police in the conduct of investigations, poor cooperation between the states on judicial matters, and ineffective witness protection mechanisms.

The experience of Croatia illustrates many of the concerns about the shortcomings of trials to date. Patterns observed by Human Rights Watch in war crimes trials in Croatia include: (i) a hugely disproportionate number of cases being brought against the ethnic Serb minority, some on far weaker charges than cases against ethnic Croats;² (ii) the use of group indictments that fail to specify an individual defendant’s role in the commission of the alleged crime;³ (iii) use of *in absentia* trials;⁴ and (iv) convictions of ethnic Serbs where the evidence did not support the charges.⁵

Problems of bias have also marred accountability efforts in Republika Srpska, where the majority of people are Serbs. (The other entity in Bosnia and Herzegovina is Federation Bosnia and Herzegovina, which is inhabited mainly by Bosnian Muslims and Bosnian

¹ For the purposes of this document, the term “war crimes” is meant to encompass cases involving genocide, crimes against humanity, and/or war crimes.

² For a comprehensive discussion of such cases, see “Broken Promises: Impediments to Refugee Return to Croatia,” *A Human Rights Watch Report*, Vol. 15, No. 6(D), September 2003, pp. 47-52 [online], <http://www.hrw.org/reports/2003/croatia0903/> (retrieved July 28, 2004). The Organization for Security and Co-operation (OSCE) in Europe’s monitoring also concludes: “At all stages of procedure from arrest to conviction, the application of a double standard against Serb defendants and in favor of Croat defendants continues as a general rule.” OSCE Mission to Croatia, *Status Report No. 13*, December 2003, p.13.

³ “Broken Promises,” pp. 49-50.

⁴ *Ibid.*, pp. 50-51. In *absentia* trials have been a pervasive problem in Croatia. According to the U.N. Commission for Human Rights, in 554 verdicts for war crimes and genocide reached by Croatian courts between 1991 and 1999, 470 individuals were tried in *absentia*. (Quoted in Ivica Dikic & Boris Raseta, “Judicial Sadism,” *Feral Tribune* (Split, Croatia), January 13, 2001 [online], http://news.serbianunity.net/bydate/2002/March_11/2.html (retrieved July 28, 2004)). In an ongoing trial of eighteen defendants before the county court in Vukovar (Croatia) concerning war crimes in the village of Lovas (the “Lovas” trial), all but one are absentee defendants. (County Prosecutor in Osijek, Indictment No. KT-265/92, December 19, 1994.)

⁵ See Human Rights Watch, “Croatia: The Case of Ivanka Savic,” July 2004 [online], <http://www.hrw.org/background/eca/croatia0704/> (retrieved July 28, 2004).

Croats). At present, there is only one active war crime prosecution involving Bosnian Serb suspects taking place in Republika Srpska,⁶ compared to numerous investigations and prosecutions against non-Serbs for crimes against Serbs.⁷

Investigative mechanisms remain problematic. While prosecutors are often forced to rely upon police units to conduct investigations, judicial practitioners and international officials have indicated to Human Rights Watch that there is evidence that police in the region are often unwilling to investigate war crimes when those implicated are other police officers or individuals holding prominent positions in the political and economic spheres.⁸

The inadequate cooperation in war crimes prosecutions between the states in the region— particularly between Serbia and Montenegro, and Bosnia and Herzegovina—has also hampered war crimes trials. Lack of cooperation impacts not only on the investigation of crimes, but also on the conduct of the trials themselves, including the attendance of witnesses living in another state, and the ability of judges to travel to another state to take testimony.

Current practices in the region regarding witness protection also leave much to be desired. In Serbia and Montenegro, treatment of witness protection under the criminal procedure law is cursory and inadequate. While Croatia's witness protection program is based on the most comprehensive legislation in the region, it is too early to assess whether the program works in practice.

Finally, key legal issues remain unresolved, including the admissibility of witness statements taken by the ICTY and the extent to which the doctrine of command responsibility is recognized in the national law of each country.

Bosnia and Herzegovina, Croatia, and Serbia and Montenegro have each taken a significant step toward effective war crimes prosecutions by creating special mechanisms for the adjudication of war crimes: a freestanding war crimes court in Bosnia and Herzegovina; a war crimes chamber in Serbia and Montenegro; and, specialized war crimes chambers in Croatia's county courts, with the possibility of transfer to a county

⁶ Ethnic Serbs were indicted in the Republika Srpska capital Banja Luka in 2003. The case pertains to the 1995 murder of an ethnic Croat Catholic priest in the nearby town of Prijedor. The trial began in May 2004.

⁷ In mid-2002, for example, the district prosecutor in Srpsko Sarajevo was seeking approval from the ICTY for trials against 416 Bosnian Muslims ("Bosniacs"). "Podignute optuznice protiv 416 Bosnjaka" ("Indictments Issued Against 416 Bosniacs"), *Glas Javnosti* (Belgrade, Serbia), April 9, 2002 [online], <http://arhiva.glas-javnosti.co.yu/arhiva/2002/04/09/srpski/B02040801.shtml> (retrieved June 26, 2004) (statement by Rajko Bojat, then-District Public Prosecutor in Srpsko Sarajevo). In March 2002, the district court in Banja Luka indicated that it was preparing cases against 300 Bosnian Muslims and Bosnian Croats, and 12 Bosnian Serbs. Milorad Labus, "U Banjoj Luci pod istragom tri stotine Hrvata i Bošnjaka" ("Three Hundred Croats and Bosniacs Under Investigation in Banja Luka"), *Slobodna Dalmacija* (Split, Croatia), March 22, 2002 [online], <http://arhiv.slobodnadalmacija.hr/20020322/bih03.asp> (retrieved June 26, 2004) (statement by Nenad Balaban, then-President of Banja Luka District Court).

⁸ Human Rights Watch interview with Marinko Jurcevic, Chief Prosecutor of Bosnia and Herzegovina, Sarajevo, April 14, 2004; Human Rights Watch interview with an international official involved in the creation of the legislative framework for the new war crimes prosecution structure in Bosnia and Herzegovina, April 14, 2004; Human Rights Watch interview with an international official monitoring the functioning of the new war crimes prosecution structures, Belgrade, June 25, 2004.

court in Croatia's four largest cities. While these new mechanisms are welcome, their impact on the fairness of proceedings remains to be seen. Without progress in other areas, these courts may continue to be hampered by a lack of systematic and effective witness protection mechanisms, a lack of interstate cooperation, and weak investigative mechanisms.

The European Union, other European organizations, such as the Organization for Security and Co-operation in Europe (OSCE) and the Council of Europe, and those countries that have supported the important work of the ICTY all have an interest in seeing that the legacy of the ICTY is carried on successfully. That legacy can be measured by the extent to which local courts in the former Yugoslavia have the ability to competently and fairly adjudicate war crimes cases. Proactive engagement is needed in order to resolve the problems that exist, and active monitoring will be required to ensure that, as problems are identified, they are addressed.

While Human Rights Watch recognizes that general reforms are ongoing, it is critical that the international community assist the national court systems to ensure that domestic war crimes trials in the former Yugoslavia meet basic, internationally recognized fair trial standards. These matters require urgent attention. Because the ICTY stands ready to refer cases to the courts in the former Yugoslavia, and potentially many more non-referred cases remain to be tried in these courts, the functioning of these courts cannot be ignored.⁹

This document sets out Human Rights Watch's current concerns about the conduct of war crimes trials before national courts in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro.¹⁰ It sets out detailed recommendations to the international community and to the states in the region on strategies to address those concerns.

BACKGROUND

The wars in Croatia and in Bosnia and Herzegovina that accompanied the dissolution of the former Yugoslavia were characterized by breaches of international humanitarian law, which escalated to crimes against humanity and genocide.¹¹ In response, the Security Council established the ICTY in May 1993. At the time of its creation, the United Nations Secretary-General stressed that in establishing an international tribunal for the prosecution of persons responsible for serious violations committed since 1991, it was "not the intention of the Security Council to preclude or prevent the exercise of jurisdiction by national courts with respect to such acts. Indeed national courts should

⁹ For periodic updates on the workings of the national judiciaries in the former Yugoslavia, see Human Rights Watch's Balkans Justice Bulletins [online], <http://hrw.org/doc?t=balkans> (retrieved July 28, 2004).

¹⁰ War crimes trials in Kosovo are not a subject of this document because of the specific context that largely distinguishes the accountability efforts in the province from such efforts elsewhere in the former Yugoslavia. Since June 1999, when the NATO bombing ended and Serbian and Montenegrin troops pulled out from Kosovo, the United Nations Mission in Kosovo (UNMIK) has been running the province. Under the direction of the Special Representative of the U.N. Secretary-General, UNMIK works at the operation level in four "pillars." Pillar I, responsible for police and the administration of justice, includes war crimes prosecutions, using predominantly international prosecutors and judges.

¹¹ *Prosecutor v. Radislav Krstic*, Appeals Chamber Judgment, April 19, 2004, para. 39.

be encouraged to exercise their jurisdiction in accordance with their relevant national laws and procedures.”¹²

While hostilities were ongoing, courts in the former Yugoslavia proved to be ineffective in bringing perpetrators to justice and providing remedies to their victims. In the limited number of trials that did take place during the wars, the overwhelming majority involved the prosecution and conviction of defendants who belonged to the opposing side in the conflict, often in their absence.¹³ In the post-war period, the international community undertook efforts to bring judiciaries in Bosnia and Herzegovina, and later in Kosovo, into compliance with internationally recognized standards. The democratic governments that replaced authoritarian regimes in Croatia and Serbia and Montenegro in the year 2000 have also begun to reform their judicial systems.

The Question of Political Will

In most parts of the former Yugoslavia, there is limited public support for war crimes prosecutions against members of the ethnic majority. Police assistance to war crimes prosecutors and investigative judges remains half-hearted at best, in part because police officers are often themselves implicated in the commission of war crimes. Under these conditions, effective and fair prosecutions are possible only if governments are seriously willing to commit themselves to creating the conditions necessary for war crimes accountability.

In the past several years, government support for domestic prosecutions of members of the ethnic majority—as well as a willingness to cooperate with the ICTY—has gradually increased in Federation Bosnia and Herzegovina and in Croatia. Subtle forms of obstructionism persist, however, and hinder accountability efforts. For example, the Chief State Prosecutor of Bosnia and Herzegovina has recently expressed to Human Rights Watch his concern regarding the willingness of municipal, cantonal, and state administrations to support war crimes prosecutors by making available relevant evidence to them.¹⁴

Government officials in Serbia and Montenegro and in Republika Srpska, on the other hand, have either openly opposed or only grudgingly supported the work of the ICTY. They have occasionally stated that they support domestic prosecutions, but such statements often sound like arguments against holding trials at the ICTY rather than an expression of a genuine commitment to accountability. The hollowness of their support

¹² Report of the Secretary-General Pursuant to Paragraph 2 of the Security Council Resolution 808 (1993) (S/25704), Section II, Article 8D, para. 64, p. 16.

