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**TRANSITIONAL
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CASE STUDIES
SERIES**

**Against the Current—War Crimes
Prosecutions in Serbia (2007)**

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Bogdan Ivanišević

**AGAINST THE CURRENT:
WAR CRIMES PROSECUTIONS IN SERBIA**

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ABOUT THE AUTHOR

Bogdan Ivanišević has been a Belgrade-based consultant on the former Yugoslavia program with the International Center for Transitional Justice since November 2006. Before joining the organization in this capacity, he was a researcher on the former Yugoslavia at Human Rights Watch (1999–2006) and program and analysis director at the Humanitarian Law Center, a leading human rights group in Serbia (1997–98). He also conducted research for the Prosecutor's Office of the International Criminal Tribunal for the Former Yugoslavia through the War Crimes Research Center at the Center for Human Rights and Humanitarian Law at the American University–Washington College of Law (1996). Mr. Ivanišević received an LL.M. from the Washington College of Law in 1996.

THE ICTJ'S WORK IN THE FORMER YUGOSLAVIA

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Bosnia and Herzegovina: Selected Developments in Transitional Justice (October 2004)

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AGAINST THE CURRENT: WAR CRIMES PROSECUTIONS IN SERBIA

Contents

<i>EXECUTIVE SUMMARY</i>	vi
I. INTRODUCTION	1
A. Background: War in Former Yugoslavia.....	1
B. Establishment of Specialized Structures for War Crimes Prosecutions in Serbia.....	1
C. Political Will and Transitional Justice.....	2
D. Progress to Date: Completed and Pending Cases	3
II. OFFICE OF THE WAR CRIMES PROSECUTOR	5
A. Resource Deficits	6
B. Readiness to Deal with an Increased Workload?.....	7
C. Allegations of OWCP Protection of High-Ranking Officials	8
1. Reluctance to Use the Doctrine of Command Responsibility against High-Ranking Individuals	9
D. Failure to Expose the Role of the Serbian State.....	10
E. Lack of Techniques to Address System Crimes and Engage in Multidisciplinary Investigations	11
III. THE WAR CRIMES INVESTIGATION SERVICE: THE ROLE OF THE POLICE	12
A. Staff, Space and Salary Limitations	12
B. Relationship with the Prosecutors.....	13
IV. WAR CRIMES CHAMBER.....	15
A. From Unqualified Praise to Deserved Criticism	16
B. Limited Use of ICTY Jurisprudence	17
V. CONCERNS REGARDING THE WITNESSES.....	19
A. Ensuring the Presence of Non-Serb Witnesses in the Trial	20
B. Late Establishment of a WCC Victim and Witness Support Unit.....	21
C. Protection of Witnesses: The Legislative Framework	21
D. Protecting Safety of Witnesses in Court.....	22
E. Harassment of Witnesses in Court.....	24
F. Protecting Safety of Witnesses outside the Court.....	24
G. Witness Intimidation in Relation to the Trials against Serb Police.....	25
H. Victims' Representatives.....	25
VI. RELATIONSHIP WITH THE ICTY.....	26
A. Use of ICTY Evidence in Investigations.....	26
B. Lack of Clarity Concerning Use of Evidence in Non-11 <i>bis</i> Trials.....	27
C. Means of Accessing ICTY Evidence.....	28
D. Other Forms of ICTY's Contribution to War Crimes Trials in Serbia	29
E. ICTY Oversight of Investigations and Trials	29
VII. REGIONAL COOPERATION	30
A. Cooperation with Croatia	30
B. Cooperation with Bosnia and Herzegovina.....	31
C. Failure to Access Witnesses in Kosovo	31

1.	Serbian Critiques and UNMIK’s Denials.....	32
2.	What Happens When UNMIK Leaves?	33
VIII.	DEFENSE.....	34
A.	Inadequate Payment of Court-Appointed Defense Counsel	34
B.	Hindrances to Access to Evidence outside Serbia.....	35
C.	Lack of Training in International Humanitarian Law	35
IX.	PUBLIC INFORMATION AND OUTREACH.....	36
A.	Public Information and Outreach Sections.....	36
B.	Web Site and Broadcasting.....	38
X.	PLANNED CHANGES IN LEGISLATION.....	38
XI.	CONCLUSION.....	40
XII.	RECOMMENDATIONS.....	41
ANNEX I.	SUMMARY OF CASES BEFORE THE WCC	44
ANNEX II.	RELEVANT TREATIES TO WHICH SERBIA IS A PARTY.....	46

EXECUTIVE SUMMARY

Since its establishment in 2003 the War Crimes Chamber (WCC) of the District Court in Belgrade has made steady progress beyond what may have been deemed possible in the aftermath of almost a decade of war in the former Yugoslavia. As of December 2007 it has completed five trials. In addition, four first-instance trials are ongoing. Indictments have been issued in additional three cases, and nine cases are under investigation. The Serbian human rights community, the International Criminal Tribunal for the former Yugoslavia (ICTY), and representatives of international organizations all generally support the work of the WCC and the Office of the War Crimes Prosecutor (OWCP) of the Republic of Serbia as a contribution to overall efforts to establish accountability for war crimes in the former Yugoslavia.

At the same time the trials take place in what continues to be a very unfavorable political context. Serious problems remain in various segments of the judicial system and the executive. Until most recently the government did not support the efforts of the OWCP and the WCC. Since the formation of a new cabinet in May 2007 signs have appeared that the situation may be changing. Ethnic nationalists, however, remain a powerful political force in Serbia, and their vocal or tacit opposition to the ICTY and domestic war crimes prosecutions weakens the resolve and effectiveness of the WCC, the OWCP, and the special unit for investigation of war crimes in the police.

Compared to counterpart institutions in Bosnia and Croatia, very few trials have taken place. A number of reasons may be identified for this lack of progress, including resource deficits in the OWCP and inadequate cooperation between the OWCP and the War Crimes Investigation Service of the Serbian police, which indicates insufficient drive in initiating war crimes investigations. Likewise, there has been little progress in the OWCP's pre-investigative activities concerning crimes in Kosovo. Although the unwillingness of Kosovo Albanian witnesses to cooperate with Serbian institutions is a critical factor in this respect, lack of cooperation between the OWCP and the United Nations Mission in Kosovo has also hindered progress.

In contrast, improved cooperation between the prosecutors and judges in Serbia, Croatia, and Bosnia and Herzegovina (BiH) in war crimes matters has increased prospects for successful prosecutions from those areas. Serbia has greatly benefited from that cooperation because many of the witnesses and much of the evidence are located in the other two countries. Evidence from the ICTY has also contributed to progress in investigations and trials in Belgrade.

However, the OWCP and the WCC have been only partially successful in creating conditions to ensure that witnesses can testify freely and truthfully. In particular, witnesses from Serbia often feel intimidated from testifying against police officers suspected of war crimes; witness protection mechanisms in and out of court are operated by the Witness Protection Unit of the Serbian police. Victims' representatives have played an important role in all but one trial, and they have also contributed to clarifying important factual matters at trial.

Significant concerns exist regarding the obstacles for defense counsel in mounting an effective defense, the questionable role in war crimes trials of the Supreme Court judges appointed before the democratic transition in Serbia, and the fact that public information and outreach efforts by the WCC and the OWCP have barely altered the Serbian public's biases or indifference about war crimes.

In spite of the shortcomings and problems identified in this report, the WCC and the OWCP have the potential to provide justice for many of the atrocities committed during the wars in the former Yugoslavia. In the past four years actors in the OWCP and the WCC have developed significant capacity, and those supporting them have invested substantial resources. All now provide a solid foundation for a major increase in the scope and impact of their work. The OWCP and the relevant police agency need to demonstrate the will and ability to prepare a far greater number of war crimes cases, and prosecutors' scrutiny should be directed more toward individuals who held significant positions in the army and police. The objective for the prosecutors—and police and judges—should be to contribute ever more to the cause

of justice and the rule of law in Serbia and the whole of the former Yugoslavia. For this to happen, more active political support—at both the domestic and international levels—is essential.

I. INTRODUCTION

A. Background: War in Former Yugoslavia

The break-up of the former Socialist Federal Republic of Yugoslavia in 1991 provoked a series of armed conflicts in the region that lasted for almost a decade. After a brief conflict in Slovenia (in June and July 1991), protracted and bloody wars took place in Croatia (1991–1995), Bosnia and Herzegovina (1992–1995), and the Serbian province of Kosovo (1998–1999). Ethnic Serbs, significant numbers of whom lived in Croatia and BiH, attempted to secede from the newly recognized states with logistical, financial, and military support from Serbia. In Kosovo the troops from Belgrade fought against the Kosovo Albanian rebels, whose objective was to win independence from Serbia.

During the decade nationalistic sentiments were dominant within various ethnic groups in the region, but Serb nationalism stood out from the others for the especially damaging consequences it wrought. Relying on the numerical predominance and apparent military might of the group they represented, Serb leaders in various parts of the former Yugoslavia pursued intransigent policies designed to unite Serbs in different parts of the disintegrating country. Serbia's former president, Slobodan Milošević, represented this aggressive and uncompromising approach better than anybody else.

In 1995, after years of appearing victorious, the Serb formations in Croatia and BiH were forced to admit defeat by the government forces in those countries. In Kosovo the party defeating the Serbian troops was NATO, the North Atlantic Treaty Organization, which carried out a bombing campaign from March to June 1999. In October 2000 Milošević was deposed from power as a result of mass protests in Belgrade and was transferred to The Hague to face trial. He subsequently died in detention. Since then Serbia has walked an unsteady path of democratic transition, complicated by the inability of political elites and broad sectors of society to come to terms with the responsibility for their recent past.

With a handful of exceptions, the focus of the conflicts in the former Yugoslavia occurred in areas outside Serbia proper, as did the majority of the war crimes committed. Many of the perpetrators, including those who settled there after the war, now reside in Serbia, however. As a country in transition to full-fledged democracy, Serbia has a moral and political imperative to bring to justice those responsible for war crimes. The imperative is especially pronounced given Serbia's declared objective to become a member of the European Union. Respect for the rule of law is one of the prerequisites of membership.¹ Yet the bulk of international attention has focused on Serbia's cooperation with the International Criminal Tribunal for the former Yugoslavia (ICTY), rather than its progress in prosecuting war crimes at home.

An additional factor necessitating progress in domestic war crimes prosecutions is the ICTY's completion strategy, which requires it to finish all first-instance trials by the end of 2008 and all appellate proceedings by the end of 2010.² Even at that point, the tribunal, established during the conflict in 1993 and sitting in The Hague, will have adjudicated only a small portion of the total number of war crimes, crimes against humanity, and crimes of genocide committed during the Balkan wars, mainly by high-level suspects such as heads of state and senior military or political officials. The task of bringing to justice the lower echelons of leaders as well as other suspects remains the responsibility of national judiciaries throughout the region.

B. Establishment of Specialized Structures for War Crimes Prosecutions in Serbia

Between 1996 and 2003 the competence to try war crimes cases in Serbia belonged to ordinary criminal law jurisdictions in all district courts in the country. Only seven war crimes trials took place during that

¹ See Copenhagen Criteria, European Council, Copenhagen, 21–22 July 1993, SN 180/1/93 REV 1, at http://ec.europa.eu/enlargement/enlargement_process/accession_process/criteria/index_en.htm.