¹³ For example, as of the end of 1993, 94 percent of the war crimes cases in Croatia had been against ethnic Serbs, 3 percent against ethnic Croats, and 3 percent against “others.” Of the thirty-eight convicted persons, only one was present during the court proceedings. See “War Crimes Trials in the Former Yugoslavia,” *A Human Rights Watch Report*, Vol. 7, No. 10, June 1995 [online], <http://www.hrw.org/reports/1995/Yugo.htm> (retrieved July 28, 2004).

¹⁴ Human Rights Watch interview with Marinko Jurcevic, Chief Prosecutor of Bosnia and Herzegovina, Sarajevo, April 14, 2004.

is evidenced by the fact that there have been few domestic trials in Serbia,¹⁵ and virtually none in Republika Srpska.

The Creation of Specialized War Crimes Chambers

Bosnia and Herzegovina, Croatia, and Serbia and Montenegro have each recently taken a significant step toward effective war crimes prosecutions by creating special mechanisms for the adjudication of war crimes. While these new mechanisms are welcome, their impact on the fairness of proceedings remains to be seen.

In Bosnia, the ICTY and the Office of the High Representative have initiated the establishment of a special war crimes chamber, as part of the State Court of Bosnia and Herzegovina, to try the most serious war crimes cases.¹⁶ At present, ordinary (cantonal and district) courts try war crimes cases, and will continue to do so after the special war crimes chamber begins its work.¹⁷ The chamber, which is to be based in the Bosnian capital Sarajevo, is expected to be operational by the beginning of 2005. Initially, the chamber will be staffed by a combination of international and local judges and prosecutors. It is envisaged that there will be a gradual reduction in the proportion of international staff over time.¹⁸ To date, the position of the special war crimes prosecutor has not yet been established.¹⁹

In Serbia, a special war crimes chamber in the Belgrade District Court was established in 2003.²⁰ The chamber, which has nine judges, is in charge of all future war crimes trials in Serbia. The legislation which created the chamber also mandated a specialized prosecutor for war crimes, a special detention unit, and a special war crimes investigation service within the Ministry of Internal Affairs.²¹ The war crimes court includes regular district court judges from Belgrade and seconded judges from other courts.²² At present, there is only one trial being conducted in the special chamber of the Belgrade

¹⁵ Since 1995, only nine war crimes trials have taken place in Serbia. See Organization for Security and Co-operation in Europe—Mission to Serbia and Montenegro, *War Crimes Before Domestic Courts*, (Belgrade, October 2003), pp. 10-14.

¹⁶ See "Security Council briefed on establishment of War Crimes Chamber within State Court of Bosnia and Herzegovina," United Nations Press Release, SC/7888, October 8, 2003 [online], <http://www.un.org/News/Press/docs/2003/sc7888.doc.htm> (retrieved July 28, 2004).

¹⁷ Bosnia and Herzegovina is divided into two entities—Republika Srpska, and Federation Bosnia and Herzegovina—and the Brcko District. Republika Srpska is further divided into municipalities. Municipalities in Republika Srpska have municipal courts with jurisdiction to adjudicate comparatively minor crimes; higher, district courts have jurisdiction over cases involving more serious crimes. Federation Bosnia and Herzegovina, in contrast, is divided into nine cantons, each of which contains a certain number of municipalities. Municipal and cantonal courts exist within a canton, with a similar division of competence as the municipal and district courts in Republika Srpska.

¹⁸ Amnesty International, "Concerns in Europe and Central Asia: January to June 2003," AI Index: EUR 01/016/2003, October 1, 2003 [online], <http://web.amnesty.org/library/Index/ENGEUR010162003?open&of=ENG-BIH> (retrieved July 28, 2004).

¹⁹ Human Rights Watch telephone interview with an international official involved in the creation of the legislative framework for the new war crimes prosecution structure in Bosnia and Herzegovina, September 28, 2004.

²⁰ Serbia—which is one of the two members of the State Union of Serbia and Montenegro—is divided into districts, and the districts into municipalities. Municipalities and districts have respective courts, whose first-instance jurisdiction is analogous to that of the judiciary in Bosnia and Herzegovina as well as Croatia.

²¹ Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Sluzbeni glasnik Republike Srbije* (official gazette of the Republic of Serbia), No. 67/2003, July 1, 2003, Art. 11 and Art. 12.

²² *Ibid.*, Art. 10.

District Court. The trial involves eighteen defendants charged with participating in the execution of two hundred Croat prisoners of war and civilians at the Ovcarica farm near Vukovar in 1991 (hereafter, the Ovcarica trial).²³ As of September 2004, the Ovcarica trial is still in an early stage, making any evaluation of either the trial or the chamber premature.

In Croatia, all county courts have jurisdiction over war crimes cases, but legislation adopted in October 2000 permits the transfer of war crimes cases from the county courts with territorial jurisdiction to county courts in Croatia's four biggest cities—Zagreb, Osijek, Rijeka, and Split.²⁴ In order to justify a transfer under the law, the State Prosecutor has to demonstrate that the “circumstances under which the crime was committed, and the exigencies of [conducting] the proceedings” justify its transfer.²⁵ The president of Croatia's Supreme Court must also consent to the transfer. The legislation also provides for the establishment of specialized chambers for war crimes in every county court in Croatia, composed of three judges with experience in particularly complex cases.²⁶ There is no international involvement in the Croatian special chambers. As of September 2004, no cases have been referred to the four designated courts.

Referrals by the ICTY

In June 2002, the ICTY announced an intention to refer all cases not involving the main political and military figures from the Yugoslav wars to the national courts in the region. The referrals policy is motivated by the ICTY's objective, mandated by the U.N. Security Council, to complete all investigations by the end of 2004 and all first-instance trials by the end of 2008.²⁷ All appeals must be concluded by the end of 2010.

The procedure for the referral of a case by the ICTY to a national court once an indictment has been confirmed by the ICTY is contained in ICTY Rule 11 *bis*.²⁸ The trial chamber must consider the gravity of the crimes charged and the level of responsibility of the accused before approving a referral.²⁹ Referrals are permitted regardless of whether the accused is already in ICTY custody. Referrals may be made to the state on whose territory the crimes are alleged to have occurred, the state where the

²³ “Serbian prosecutor files charges against about Ovcarica war crimes suspect,” *BBC Monitoring European*, May 27, 2004.

²⁴ Croatia is divided into counties and the counties are divided into municipalities. All counties and the larger municipalities have their respective courts.

²⁵ Law on the Application of the Statute of the International Criminal Court and on the Prosecution of Criminal Acts against International Law on War and Humanitarian Law, *Narodne novine* (official gazette of the Republic of Croatia), No. 175/2003, November 4, 2003, Art. 12.

²⁶ *Ibid.*, Art. 13 (2). Panels in other criminal cases consist of two professional judges and three lay judges.

²⁷ See United Nations Security Council Resolutions 1503 and 1534. S/RES/1503 (2003), adopted by the Security Council on its 4817th meeting on August 28, 2003, and S/RES/1534 (2004), adopted by the Security Council on its 4935th meeting on March 26, 2004. See also “Security Council endorses proposed strategy for transfer to national courts of certain cases involving humanitarian crimes in Former Yugoslavia,” U.N. Security Council Press Release, July 24, 2002 [online], <http://www.unis.unvienna.org/unis/pressrels/2002/sc7461.html> (retrieved July 28, 2004).

²⁸ Rule 11 *bis* was amended on June 17, 2004. As amended, the rule requires in paragraph (B) that the court is “satisfied that the accused will receive a fair trial and that the death penalty will not be imposed or carried out,” and “where applicable,” gives the accused “the opportunity to be heard.” <http://www.un.org/icty/legaldoc/> (retrieved July 30, 2004).

²⁹ Rule 11 *bis*, para. (C), as amended.

accused was arrested, or the state “having jurisdiction and being willing and adequately prepared to accept such a case.”³⁰

In September 2004, the ICTY’s Office of the Prosecutor filed a request for the referral of the case *Prosecutor v. Rabim Ademi and Mirko Norac* to the authorities in Croatia for trial at the county court in Zagreb, which is one of the four courts in Croatia to which war crimes cases can be transferred from the county courts with territorial jurisdiction.³¹ Both accused were indicted by the ICTY for war crimes against Croatian Serbs in 1993. Prior to the referral, the ICTY will be required to determine whether the conditions for referral are satisfied.³² The Office of the Prosecutor also made a motion to refer the cases against Zeljko Mejakic, Momcilo Gruban, Dusko Knezevic, and Dusan Fustar, regarding the Omarska and Keraterm camps, to the war crimes chamber in Bosnia and Herzegovina.³³ The president of the ICTY requested additional information from the Office of the Prosecutor on the ability of Bosnia and Herzegovina to provide fair trials before a competent court.³⁴ A further fifty individuals who have been investigated but not yet indicted by the ICTY are likely to have their files turned over to the chamber in Bosnia, together with an unspecified number of most sensitive “Rules of the Road” cases.³⁵

To date, there have been no indications that any cases will be transferred from the ICTY to the Serbian judiciary. Such transfers appear unlikely as long as Serbia and Montenegro remains unwilling to cooperate with the tribunal either in the arrest and transfer of ICTY indictees or otherwise.³⁶ Serbia’s cooperation is required under the ICTY Statute and relevant U.N. Security Council resolutions. ICTY President Theodor Meron recently observed: “Belgrade has shown such a lack of cooperation that we cannot send accused Serbian war criminals back.”³⁷

³⁰ Rule 11 *bis*, para. (A), as amended.

³¹ See ICTY, “President Appoints a Trial Chamber to Consider an Application by the Prosecutor to Refer the ‘Ademi & Norac’ Case to Croatia,” Press Release (CC/ P.I.S./891-e), September 8, 2004.

³² See ICTY, Rule 11 *bis*.

³³ See ICTY, Weekly Press Briefing, September 23, 2004 [online], www.un.org/icty/briefing/2004/PB040923.htm (retrieved September 28, 2004) (statement by Jim Landale, Spokesman for the ICTY Registry and Chambers).

³⁴ *Ibid.*

³⁵ Human Rights Watch interview with an ICTY official, Sarajevo, April 14, 2004. Under the “Rules of the Road” agreement, concluded in 1996 in Rome by the signatories of the 1995 Dayton Peace Agreement, the authorities in Bosnia and Herzegovina cannot proceed with a war crimes prosecution unless the indictment has first “been reviewed and deemed consistent with international legal standards” by the ICTY prosecutor.

³⁶ In a recent address to the Council of Ministers of the Council of Europe, ICTY President Theodor Meron expressed regret about Serbia and Montenegro’s consistent failure to comply with its obligations to cooperate with the ICTY. The president insisted that Serbia and Montenegro’s cooperation with the ICTY had been in decline since the parliamentary elections of December 2003 and had become “nearly non-existent.” This failure to cooperate includes obstruction on the arrest and transfer of fugitives, on the production of documents, and on the tribunal’s access to witnesses. Speech by Theodor Meron, president of the International Criminal Tribunal for the former Yugoslavia, May 7, 2004 [online], http://www.coe.int/T/E/Com/press/News/2004/20040507_disc_meron.asp#TopOfPage (retrieved July 28, 2004).