² See Security Council Resolution 1503 of August 28, 2003, UN Doc S/Res/1503 (2003).

period.³ In July 2003 the Serbian Assembly passed the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes.⁴ This law established the specialized War Crimes Chamber of the District Court in Belgrade and the Office of the War Crimes Prosecutor of the Republic of Serbia as the two agencies with exclusive responsibility to deal with war crimes cases. Vladimir Vukčević was elected as the war crimes prosecutor. The Office of the War Crimes Prosecutor (OWCP) became fully operational in January 2004, and the War Crimes Chamber (WCC or chamber) of the District Court in Belgrade was set up in October 2003. The legislation that created the chamber and the OWCP also mandated a special detention unit and a special War Crimes Investigation Service (WCIS) in the Ministry of the Interior.⁵ Together these institutions constitute Serbia's domestic response to calls for judicial accountability for war crimes and are the subject of this report.⁶

The WCC's personal and territorial jurisdiction extends to Serbian citizens and foreign nationals suspected of having committed specified types of crimes in the territory of the former Socialist Federal Republic of Yugoslavia.⁷ The subject-matter jurisdiction of the chamber covers war crimes, genocide, and crimes against humanity.⁸ It is doubtful that crimes against humanity committed in the 1990s will be tried as such, because unlike genocide or war crimes, crimes against humanity did not exist as a distinct category in the domestic legislation at the time.⁹ A near-consensus exists in Serbia's legal community that the principle *nullum crimen sine lege* precludes prosecutions on that basis.¹⁰

C. Political Will and Transitional Justice

Ethnic nationalism remains strong in Serbia, as demonstrated by the public's significant support for nationalist political parties. These range from more-radical parties such as the Serbian Radical Party and the Socialist Party of Serbia, which together won 34 percent of the vote in the parliamentary elections in January 2007, to the more moderate coalition of nationalist parties around Prime Minister Vojislav Koštunica, which won 16.5 percent.¹¹ Radical nationalists have frequently attacked the work of the OWCP and the WCC, and the more moderate nationalists who ruled Serbia between 2004 and 2007 never publicly supported war crimes prosecutions. During that period the prime minister, the justice minister, and the interior minister, all belonging to Koštunica's Democratic Party of Serbia, either ignored the work of the OWCP and the WCC or actively undermined it.¹²

Since the elections in January 2007 the moderate nationalists are a smaller partner in the new coalition government that formed in May. Prime Minister Koštunica and the interior minister, both from the Democratic Party of Serbia, retained their posts. Thirteen ministerial posts out of 25 now belong to the liberal-left Democratic Party. The justice minister, from the Democratic Party, visited the WCC and the

³ See Organization for Security and Cooperation in Europe (OSCE)—Mission to Serbia and Montenegro, *War Crimes before Domestic Courts* (Belgrade, October 2003), 7–10.

⁴ Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Official Gazette of the Republic of Serbia*, no. 67/2003, July 1, 2003 (War Crimes Law).

⁵ *Ibid.*, art. 11 and art. 12.

⁶ The primary focus of this report is on the work of the OWCP and the WCC.

⁷ War Crimes Law., art. 3.

⁸ Law Amending the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Official Gazette of the Republic of Serbia*, no. 135/2004, December 21, 2004, art. 3 (amending art. 2 in the original law).

⁹ The relevant provisions on genocide and war crimes were included in Chapter 16 ("Criminal Offences against Humanity and International Law") of the Yugoslav penal code. See Basic Penal Code, *Official Gazette of the SFRY*, no. 44/1976, 46/1977, 34/1984, 37/1984, 74/1987, 57/1989, 3/1990, 38/1990, 45/1990 and 54/1990, *Official Gazette of the SRY*, no. 35/1992, 16/1993, 31/1993, 37/1993 and 24/1994, arts. 141–156.

¹⁰ Interview with a representative of the Rule of Law and Human Rights Department of the OSCE Mission in Serbia.

¹¹ The results of the parliamentary elections held in January 2007 may be found on the official web site of the Serbian government, www.srbija.sr.gov.yu/vesti/vest.php?id=31349&q=democratic+party+elections (accessed September 3, 2007).

¹² The justice minister even initially questioned the need for the OWCP and the WCC to exist but reportedly backed off when the opposition parties and the international community vigorously objected.

OWCP within days after the appointment and expressed full support for their efforts.¹³ This may mark the beginning of a shift in the political climate.

The lack of support for domestic war crimes prosecutions, however, has occurred against a backdrop of failed cooperation and even active hostility to the work of the ICTY. It has been manifested primarily in the failure of Serbian authorities to arrest outstanding indictees, such as former Bosnian Serb commander Ratko Mladic, accused of genocide in Srebrenica, who are believed to be hiding in Serbia. Although there have been some recent improvements in this regard, many in Serbia still regard the ICTY as an anti-Serb institution—a sentiment easily exploited by the powerful political opposition.

Apart from political ambivalence regarding war crimes trials, Serbia's transition has also been marked by the absence of successful transitional-justice processes such as formal truth-seeking efforts, reparations to victims, and vetting of officials who may be implicated in past crimes.¹⁴ This fact shows the political strength in Serbia of those who resist coming to terms with the past, as well as the predominance of a widely accepted popular view of recent history in which Serbia is the greater victim of external forces. A short-lived attempt to operate a truth commission failed because the makeup of the commission and the personality of its main proponent, then-President Koštunica, aroused distrust among the victims and in civil society. The commission, established in March 2001, purported to investigate the causes of the wars and related atrocities rather than focusing only on establishing the facts about the crimes.¹⁵ Until its dissolution in early 2003 the commission did not seriously advance public truth-seeking or truth-telling. Since its demise there have been no renewed official initiatives to establish a credible truth commission in Serbia. Although the Serbian Parliament managed in June 2003 to enact a reasonably comprehensive law to vet public officials suspected of human rights violations,¹⁶ nationalist forces in Parliament have blocked the appointment of candidates to the “lustration commission.” As a result the vetting law has still not been implemented.¹⁷

The absence of other transitional justice processes at the domestic level places an additional responsibility on the prosecutors, judges, and other individuals involved in war crimes prosecutions. If carried out fairly and diligently, the investigations and trials could contribute to creating an accurate historical record and establishing responsibility of individuals who still hold public positions despite their involvement in wartime abuses.

D. Progress to Date: Completed and Pending Cases¹⁸

The WCC had completed five trials as of December 2007: three cases related to crimes committed in November 1991 at the Ovčara agricultural farm near Vukovar in Croatia;¹⁹ the *Lekaj* case concerning crimes in Kosovo in 1999²⁰; and the *Scorpions* case, related to a crime in Bosnia and Herzegovina in

¹³ Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, July 17, 2007.

¹⁴ For further elaboration see International Center for Transitional Justice, *Serbia and Montenegro: Selected Developments in Transitional Justice*, October 2004.

¹⁵ *Ibid.*, 7–8.

¹⁶ Law on the Responsibility for Human Rights Violations, *Official Gazette of the Republic of Serbia*, no. 58/2003, June 3, 2003.

¹⁷ See Humanitarian Law Center (Belgrade), Documenta (Zagreb), and Research and Documentation Center (Sarajevo), *Annual Report on Transitional Justice in the Post-Yugoslav Countries* (forthcoming, 2007).

¹⁸ A summary of all cases is in Annex I.

¹⁹ The judgments were issued in the following cases: District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Miroslav Vujović et al.*, Case no. K.V. 1/2003, Judgment, December 12, 2005; *Prosecutor v. Milan Bulić*, Case no. K.V. 02-2005, Judgment, January 30, 2006; and *Prosecutor v. Saša Radak*, Case no. K.V. 03/2005, Judgment, September 6, 2006. Bulić and Radak were not available for trial at the same time as the other defendants, which led to their separate and subsequent trials.

²⁰ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Anton Lekaj*, Case no. K.V. 4/05, Judgment, September 18, 2006.

1995.²¹ Further trials in the *Suva Reka*, *Bitiqi Brothers* and *Morina* cases, pertaining to crimes in Kosovo, as well as the *Zvornik* trial, connected with crimes in BiH in 1992, are ongoing.²² Of the five judgments by the WCC, only two—*Bulić* and *Lekaj*—are final.²³ The Supreme Court of Serbia, which serves as the appellate body for the WCC, has quashed two first-instance judgments and ordered retrials (*Ovčara* and *Radak* judgments).²⁴ Appeal against one judgment, in the *Scorpions* case, was still pending at the time of this report.

In all cases but two (*Lekaj* and *Morina*) Serb forces committed the acts in question against non-Serbs. The defendants were charged with war crimes against civilian population or against prisoners of war. These crimes were covered by two distinct provisions in the Basic Penal Code (articles 142 and 144) in force at the time of commission, and both provisions include a number of foundational acts.²⁵ The charges included killings,²⁶ attack against civilian population resulting in death,²⁷ torture,²⁸ inhuman treatment,²⁹ infliction of bodily injuries,³⁰ rape,³¹ forced displacement,³² extensive destruction of property, not justified by military necessity,³³ illegal detention,³⁴ and deprivation of the right to a fair and impartial trial.³⁵ Because the Basic Penal Code did not contain provisions relating to crimes against humanity, the indictments have not included charges for such crimes. There have been no indictments for genocide,

²¹ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Slobodan Medić et al.*, Case no. K.V. 6/2005 (*Scorpions* case), Judgment, April 10, 2007.

²² Office of the War Crimes Prosecutor, *Prosecutor v. Branko Grujić et al.*, Case no. K.V. 5/05, Indictment no. KTRZ 17/04, August 12, 2005 (*Zvornik* case); *Prosecutor v. Radoslav Mitrović et al.*, Case no. K.V. 2/2006, Indictment no. KTRZ 5/05, April 25, 2006 (*Suva Reka* case); *Prosecutor v. Sreten Popović and Miloš Stojanović*, Case no. K.V. 3/2006, Indictment no. KTRZ 5/06, August 23, 2006 (*Bitiqi Brothers* case); *Prosecutor v. Sinan Morina*, Case no. K.V. 02/07, Indictment No. KTRZ 1/07, July 13, 2007 (*Morina* case).

²³ On March 1, 2007, the Supreme Court confirmed the conviction of Milan Bulić but reduced the sentence from eight years to two. “Potvrđena jedna kazna za Ovčaru” (“One Conviction for Ovčara Confirmed”), *website B 92*, March 1, 2007, www.b92.net/info/vesti/index.php?yyyy=2007&mm=03&dd=01&nav_id=234612 (accessed July 22, 2007). On April 5, 2007, the court confirmed the judgment against Anton Lekaj, including the sentence of 13 years’ imprisonment. “Potvrđena presuda Lekaj” (“Lekaj Judgment Confirmed”), *website B 92*, April 5, 2007, www.b92.net/info/vesti/index.php?yyyy=2007&mm=04&dd=05&nav_id=240523 (accessed July 22, 2007).

²⁴ The Supreme Court issued these two decisions on December 14, 2006, and April 10, 2007, respectively.

²⁵ Basic Penal Code, Article 142:

[War crime against the civilian population] includes attack against civilian population, resulting in death, serious physical injury or serious damage to health; killings; torture; inhuman treatment; infliction of great suffering or violation of bodily integrity or health; dislocation or displacement or forcible conversion to another nationality or religion; forcible prostitution or rape; application of measures of intimidation and terror; taking hostages; imposing collective punishment; unlawful bringing into concentration camps and other illegal arrests and detention; forcible service in the armed forces of enemy's army or in its intelligence service or administration; forced labor; starvation of the population; property confiscation; pillage; illegal and extensive destruction of property not justified by military necessity.

Article 144:

[A war crime against prisoners of war] includes the following punishable acts: murder; torture or inhuman treatment of prisoners of war; causing of great suffering or serious injury to bodily integrity or health; compulsory enlistment into the armed forces of an enemy power.

²⁶ *Suva Reka* case, *Ovčara* case, *Radak* case, *Zvornik* case, *Scorpions* case, and *Lekaj* case.

²⁷ *Morina* case.

²⁸ *Zvornik* case, *Lekaj* case, and *Morina* case.

²⁹ *Ovčara* case, *Radak* case, *Zvornik* case, and *Lekaj* case.

³⁰ *Ovčara* case, *Radak* case, *Zvornik* case, *Suva Reka* case, *Lekaj* case, and *Morina* case.

³¹ *Lekaj* case.

³² *Suva Reka* case, *Zvornik* case, and *Morina* case.

³³ *Suva Reka* case and *Morina* case.

³⁴ *Lekaj* case.

³⁵ *Bitiqi* case, *Lekaj* case.

although this is a crime under the applicable law.³⁶ Gender crimes were charged in one case (*Lekaj*) in which the accused Kosovo Albanian was found guilty for having raped a Roma girl in Kosovo in June 1999. All judgments so far have led to convictions, although several individuals in two cases against multiple defendants (*Ovčara* and *Scorpions*) were acquitted. The prosecutors appealed the acquittals, and the final outcome of these cases is pending.