³⁷ H. Dale, “Balkan ghosts; Wheels of justice spinning,” *The Washington Times*, June 16, 2004.

CONCERNS PERTAINING TO THE JUDICIARY

Ethnic Bias

Human Rights Watch is greatly concerned about the ability of some courts in the former Yugoslavia to adjudicate war crimes cases without ethnic bias. Based on its trial monitoring, Human Rights Watch has concluded that bias by the judiciary has influenced trials in Croatia following the 1991-95 war. Ethnic bias on the part of judges does not figure significantly in the war crimes trials currently being conducted in courts in Federation Bosnia and Herzegovina, where multiethnic panels try most war crimes cases, or in Serbia and Montenegro, where in the past three years only Serb defendants have been prosecuted by Serb judges and prosecutors. The defendants in the only war crimes trial taking place in Republika Srpska (the Matanovic case) are of Serb ethnicity.

War crimes trial monitoring in Croatia by the OSCE during 2002-03 demonstrates a significantly different rate of conviction and acquittal depending upon the ethnicity of the defendants. While 83 percent of Serbs were found guilty in 2002, only 18 percent of Croats were convicted during that period. Conversely, 17 percent of Serb defendants were acquitted or the prosecution was dropped, while 82 percent of Croats were found not guilty or the charges were dropped. In cases monitored by the OSCE during the first eleven months of 2003, nearly 85 percent of Serbs were convicted, whereas 57 percent of Croats were convicted. During the same period, 15 percent of Serbs were either acquitted, had the charges against them dropped, or were amnestied, while 43 percent of Croats were acquitted or had charges dropped.³⁸

The case of Ivanka Savic provides a recent example of the bias exhibited by Croatian county courts in war crimes cases (hereafter “the Savic case”). Savic, a seventy-eight year old Croatian Serb woman, was sentenced by the Vukovar County Court on January 21, 2004, to four and one-half years imprisonment for war crimes. The Vukovar court is not one of the four Croatian county courts specially designated to hear war crimes trials.

The court in Vukovar accepted allegations against Savic that lacked corroboration in testimony heard at the trial and the court misinterpreted witness testimony. The court found Ivanka Savic guilty on three grounds. First, in the opinion of the court, Savic “denounced” (identified at the request of Serb forces) non-Serbs who participated in the defense of the town; allegedly as a result of this denunciation, three Croats were transferred from Vukovar to a detention camp in Serbia where they were inhumanely treated. Second, Savic intimidated and ill-treated Marija Blazinic, an ethnic Croat woman from Vukovar, by forcing Blazinic to serve and cook for her. Finally, Savic allegedly stole valuables from the house of Marija Blazinic and from another house in the neighborhood.

³⁸ OSCE Mission to Croatia, *Status Report No. 13*, December 2003, endnote 33, pp. 21-2 (covering statistics for both 2002 and 2003).

The court's factual findings ignored exculpatory testimony by the very persons Savic had supposedly "denounced,"³⁹ and grossly distorted the meaning of the testimony of one witness in order to use it as a key piece of evidence for the charge of ill-treatment.⁴⁰ The court also failed to examine a range of legal issues that clearly should have been resolved before any conclusion about war crimes could be made. Specifically, the court failed to establish a causal link between the "denunciations" and the inhuman treatment of the persons Savic allegedly denounced; failed to establish a criminal intent behind the "denunciations," and; failed to show that Savic's alleged treatment of Marija Blazinic amounted to a war crime.⁴¹

A recent war crimes case from another county court in Croatia provides an even sharper illustration of ethnic bias against a Serb defendant. Svetozar Karan, a Serb returnee to Korenica, was convicted by the county court in Gospić in July 2003 and sentenced to thirteen years imprisonment because of his alleged participation in the torture of Croat prisoners of war. The highly politicized judgment by the Gospić County Court faulted Karan "and his ancestors" for having been a "burden to Croatia over the past 80 years;" the judgment also lamented the five centuries in which "the accused and his ancestors ... together with Turks were coming and destroying Croats."⁴² On February 5, 2004, the Supreme Court of Croatia overruled the sentence and ordered a retrial.⁴³ The judgment was also condemned in the Croatian media. There has been no indication, however, that the judge will be reprimanded or disciplined for his overt expressions of racial hatred and abuse of judicial authority.

While the problems of judicial bias observed by Human Rights Watch have taken place in the ordinary criminal chambers of county courts rather than specialized war crimes chambers, problems of ethnic bias are likely to remain a concern in Croatia, even when complex cases begin to be transferred to the four largest cities in the country and other cases are heard by special war crimes chambers in each county court. It will be important to monitor for bias in proceedings before the specialized chambers.

³⁹ The Vukovar court accepted the testimony of a single witness incriminating the defendant for the "denunciation" of Juraj Grabusic, Ivo Pleckovic, and Mato Gombovic. Judgment of the Vukovar County Court, No. K-3/01, January 21, 2004, p. 10. However, in their testimony in the case, Gombovic explicitly denied that, during the critical event, Savic, accompanied by a Serb soldier, pointed at him or said something about him, Pleckovic said that Savic did not say anything, and Grabusic told the court that he had never even seen Savic at the location. It is also worth noting that Gombovic and Pleckovic did not know Savic prior to that night. A reasonable inference is that Savic did not know Gombovic and Pleckovic either, and for that reason alone she could not have identified them.

⁴⁰ To strengthen its conclusion about Savic's ill-treatment of a Croatian woman, Marija Blazinic, the Vukovar court invoked testimony by the neighbor with whom Blazinic and Savic stayed after the fall of Vukovar in November 1991. The judgment repeatedly mischaracterizes the neighbor's testimony to have been that "[the neighbor's] husband threw out Ivanka Savic from the house, because [Savic] mistreated and harassed Marija Blazinic." Judgment of the Vukovar County Court, pp. 9, 13, 14, and 16. However, nowhere in her statement did the witness actually suggest that Ivanka Savic "mistreated or harassed" Marija Blazinic. The witness only said that "the two of them, Marija Blazinic and Ivanka Savic, could not be there together." Testimony by Milica Arsenic, transcript of the December 29, 2003, hearing before the county court in Vukovar, p. 2.

⁴¹ For a full discussion of the case, see "Croatia: The Case of Ivanka Savic," Human Rights Watch, July 2004 [online], <http://www.hrw.org/backgrounder/eca/croatia0704/> (retrieved July 19, 2004).

⁴² Judgment by the Gospić County Court, No. K-4/03-185, July 30, 2003, p. 23.

⁴³ "Croatian Supreme Court orders retrial of Serb war crimes suspect," *Deutsche Presse-Agentur*, February 5, 2004. A new trial began on June 2 before another county court (in Karlovac). "Na Karlovackom zupanijskom sudu ponovno se sudi S. Karanu lani osudjenom u Gospicu" ("Before Karlovac County Court, a New Trial of S. Karan, Convicted Last Year in Gospić"), *Hina*, June 3, 2004 [online], <http://www.index.hr/clanak.aspx?id=205714> (retrieved July 28, 2004).

Protection of Judges

War crimes cases are extremely sensitive and can generate considerable public emotion. Protective measures for judges are vital to preserve the independence of judges and ensure the integrity of the judicial process. The need for such measures was underscored during a recent trial of Sasa Cvjetan before the Belgrade District Court (hereafter, the Cvjetan trial).⁴⁴ Cvjetan was accused of the war-time killing of seventeen Kosovo Albanian women and children in a town in Kosovo called Podujevo in 1999. The presiding judge in the trial had the tires of her car slashed in Belgrade by unknown perpetrators. The same judge also found threatening messages attached to her car.

The presiding judge in Croatia's highest profile war crimes trial to date also received serious threats. Between June 2001 and March 2003, former Croatian army officer Mirko Norac and three Croatian army officers were tried at the county court in Rijeka for the murder of fifty civilians, most of them ethnic Serbs, near the central town of Gospic in 1991. In April 2002, through an anonymous telephone call to the Rijeka police, the presiding judge's life was threatened.⁴⁵ Similarly, according to the OSCE, "judicial and prosecution personnel" involved in the trial of Fikret Abdic received threats from unknown persons after Abdic was convicted and sentenced in July 2002 to 20 years imprisonment for war crimes committed in the area of the "Bihac Pocket" in north-western Bosnia and Herzegovina.⁴⁶

In Croatia and in Republika Srpska, threatening a judge or prosecutor is a specific criminal offense.⁴⁷ Penal codes in Federation Bosnia and Herzegovina and in Serbia prohibit "prevention of an official from performing official acts," by using force or threat of the use of force.⁴⁸ Judges and prosecutors, as state officials, are covered by the provision. However, there have been no prosecutions against those who have used threats to intimidate judges and prosecutors. It is unclear whether this is a result of difficulties in identifying the perpetrators, lack of diligence, or some other reason.

CONCERNS PERTAINING TO THE PROSECUTION

An independent and competent prosecution is a vital component of impartial, fair, and effective war crimes trials. Prosecutors—as well as investigative judges in those states that still utilize them—must have the will and be given the means to prosecute war

⁴⁴ The case was tried by an "ordinary" chamber prior to the establishment of the special war crimes chamber within the Belgrade District Court. The trial in Belgrade began in March 2003 and concluded in March 2004. Cvjetan was convicted to 20 years imprisonment.

⁴⁵ Fiore Veznaver & Ico Mikulicic, "Prijetnja sutkinji stigla s Vojaka" ("Threat to Judge Arrived From Vojak"), *Novi List* (Rijeka, Croatia), April 5, 2002 [online], <http://www.novolist.hr/Default.asp?WCI=Rubrike&WCU=285D2863285C2863285A28582858285A2863288B2893286328632861285D285B285E28632863286328582863J> (retrieved July 28, 2004) (statement by Veljko Miskulin, president of the county court in Rijeka).

⁴⁶ Organization for Security and Co-operation in Europe—Mission to Croatia, *Status Report No. 11*, November 18, 2002, p. 12.

⁴⁷ Penal Code of the Republic of Croatia, *Narodne novine* (official gazette of the Republic of Croatia), No. 110/1997, October 21, 1997, Art. 309; Penal Code of Republika Srpska, *Sluzbeni glasnik RS* (official gazette of Republika Srpska), No. 49/2003, June 25, 2003, Art. 369.

⁴⁸ Penal Code of the Federation of Bosnia and Herzegovina, *Sluzbene novine Federacije Bosne i Hercegovine* (official gazette of the Federation of Bosnia and Herzegovina), No. 36/2003, July 29, 2003, Art. 358.

crimes trials effectively and without ethnic bias. Human Rights Watch has serious concerns about the exercise of prosecutorial authority in the ordinary state courts in the former Yugoslavia. We are also particularly concerned about the issue of inadequate police cooperation with investigations—an issue relevant both to ordinary criminal courts and specialized war crimes chambers.

Ethnic Bias in Prosecutions

Human Rights Watch's foremost concern regarding ethnic bias on the part of the prosecution relates to the limited number of war crimes prosecutions against members of the dominant ethnic group. This concern pertains particularly to Croatia and to Republika Srpska. The same bias that makes judges in Croatia reluctant to convict ethnic Croats charged with war crimes against Serbs appears to impede the willingness of Croatian prosecutors to charge ethnic Croats with such crimes or to diligently pursue the cases against them once they are charged. With one exception,⁴⁹ Croatian prosecutors have failed either to indict any suspects for key incidents in which ethnic Croats were responsible for the killing of Serbs, or failed to diligently pursue the cases where indictments have been issued.⁵⁰ The failure stands in stark contrast to the hundreds of Serbs prosecuted for wartime violations.

During 2002, for comparable offenses, the OSCE determined that twenty-eight of the thirty-five persons arrested for war crimes in Croatia were Serbs. Serbs also comprised 114 of 131 of those under judicial investigation; nineteen of thirty-two persons indicted; and ninety of 115 persons on trial. According to the OSCE, this trend appeared to continue in 2003.⁵¹

While a perfect symmetry in the numbers of war crimes indictees from the two ethnic groups—Serb and Croat—might not reflect the actual number of crimes committed, the disproportion in the number of prosecutions brought against Serbs as compared to Croats (a ratio of 5:1, on average) is so large that it strongly suggests discrimination. By way of comparison, the Office of the Prosecutor for the ICTY has issued just over twice as many indictments against ethnic Serbs as against ethnic Croats (a ratio of 11:5) for crimes committed in the Croatian war.⁵²

⁴⁹ On March 24, 2003, the county court in Rijeka sentenced three Croatian army officers to fifteen, twelve, and ten years in prison for the murder of fifty civilians, most of them ethnic Serbs, near Gospić in October 1991. Damir Herceg, "Oreskovicu 15, Norcu 12, Grandicu 10 godina zatvora" ("15 Years of Imprisonment to Oreskovic, 12 To Norac, 10 To Grandic"), *Vjesnik* (Zagreb, Croatia), March 25, 2003 [online], <http://www.vjesnik.com/html/2003/03/25/Clanak.asp?r=unu&c=1> (retrieved July 28, 2004).

⁵⁰ In the Lora trial (2002), dealing with the torture and killing of Serb civilians in 1992 in the Lora military prison in Split, all eight accused were acquitted due to lack of evidence. In the Paulin Dvor trial, which took place between June 2003 and April 2004, one former Croatian army member was convicted for participating in the December 1991 killing of nineteen Serb civilians in the village of Paulin Dvor; a co-defendant was acquitted, while other perpetrators have not been brought to trial at all. Prosecution has also been ineffective or absent in the cases involving numerous killings of Croatian Serbs in Medak Pocket, Vukovar, Sisak, and Karlovac (Korana bridge), for which no individual has been convicted so far.

⁵¹ OSCE Mission to Croatia, "OSCE Mission to Croatia report finds ethnic Serbs 'disadvantaged' in war crime trials," Press Release, March 1, 2004 [online], http://www.osce.org/news/show_news.php?id=3893 (retrieved March 1, 2004).

⁵² ICTY website, n.d. [online], <http://www.un.org/icty/glance/index.htm> (retrieved March 1, 2004).

The Croatian prosecutors have indicted Serbs for relatively minor acts such as the theft of flour, plates, or tapestry from a house (charged as pillage) or the knocking out of a tooth (charged as an inhuman act) in the context of the many instances of slaughter, sexual violence, torture, and inhumane treatment that took place.⁵³ While it is conceivable that under some circumstances such facts might give rise to war crimes convictions, no ethnic Croat has been prosecuted on war crimes charges for abuses of this kind. Taken together, these prosecutorial practices amount to discriminatory enforcement of the law.

The problem of bias in bringing cases has not arisen in war crimes prosecutions in Serbia. Most non-Serb suspects who committed crimes against ethnic Serbs live outside Serbia – in Kosovo, Bosnia and Herzegovina, and Croatia. Serbian courts have yet to try a war crimes case involving non-Serb defendants.

Republika Srpska, as mentioned above, has brought only one war crimes prosecution against ethnic Serbs, while prosecutors there have conducted investigations and issued a number of indictments against non-Serbs for war crimes against Bosnian Serbs. In Federation Bosnia and Herzegovina, which is mainly inhabited by Bosnian Muslims (Bosniacs) and Bosnian Croats, there has been more ethnic diversity in prosecutions than elsewhere in the region. In 2004, for example, members of the local ethnic majority have been tried or indicted in several important cases, including the Konjic case⁵⁴ and the Ivan Bakovic case.⁵⁵ An investigation into another major case (the so-called “Dretelj” case) was nearing conclusion in the first half of the year.⁵⁶ However, hundreds of individuals whose prosecution has been approved by the ICTY pursuant to the “Rules of the Road” procedure apparently remain at liberty in those parts of Bosnia and Herzegovina in which the ethnic group to which they belong is the majority, either because the suspects have not been indicted or because the police have failed to arrest those who are indicted.⁵⁷ Lack of support for accountability on the part of police and political elites in the given area may help to explain why many suspects approved by the ICTY for prosecution remain at large.

⁵³ Human Rights Watch interview with a lawyer at the OSCE field office in Pakrac, Pakrac, June 18, 2002; Human Rights Watch, “Croatia: The Case of Ivanka Savic,” July 2004 [online], <http://www.hrw.org/background/eca/croatia0704/> (retrieved July 28, 2004).

⁵⁴ Seven Bosniacs are accused of committing war crimes against Bosnian Serb civilians in 1992 in the majority Bosniac town of Konjic. “Mostar: Odgodjeno sudjenje Bosnjacima optuženim za ratne zločine nad Srbima” (“Mostar: The Trial of Bosniacs Accused of War Crimes against Serbs Postponed”), *Hina*, April 15, 2004 [online], <http://www.index.hr/clanak.aspx?id=196827> (retrieved July 28, 2004).

⁵⁵ On April 7, 2004, the Cantonal court in the majority Croat town of Livno sentenced Ivan Bakovic to a 15-year term of imprisonment for murdering nine Bosniac civilians in a nearby village in 1993. “BiH: 15 godina zatvora za ubojstvo devet Bosnjaka” (“BH: 15 Years Imprisonment for the Killing of Nine Bosniacs”), *Hina*, April 7, 2004 [online], <http://www.index.hr/clanak.aspx?id=195630> (retrieved July 28, 2004).

⁵⁶ In the first half of 2004, the Cantonal prosecutor in Mostar completed an investigation against five former officials of the Dretelj camp near Capljina who are suspected of war crimes against Bosniacs and Bosnian Serbs. F. Vele, “Slijede optuznice protiv pet osoba odgovornih za zlocine u logoru Dretelj” (“Indictments Against Five Persons Responsible for Crimes in Dretelj Camp Follow”), *Dnevni Avaz* (Sarajevo), March 27, 2004.

⁵⁷ Human Rights Watch interview with officials at the Office of the High Representative, Sarajevo, April 14, 2004.

Poor Case Preparation

Poor case preparation by the prosecution in war crimes cases has been a persistent problem in national courts in the region.

Human Rights Watch has concluded that investigating judges in Bosnia often carried out flawed investigations into war crimes. While a new criminal procedure law eliminates the role of the investigating judge and authorizes a public prosecutor to carry out investigations,⁵⁸ Bosnia's poor track record raises fundamental questions about the ability of investigative and prosecutorial authorities in Bosnia to manage war crimes cases in its ordinary courts.

The trial of Dominik Ilijasevic before the Zenica Cantonal Court in Bosnia and Herzegovina,⁵⁹ for example, was undermined by weak preparation on the part of the Zenica Cantonal Prosecutor. In the first ten months of the trial, the prosecutor lacked any written evidence or testimony clearly pointing at Ilijasevic's position as the commander of the "Maturice" Unit of the Bosnian Croat Army (HVO). In fact, the preponderance of prosecution witnesses' statements did not support the prosecution's case.⁶⁰

In both the Ilijasevic trial and another war crime trial before the same court also monitored by Human Rights Watch—that of Bosnian Serb Tomo Mihajlovic—investigative judges inserted phrases not uttered by interviewed witnesses into the official records of earlier questioning.⁶¹ It is unclear whether the judges' actions were motivated by attempts to construct "stronger" evidence against accused persons of a different ethnicity or some other motive, or if the judges were merely incompetent. Because many of the witnesses were poorly educated, they did not intervene during the investigation to request corrections. Whatever the explanation for them, such alterations create a discrepancy between the witness' evidence and the official record of it, allowing the defense to undermine the credibility of the witness and hence the prosecution's case, even where the witness is testifying truthfully.

⁵⁸ The November 1998 Criminal Procedure Act required prosecutors to rely heavily on the work of investigative judges. (Criminal Procedure Act, *Sluzbene novine Federacije Bosne i Hercegovine*, No. 43/1998, November 20, 1998, Arts. 149-173) This was changed when the new criminal procedure law came into force on August 1, 2003. (Criminal Procedure Act, *Sluzbene novine Federacije Bosne i Hercegovine*, No. 35/2003, July 28, 2003, Art. 45)

⁵⁹ *Cantonal Prosecutor in Zenica, Indictment against Dominik Ilijasevic*, No. KT.1/2000, February 20, 2001. The charges related to the killings by Bosnian Croat forces of Bosniac civilians in central Bosnia. The case commenced on December 16, 2002. On December 10, 2003, the High Judicial and Prosecutorial Council of Bosnia and Herzegovina decided not to re-appoint the presiding judge, a decision that could significantly slow down the trial.

⁶⁰ For a more comprehensive discussion of the case, see Human Rights Watch, "Balkans Justice Bulletin: The Trial of Dominik Ilijasevic," January 2004 [online], <http://hrw.org/backgrounder/eca/balkans0104.htm> (retrieved July 28, 2004).

⁶¹ For example, Himzo Likic, testifying in the Ilijasevic trial on March 25, 2003, denied that Ilijasevic had put a gun into his mouth during an interrogation in Vares in October 1993; the statement recorded by the investigating judge contained that claim. Rusid Avdic, another witness in the Ilijasevic trial, said on April 22, 2003, that the investigation minutes distorted the content of a conversation between him and the accused from mid-1993. In the trial of Tomo Mihajlovic before the Zenica-Doboj Cantonal Court, the number of witnesses who complained about the adequacy of their recorded statements from investigation was particularly high.