By way of comparison, during only one year (2006) the War Crimes Chamber of the State Court of BiH rendered eight first-instance judgments and tried an additional 10 cases.³⁷ In Croatia 23 trials took place in 2006.³⁸ But numbers do not necessarily tell the whole story about efforts to establish accountability for war crimes. It should be acknowledged that both BiH and Croatia have significantly greater capacity to process war crimes prosecutions than Serbia.³⁹ In addition, the task of the prosecutorial authorities in Croatia and BiH is made easier by the fact that unlike in Serbia, victim-witnesses and the crime scenes are located in their jurisdictions. Yet in both these jurisdictions the authorities also have problems with suspects fleeing outside their borders. Furthermore, the prosecutions in Croatia, while numerous, have often suffered from ethnic bias to the detriment of the ethnic Serb minority. Despite these caveats, however, the contrast between the numbers of trials in Serbia and the other two countries is so stark that it gives rise to concerns regarding Serbia's commitment to justice.

II. OFFICE OF THE WAR CRIMES PROSECUTOR

The Office of the War Crimes Prosecutor has the sole authority in Serbia to issue indictments in war crimes cases. The prosecutor also has the critical role of initiating a formal investigation, which precedes the issuance of an indictment. Although investigating judges conduct the investigation, the prosecutor decides whether to issue an indictment based on the results of the investigation.⁴⁰ In addition, statements and other information gathered by the prosecutor during the pre-investigation stage can be used at trial in organized-crime and war crimes cases, unlike in ordinary criminal cases.⁴¹

The war crimes prosecutor, supported by deputy prosecutors, heads the office. Only the prosecutor, Vladimir Vukčević, had experience from an earlier war crimes trial. Most of the deputy prosecutors, however, had substantial prior experience in criminal cases.⁴²

The OWCP is divided into three teams based on the geographical areas where the war crimes occurred—Croatia, BiH, or Kosovo. As a rule the deputy prosecutors work in one team only, but some work across two teams. All deputy prosecutors are based in Belgrade.⁴³ The salaries of the deputy prosecutors equal those in the Office of the Public Prosecutor of the Republic of Serbia. They are paid twice as much as

³⁶ Basic Penal Code, art. 141.

³⁷ Information received from the OSCE—Mission in BiH, February 5, 2007.

³⁸ Center for Peace, Nonviolence, and Human Rights, Osijek, *Praćenje suđenja za ratne zločine, Izvještaj za 2006* (“Monitoring of War Crimes Trials, Report for 2006”) (Osijek, 2006), 15.

³⁹ In Croatia five district courts have jurisdiction over war crimes cases; see *Croatia: Selected Developments in Transitional Justice* (February 2007), International Center for Transitional Justice. In BiH the War Crimes Chamber of the Court is composed of five panels of judges and receives considerable international financial and technical assistance. See International Center for Transitional Justice, *From Hybrid to National: The War Crimes Chamber of Bosnia and Herzegovina* (forthcoming).

⁴⁰ For further information on the investigating judges and plans to abolish their office, see X, below.

⁴¹ Such evidence cannot, however, form the sole basis of a judgment. Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 504j.

⁴² Interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007.

⁴³ *Ibid.*

district prosecutors, the latter having the mandate to prosecute the most serious offences in non-war-crime cases.⁴⁴

International assessments of the OWCP's progress have been largely positive, with the ICTY prosecutor's office, international organizations, and foreign embassies in Belgrade all expressing support for its activities. Even the Serbian media and nongovernmental organizations have, by and large, been sympathetic to its work. Although extreme nationalists who support the opposition Serbian Radical Party accuse the OWCP of "anti-Serb" activity, such claims are not widespread.⁴⁵ However, the question remains whether the OWCP is achieving enough with its existing resources.

A. Resource Deficits

In the words of an OSCE adviser in Serbia on war crimes issues, the OWCP is "utterly understaffed."⁴⁶ OWCP bylaws on the internal organization of the office, approved by the justice ministry, envisage the appointment of 10 deputy prosecutors, but only seven (all men) have been employed.⁴⁷ In July 2007 no associate legal officers were in the office. Two analysts worked with the deputy prosecutors, one tasked only with conducting research into the crimes against Kosovo Serbs and other non-Albanians.⁴⁸ The OWCP does not have sufficient funds to hire more analysts and legal officers.⁴⁹

The OWCP also lacks its own specialized investigators who can interview potential witnesses before a case is referred to an investigative judge. Under Serbian law it is not possible to hire investigators in prosecutorial offices, and the OWCP can only delegate the task of interviewing the witnesses to the War Crimes Investigation Service of the Serbian police. The police unit, however, belongs to a separate agency, and its performance has been a cause of frustration on the part of the prosecutors.⁵⁰

Other resource deficits create additional difficulties in the OWCP's day-to-day functioning. The budget is insufficient to cover the travel expenses of the deputy prosecutors and the chief prosecutor, and the office frequently needs to rely on financial assistance by the OSCE and the United States Embassy in Belgrade for trips to Kosovo, BiH, and The Hague.⁵¹ Transport for investigations is additionally complicated by the fact that only three vehicles are at the disposal of the seven deputy prosecutors.⁵²

Lack of greater progress in the preparation of new cases may also result from the recent addition of other activities to the OWCP workload, some of which may serve as a distraction. In July 2006 the government of the Republic of Serbia adopted an action plan to arrest Ratko Mladić, the most important of the ICTY indictees still at large. The government named Vladimir Vukčević, the war crimes prosecutor, as coordinator of the plan. Chief ICTY Prosecutor Carla del Ponte supported the appointment of Vukčević.⁵³

⁴⁴ Interview with Bruno Vekarić.

⁴⁵ In a recent opinion poll, when asked, "What has affected your perception of domestic war crimes courts most?" only one-fifth of the respondents (21 percent) responded, "Only Serbs are convicted." Other responses were "slow and long-lasting procedures" (22 percent), "inefficiency" (22 percent), "insufficiently established role of the police, army, and other countries" (10 percent), and other. Belgrade Center for Human Rights, OSCE—Mission in Serbia, and Strategic Marketing, *Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal*, December 2006, slide 18.

⁴⁶ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

⁴⁷ Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, July 17, 2007.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.* In 2006 the budget of the OWCP was 458,000 euros. In 2007 the budget increased by 60,000 euros. Interviews with Bruno Vekarić, OWCP spokesperson, Belgrade, March 15, 2007, and July 17, 2007.

⁵⁰ See III B, below.

⁵¹ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia; interview with Bruno Vekarić, Belgrade, March 15, 2007.

⁵² Interview with Bruno Vekarić, Belgrade, July 17, 2007.

⁵³ Interview with a source in the ICTY, Belgrade, March 30, 2007.

However, there has been no progress in locating and arresting Mladić since the plan's adoption. Del Ponte has publicly spoken of her suspicion that Serbian intelligence services concealed information from Vukčević.⁵⁴ Three other OWCP members are also engaged in implementing the action plan.⁵⁵ One of them, an OWCP deputy prosecutor in charge of Kosovo cases, commits a great portion of his time to these activities.⁵⁶

In all, the staff of the OWCP is very small compared to that of counterparts in other countries. In particular the absence of legal, investigative, and analytic support is seriously hindering its ability to investigate more-complex criminal cases.

B. Readiness to Deal with an Increased Workload?

In addition to the resource challenges, there are other reasons that the number of cases pursued by the OWCP in the coming years might remain too low when measured against the number of crimes committed by Serb forces and the number of suspects residing in Serbia. It remains to be seen whether the office will demonstrate greater resolve than in the past to initiate investigations.

As of December 2007, according to the OWCP Web site, investigations were ongoing in nine cases. Forty-eight additional cases were at a stage preceding the opening of formal investigation by the investigating judge.⁵⁷ More than a half of these cases concerned crimes committed by the Kosovo Liberation Army against Serbs and other non-Albanians. It is unclear how many of the total of 57 cases under investigation or at a pre-investigation stage will result in indictments. Thirty-seven pertain to crimes committed against ethnic Serbs in other parts of the former Yugoslavia, and the suspects are beyond the reach of the Serbian state.

It seems that as a matter of prosecutorial strategy, before initiating investigations the OWCP is relying heavily on authorities in Croatia and BiH to make evidence available. If the prosecutors in the neighboring states are willing to transfer case files to the OWCP, as the Croatian prosecutor has recently done, the OWCP then can investigate suspects living in Serbia.⁵⁸ If not, the office is unlikely to initiate the investigation on its own.⁵⁹ The OWCP is more proactive with regard to the crimes in Kosovo because the crimes were mainly committed by members of Serbia's regular police forces. The deputy prosecutors can interview police as well as use police archives as a starting point in the investigations. However, the spokesperson for the OWCP has said that further progress in 10 Kosovo cases is hampered by a lack of access to Kosovo-Albanian witnesses.⁶⁰

Absent any major changes in this approach to prosecutorial strategy, the OWCP is likely to pursue fewer than 20 cases against Serb perpetrators in the coming years. Even this estimate could prove too optimistic if the current deadlock persists in the investigations in Kosovo.⁶¹ The OWCP also intends to investigate crimes against ethnic Serbs, especially in Kosovo, but the number of such prosecutions will be low because of the nonavailability of the suspects.

⁵⁴ Zoran Preradović, "Bezbednosne službe skrivaju informacije?" ("Intelligence Services Conceal Information?"), *Radio Free Europe*, October 5, 2006, www.danas.org/article/2006/10/05/f904e296-91a7-4bad-b91c-37d4de8a9a0c.html (accessed July 22, 2007).

⁵⁵ Interview with Bruno Vekarić, July 17, 2007.

⁵⁶ Interview with the prosecutor, Belgrade, April 18, 2007.

⁵⁷ The list of cases (in Serbian) is available at http://www.tuzilastvorz.org.yu/html_trz/PREDMETI_LAT.htm (accessed December 15, 2007).

⁵⁸ See VII A, below.

⁵⁹ The two Bosnian cases tried so far—Zvornik and Scorpios—were based on evidence provided to the OWCP by the ICTY and the Humanitarian Law Center.

⁶⁰ See VII C, below.

⁶¹ Because of the impasse, only one deputy prosecutor currently works full-time on Kosovo-related investigations, and another assists him occasionally. See VII C, below.

However, the OWCP's excessive reliance on the prosecutors in Croatia and BiH limits its potential effectiveness. The OWCP should be able to use additional sources—such as ICTY evidence—to identify crime scenes and potential suspects and to reconstruct the incidents on its own initiative. After that stage the OWCP could request assistance from prosecutors in the neighboring countries in approaching witnesses and obtaining other evidence. In sum, it seems that the OWCP is operating in a largely reactive manner, restricting its activities to cases that come to it, rather than proactively pursuing cases itself.

C. Allegations of OWCP Protection of High-Ranking Officials

Serious criticisms have been leveled at the OWCP by Serbia's leading human rights and transitional justice organization, the Humanitarian Law Center (HLC).⁶² Although the HLC and the OWCP frequently cooperate on issues concerning witnesses and evidence, a recent HLC paper boldly argues that “the basic characteristic of all war crimes trials has been the attempt of the prosecutor to conceal evidence of the involvement in war crimes of the institutions of the Republic of Serbia and the Federal Republic of Yugoslavia and of the individuals who hold important positions in these institutions.”⁶³

Critics argue that in failing to investigate senior officials the OWCP is avoiding the more politically challenging implications of bringing cases that suggest that crimes were committed following high-level policy. In other words, the office is focusing its efforts on trigger-pullers rather than masterminds. The origins of accused to date seem indicative. Of the 60 ethnic Serbs indicted in nine cases for crimes against Croats, Bosnian Muslims, and Albanians, two were mid-level superiors in the police, one was mid-level superior in the former Yugoslav People's Army (JNA), while all the others are former police officials or paramilitary leaders at the local level, JNA reservists, or, most often, ordinary members of the police or paramilitary groups.⁶⁴

Given the persistent aura of omnipotence surrounding the police and army, security concerns may partly explain the OWCP's reluctance to bring charges against high-ranking officials in those institutions. As in all other areas of Serbian public life, the police and the army have not been subject to any vetting procedures. OWCP representatives argue, however, that the overall prosecutorial strategy has been to go after the small-fry first, to build up public legitimacy before engaging in more-sensitive efforts to bring influential individuals to justice.⁶⁵ While this strategy might have been appropriate in the initial stage of the OWCP's work, four years later the prosecutor needs to demonstrate more compellingly a commitment to bringing war crimes suspects to justice regardless of their political or social status. One of the basic principles in the Serbian Criminal Procedure Code is that a public prosecutor is duty-bound to initiate criminal prosecution when reasonable suspicion exists that a specific person committed a criminal offense that is prosecutable *ex officio*.⁶⁶ All war crimes belong to this category of offenses.⁶⁷ The decision to prosecute war crimes is not left to the prosecutor's discretion.