There are similar concerns about the diligence of Serbian prosecutors in war crimes cases. In the so-called “Sjeverin trial” in Belgrade, which was completed prior to the establishment of a special war crimes chamber and is discussed further below, although the prosecutor produced more evidence than had been standard in previous war crimes trials in Serbia, most observers agree that the crimes that were the subject of the trial were not comprehensively investigated. Although the testimony in the trial plausibly suggested possible command responsibility of the superiors in the Bosnian Serb army and the then-Yugoslav army who failed to prevent the commission of the crime and punish its perpetrators, the prosecutor did not pursue that issue. The defendants in the case, which is now on appeal, are Serbs.⁶²

In several instances, it was nongovernmental organizations, rather than investigative judges and prosecutors, which obtained critical evidence against the accused. This was true in the Cvjetan trial (discussed above), where the Belgrade-based Humanitarian Law Center facilitated the testimony of key witnesses. While the nongovernmental organizations played a useful role here, it is troubling that the prosecution was clearly either unable or unwilling to obtain this evidence on its own initiative. Such a lack of initiative bodes ill for future cases, particularly those in which nongovernmental organizations are not actively involved.

Inadequate Police Cooperation

The cooperation and diligent work of the police is also needed if the prosecution is to build cases effectively. In practice, police cooperation is extremely problematic throughout the region.

In Serbia, for example, where many war crimes were committed by the police, the prosecutors depend on the same police to investigate and obtain relevant evidence about war crimes. Mass graves exhumed in a Belgrade suburb in 2001 provide a striking illustration of these difficulties. The graves were found to contain approximately five hundred bodies of Kosovo Albanians killed in 1999. The Office of the United Nations High Commissioner for Human Rights (UNHCHR) has closely monitored the developments regarding the mass graves. It has concluded that “the failure to make any real progress in the criminal investigations since June 2001 appears largely the result of an absence of genuine cooperation between the Police and Military authorities on the one hand and the Belgrade District Court and Prosecutor’s Office on the other.”⁶³

Only with the recent appointment of a special war crimes prosecutor in Serbia does the investigation in the case appear to have moved forward. However, Human Rights Watch is concerned that even the newly created war crimes chambers in Serbia will

⁶² For a discussion of the inadequacies in the early stage of the case, see Human Rights Watch, “Balkans Justice Bulletin: The First Phase of the Sjeverin Trial,” March 15, 2003 [online], <http://hrw.org/backgrounder/eca/serbia031503.htm> (retrieved July 28, 2004).

⁶³ United Nations High Commissioner For Human Rights—Human Rights Field Operation in Serbia and Montenegro, *Report with Recommendations on the Investigations into Mass Gravesites in Serbia*, October 2003, p. 12.

require police cooperation in order to obtain evidence, and anecdotal evidence suggests that the police are often unwilling to cooperate fully.⁶⁴

Analogous problems in Bosnia and Croatia have hampered war crimes prosecutions in ordinary courts and could threaten the success of prosecutions before the special war crimes chambers in those countries. Rural areas are especially affected. Local police in rural areas are frequently unwilling to investigate crimes against the minority population where the suspects are members of the ethnic majority and may hold positions of influence in the local area.

The investigation in the “Medak Pocket case” (named after a geographical area in the vicinity of Gospić in Croatia where at least 100 Serbs, including twenty-nine local Serb civilians, were unlawfully killed in a Croatian army operation in September 1993)⁶⁵ provides an example. In 2002, the investigative judge in the case called in police from the Croatian capital, Zagreb, because of a lack of cooperation from the Gospić police. Despite the arrival of the officers from Zagreb, the judge was unable to put together the necessary evidence. Potential witnesses were reportedly afraid to come forward. No indictments have been issued in the case to date.

In Bosnia and Herzegovina, sharp ethno-political differences still hinder cooperation between courts, prosecutors, and police in the two entities, Republika Srpska and Federation Bosnia and Herzegovina. Since mid-2003, a certain level of cooperation has been established between courts in Federation Bosnia and Herzegovina and the police of Republika Srpska. This cooperation has facilitated efforts to locate witnesses and secured the surrender of a Serb from Republika Srpska to a court in Federation Bosnia and Herzegovina (in the town of Zenica), where he was indicted for war crimes.⁶⁶ However, such practices are still the exception rather than the rule.

As part of the police reform in Bosnia and Herzegovina, an all-Bosnian intelligence service—known by the acronym SIPA (State Investigations and Protection Agency)—was established in 2002, but it is still not fully operational.⁶⁷ The SIPA investigations department will include a war crimes unit.

⁶⁴ Human Rights Watch has learned that the war crimes investigation service within the Serbian police, established after the enactment of legislation on war crimes prosecutions in 2003, has taken a rather restrictive approach in assisting the war crimes prosecutor. The investigation service provides documents to the prosecutor only in response to specific requests, rather than at the service's own initiative. Human Rights Watch interview with an international official monitoring the functioning of the new war crimes prosecution structures, Belgrade, June 2004.

⁶⁵ See the International Criminal Tribunal for the former Yugoslavia, *Prosecutor v. Janko Bobetko, Indictment*, Case No. IT-02-06, August 23, 2002 [online], <http://www.un.org/icty/indictment/english/bob-ii020826-e.htm> (retrieved September 28, 2004), paras. 27-28.

⁶⁶ The case at issue is the prosecution of Bosnian Serb Tomo Mihajlovic, who was accused of having committed war crimes against Bosnian Muslims in the town of Teslic (Republika Srpska), where he lived at the time the indictment was issued.

⁶⁷ On July 14, 2004, the agency moved into its own premises. The move concluded the process of setting up a legal and technical framework for the operation of SIPA. See “Bosnia Gets Its Own National ‘FBI,’” *RFE/RL Newswire*, July 16, 2004. However, SIPA Director Sredoje Novic explained in a newspaper interview that SIPA would not start operating “completely;” as an illustration, Novic mentioned that the department for war crimes investigations should start operating “by the end of the year.” See “OHR BiH Media Round-up, 19/7/2004,” July 19, 2004 [online], http://www.ohr.int/ohr-dept/press/bh-media-rep/round-ups/default.asp?content_id=32975 (retrieved July 28, 2004).

Insufficiently Particularized Group Indictments

Human Rights Watch is concerned about the use of group indictments that fail to specify an individual defendant's role in the commission of the alleged crime.

In Croatia's normal county courts, for example, a number of Serbs have been indicted based on their membership in a particular military or police unit, or merely by virtue of being present at the location where a war crime was committed. The OSCE mission in Croatia has noted the case of Mirko Svonja. The indictment in that case, which charged fifty-five Serbs with war crimes, only contained detailed allegations against four of the defendants. The remaining fifty-one accused were merely listed as members of a paramilitary group believed to have participated in the alleged acts.⁶⁸ Often in such cases, when the defendant is arrested and interrogated, it turns out that the prosecution lacks evidence linking him directly to the crime and drops the charges. But dropping the charges does not remedy the harm of the original, ill-founded indictment. In particular, Human Rights Watch research has confirmed that arrests of Serb returnees on such charges have had a detrimental effect on minority return.⁶⁹

Protection of Prosecutors

Information indicating a heightened safety risk for war crimes prosecutors is scarce, but it is plausible to assume that the risk does exist. Human Rights Watch has learned of two cases involving threats to prosecutors involved in war crimes cases. In April 2004, a prosecutor in the ongoing Ovchara trial in Belgrade had his private and official vehicles smashed during the first month of the trial.⁷⁰ The public prosecutor dealing with the Lora case in Croatia in 2001 reportedly also received threats.⁷¹ (See above, under *Protection of Judges*, for an examination of the legislative prohibitions against intimidation of prosecutors in Croatia, Bosnia and Herzegovina, and Serbia.)

COOPERATION BETWEEN STATES

Cooperation between the judiciaries in the different countries is crucial to fully address the problem of impunity across state borders. Interstate cooperation both supports, and is supported by, the general reform of these national justice institutions to enhance their capacity to handle cases with professionalism and integrity.

⁶⁸ Organization for Security and Co-operation in Europe–Mission to Croatia, *Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring*, June 22, 2004 [online], http://www.osce.org/documents/mc/2004/06/3165_en.pdf, p. 8.

⁶⁹ See "Broken Promises," pp. 46-48.

⁷⁰ See Marijana Milosavljevic, "Dogovor sa Karlom je moguc" ("A Deal with Carla is Possible"), *NIN* (Belgrade), June 17, 2004.

⁷¹ Amnesty International, "Croatia: Victims and witnesses in war crimes trials must be adequately protected," AI Index: EUR 64/002/2002, June 20, 2002 [online], <http://web.amnesty.org/ai.nsf/recent/EUR640022002!Open> (retrieved July 28, 2004).

Inadequate Legal Framework

The legal framework governing cooperation between the states in the former Yugoslavia has been historically inadequate. Cooperation between Serbia and Bosnia has been particularly difficult. The two states lack a bilateral agreement governing judicial assistance in criminal matters, including extradition. By contrast, Croatia and Bosnia concluded an agreement on judicial cooperation in criminal matters in 1996.⁷² There is also a bilateral agreement on mutual legal assistance in civil and criminal matters between Croatia and Serbia and Montenegro, concluded in 1998.⁷³

In the case of cooperation between Bosnia and Serbia, multilateral agreements such as the European Convention on Extradition and the European Convention on Mutual Assistance in Criminal Matters could not fill the legal void, because unlike Serbia, Bosnia and Herzegovina was not a party to either.⁷⁴ Finally, on April 30, 2004, Bosnia and Herzegovina signed the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, and the Convention on the Transfer of Proceedings in Criminal Matters.⁷⁵ This opens the way for effective cooperation between Bosnia and Serbia in criminal matters, once the Bosnian parliament ratifies the conventions.

Lack of Sufficient Engagement

There are a variety of ways in which cooperation between the states in the region on war crimes prosecutions could be improved. To date, however, most avenues for possible cooperation are untested, either because of a lack of prosecutorial diligence, a lack of political will, or the still sensitive political and diplomatic relations between the states. Despite the clear difficulties in securing the participation of witnesses living elsewhere, the states have never requested or offered to provide videoconference facilities for hearing witnesses who reside in one state for trials that take place in another state. There are no examples of joint work by investigation teams in different states. Nor have any prosecutions been transferred from one state to another.

The lack of sufficient engagement between the states is illustrated by three of the most prominent war crimes cases in Croatia in the past three years—the Lora case (2002), the Zorica Banic case (2002), and the Paulin Dvor case (2003-04). Witnesses in those cases residing in Serbia and Montenegro were afraid or otherwise unwilling to travel to Croatia to testify. Although arrangements were made for witnesses to be examined locally,

⁷² Agreement Between the Government of Bosnia and Herzegovina, the Government of the Federation Bosnia and Herzegovina, and the Government of the Republic of Croatia, on Legal Assistance in Civil and Criminal Matters, *Sluzbeni list Republike BiH* (official gazette of the Republic of Bosnia and Herzegovina)—Special Edition, International Agreements, May 27, 1996.