⁶² The HLC has been very important in the war crimes prosecutions in a variety of ways: providing evidence to the prosecutor, representing the victims in the trials, encouraging witnesses from other parts of the former Yugoslavia to participate in the proceedings, and so on. For further information see www.hlc-rc.org/english/.

⁶³ Humanitarian Law Center, *Bilten 'Tranziciona pravda': Suđenja za ratne zločine u Srbiji* (“Transitional Justice Bulletin: War Crimes Trials in Serbia”), January 11, 2007.

⁶⁴ The two mid-level superiors are Radoslav Mitrović, one of the accused in the ongoing Suva Reka trial, and Slobodan Medić, accused in the Scorpions case and sentenced to 20 years' imprisonment. Mitrović was the assistant commander in the gendarmerie at the time of the arrest, and Medić had been the commander of the Scorpions, an elite unit of the Serbian special police.

⁶⁵ Interview with Bruno Vekarić, Belgrade, March 15, 2007; interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

⁶⁶ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 20.

⁶⁷ Under the penal code a large majority of crimes are prosecutable *ex officio*. Only with respect to less-serious crimes does the law explicitly state that injured parties are authorized to initiate the proceedings.

Some encouraging signals have appeared recently that the OWCP is progressing to the mid-level cases. One of the accused in the ongoing *Suva Reka* trial, Radoslav Mitrović, was the assistant commander of the gendarmerie, an elite formation of the Serbian police. In February 2007 a deputy gendarmerie commander, Milenko Arsenijević, was arrested in the *Bitiqi Brothers* case.⁶⁸ One of the accused in the *Scorpions* case, Slobodan Medić, was the commander of the Scorpions, an elite unit associated with the Serbian special police in the 1990s. Medić received the maximum prison sentence of 20 years for ordering the crime for which he stood trial.⁶⁹ Finally, in May 2007 four members of the former Yugoslav People's Army, along with eight other persons, were arrested on suspicion of war crimes in Lovas, eastern Croatia, in 1991. Among those arrested was Miodrag Dimitrijević, who at the time of the crimes held the rank of lieutenant colonel.⁷⁰ The concern remains, however, that it would be difficult for the OWCP as currently constructed to succeed in a more complex investigation against even higher-level accused.

1. Reluctance to Use the Doctrine of Command Responsibility against High-Ranking Individuals

One obstacle to more-vigorous prosecutions of individuals in positions of superior authority is the dominant view among the prosecutors that they cannot apply the doctrine of command responsibility in the form in which it exists in international law. The Serbian Penal Code, which entered into force in January 2006, includes a provision on the responsibility of a commander who fails to prevent commission of war crimes (art. 384) or to punish the perpetrators (art. 332). However, these two provisions apply only *pro futuro*. The penal code in existence when the alleged crimes took place did not have a provision on command responsibility.

It could be argued, however, that other provisions applicable at the time the crimes were committed could substitute for explicit command responsibility: perpetration by omission,⁷¹ failure to report crimes,⁷² incitement (by omission) to commit a crime,⁷³ or aiding and abetting by omission.⁷⁴ In one case the OWCP has already used perpetration by omission to indict two individuals who held positions of superior authority. According to the indictment in the *Zvornik* case, the defendants “knew about the illegal acts of the [other accused] and others against the detained civilians, but they did nothing to prevent this ... whereby they committed the war crime against the civilian population.”⁷⁵ The indictment said the two accused had a duty to protect the detained persons because of the positions they held.⁷⁶ By failing to discharge their duty they committed a crime by omission.

Although the legal reasoning in the indictment in the *Zvornik* case could be applied to similar cases, a deputy prosecutor expressed his skepticism concerning the likelihood of obtaining evidence in many other cases that the high-ranking superiors had acted with the requisite state of mind: direct intent (*dolus directus*) or recklessness (*dolus eventualis*).⁷⁷ It is not obvious, however, that it should be particularly difficult to prove that an accused was aware that as result of his act of commission or omission a prohibited consequence might ensue and he accepted such an outcome. This is how *dolus eventualis* is defined in Serbian law. The deputy prosecutor's statement may veil unease with command responsibility as a doctrine whose application could put the office at odds with the military, police, and political elites.

⁶⁸ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007. In the meantime Arsenijević has been released from detention. Interview with Bruno Vekarić, Belgrade, July 17, 2007.

⁶⁹ “Jail for Serb video death squad,” *BBC World Service*, April 10, 2007, <http://news.bbc.co.uk/2/hi/europe/6540645.stm> (accessed July 22, 2007).

⁷⁰ See Humanitarian Law Center, *Transitional Justice Bulletin*, June 4, 2007, 1.

⁷¹ Basic Penal Code, art. 30.

⁷² Criminal Code of the Republic of Serbia, consolidated version (1977), art. 203.

⁷³ Basic Penal Code, art. 23 and art. 30.

⁷⁴ *Ibid.*, art. 24 and art. 30.

⁷⁵ Office of the War Crimes Prosecutor, *Indictment against Branko Grujić et al.*, no. KTRZ 17/04, August 12, 2005.

⁷⁶ *Ibid.*

⁷⁷ Interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007.

Even the application of a “pure” doctrine of command responsibility in Serbia is not precluded if one accepts the applicability of international law in the national legal system. The skeptics in the OWCP argue that even if consensus existed that Protocol I of the Geneva Conventions (which contains a provision on command responsibility) and the international customary rule of command responsibility were part of domestic law, neither the protocol nor customary international law prescribes penalties for breaches of such provisions. Using these sources of international law, the argument goes, would violate the principle that only the law can define a crime and *prescribe a penalty (nullum crimen, nulla poena sine lege)*.⁷⁸ But a plausible rebuttal of this argument is that the principle of legality is intended to protect from *arbitrary* prosecution or punishment,⁷⁹ and the prosecution and punishment for command responsibility would not belong to that category. The sentences should be within the limits determined by the minimum and maximum terms of imprisonment that could have been imposed under Serbian law for the underlying crime at the time it was committed.⁸⁰

D. Failure to Expose the Role of the Serbian State

The discussion above regarding the OWCP’s reluctance to pursue high-ranking officials is suggestive of a broader unwillingness or inability to fully confront the facts about the role of Serbia in the various conflicts. This could reflect a conformist attitude among the prosecutors that they should not disturb the political consensus in the country, which clings to the belief that Serbia itself was not significantly involved in the armed conflicts in other parts of the former Yugoslavia. The OWCP reflects this consensus in the indictments concerning the events in Bosnia and Herzegovina. The indictment in the *Zvornik* case, for example, alleges that “in May 1992, in the then-Republic of Bosnia and Herzegovina, a civil war began between the members of the Serb, Croat, and Muslim ethnicities. It was a non-international armed conflict.”⁸¹

Such qualification of the conflict in BiH directly contradicts prior international judicial findings. At the time the OWCP drafted the *Zvornik* indictment, the ICTY had consistently held that the crimes in BiH between 1992 and 1995 were committed in the context of an international armed conflict.⁸² The tribunal based this conclusion on evidence showing various forms of Serbia’s involvement in the events in BiH.⁸³

Even the February 2007 decision of the International Court of Justice (ICJ), in the case brought by BiH against Serbia and Montenegro for breaches of its obligations under the Genocide Convention, did not

⁷⁸ Ibid.

⁷⁹ See European Court of Human Rights, *CR v UK*, 21 EHRR 363 (1995) (judgment), para. 42.

⁸⁰ Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, October 2004, 16, no. 7(D), 26–27.

⁸¹ Office of the War Crimes Prosecutor, *Indictment against Branko Grujić et al.*, no. KTRZ 17/04, August 12, 2005.

⁸² The ICTY Appeals Chamber first developed this argument in the *Tadić* judgment (*Prosecutor v. Duško Tadić*, Case No. IT-94-A, Judgment, July 15, 1999) and then in the judgment in the *Čelebići* case (*Prosecutor v. Zejnil Delalić et al.*, Case No. IT-96-21-A, Judgment, February 20, 2001).

⁸³ The ICTY Appeals Chamber based its finding on the nature of the armed conflict in BiH on factors such as the following: Non-Bosnian Serb officers from the former Yugoslav People’s Army (JNA) were transferred to units of the Bosnian Serb Army (VRS); the government of the Federal Republic of Yugoslavia (FR Yugoslavia; that is, Serbia and Montenegro) continued payment of salaries to Bosnian Serb and non-Bosnian Serb officers in the VRS; although undertaken to create the appearance of compliance with international demands, internal restructuring of the JNA and the change of name of a part of the JNA as the VRS were designed to ensure that a large number of ethnic Serb armed forces were retained in BiH; over and above the extensive financial, logistical, and other assistance and support, the FR Yugoslavia and the JNA directed and supervised the activities and operations of the VRS; “active elements” of the JNA continued to be directly involved in an armed conflict with BiH; in addition to routing all high-level VRS communications through secure links in Belgrade, a communications link for everyday use was established and maintained between main staff headquarters of the Bosnian Serb Army and the main staff of the Yugoslav army in Belgrade; forces of the Republika Srpska were almost completely dependent on the supplies of the Yugoslav army to carry out offensive operations. See ICTY Appeals Chamber, *Prosecutor v. Duško Tadić*, Case No. IT-94-A, Judgment, July 15, 1999, paras. 150–151, 154, and 155 (footnote 189).

disturb the legal findings of the ICTY regarding the overall international character of the conflict in 1992. Although the ICJ found no evidence that acts committed by Bosnian Serbs in Srebrenica in 1995 could be imputed to Serbia under the law of state responsibility, the court also emphasized that this issue was “very different in nature” from the one the ICTY was called on to decide in the leading case (*Tadić*) addressing the nature of the armed conflict in BiH. The ICJ addressed only the degree of Serbian involvement required to hold it responsible for the crimes committed in 1995 in Srebrenica, whereas the ICTY examined “the degree and nature of a State’s involvement in an armed conflict on another State’s territory which is required for the conflict to be characterized as international.”⁸⁴ The ICJ did not analyze the relationship between the Republika Srpska and Serbian armed forces in 1992 and did not reach any conclusion regarding the nature of the conflict in BiH at that time.⁸⁵

Reactions in Serbia to the ICJ judgment—misinterpreted by many to absolve Serbia from any responsibility for crimes in Bosnia—could also act as a disincentive to the prosecutors to inquire into potential criminal responsibility of members of the Serbian intelligence, police, and military structures who operated in the neighboring country. Prospects for any genocide cases are greatly diminished in light of the ICJ decision.

E. Lack of Techniques to Address System Crimes and Engage in Multidisciplinary Investigations

In addition to the ambivalence outlined above, technical problems obstruct the OWCP’s ability to pursue higher-level cases. A necessary precondition for a more proactive approach to investigation and prosecution is greater use of analysts and legal assistants in the OWCP. The lack of such resources is a problem that deserves urgent attention. Crimes such as genocide, crimes against humanity, and war crimes differ from ordinary crimes in that they are generally on such a scale that they require organization or a system to perpetrate. The key challenge in prosecuting system crimes is not normally to prove that the facts occurred, but to show the nature of participation and the knowledge and intent of those behind the scenes.⁸⁶

As a result, investigation techniques for system crimes, as developed initially at Nuremberg and later by the ad hoc tribunals, differ from those of ordinary crimes.⁸⁷ In addition to traditional investigation techniques, such as the reconstruction of the crime scene and forensic analysis, system crimes often require a detailed analysis of the particular practices and structure of military and paramilitary organizations.⁸⁸ To present an accurate account of how these events occurred, investigators and prosecutors must uncover the nature of political, historical, and institutional relationships. Analyses of the local context and dynamics of violence, as well as documentary evidence, are other important elements in the investigation of system crimes. The testimony of so-called insiders can be particularly crucial but is very difficult to obtain.

The skills required to fulfill these tasks go beyond ordinary criminal-investigation techniques. Experts such as military analysts, historians, and political scientists may be needed to complement investigation of the underlying crimes in a field traditionally dominated by police and prosecutors. Many domestic investigative authorities are often neither equipped nor trained to conduct such multidisciplinary

⁸⁴ International Court of Justice, *Case Concerning the Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, Judgment, February 26, 2007, para. 403.