⁷³ Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on Legal Assistance in Criminal and Civil Matters, *Narodne Novine (Special Edition: International Agreements)*, No. 6/1998, April 10, 1998.

⁷⁴ Serbia and Montenegro became a party to both conventions in December 2002. Croatia earlier became a party to both conventions.

⁷⁵ The Parliamentary Assembly of the Council of Europe—Committee on the Honouring of Obligations and Commitments by Member States of the Council of Europe (Monitoring Committee), *Honouring of obligations and commitments by Bosnia and Herzegovina*, Report, Doc. 10200, June 4, 2003 [online], <http://assembly.coe.int/Main.asp?link=http%3A%2F%2Fassembly.coe.int%2FDocuments%2FWorkingDocs%2Fdoc04%2FFEDOC10200.htm> (retrieved July 28, 2004), footnote 63.

prosecutors from Croatia did not travel to Serbia and Montenegro to attend those hearings.⁷⁶ Nor was any effort made to facilitate the participation of the witnesses remotely by video-link.

Impact on Investigations and Trials

The impact of poor cooperation was highlighted during the trial of the Bosnian Croat Dominik Ilijasevic in Zenica, Bosnia and Herzegovina (discussed above). On May 19, 2003, the Zenica court sent a request to a county court in Split (Croatia), through the Croatian Ministry of Justice, for the examination of another Bosnian Croat, Miroslav Anic, as a witness. It was not until September 3, 2003, that a county court in Split informed the Croatian Justice Ministry that Anic did not live at the address specified in the Zenica court request. The county court also indicated that the request contained insufficient identification data to enable the court in Split to determine whether Anic lived in the area of its jurisdiction. The court in Zenica did not receive that response until September 29, 2003.⁷⁷ The Split court's argument that the request contained insufficient data for it to locate Anic is unconvincing, given that Anic had been arrested in Split two years earlier on the basis of an international arrest warrant issued by the Bosnian police. That warrant alleged Anic's involvement in the same massacre.

A more positive sign of the potential for cooperation between states in the region came in May 2004 with the visit by a war crimes prosecutor and an investigating judge from Serbia to the Zagreb County Court and the Croatian war crimes prosecutor. The Serbian officials—who participated in the Ovcara trial in Belgrade—obtained relevant information from their Croatian colleagues and were able to interview important witnesses for the case.⁷⁸

WITNESS PROTECTION

The Importance of Witness Protection

The successful prosecution of war crimes cases depends on the availability of credible witnesses, which in turn requires that witnesses are confident that they can testify truthfully without fear of retribution. Achieving accountability through national war crimes trials, therefore, requires measures to protect witnesses prior to, during, and after trials. In some cases, effective witness protection requires a long-term witness protection program or resettlement in another country.

Current practice in the region in relation to witness protection leaves much to be desired. In Serbia and Montenegro, the treatment of witness protection under the

⁷⁶ See Organization for Security and Co-operation in Europe—Mission to Croatia, *Supplementary Report: War Crime Proceedings in Croatia and Findings from Trial Monitoring*, June 22, 2004, p. 9.

⁷⁷ The chronology of the events is described in a communication by the Ministry of Justice of Bosnia and Herzegovina, read at the October 29, 2003, session of the Ilijasevic trial.

⁷⁸ See Marijana Milosavljevic, "Dogovor sa Karlom je moguc" ("A Deal with Carla is Possible"), *NIN* (Belgrade), June 17, 2004 (interview with Vladimir Vukcevic, Serbian War Crimes Prosecutor).

criminal procedure law is cursory and inadequate.⁷⁹ Serbia's witness protection program does not provide for witnesses to change identities or residences. Nor does it provide for the protection of the family members of witnesses. Moreover, the government lacks funds for such measures. Even in trials not related to war crimes, the lack of witness protection often causes witnesses to alter their testimony at trial.

Croatia's witness protection program is based on the most comprehensive legislation in the region, but it is too early to assess how the program is working in practice. In 2003, the parliament enacted a comprehensive witness protection law, which entered into force on January 1, 2004.⁸⁰ The most recent report by the OSCE Mission in Croatia concludes that a "full witness protection scheme remains to be developed."⁸¹ In Bosnia, the House of Representatives in the Bosnian parliament approved comprehensive witness protection legislation on September 23, 2004; the other chamber, the House of Peoples, had not yet endorsed the law.⁸²

Croatia's penal code—akin to the codes in Federation Bosnia and Herzegovina and Republika Srpska, and unlike the penal code in Serbia—also sets out witness intimidation and tampering as criminal offenses.⁸³ However, the provisions outlawing this kind of obstruction of justice have not been used in connection with war crimes trials in the former Yugoslavia.

Governments in the region should develop mechanisms to resettle witnesses in other countries, in cooperation with the international community, as a complement to effective in-country witness protection programs. Many crimes will be impossible to prove unless former members of the military, paramilitary, or police units that perpetrated the crimes testify against their comrades. The international community must undertake to facilitate the relocation of such witnesses, including arrangements for them to reside outside the former Yugoslavia.

Ultimately, the small size of many Balkan states sets an objective limit to the usefulness of witness protection measures. In the long run, the best defense against witness

⁷⁹ Art. 109(3) of the Criminal Procedure Act (2001) provides: "At the proposal of the investigating judge or the president of the chamber, the president of the court or the state prosecutor may request that the organs of internal affairs take necessary measures to protect the witness or the injured party." *Zakonik o krivicnom postupku, sa izmenama i dopunama* (Criminal Procedure Act, with Amendments) [2001], (Sluzbeni list, Belgrade, 2002) (unofficial translation). In December 2002, a new chapter was added to the Criminal Procedure Act dealing with the prosecution of individuals involved in organized crime and war crimes trials. In terms of witness protection, Art. 504p states that: "The state prosecutor may order that special protection be accorded to a witness, witness collaborator, and members of their immediate family." While the language is rudimentary, it does at least allow for witness protection measures.

⁸⁰ Law on Witness Protection, *Narodne novine*, No. 163/2003, October 16, 2003.

⁸¹ Organization for Security and Co-operation in Europe—Mission to Croatia, *Supplementary Report: War Crimes Proceedings in Croatia and Findings from Trial Monitoring*, June 22, 2004 [online], http://www.osce.org/documents/mc/2004/06/3165_en.pdf (retrieved July 28, 2004), p. 6.

⁸² See "BiH House of Representatives Adopts War Crimes Legislation," *South European Times*, September 24, 2004 [online], http://www.setimes.com/cocoon/setimes/xhtml/en_GB/newsbriefs/setimes/newsbriefs/2004/09/24/nb-08 (retrieved September 28, 2004).

⁸³ Penal Code [of Republic of Croatia], *Narodne novine* 110/1997, October 21, 1997, Art. 304; Penal Code of Republika Srpska, *Sluzbeni glasnik RS*, No. 49/2003, June 25, 2003, Art. 366; Penal Code of the Federation of Bosnia and Herzegovina, *Sluzbene novine Federacije Bosne i Hercegovine*, No. 36/2003, July 29, 2003, Art. 349.

intimidation is the creation of a climate conducive to war crimes prosecutions throughout the Balkans, by developing a political consensus about the importance of war crimes prosecutions, as well as independent and professional legal systems. Unfortunately, the actual climate is far from ideal. It is crucial that the governments show leadership and speak clearly in favor of accountability.

Witness Protection in Practice

Human Rights Watch's monitoring of recent war crimes trials in the Balkans indicates that the lack of adequate witness protection is hampering trials and forcing witnesses to take unnecessary risks.

The Ilijasevic Trial in Bosnia and Herzegovina

The Ilijasevic trial in Bosnia and Herzegovina makes clear that where witnesses share the same ethnicity as the accused they are often afraid or otherwise unwilling to testify in war crimes trials. The three ethnic Croats who testified for the prosecution in the trial between December 2002 and October 2003 stated that they did not know the accused. A former prison guard in the Croat-held Vares detention facility, testifying on March 25, 2003, even claimed that he did not know the name of any other guard who worked in the same shift with him in the prison.

Trial observers and journalists from the area have repeatedly suggested to Human Rights Watch that fear of retribution prevented some Bosniac (Bosnian Muslim) witnesses in the Ilijasevic trial from telling the court all they knew and, in some cases, from coming forward at all. A majority of the Bosniac witnesses in the trial are returnees to the locations mentioned in the indictment against Ilijasevic. Although it is difficult to establish whether or why witnesses were unwilling to provide complete and accurate evidence, fear of retribution is certainly a plausible explanation.

The Sjeverin and Cvjetan Trials in Serbia

Witness protection also proved problematic in the Sjeverin and Cvjetan trials, both held in the Belgrade District Court prior to the establishment of the special war crimes chamber.

During the first stage of the Sjeverin trial, the prosecutor, the police, and the court improvised to achieve some degree of witness protection, but the proceedings highlighted a general need for more thorough witness protection mechanisms.

On January 21, 2003, the second day of the trial, a number of relatives of the victims testified. On the third day of the trial, they informally expressed concern about their safety to nongovernmental trial monitors. The state prosecutor learned of their concern, and during the afternoon he arranged for the Serbian police to accompany the relatives of the victims to their final destination in Serbia and, for those traveling to Bosnia, to the border.

The anxiety expressed by these witnesses may have been heightened by the fact that pursuant to Serbian criminal procedure law, the judge read the address of each witness before examining the witness. Such disclosures unnecessarily expose witnesses to danger.⁸⁴

When a key witness for the prosecution was to testify on the fourth day of the Sjeverin trial, the state prosecutor asked in court that the session be closed for the safety of the witness. The Criminal Procedure Act does not include witness safety among the grounds for closing a session. Instead, the court had to invoke “public order” as the legal basis for closing the session.⁸⁵ The witness then testified in a session attended only by monitors from the OSCE and nongovernmental organizations. The witness ultimately received twenty-four-hour police protection before, during, and after his testimony. However, these remain ad hoc arrangements rather than measures taken pursuant to a witness protection program defined by law.

The challenges in relation to vulnerable witnesses were illustrated during the trial of Sasa Cvjetan before the Belgrade District Court. In July 2003, four Kosovo Albanian children testified in the trial. The children gave evidence about the Serbian policemen who shot their mothers, brothers, and sisters after lining them up against the wall of a small house. Since Serbia has no witness protection legislation or experience in this field, ad hoc arrangements were made to facilitate the children’s testimony. The arrangements were developed by the Humanitarian Law Center in conjunction with the War Crimes Investigation Unit of the Serbian Ministry of Internal Affairs.

Specifically, it was agreed with the children’s fathers, a child psychologist, and the judge that all security personnel would be in civilian clothes, that they would include two members of the multi-ethnic police force from Presevo and Bujanovac (a region in southern Serbia to the east of Kosovo with a large ethnic Albanian population), and that no marked police cars would be used. The judge instructed a local child psychologist to interview the children to evaluate their ability to testify. Additionally, the protection team accompanied the witnesses around the clock.⁸⁶

A new Serbian law on war crimes trials, adopted on July 1, 2003, contains several provisions on protection in the courtroom, including testimony via video conference link and the protection of personal information relating to the witness or victim. The law also provides for the creation of a special section in the Belgrade District Court responsible for carrying out activities related to the protection of witnesses and victims. However, Serbia and Montenegro still lacks comprehensive legislation to address witness protection before, during, and after trials.