⁸⁵ The International Court of Justice found no evidence of genocide in Bosnia in 1992. This finding rendered moot the issue of Serbia’s alleged responsibility for genocide in that period. Thus the court did not examine the nature of the relationship between Serbia and the Bosnian Serb forces in 1992.

⁸⁶ Paul Seils and Marieke Wierda, “Evidence,” in Dinah L. Shelton, *Encyclopedia of Genocide and Crimes against Humanity*, 1 (2005), 321.

⁸⁷ United Nations Office of the High Commissioner for Human Rights, “Rule of Law Tools for Post-Conflict States,” *Prosecution Initiatives* (“OHCHR Prosecution Tools”) (2006), 11.

⁸⁸ *Ibid.*, 12.

investigations.⁸⁹ There is a tendency to overload investigations with crime scene findings, which ultimately prove that a great number of criminal acts were committed but neither clarify the nature of participation in these crimes nor identify the intellectual authors.

The OWCP is currently structured to focus on crime scene investigations and not investigations of criminal organizations and systems. Especially for the prosecution of mid- to high-level accused it seems extremely difficult with the current resources and techniques for the OWCP to gather the required evidence to establish the link between the trigger pullers and the masterminds behind the scenes. This is even more complex work considering the often indirect connection in Serbia between some of the paramilitary groups responsible for perpetrating serious crimes and more-official Serbian institutions such as the JNA.

III. THE WAR CRIMES INVESTIGATION SERVICE: THE ROLE OF THE POLICE

A key component of the Serbian police mandate, as defined by law, is to uncover the perpetrators of criminal offences, arrest them, and collect information that could be used as evidence in a criminal trial.⁹⁰ To date, however, the War Crimes Investigation Service (WCIS) of the Serbian police has rarely approached the OWCP with information about perpetrators of a war crime.⁹¹ The service allegedly had an important role in identifying the suspects in the *Suva Reka* case.⁹² In other cases the WCIS's role has been restricted to taking statements from various persons, usually after the prosecutors identified them as potential witnesses.⁹³ The WCIS members carry out this task skillfully, but that does not compensate for the overall lack of initiative.⁹⁴

According to war crimes prosecutors, only recently did signs appear of an improved attitude in the WCIS. The unit allegedly provided solid assistance in amassing evidence on a major war crime in Kosovo.⁹⁵ In an interview in May 2007, War Crimes Prosecutor Vladimir Vukčević described the cooperation with the WCIS as "improving each day."⁹⁶ The head of the WCIS, on the other hand, has argued that prosecutors give only limited information on a case to the service, and lacking insight into the wider context of the case, the service finds it difficult to expand its activities and come up with better results.⁹⁷ These arguments about who drives the investigation are not uncommon in other jurisdictions, but here the net result may be the pursuit of fewer cases.

A. Staff, Space and Salary Limitations

In May 2007 the WCIS employed 22 police officers, 10 more than a year earlier.⁹⁸ Until recently it was difficult to attract police to the service because of the perceived risks the job entails and the perception that the WCIS was engaging in an unpatriotic activity.⁹⁹ According to the head of the unit, interest in working

⁸⁹ OHCHR Prosecution Tools, 13.

⁹⁰ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001 and 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 225.

⁹¹ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

⁹² Interview with Aleksandar Kostić, head of WCIS, Belgrade, May 14, 2007.

⁹³ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007; interview with Bruno Vekarić, OWCP spokesperson, Belgrade, March 15, 2007.

⁹⁴ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

⁹⁵ *Ibid.*

⁹⁶ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007.

⁹⁷ Interview with Aleksandar Kostić.

⁹⁸ *Ibid.*

⁹⁹ The service is also assigned to search for fugitives from the International Criminal Tribunal for the former Yugoslavia, among other tasks.

for the service has increased in the past year; in May 2007 there were at least two applicants for each of the remaining 19 posts envisaged in the bylaws on the internal organization of the service.¹⁰⁰ One possible explanation for this increase in police interest in participating in war crimes investigations is that such work has proven less risky than originally anticipated. Employment in the WCIS also provides certain professional opportunities, including frequent trainings organized by the U.S. Department of Justice and the OSCE.¹⁰¹

The WCIS has been unable to fill the remaining posts, however, because of office space limitations. Until September 2007 the 22 employees shared five offices. This congestion has hampered the use of existing resources. For example, a new color photocopy machine received from foreign donors could not be used because it remained unpacked.¹⁰² The service moved to new office premises in September.¹⁰³

Unlike the salaries of war crimes prosecutors and judges in Serbia, the salaries in the WCIS are no higher than those in other police departments. Although the head of the service denies that the low salaries discourage the adequate implementation of tasks,¹⁰⁴ arguably officers investigating war crimes should receive higher salaries, given the particular sensitivity and complexity of their job.

It is difficult to determine if the lack of profound reforms in the Serbian police since the beginning of the democratic changes in 2000 has deterred the WCIS from fully exercising its duties and identifying war crimes suspects on a larger scale. As mentioned above, the Serbian Parliament enacted a law on vetting in June 2003, but the law has never been implemented.¹⁰⁵ Members of the police are believed to have committed numerous war crimes in Kosovo in 1998 and 1999, and many are still employed. These factors may have an impact on the prevailing climate in the current Serbian police. Hence the WCIS staff may hesitate to go after their colleagues in other departments, both for reasons of security and reluctance to break ranks.¹⁰⁶

One-fifth of the staff employed in the WCIS are women, working mainly as analysts. When asked whether the service included female staff with sufficient skills to conduct interviews with female victims of sexual violence, the head of the service responded positively. According to him, the analysts are officially authorized to take statements from victims and witnesses. Although the female staff have not been trained in dealing with victims of sexual violence, the head of the service and another member received such training and could, if necessary, convey the knowledge to their female colleagues.¹⁰⁷ The assertion of the head of the WCIS remains to be tested in practice. The WCIS did not interview the only female victim of sexual violence who has testified so far before the War Crimes Chamber in the pre-investigation stage of the proceedings, because only the prosecutors conducted the entire pre-investigation in the case (*Lekaj*).¹⁰⁸

B. Relationship with the Prosecutors

A recurring debate relates to the role of police in investigations and their location in the system as a whole. Serbian war crimes prosecutors believe that the key for improving the work of the WCIS is to place the unit under the formal authority of the OWCP, removing it from the Ministry of the Interior.¹⁰⁹ They argue

¹⁰⁰ Interview with Aleksandar Kostić.

¹⁰¹ Ibid.

¹⁰² Ibid. Other departments in the Directorate of the Criminal Police (such as the unit for suppression of drug trafficking, and the unit for suppression of organized crime) face equally dire conditions.

¹⁰³ Telephone interview with Aleksandar Kostić, September 3, 2007.

¹⁰⁴ Interview with Aleksandar Kostić, Belgrade, May 14, 2007.

¹⁰⁵ See I C, above.

¹⁰⁶ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

¹⁰⁷ Telephone interview with Aleksandar Kostić, September 3, 2007.

¹⁰⁸ Ibid.

¹⁰⁹ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007; interview with a deputy war crimes prosecutor, Belgrade, May 8, 2007.

this would ostensibly generate direct and regular interaction between the police and the prosecutors and enable prosecutors to issue effective instructions.¹¹⁰ Likewise, OWCP members believe that particular police officers should be attached to particular deputy prosecutors.¹¹¹ Given the division of labor among the prosecutors, this mechanism would facilitate building of teams with expertise in the crimes that took place in specific parts of the former Yugoslavia.

The head of the WCIS considers that the existing practice already conforms to a significant extent to the described model. Although there is no formal division of responsibilities among the police officers based on crime location, the reality is that certain officers spend more time looking into crimes committed in one country than in another and work with the same prosecutors.¹¹² However, officers are not directly under the control of such prosecutors, who send written requests for the WCIS to obtain certain information. They direct these requests to the head of the service, who issues instructions to an officer assigned to the case.¹¹³

A controversial issue that typifies the relationship between the OWCP and the police has been the dispute over war crimes prosecutors' access to the so-called Kosovo and Metohija Dossier. This dossier contains police reports about wartime activities of the Serbian police in Kosovo, including information about the whereabouts of specific units on specific dates, as well as about specific crimes.¹¹⁴ OWCP representatives interviewed in March and April 2007 objected that the office had been asking the interior ministry for access to the dossier, but the ministry claimed it could not meet the requests because the files were in the process of "systematization."¹¹⁵ The head of the WCIS confirmed that the service was organizing the dossier, but he denied that it was closed to the prosecutors.¹¹⁶ To illustrate the point, the head of the service said the ICTY investigators had examined the dossier twice during 2006, and the national prosecutor conceivably enjoyed the same right.¹¹⁷ In a follow-up interview the OWCP's spokesperson acknowledged that access to the dossier had improved.¹¹⁸ But the example is indicative of the strained relationship between prosecutors and police.

It is possible, however, that taking the war crimes unit out of the current police structure would remove it from an important source of information.¹¹⁹ While refraining from giving a firm answer to a question about the optimal solution, the head of the WCIS remarked that in well-functioning justice systems, such as in the United States, prosecutors have little say in the affairs of the police investigators (the FBI, in his example). He added that the various models also include those in which the police investigators belong to the justice ministry rather than the interior ministry.¹²⁰

Despite the justifiable concern regarding access to information, arguments for the separation of the WCIS from the interior ministry are nonetheless strong. Such restructuring might remove or decrease concerns about psychological and practical obstacles associated with police inquiries about work colleagues. Assistance by the service to the OWCP would probably improve, regardless of whether the service became an independent agency or a unit of the OWCP.

Frequent complaints by the OWCP about the role of the police, and the variety of views on the optimal relationship between the two agencies, suggest that the search for the right model is far from over. In

¹¹⁰ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

¹¹¹ Interview with Vladimir Vukčević; interview with a deputy war crimes prosecutor, Belgrade, May 8, 2007.

¹¹² Interview with Aleksandar Kostić, Belgrade, May 14, 2007.

¹¹³ Telephone interview with Aleksandar Kostić, September 3, 2007.

¹¹⁴ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

¹¹⁵ Ibid; interview with Bruno Vekarić, OWCP spokesperson, Belgrade, March 15, 2007.

¹¹⁶ Interview with Aleksandar Kostić, Belgrade, May 14, 2007.

¹¹⁷ Ibid.

¹¹⁸ Interview with Bruno Vekarić, Belgrade, July 17, 2007.

¹¹⁹ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

¹²⁰ Interview with Aleksandar Kostić, Belgrade, May 14, 2007.

December 2006 a government-appointed group of experts produced a draft law on war crimes prosecutions that introduces changes in the relationship between the OWCP and the WCIS. The draft leaves the WCIS within the Ministry of the Interior while increasing the controlling powers of the war crimes prosecutor. The existing law stipulates that the Minister of the Interior shall hear the opinion of the war crimes prosecutor before appointing the head of the unit. Under the new law the prosecutor's assent would be required. Also, according to the draft the Ministry of the Interior must remove the WCIS head if the prosecutor so requests.¹²¹ The new law, however, does not provide for a procedure whereby the prosecutor could lodge an official complaint to superiors in the police about noncooperation or insufficient cooperation by other WCIS staff, impose disciplinary sanctions, or hinder promotions.¹²² In other words, it is unclear if the newly proposed legislative changes will necessarily result in improved coordination at a practical level in individual investigations. In addition, the law is unlikely to be enacted in the immediate future.¹²³

IV. WAR CRIMES CHAMBER

Although the WCC is colloquially referred to as a “war crimes court,” or “special court,” it is in fact one of a dozen departments within the Belgrade District Court. The WCC has six judges and two investigating judges, all appointed by the court's former president in 2004. The Chamber's current president, Siniša Važić, had adjudicated one war crimes trial before the establishment of the WCC. Some of the judges have attended seminars on international humanitarian law issues organized in Serbia by the OSCE, the United Nations Development Program (UNDP), and the Humanitarian Law Center.¹²⁴ The trial chambers consist of three judges, and their composition is not fixed. Seven law clerks assist the judges and investigating judges.¹²⁵ Taking into consideration the complex nature of war crimes investigations, arguably the current number of investigating judges is insufficient for the number of cases under investigation and would impede any attempt to increase the number of cases brought before the War Crimes Chamber.

Although the WCC is only one of several special chambers in the District Court (including the chambers for cyber-crime and crimes committed by military personnel and minors), some of its features differ from those of the other chambers. The WCC appoints the judges for a period of four years instead of only one year or, in the organized crime chamber, two years.¹²⁶ The presiding judge of the trial chamber does not dictate the minutes of the proceedings (they are recorded and then transcribed verbatim), significantly speeding the proceedings and increasing their effectiveness. As a rule, war crimes trials take place outside the District Court in a special building constructed in 2003 and equipped with modern technology.¹²⁷ The same building also hosts the chamber for organized crime as well as the offices of the war crimes prosecutor and the special prosecutor for organized crime. As already mentioned, the procedure in cases of war crimes and organized crime also differs significantly, in that the chambers can use evidence

¹²¹ Interview with OSCE expert assigned as consultant to the working group drafting the Law on the State Bodies and Procedure for Prosecution of Crimes under International Humanitarian Law, Belgrade, March 14, 2007.

¹²² Ibid.

¹²³ For further discussion see section X below.

¹²⁴ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

¹²⁵ Interview with Siniša Važić, president of the Belgrade District Court and the War Crimes Chamber, Belgrade, March 30, 2007.

¹²⁶ Judicial tenure is permanent. See Constitution of Serbia, adopted on November 8, 2006, art. 146 (1).

¹²⁷ Exceptionally, some of the sessions in the Suva Reka trial have taken place in a courtroom in the District Court building. Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, July 17, 2007,

collected by the prosecutor before the opening of the formal investigation.¹²⁸ The WCC judges receive salaries twice as high as other those of District Court judges, except in the organized crime chamber.¹²⁹

To date the existing number of judges in the WCC has been sufficient to deal with the small number of cases brought by the OWCP. Any increase in the caseload in the foreseeable future is likely to be modest, and the president of the District Court could appoint additional judges to the chamber. The appointment would, however, create logistical problems resulting from the lack of additional courtrooms and offices in the court.¹³⁰

A. From Unqualified Praise to Deserved Criticism

As recently as January 2007 the Humanitarian Law Center (HLC), a leading human rights group in Serbia that represents the victims in war crimes trials, expressed the opinion that “the War Crimes Chamber of the District Court in Belgrade performs its judicial functions professionally, objectively, and impartially. The judges acting in war crimes cases strictly respect the law, in keeping with the principles of fair trial.”¹³¹ This endorsement was based on the recognized skill with which most trial chambers conducted the proceedings and the WCC judgment in the *Ovčara* case, in which the court convicted 14 Serb defendants for the killings of 200 Croat prisoners of war and civilians at the Ovčara farm near Vukovar in 1991.¹³²

Three months later, however, an HLC press release painted a very different picture. The court, the HLC alleged, “was led by political rather than legal reasons,” “insult[ed] the victims’ closest family members who attended the main hearing and the rendering of judgment,” “completely oversaw (sic)” certain facts, and “dropped the determined facts and turned to political balancing.”¹³³

The press release specifically reflected the HLC’s disappointment with the War Crimes Chamber judgment of April 10, 2007, against members of the Scorpions unit indicted for the execution of six Bosniak (Bosnian Muslim) civilians in Trnovo, BiH, in July 1995. The Scorpions unit leader and one accomplice were each sentenced to 20 years’ imprisonment, one indicttee to 13 years, and another to five years. The trial chamber acquitted the fifth accused. The chamber indeed rendered a flawed decision, possibly because it tried to balance different political considerations. Among a number of controversial points, some stand out as clearly defective. The judgment states that there was not enough evidence that the six executed Bosniaks had been brought from Srebrenica,¹³⁴ despite the fact that members of the victims’ families testified to confirm that the victims were from that town. The court apparently endeavored to disassociate the activities of the Scorpions unit from the events in Srebrenica during the same period, when 8,000 Muslims were executed.¹³⁵ The HLC and others claimed that during the events in Srebrenica the Scorpions were a unit of the Serbian special police. It is beyond dispute that in 1999, during the Kosovo war, the Scorpions belonged to the Special Anti-Terrorist Unit of the Serbian police.¹³⁶

¹²⁸ Interview with Siniša Važić. Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 504j.

¹²⁹ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia.

¹³⁰ Interview with Siniša Važić.

¹³¹ Humanitarian Law Center, *Bilten 'Tranziciona pravda': Suđenja za ratne zločine u Srbiji* (“Bulletin 'Transitional Justice': War Crimes Trials in Serbia”), January 11, 2007.

¹³² District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Miroljub Vujović et al.*, Case no. K.V. 1/2003, judgment, December 12, 2005, p 131

¹³³ Humanitarian Law Center, “Scorpions Verdict Politically Motivated” (press release), April 12, 2007.

¹³⁴ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Slobodan Medić et al.*, Case no. K.V. 6/2005 (*Scorpions* case), Judgment, April 10, 2007, 108.

¹³⁵ Humanitarian Law Center, “Scorpions Verdict Politically Motivated” (press release), April 12, 2007.

¹³⁶ The fact was established in the war crimes trial of one of the unit’s members (Saša Cvjetan) before the District Court in Belgrade between 2002 and 2004.

The court sentenced one of the indictees, Aleksandar Medić, to the minimum sentence prescribed (five years), although the video of the crime shows that Medić verbally humiliated one of the prisoners, a 16-year-old boy, before the execution.¹³⁷ In ICTY jurisprudence verbal abuse before a killing is recognized as an aggravating factor.¹³⁸ The fact that Medić received a minimum sentence indicates that in its determination of the sentence the WCC chamber does not appear to have taken account of Medić's brutality.

B. Limited Use of ICTY Jurisprudence

As of August 2007 the WCC had issued written opinions in only two cases, *Ovčara* and *Lekaj*, making it difficult to fully assess the impact of ICTY case law on the WCC.¹³⁹ In its judgments the Chamber made no use of ICTY jurisprudence concerning issues of substantive law. In only one instance, in the *Lekaj* judgment, the WCC briefly referred to ICTY's position regarding the existence of an armed conflict. The trial chamber examined whether the Fourth Geneva Convention and the First Additional Protocol of the Geneva Conventions could be applied in the case. The underlying crimes had been committed between June 12 and 16, 1999, after the conclusion (on June 9) of the Military Technical Agreement between NATO and representatives of the Yugoslav army and the Serbian police, providing for the withdrawal of all Yugoslav and Serbian forces from Kosovo. The chamber decided that the convention and the protocol did apply because military operations ceased only on June 20, 1999. However, rather than citing established findings from ICTY judgments, the WCC cited unspecified "ICTY indictments concerning Kosovo" in support.¹⁴⁰

The chamber also found that at the pertinent time, the conflict in Kosovo was "both internal and international."¹⁴¹ Although it did not develop the argument in any detail or refer to any ICTY decision, this finding is consistent with the ICTY Appeals Chamber's reasoning in the *Tadić* judgment of July 1999.¹⁴²

In the main *Ovčara* judgment the chamber addressed the nature of the armed conflict in Vukovar in November 1991. At that time Croatia had declared independence but other states still had not recognized it. The ICTY has not established in any judgment whether the conflict at that time was international or internal,¹⁴³ but in a decision on a defendant's motion one ICTY trial chamber found sufficient evidence

¹³⁷ Medić asked the boy, "Have you ever had sex?" When the boy answered no, Medić told him, "Well then, you never will!" Humanitarian Law Center, "Scorpions Verdict Politically Motivated" (press release), April 12, 2007.

¹³⁸ *Prosecutor v. Mitar Vasiljević*, Case no. IT-98-32-T (Trial Chamber) Judgment, November 29, 2002, para. 276; *Prosecutor v. Mitar Vasiljević*, Case no. IT-98-32-T (Appeals Chamber) Judgment, February 25, 2004, para. 162.

¹³⁹ In the *Ovčara* trial the WCC issued three judgments, of which one contains all major findings and the remaining two, resulting from severed trials against two accused, focus only on the specific role of the defendants.

¹⁴⁰ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Anton Lekaj*, Case no. K.V. 4/05, Judgment, September 18, 2006, p. 26. ICTY indictments indeed allege that a joint criminal enterprise, the purpose of which was the expulsion of a substantial portion of the Kosovo Albanian population from Kosovo, existed until June 20, 1999, when KFOR, NATO's Kosovo force, announced that the withdrawal of Yugoslav and Serbian forces from Kosovo was complete. See *Prosecutor v. Slobodan Milošević et al.*, Second Amended Indictment, October 16, 2001, para. 108. See also *Prosecutor v. Milan Milutinović et al.*, Case no. IT-99-37-AR72, Third Amended Indictment, July 19, 2002, para. 108.

¹⁴¹ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Anton Lekaj*, Case no. K.V. 4/05, Judgment, September 18, 2006, 26.

¹⁴² ICTY Appeals Chamber, *Prosecutor v. Duško Tadić*, Case No. IT-94-A, Judgment, July 15 1999, para. 84: "[I]n case of an internal armed conflict breaking out on the territory of a State, it may become international (or, depending upon the circumstances, be international in character alongside an internal armed conflict) if (i) another State intervenes in that conflict through its troops, or alternatively if (ii) some of the participants in the internal armed conflict act on behalf of that other State."

¹⁴³ In the only ICTY judgment as of September 2007 that pertained to the conflict in Croatia, the charges were based on articles 3 and 5 of the ICTY Statute. In both it is immaterial whether the armed conflict was international or non-international. See *Prosecutor v. Milan Martić*, Case no. IT-95-11-T, (Trial Chamber) Judgment, June 12, 2007, paras. 42 and 48.

that Croatia was a state by October 8, 1991.¹⁴⁴ The result of this would be that crimes in Vukovar in November 1991 were committed in an international armed conflict. In contrast the WCC Chamber concluded that Croatia was still part of the former Socialist Federal Republic of Yugoslavia when the crimes in the indictment were committed (November 20–21, 1991), and the conflict was internal.¹⁴⁵

If the WCC continues to use the ICTY jurisprudence only scarcely or make contrary findings of law and fact, such an attitude will stand in sharp contrast to the practice of the War Crimes Chamber of the State Court of BiH, which has drawn extensively on ICTY case law.¹⁴⁶ In part this difference might reflect the fact that war crimes trials before the Bosnian State Court benefit from the presence of international judges and prosecutors, some of whom have considerable experience from the Hague-based tribunal. Officials participating in the trials in Serbia, in contrast, are all Serbian citizens, with little practical experience in international humanitarian law. Lawyers in Serbia are generally unaccustomed to invoking international law in their decision-making. On the other hand, war crimes judges (and prosecutors) in Belgrade have recently attended a number of advanced seminars, often with ICTY practitioners as trainers.

This raises the question of whether the difference is a matter of mentality. Translations of the ICTY judgments are available on the tribunal's Web site and accessible to the national judges. The WCC judges could demonstrate greater creativity and boldness in making practical use of the knowledge they have either already acquired or could develop with a modest investment of time and effort.

C. Supreme Court as Impediment?

On December 14, 2006, the Supreme Court of Serbia annulled the first-instance judgment by the WCC of a year earlier in the *Ovčara* case and ordered a retrial. The decision represented a significant setback for the war crimes prosecutions in Serbia. Widely hailed as a fair and effective trial, *Ovčara* had helped victims outside Serbia believe that their participation in the trials in Belgrade would be meaningful. After the Supreme Court's decision this positive effect began to wane. Relatives of the *Ovčara* victims, who had attended the trial in 2005, refused to observe the retrial, which began on March 13, 2007. Representatives of Croatian victims' groups stated they did not wish to serve as decoration at a trial in a country that could not or would not deliver justice.¹⁴⁷

The OSCE mission in Serbia, which observed the first-instance trial as well as the public part of the appellate procedure, identified some elements in the Supreme Court's decision as indicating possible political motives. The mission did not, however, find conclusive evidence that the decision of the Supreme Court was politically driven.¹⁴⁸ According to the OSCE, the first-instance judgment contained certain weaknesses that exposed it to reasonable criticism.¹⁴⁹ The OSCE analysis nonetheless concludes that the Supreme Court could have upheld the convictions of some of the defendants. The choice not to do so

¹⁴⁴ *Prosecutor v. Slobodan Milošević*, Case No. IT-02-54-T, Decision on Motion for Judgment of Acquittal, June 16, 2004, para. 115. The chamber assessed the sufficiency of prosecutor's evidence for the purposes of rule 98 *bis* of the ICTY Rules of Procedure and Evidence. The standard for determining sufficiency was whether the tribunal *could* convict on basis of the evidence, rather than whether the tribunal *should* convict. *Ibid.*, para 13.