⁸⁴ The need to establish this sort of personal data about a witness can be satisfied through sealed written submissions to the court or an *in camera* examination of the witness by the judges, leaving sensitive information, such as the witness’ precise address, undisclosed to the public.

⁸⁵ According to Article 292 of the Serbian Criminal Procedure Act, the court can close the sessions if necessary to protect the secrecy of certain facts, public order, morals, or interests of a minor, or the protection of the physical integrity of the indictees, the victims, or their families.

⁸⁶ Natasa Kandic, “How to Protect Witnesses Who Are Seen by Public and Police as Traitors?,” Humanitarian Law Centre, February 6, 2004 [online], http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/Serbia/index.php?file=727.html (retrieved July 28, 2004).

The Norac, Lora, and Paulin Dvor Trials in Croatia

All major war crimes trials in Croatia against ethnic Croat indictees—the Norac trial before the county court in Rijeka (June 2001 – March 2003), the Lora trial before the county court in Split (June – November 2002), and the Paulin Dvor trial before the county court in Osijek (June 2003 – April 2004)—suffered from inadequate witness protection.

The Norac trial, named after one of four co-accused in the case, dealt with the murder of fifty civilians near Gospić in 1991, most of them ethnic Serbs. The president of the court stated during the trial that witnesses in the trial were receiving anonymous threats. He remarked that it was “very difficult to undertake any measures of adequate protection of witnesses from possible threats.”⁸⁷

The Lora trial dealt with the torture and killing of Serb civilians in 1992 in the Lora military prison in Split. Out of fear, a number of key witnesses—Lora survivors who now live in Serbia or in Bosnia—did not appear in court. Several witnesses stated at the trial that they had been threatened and, therefore, could not testify freely.⁸⁸ All eight accused were acquitted due to lack of evidence.

In the Paulin Dvor trial, which began in June 2003, two former Croatian army members were charged with the December 1991 killing of nineteen Serb civilians in the village of Paulin Dvor. During the investigation, two witnesses gave detailed accounts of the crimes and the perpetrators; another witness contacted the public prosecutor one month after the beginning of the trial with important information corroborating the charges. All three, however, drastically changed their statements when they appeared in the courtroom, failing to provide any information about the identity of the perpetrators. The most plausible explanation for the change in testimony is that the witnesses feared for their safety, which the inadequate witness protection mechanisms used by the Croatian police and courts could not help eliminate.

LEGAL REFORMS

Admissibility of ICTY Evidence

The use of evidence held by the ICTY Office of the Prosecutor can contribute to the effectiveness of war crimes trials in national courts in the region. By admitting

⁸⁷ Fiore Veznaver & Ico Mikulicic, “Prijetnja sutkinji stigla s Vojaka” (“Threat to Judge Arrived From Vojak”), *Novi List* (Rijeka), April 5, 2002 [online], <http://www.novolist.hr/Default.asp?WCI=Rubrike&WCU=285D2863285C2863285A28582858285A2863288B2893286328632861285D285B285E28632863286328582863J> (retrieved July 28, 2004) (statement by Veljko Miskulin, president of the county court in Rijeka).

⁸⁸ See Damir Tolj, “Znam svasta, ali ne smijem govoriti!” (“I Know A Lot, But I Cannot Speak Up!”), *Slobodna Dalmacija* (Split), October 24, 2002 [online], <http://arhiv.slobodnadalmacija.hr/20021024/novosti07.asp>; Damir Tolj, “Novi val amnezije” (“New Wave of Amnesia”), *Slobodna Dalmacija*, October 18, 2002 [online], <http://arhiv.slobodnadalmacija.hr/20021018/novosti08.asp>; Damir Tolj, “Pravi krivci slobodno setaju ulicama Splita, Sibenika i Zagreba” (“Real Culprits Walk Freely In the Streets of Split, Sibenik, and Zagreb”), *Slobodna Dalmacija*, October 17, 2002 [online], <http://arhiv.slobodnadalmacija.hr/20021017/novosti04.asp>; and, Irena Dragicevic, “Sulejmanovic: Nakon sto je moj sin dao iskaz, poceli su prijeteći telefonski pozivi” (“Sulejmanovic: After My Son Testified, Threatening Phone Calls Began”), *Vjesnik* (Zagreb), October 19, 2002 [online], <http://www.vjesnik.com/html/2002/10/19/Clanak.asp?r=unu&c=13> (retrieved July 28, 2004).

statements given to the ICTY during proceedings, national courts could avoid direct examination of witnesses who have already testified in judicial proceedings about the same events. This would save resources and time in that the witness would not have to present anew his or her direct examination; should the defense choose not to cross-examine the witness, the witness might not need to appear at all. The use of ICTY evidence would also allow judges and prosecutors in national courts to benefit from the investigative expertise and resources of the ICTY.

With the exception of Croatia, it is unclear at present whether witness statements made in ICTY proceedings and investigations are admissible in proceedings before national courts in the region. Lawmakers and courts in Serbia have yet to decide on admissibility. In Bosnia, the court in the Ilijasevic trial refused to admit into evidence videotaped interviews which the ICTY conducted with an eyewitness to the Stupni Do massacre.⁸⁹ The court held the testimony inadmissible in part because “the evidence was not obtained pursuant to the provisions of the law on criminal procedure in Federation Bosnia and Herzegovina.” Sarajevo Cantonal Court judges with considerable experience in war crimes trials, interviewed by Human Rights Watch in April 2004, held opposing views on the admissibility of evidence under the then-existing legislation.⁹⁰ In July 2004, the government of Bosnia and Herzegovina adopted a draft law to permit the use of testimony taken before the ICTY in Bosnian court proceedings. The trial judge has discretion to permit applications by the defense to cross-examine witnesses.⁹¹ Where the judge declines a request, the subsequent judgment cannot be founded solely or primarily on the statement obtained from the ICTY.⁹² At the time of this writing, the legislation has been adopted by one of two chambers in the Bosnian parliament, and the other chamber was expected to consider it in the near future.

Croatia has taken a step toward the use of evidence collected by the ICTY in domestic proceedings with the enactment of legislation in October 2003. The law states that such evidence can be used “provided that [it] was presented in a manner provided for by the [ICTY] Statute and the Rules of Procedure and Evidence, and that it can be used before that court.” The law allows the domestic court significant leeway in assessing the reliability of such evidence.⁹³ The law has yet to be used in any case.

The Doctrine of Command Responsibility

There is a lingering question as to whether the doctrine of command responsibility will be applied in national war crimes trials in the former Yugoslavia. The inability of national courts to prosecute cases arising from command responsibility would effectively

⁸⁹ See discussion of the Ilijasevic Trial above.

⁹⁰ One judge from the Sarajevo Cantonal Court believed that, except under a narrow set of circumstances, accepting a statement from other trials could be prejudicial to the interests of the accused in the trial in progress, even if the witness in the other trial has been cross-examined. Another judge, in contrast, argued that evidence received from another court should be admissible unless it was gathered in variance with Bosnian legislation. Human Rights Watch interview, April 14, 2004.

⁹¹ Draft Law On the Transfer of Cases From the ICTY To the Prosecutor's Office Of BiH And the Admissibility of Evidence Collected By ICTY In Proceedings Before the Courts in BiH, Art. 5, para. 3.

⁹² *Ibid.*, Art. 3, para. 2.

⁹³ Law on Implementation of the Statue of the International Criminal Court and Criminal Prosecution for Acts against International Humanitarian Law, *Narodne novine* [Official Gazette], November 4, 2003, Articles 28(4) and 49(2).

limit those courts to cases where the defendant was accused of directly carrying out or ordering the prohibited acts. Such a limitation could effectively eviscerate the cases against many commanders and other high-level suspects who failed in their duty to prevent and punish the commission of war crimes, and create a window for widespread impunity.

Serbian criminal laws do not provide specifically for command responsibility. While the Constitution of Serbia and Montenegro provides that ratified international agreements and treaties (in this case Additional Protocol I to the 1949 Geneva Conventions) are directly applicable,⁹⁴ it also provides that criminal proceedings may only be initiated for crimes regulated by law and that crimes may only be punished in accordance with the law.⁹⁵ There is a near-consensus among Serbian lawyers and politicians that, while command responsibility could be enacted into domestic criminal law in the future, it could not apply to past crimes due to the constitutional prohibition against retroactivity.

Legal experts in Serbia have argued, however, that persons who bear command responsibility might be prosecuted for failing to report crimes,⁹⁶ incitement (by omission) to commit a crime,⁹⁷ or aiding and abetting by omission.⁹⁸ However, in all these cases, for conduct to be punishable the person must have acted with guilty intent, while command responsibility in international law also includes situations in which the superior acted with recklessness (he “had reason to know” that the subordinate was about to commit such acts or had done so.)⁹⁹ Serbian legislation does not cover the form of command responsibility where there is no intent to allow the commission of war crimes.

An identical limitation exists in the laws that were in force in Bosnia and Herzegovina, as well as in Croatia, during the armed conflict. Current plans by Serbia and Croatia to prepare amendments to their criminal codes to allow for command responsibility would have no impact on crimes committed before the measures become law.

It is nonetheless arguable that courts in the former Yugoslavia, including special war crimes chambers, are able to apply the command responsibility doctrine in war crimes cases emerging from the conflict in the former Yugoslavia, without violating the principle that only the law can define a crime and prescribe a penalty (*nullum crimen, nulla poena sine lege*).

War crimes chambers should apply the international law valid on the territory of the former Yugoslavia at the time when the war crimes took place. According to the

⁹⁴ See Constitution of Serbia and Montenegro, Art. 10.

⁹⁵ Constitution of the Republic of Serbia, Art. 121, para. 3.

⁹⁶ Criminal Code of the Republic of Serbia, consolidated version (Belgrade, 2002), Art. 203.

⁹⁷ Criminal Code [of Serbia and Montenegro], consolidated version (Belgrade, 2001), Art. 23 and Art. 30.

⁹⁸ *Ibid.*, Art. 24 and Art. 30.

⁹⁹ Under the ICTY Statute, “The fact that any of the acts [punishable under the Statute] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.” Statute of the International Criminal Tribunal for the former Yugoslavia, Art. 7(3).

constitutions that were in force in Croatia and the Federal Republic of Yugoslavia (now Serbia and Montenegro) at the time of the armed conflicts, ratified international treaties formed an integral part of domestic legislation.