¹⁴⁵ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Miroljub Vujović et al.*, Case no. K.V. 1/2003, Judgment, December 12, 2005, 131.

¹⁴⁶ See International Center for Transitional Justice, *From Hybrid to National: The War Crimes Chamber of Bosnia and Herzegovina* (forthcoming).

¹⁴⁷ "Porodice žrtava neće u Beograd" ("Victims' Families Will Not Go to Belgrade") (statement by Ivan Pšenica, President of the Federation of Associations of the Families of the Detained and Missing Croatian Defenders), *Danas* (Belgrade), March 12, 2007, <http://danas.co.yu/20070312/hronika3.html#0> (accessed September 3, 2007).

¹⁴⁸ OSCE Mission in Serbia, "Analysis of the Serbian Supreme Court's ruling annulling the first-instance judgment in the 'Ovčara' case," (unpublished report, February 2007).

¹⁴⁹ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

might reflect the usual caution of the judges of the Supreme Court's Criminal Law Chamber when confronting a complex case. The court in such cases allegedly orders retrial as a matter of routine.¹⁵⁰

However, ICTJ received a report that a senior officer of the Criminal Law Chamber in the Supreme Court was seen visiting the headquarters of the Serbian Radical Party several days before the chamber discussed the *Ovčara* appeal.¹⁵¹ Although it is difficult to confirm such allegations, some observers seemed to believe that the Supreme Court was responding to political factors. The Serbian Radical Party has attacked the OWCP and the WCC in parliamentary debates and other public appearances. Further contributing to such perceptions is the fact that some indictees in the *Ovčara* case belonged to a paramilitary unit allegedly established by the party.

The OSCE's analysis does give rise to the supposition that the Supreme Court may have acted in an obstructionist manner. The Court put a near-impossible task before the Trial Chamber by requesting that the WCC take statements at the retrial from two detainees at the ICTY in The Hague. The Court was aware that both detainees already had refused to testify during the first-instance trial. The Supreme Court also ordered the Trial Chamber to obtain certain documentary evidence from the military authorities—a written order appointing two of the accused to their formal positions as commander and deputy commander. However, the first-instance court, invoking a report procured from the military authorities, established that records related to this order were no longer available, having been either not saved or destroyed during the NATO bombing in 1999.¹⁵²

Certainly some officials working on war crimes cases share the view of many human rights activists and the press that the Supreme Court is a hostile body, packed with appointees from the Milošević era. The hope among the war crimes prosecutors is that the court will be reshuffled as result of the recent adoption of the new Serbian Constitution, which created a new supreme judicial body in Serbia, the Supreme Court of Cassation.¹⁵³ The Parliament still must appoint the judges to this new court. Following the parliamentary elections in January 2007, the parliamentary majority consists of political parties supporting war crimes prosecutions (the Democratic Party and the G-17 party).¹⁵⁴ Nevertheless, as of December 2007 the Supreme Court of Cassation still had not been established.¹⁵⁵

V. CONCERNS REGARDING THE WITNESSES

Witness testimony is by far the most important source of evidence in war crimes prosecutions in Serbia. Other forms of evidence, such as written documents and videos of the crimes, have also been used in certain trials, but such instances have been comparatively rare.¹⁵⁶ Given the unique role of witnesses and the general political environment described above, it is crucial to create conditions that ensure they can testify freely. The OWCP and the WCC have been only partly successful in realizing this goal.

¹⁵⁰ Ibid.

¹⁵¹ Interview with a representative of the OWCP, Belgrade, March 15, 2007.

¹⁵² OSCE Mission in Serbia, "Analysis of the Serbian Supreme Court's ruling annulling the first instance judgment in the 'Ovčara' case," (unpublished report, February 2007).

¹⁵³ Constitution of the Republic of Serbia, promulgated November 8, 2006, arts. 143 and 144.

¹⁵⁴ The Democratic Party should not be confused with the Democratic Party of Serbia, the leading partner in Serbia's ruling coalition from 2004 to 2007.

¹⁵⁵ According to the Constitutional Law on the Implementation of the Constitution of Serbia (November 2006), the Supreme Court of Cassation should be established and its president and judges elected within 90 days after the establishment of the High Judicial Council. According to the Constitutional Law, the Council cannot be established before the Parliament enacts a new law on courts. As of December 2007 Parliament had not passed the law on courts.

¹⁵⁶ The most obvious example is the video of the execution of six Bosniaks from Srebrenica by the members of the Scorpios unit in July 1995. The recording was a crucial part of evidence in the trial against five members of the unit between November 2005 and April 2007.

A number of indictees in the war crimes trials have been members of the Serbian police or units associated with the police. Witnesses from Serbia are often too intimidated to testify against such defendants. The fear results from the general political and social environment in the country and affects not only victim-witnesses. For the same reason the OWCP has found it difficult to secure insider witnesses who would provide critical information about crimes and those responsible for them. Members of Serb units that perpetrated mass killings did testify in two cases, *Ovčara* and *Suva Reka*.¹⁵⁷ Yet, perhaps surprisingly, there have been no instances in which insider testimony, either in the investigation or at trial, has provided links to higher-ranking suspects. The OWCP's overall reluctance to address the responsibility of superiors may serve as an additional disincentive to already reluctant, potential insider witnesses who possess this type of information.

Another important category of witness comprises citizens of the neighboring countries (BiH and Croatia) and Kosovo. Most of them are not of Serb ethnicity and distrust the Serbian government. They are under no obligation to participate in war crimes trials in Serbia. The big challenge for the OWCP and the WCC is to convince these witnesses to testify.

A. Ensuring the Presence of Non-Serb Witnesses in the Trial

A number of witnesses from Croatia and BiH have testified at the trials for crimes in Ovčara, Trnovo (the *Scorpions* case), and Zvornik. In the *Zvornik* trial, the role of the witnesses from BiH has been particularly important because four-fifths of the 81 witnesses (as of mid-December 2007) were Bosnian citizens.¹⁵⁸

The Humanitarian Law Center played the most crucial role in persuading non-Serb witnesses from BiH and Croatia to come to Belgrade to testify.¹⁵⁹ HLC Director Nataša Kandić, a leading human rights activist in the region, explained to witnesses the importance of their potential contribution to justice and assured them that they would be treated with dignity during their stay in Belgrade. In the *Zvornik* case the HLC ensured participation of 10 of the 38 witnesses who testified during 2006. Five witnesses were under the protection of the Victims' Protection Unit of the Serbian police while they stayed in Serbia, and the remaining five were accompanied only by HLC staff.¹⁶⁰ In the *Scorpions* case HLC representatives visited the families of the victims before the proceedings and asked them to participate in the trial. Three witness-victims contacted in this way eventually testified, and the OWCP ensured the participation of three more. The HLC organized the stay of all six in Belgrade.¹⁶¹

It has been more difficult to convince Kosovo Albanian witnesses to testify in the ongoing *Suva Reka* trial. Although the witnesses were willing to meet in Pristina with a Serbian deputy prosecutor and investigating judge in 2005, neither the prosecutor nor the HLC were able for a long time to persuade them to testify in Belgrade.¹⁶² At the same time the prosecutor in the case was reluctant to propose that the witnesses testify via video-link from Pristina because of his assessment that such testimonies would have a limited effect.¹⁶³ By the end of 2007, some Albanian witnesses had abandoned the reluctance to appear before the court in

¹⁵⁷ The testimonies of the two insiders in the Ovčara case directly implicated a number of the indictees in the commission of the crime. District Court in Belgrade (War Crimes Chamber), Judgment, December 12, 2005, K.v. br. 1/2003, 71–80, 89, et seq. The *Suva Reka* trial is still pending.

¹⁵⁸ Interview with the presiding judge in the *Zvornik* trial, Belgrade, May 9, 2007; telephone interview with an OSCE trial observer, Belgrade, December 19, 2007.

¹⁵⁹ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007.

¹⁶⁰ Humanitarian Law Center, *Savetovanje svedoka/žrtava i zastupanje pred sudom: model podrške - Izveštaj o realizaciji projekta* ("Counseling of Victim-Witnesses and Representation Before Court: A Model of Support—Report on the Realization of the Project"), February 21, 2007, www.hlc.org.yu/srpski/Nacionalna_sudjenja_za_ratne_zlocine/Srbija/index.php?file=1601.html (accessed May 10, 2007).

¹⁶¹ *Ibid.*

¹⁶² Interview with Nataša Kandić, executive director, HLC, Belgrade, April 17, 2007.

¹⁶³ Interview with a deputy war crimes prosecutor, Belgrade, May 8, 2007.

Belgrade. Due to efforts by the Humanitarian Law Center and the ICTY, three Kosovo Albanians testified in the *Suva Reka* trial, in November and December.¹⁶⁴

B. Late Establishment of a WCC Victim and Witness Support Unit

A Victim and Witness Support Unit (VWSU) was established in the War Crimes Chamber only in June 2006. Its main tasks include interacting with the witnesses before their arrival in Belgrade, arranging for their travel and accommodation in Belgrade, offering encouragement and basic explanations about the trial before they enter the courtroom, and other practical matters. In October 2006 the VWSU was allocated a separate office in the Special Court building, where it accommodates witnesses before and after their testimony. The unit employs two persons.¹⁶⁵

Although one of the unit's main tasks is to provide psychological support to witnesses, the VWSU does not include a professional psychologist. Contact with the witness is usually established weeks before the date scheduled for his or her testimony. In the interim the witness can notify the VWSU and the court of his or her preference regarding protective measures or other concerns. In its view the unit has established "very good" cooperation with similar units in Croatia and BiH.¹⁶⁶

VWSU employees have participated in two training sessions, the second of which (in March 2007) the ICTY organized in The Hague.¹⁶⁷ There has not been any standardized training in dealing with victims of sexual violence. It is not evident that the lack of this expertise will be of consequence in the immediate future, given that the crimes investigated include killings, torture, and forced displacement.¹⁶⁸ In that regard OWCP and WCC practice differs from that in Bosnia and Herzegovina, where the State Court of BiH has tried a number of sexual crimes and the issue of treatment of traumatized female victims has given rise to major controversy.¹⁶⁹

C. Protection of Witnesses: The Legislative Framework

Before September 2005 Serbian legislation made extremely limited provision for the protection of witnesses' safety. A provision in the Criminal Procedure Code (2001) stated in a general way, "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."¹⁷⁰ In December 2002 a new chapter was added to the Criminal Procedure Code, dealing exclusively with the prosecution of individuals involved in organized crime (including war crimes). A provision in the chapter reasserted the authority of a prosecutor to "order that special protection be secured for the witness, witness collaborator, or members of their families."¹⁷¹

¹⁶⁴ Telephone interview with Natasa Kandić, December 19, 2007.

¹⁶⁵ Interview with the members of the Victims and Witness Support Unit, Belgrade, March 29, 2007.

¹⁶⁶ Ibid.

¹⁶⁷ Ibid.

¹⁶⁸ The OWCP Web site contains a list of cases under investigation or in pre-investigation stage, at www.tuzilastvorz.org.yu/html_lat/predmeti.html.

¹⁶⁹ Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber*, February 2007, 19, no. 1(D), 17, 33–35. In some of the first war crimes trials before the Court of BiH (Stanković and Samardžić cases), dealing with sexual violence against Bosniak women, panels decided to hold the trials in camera. NGOs and victims' groups criticized the decisions, arguing that in some instances the court should have used less-drastic protective measures. Witnesses (female victims of sexual violence) also complained about the lack of sensitivity of SIPA (State Protection and Investigative Unit) officers toward them.

¹⁷⁰ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 109 (3).

¹⁷¹ Ibid., art. 504p.

The intensification of the work of the Serbian War Crimes Prosecutor and the WCC coincided with the adoption of two laws that significantly improved the legislative basis of witness protection. A law adopted in September 2005 addresses in detail out-of-court protection of the participants in any criminal proceedings.¹⁷² In May 2006 the Serbian Parliament enacted a new Criminal Procedure Code, which makes broad provision for protection of witnesses from harassment and protection of their safety in the court.¹⁷³ Of particular note is the fact that these provisions immediately entered into force, while the application of the rest of the statute has suffered delays.¹⁷⁴

With respect to witnesses whose safety could be seriously jeopardized as result of their testifying in war crimes trials, the Criminal Procedure Code (2006) sets out a range of protective measures in the following circumstances:¹⁷⁵

- a. giving testimony in a closed session;
- b. alteration of the information on the identity of the witness, its removal from the court files, or ban on making the information public;
- c. withholding information about the identity of the witness;
- d. testifying under a pseudonym;
- e. concealing the appearance of the witness;
- f. giving testimony from a separate room with the use of voice-altering devices;
- g. giving testimony from other premises outside the court, in a different town in Serbia or abroad, using video-link and with a possibility of using voice- and image-distortion devices.