One such treaty was Protocol I Additional to the Geneva Conventions, which had been ratified in the pre-war Yugoslav federation and was accepted by the successor states as binding upon them. The Protocol, which provides for command responsibility,¹⁰⁰ was therefore part of the applicable law in Croatia, as well as in Serbia and Montenegro. In addition, the constitution of the then-Federal Republic of Yugoslavia provided for the applicability of “generally accepted rules of international law.”¹⁰¹

Command responsibility had already become a generally accepted rule of international law (customary international law) at the outbreak of violence in the former Yugoslavia. In the case *Prosecutor v. Hadzihasanovic et al.*, the ICTY Appeals Chamber held that, at the time the alleged crimes in the former Yugoslavia were committed, customary international law included the concept of command responsibility in relation to war crimes committed in the course of both international and internal armed conflict.¹⁰²

Protocol I, however, does not prescribe the penalties for grave breaches of its provisions, and the customary international law does not prescribe the penalties either. Even if a consensus existed that the protocol and the customary rule of command responsibility were part of domestic law, an argument could be made that the law did not prescribe a penalty for command responsibility.

In the ultimate analysis, however, it would appear that domestic trials for command responsibility would not violate the principle of legality. The object and purpose of that principle is “to ensure that no one should be subjected to arbitrary prosecution, conviction or punishment.”¹⁰³ The prosecution and punishment for command responsibility would not be “arbitrary.” For example, even the Yugoslav Army manual from 1988 contained provisions on command responsibility similar to those from Protocol I.¹⁰⁴

Under key international human rights instruments—in particular, the International Covenant on Civil and Political Rights and the European Convention on Human Rights—it is consistent with the principle of legality to have “the trial and punishment ... for any act or omission which, at the time when it was committed, was criminal

¹⁰⁰ Protocol I Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts, Art. 87(3).

¹⁰¹ Constitution of the Federal Republic of Yugoslavia, adopted on April 27, 1992, Art. 16(2).

¹⁰² *Prosecutor v. Enver Hadzihasanovic, Mehmed Alagic, and Amir Kubura, Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility*, July 16, 2003 [online] <http://www.un.org/icty/hadzihas/appeal/decision-e/030716.htm> (retrieved July 28, 2004).

¹⁰³ See European Court of Human Rights, *CR v UK*, 21 EHRR 363 (1995) (judgment), [online] <http://www.menneskeret.dk/menneskeretieuropa/konventionen/baggrund/domme/ref00000540/> (retrieved July 28, 2004), para. 42.

¹⁰⁴ “Propisi o primeni pravila medjunarodnog ratnog prava u oruzanim snagama SFRJ,” Savezni sekretarijat za narodnu odbranu, PrU-2, 1988. godina, clan 21. (“Regulations on application of international rules of armed conflict in the armed forces of the Socialist Federal Republic of Yugoslavia,” Federal Secretariat for Defence, PrU-2, 1988, Art. 21).

according to the general principles of law recognised by civilised nations,”¹⁰⁵ even though the act or omission did not constitute a criminal offence under national law.¹⁰⁶

At the Nuremberg and Tokyo tribunals, war criminals could not rely on the argument that their acts had been lawful under Nazi legislation or under the war legislation of Japan. Similarly, those suspected of war crimes in the former Yugoslavia could not plausibly claim that command responsibility was not punishable under the laws of Serbia, Croatia, or Bosnia and Herzegovina. Sentences passed by courts in Bosnia, Croatia, and Serbia in cases involving command responsibility should be subject to no more than the maximum terms of imprisonment that could have been imposed under the legislation in force for the substantive crimes at issue when the crimes were committed.

RECOMMENDATIONS

To the European Union and its Member States:

The European Union and its Member States should support the newly established war crimes chambers in the states of the former Yugoslavia as a positive development toward European integration, especially after accepting Croatia as a candidate for E.U. membership. Only sufficient resources can ensure that the perpetrators will receive fair trials and that due process will be respected. The E.U. should, therefore, consider providing funds to support domestic war crimes prosecutions, especially for:

- The education and training of investigators, judges, and prosecutors;
- Legal and forensic experts needed for investigating war crimes;
- Access of victims and witnesses to trials (traveling expenses, accommodations, video and audio transmissions); and
- Witness protection programs, including mechanisms for a witness to change identity, resettlement of witnesses internally or in other countries, protection of the witness’ family members, police escort, and home protection.

E.U. member states should also consider resettling witnesses and their families as part of witness protection programs.

To the Organization for Security and Co-operation in Europe:

- Ensure that the monitoring of domestic war crimes trials remains a priority in the OSCE missions to Bosnia and Herzegovina, Croatia, and Serbia and Montenegro.

¹⁰⁵ International Covenant on Civil and Political Rights, adopted and opened for signature, ratification and accession by General Assembly Resolution 2200 A (XXI) of December 16, 1966, Art. 15; European Convention for the Protection of Human Rights and Fundamental Freedoms, adopted on November 4, 1950, entered into force on September 3, 1953, Art. 7.

¹⁰⁶ See R.A. Lawson & H.G. Schermers, *Leading Cases of the European Court of Human Rights*, 2nd edition (Leiden, 1999), p. 615.

To the ICTY:

- Provide war crimes prosecutors and judges with assistance and training in conducting war crimes trials.
- To the extent that referrals occur while the ICTY is still in operation, the ICTY should perform systematic and proactive monitoring of the cases referred and provide assistance, in accordance with Rule 11 *bis* (iv) of the rules of procedure.

To the authorities in Bosnia and Herzegovina, Croatia, and Serbia and Montenegro:

Training

- All war crimes judges and prosecutors in national jurisdictions should undertake training in international humanitarian and human rights law and, in particular, the jurisprudence of the ICTY, including the crimes set forth in Articles 2 to 5 of the ICTY Statute, as well as command responsibility and other forms of individual criminal responsibility.

Witness protection mechanisms

- Bosnia and Herzegovina, and Serbia and Montenegro, should adopt comprehensive witness protection legislation and fund resulting programs. In all countries, witness protection should include mechanisms for the witness to change identity or residence (e.g., the resettlement of witnesses to other countries), and provide for the protection of the witness' family members, police escorts, home protection, and protection of the personal information of a witness. Closed court sessions also need to be available. In particular, the following principles should be taken into account:
 - Witness protection must function at the pre-trial stage, during trials, and, when needed, after the trial.
 - When necessary for their protection, witnesses should be transferred to locations other than their places of residence, including to other countries, pending trial and, if necessary, after trial.
 - A detainee should not be released pending trial if the criteria for protecting the security of witnesses and victims are not satisfied, and if a determination has been made that the detainee poses a potential threat to the security of such witnesses or victims.
 - While priority should be given to developing effective witness protection, if disclosing evidence during pre-trial proceedings will place a witness or his or her family in danger, the prosecutor should be permitted to withhold evidence until the trial begins and instead submit to the defense a summary of the evidence.

- Legal provisions making intimidation or threats to witnesses a criminal offence should be aggressively enforced.
- Protective measures should be available in all courts that hear war crimes cases, including: expunging names and identifying information from public records; giving of testimony through image- or voice-altering devices or closed circuit television; and the assignment of pseudonyms.
- Protective measures should be available upon the request of either party, the victim or witness concerned, or a judge, provided that the measures are consistent with the rights of the accused.
- In relation to child witnesses, children who are witnesses to these severe crimes, and who are capable of forming their own views, should have the opportunity to testify, should be protected from intrusion into their privacy and slander, and should have the right to all appropriate measures to promote physical and psychological recovery and social reintegration.

Interference with the administration of justice

- States should implement the penal code provisions outlawing interference with the administration of justice, including threats to a judge or prosecutor.

Ethnic diversity of prosecutors' offices

- The ethnic composition of prosecutors' offices should be diverse and should roughly correspond to the ethnic composition of the area over which each prosecutor has jurisdiction.

Protective measures for prosecutors and judges

- Protective measures for judges and prosecutors should be implemented, including 24-hour protection if needed.

Cooperation between states

- Effective cooperation between states in war crimes prosecutions should include the following elements:
 - The identification and location of witnesses and victims (in a manner consistent with witness protection);
 - Access to witnesses and victims (in a manner consistent with witness protection);
 - Facilitating the work of investigation teams;
 - Providing requested documents;
 - Travel of witnesses, victims, experts, and journalists who follow the trials;
 - Hearing witnesses by video-link;
 - A mechanism to allow judges and prosecutors from each country to travel to the other country in order to take witness statements from any

witness living there who is unable or unwilling, for reasons of personal safety or trauma, to travel to the country where the trial is taking place in order to testify; and

- The transfer of prosecutions, consistent with any domestic rules prohibiting extradition of nationals, to courts in other states.

Prosecutions on the basis of command responsibility

- States in the territory of the former Yugoslavia should prosecute individuals on the basis of command responsibility, including holding commanders responsible for having reason to know their subordinates would commit crimes and failing to prevent them—a standard that encompasses both guilty intent and grossly negligent behavior.

Admissibility of ICTY evidence

- Bosnia and Herzegovina, and Serbia and Montenegro, should enact legislation allowing for the use of evidence collected by the ICTY in domestic war crimes proceedings.

To the authorities in Croatia:

- War crimes prosecutions need to be brought without regard to ethnicity.
- Croatia should enhance efforts to investigate and prosecute incidents in which ethnic Croats were responsible for crimes against ethnic Serbs.
- Charging standards and sentencing practice should be the same for all defendants, regardless of their ethnic origin. Croatian prosecutors should cease the practice of indicting Serbs for war crimes on the basis of minor offences, where Croats alleged to have committed the same acts are not charged.
- Croatia should not discriminate on the basis of ethnicity in hiring judges. Returnee Serbian judges should not be discriminated against and should have an opportunity for employment in Croatian courts.
- In cases of group indictments, prosecutors for the special war crimes chambers should specify the role of each individual in the commission of the crime and not merely ground the charges on, e.g., membership in a specific military unit to which alleged perpetrators belonged.

To the authorities in Bosnia and Herzegovina:

- Bosnia and Herzegovina should ratify the European Convention on Extradition, the European Convention on Mutual Assistance in Criminal Matters, and the Convention on the Transfer of Proceedings in Criminal Matters.

- The authorities in Republika Srpska should show a far greater commitment to prosecuting war crimes, regardless of the ethnicity of the perpetrators. Investigations should be launched into the numerous war crimes committed against non-ethnic Serbs in the territory of Republika Srpska.

To the authorities in Serbia and Montenegro:

- Serbia and Montenegro should ensure sufficient political support to the special war crimes chamber at the Belgrade District Court. Without such support, the chamber cannot function effectively or ensure fair and unbiased trials for the perpetrators and for the victims.
- Serbia and Montenegro should cooperate fully with the ICTY.
- Investigative mechanisms for trials before the special war crimes chamber should be strengthened. The special war crimes division within the Serbian police should show a far greater initiative than in the past in cooperating with the war crimes investigators and prosecutors.
- Serbia should introduce legislation making it an offence to intimidate or otherwise interfere with witnesses involved in a criminal investigation or prosecution.