In addition to these procedural reforms, Serbia has entered into several bilateral agreements that provide the legal basis for relocating witnesses to other countries.¹⁷⁶ These could help ensure safety of former members of the military, paramilitary, or police units who might be willing to testify against their former comrades. Available information suggests that serious consideration has been given so far to relocating one potential witness, but the receiving country and the witness have been unable to agree about the mutual obligations following the relocation.¹⁷⁷ The list of countries with which Serbia has made relocation agreements has not become public because of the sensitivity of the issue. Relocation within Serbia is unlikely, except perhaps on a temporary basis and in addition to police protection, because of the small size of the country.¹⁷⁸

D. Protecting Safety of Witnesses in Court

Two important trials—*Ovčara* and *Scorpios*—had been completed or were ongoing before the new provisions on witness protection entered into force in May 2006. The witnesses in these cases who testified before that date could not benefit from protective measures in court, even including simple options such as use of a pseudonym. An arguable exception was the use of video-link when two witnesses in the *Ovčara* trial testified from the County Court in Zagreb. Also, two protected ICTY witnesses testified in the *Scorpios* trial from a location abroad.¹⁷⁹ The formal basis for the use of video-link in those

¹⁷² Law on the Program of Protection of the Participants in Criminal Proceedings, *Official Gazette*, no. 85/05.

¹⁷³ Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, no. 46/2006, arts. 116–122.

¹⁷⁴ “Skupština usvojila izmene ZKP-a” (“Parliament Adopted Amendments to C[riminal]P[rocedure]C[ode]”), *website B 92*, May 29, 2007, www.b92.net/info/vesti/index.php?yyyy=2007&mm=05&dd=29&nav_id=248822 (accessed July 22, 2007).

¹⁷⁵ Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, no. 46/2006, art. 117.

¹⁷⁶ Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, July 17, 2007.

¹⁷⁷ Interview with OWCP representatives, Belgrade, May and July 2007.

¹⁷⁸ Serbia covers 88,361 square kilometers, or 34,116 square miles.

¹⁷⁹ Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, March 15, 2007; interview with representatives of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, May 4, 2007.

instances was not witness protection,¹⁸⁰ but a provision in the war crimes law stipulating that witnesses whose presence cannot be ensured at trial may testify via video-conference link.¹⁸¹

Between January and July 2007, according to the VWSU, 18 witnesses—out of a total of 143—testified at the trial using protective measures. Two testified via video-link, 10 under pseudonyms, one on closed-circuit television, and six witnesses in closed sessions. In one case information on the identity of the witness was removed from the court files.¹⁸²

A number of Bosnian nationals living in Zvornik and its surroundings testified using pseudonyms in the *Zvornik* case.¹⁸³ With a very few exceptions, the witnesses who reside in Serbia have testified in open sessions and have not requested protective measures. On the other hand, these witnesses regularly profess ignorance of the relevant facts concerning the crime and the accused. This pattern is even more evident in the *Suva Reka* trial, in which the accused are former members of the police in Suva Reka and the witnesses are their colleagues or former Serb inhabitants of the town. It appears that they do not wish to expose themselves to any risks, and they assess that such risks would exist even if they testified using pseudonyms or other protective measures. Most of the witnesses were more forthcoming when the prosecutors took their statements during the pre-investigation stage than during their subsequent testimony in court. The prior statements can be used at the trial, and the judges are free to decide which of the two accounts they take as credible.¹⁸⁴ The WCC's policy in this regard is still unknown because the *Zvornik* and *Suva Reka* trials are ongoing.

Although the implementation of witness protection measures in court so far has not given rise to major concern,¹⁸⁵ occasional observations of trials during the research for this report exposed some inadequacies. Probably because of a lack of clear instructions before their appearance, some witnesses mentioned the names of protected witnesses who had testified using a pseudonym.¹⁸⁶ The presiding judge in the *Suva Reka* trial asked a witness who testified under a pseudonym to give identifying information, such as the name of the father, thus undermining protective measures that had been granted.¹⁸⁷

The judges routinely ask the witness at the outset of testimony to give his or her precise address.¹⁸⁸ Such disclosures unnecessarily expose witnesses to danger. The need to establish this sort of personal data can be satisfied through sealed, written submissions to the court or *in camera*.

Only one victim of sexual violence has testified before the WCC, and the court did not use any protective measures in that instance. The victim, a Roma woman from Kosovo whom the accused (Anton Lekaj) allegedly raped in June 1999, was offered the opportunity to testify in a closed session or use other protective measures, but she declined.¹⁸⁹ According to an OSCE trial observer, the witness-victim handled the examination well and did not appear to be traumatized. In that case it would appear that the WCC gave the witness reasonable opportunity to take advantage of the available protective measures. On the other hand, the court's decision not to use any other measure to preserve the witness's dignity and privacy may have been inappropriate, as witness protection should not depend just on the wishes of the victim but on

¹⁸⁰ The May 2006 law still was not in place when the video-conference link was used in the Ovčara and Scorpions trials.

¹⁸¹ Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Official Gazette of the Republic of Serbia*, no. 67/2003, July 1, 2003, art. 14.

¹⁸² Information received from Ivana Ramić, media coordinator in the District Court in Belgrade, September 4, 2007.

¹⁸³ Interview with Nataša Kandić, victims' representative in the *Zvornik* trial, Belgrade, April 17, 2007; interview with the presiding judge in the *Zvornik* trial, Belgrade, May 9, 2007.

¹⁸⁴ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 504j.

¹⁸⁵ Interviews with OSCE trial observers, Belgrade, April-May 2007.

¹⁸⁶ *Suva Reka* trial, session of April 3, 2007, testimony of Nedeljko Petković.

¹⁸⁷ *Suva Reka* trial, session of April 5, 2007, testimony of witness "B".

¹⁸⁸ *Zvornik* trial, session of March 29, 2007, testimony of Miko Miljanović.

¹⁸⁹ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007; interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, May 8, 2007.

objective factors. The witness could have testified behind a screen in the same room as the defendant, with her identity—but not her testimony—shielded from the public.

E. Harassment of Witnesses in Court

Under the laws in force in Serbia, the overarching duty of an organ conducting criminal proceedings is to “protect a witness or an injured party from insults, threats, or any other harassment.”¹⁹⁰ The degree to which various chambers succeed in ensuring respectful treatment of witnesses mainly depends on the skill and personality of the presiding judge.

In the *Ovčara* case, for example, the presiding judge earned praise from nongovernmental organizations and the press because of his treatment of the witnesses. In contrast, the presiding judge in the ongoing *Suva Reka* trial was criticized for the way she treated the witnesses. In a recent session in the trial, the chamber allowed a defendant—a Serb policeman in Suva Reka during the war in 1999—to direct questions to two visibly traumatized and nervous Roma witnesses from the same town while addressing each of them with the Serbian word *ti* (you) instead of the respectful *Vi* (You).¹⁹¹ This mode of addressing the witnesses appeared intended to intimidate them by a defendant whose acts, according to the indictment and testimony at the trial, had been particularly brutal. When the deputy prosecutor argued that the treatment of the witnesses was unacceptable, the presiding judge answered that “it [was] absolutely unimportant.”¹⁹²

F. Protecting Safety of Witnesses outside the Court

The Witness Protection Unit of the Serbian police and the HLC staff accompany and protect victim-witnesses from BiH and Croatia during their stays in the territory of Serbia.¹⁹³ The unit has suffered a serious shortage of funds for these purposes.¹⁹⁴ Nonetheless, according to the HLC director, whose involvement has been instrumental in ensuring participation of non-Serb victim-witnesses in the trials, the police provide adequate protection and treat the witnesses considerately.¹⁹⁵

The VWSU of the War Crimes Chamber has established a commendable practice of contacting witnesses, including those who live outside Serbia, within two weeks after they testify to follow up on their psychological and security situation.¹⁹⁶ There have been no reports of intimidation or harassment after the witnesses returned to BiH or Croatia.¹⁹⁷ One witness who was scheduled to testify in the Zvornik trial informed the VWSU about the threats he had received before his trip to Belgrade. The VWSU notified SIPA’s Witness Protection Unit in BiH, which took measures to protect the witness, who eventually testified before the WCC in Belgrade.¹⁹⁸

Only in the *Ovčara* case are Serbian authorities known to have provided long-term protection to witnesses in the period after trial. Two persons, so-called witness-collaborators, were the beneficiaries of the witness

¹⁹⁰ Criminal Procedure Code (2006), art. 116.

¹⁹¹ This observation is based on monitoring of a session in the Suva Reka trial, April 5, 2007, as part of the research for the present report.

¹⁹² *Ibid.*

¹⁹³ Interview with Natasa Kandić, Belgrade, April 17, 2007.

¹⁹⁴ J. Čolak, “Svedoci saradnici su ključ suđenja” (“Witness-Collaborators a Key to Trials”), *Danas* (Belgrade), May 20–21, 2006 (quoting Dragan Jovanović, head of the Witness Protection Unit in the Serbian Ministry of the Interior); interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007.

¹⁹⁵ Interview with Natasa Kandić, Belgrade, April 17, 2007.

¹⁹⁶ Interview with Ivana Ramić, Media Coordinator in the District Court in Belgrade, May 7, 2007.

¹⁹⁷ *Ibid.*; interview with the presiding judge in the Zvornik trial, Belgrade, May 9, 2007.

¹⁹⁸ *Ibid.*

protection program in that case.¹⁹⁹ The term “witness-collaborator” refers to individuals who originally were indicted and then decided to cooperate with the prosecution. The law authorizes the prosecutor to waive the charges against a witness-collaborator in exchange for truthful and complete testimony.²⁰⁰ The two persons who testified in this capacity in the *Ovčara* case provided crucial pieces of evidence, directly implicating a number of the indictees in the commission of the crime.²⁰¹

G. Witness Intimidation in Relation to the Trials against Serb Police

In cases against members of the Serbian police many witnesses from Serbia decline to testify fully, despite the availability of various witness protection mechanisms. The OWCP spokesperson publicly stated in 2007 that the witnesses in the *Suva Reka* and *Bitiqi Brothers* cases were visibly frightened.²⁰² Both cases dealt with crimes committed by the police against ethnic Albanians in 1999. Numerous witnesses, including other members of the police units to which the indictees belonged, feigned ignorance about the crimes and the role of the accused. Policemen from Suva Reka stated that the first time they ever heard about the killing of 48 Albanians in their town on March 26, 1999, was when they read about the indictment in 2006. In the interaction with the prosecutor before the formal opening of the investigation, the same witnesses had been much more forthcoming.²⁰³

The unwillingness of these witnesses to tell the truth in court reflects the unfavorable political atmosphere in which the trials take place. Yet it is possible that more elaborate and creative witness protection measures could strengthen the witnesses’ readiness to testify.

H. Victims' Representatives

Under the current Criminal Procedure Code a victim is defined as a “person whose personal or property right was violated or jeopardized by commission of a crime.”²⁰⁴ Although not formally parties to the proceedings, victims have certain rights that they can exercise in person or through victims’ representatives, as is often the case. The representatives are allowed to question witnesses and introduce evidence. If the public prosecutor decides not to pursue the charges for lack of evidence, victims are entitled to continue the proceedings as private plaintiffs.²⁰⁵

Yet there are also important limitations on victims’ participation in any criminal trial in Serbia. Most significantly, victims’ representatives are not entitled to do any of the following: be present during the questioning of the suspect and witnesses in the investigation; pronounce on the relevance and meaning of evidence introduced by the parties (the prosecutor and the defendant) at the trial; or appeal a judgment, except on issues relating to legal expenses.²⁰⁶

In a majority of war crimes trials before the WCC, two victims' representatives—Nataša Kandić and an attorney hired by the HLC, Dragoljub Todorović—actively participate in the trial. As mentioned, Kandić

¹⁹⁹ Interview with representatives in the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, May 4, 2007.

²⁰⁰ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 504z.

²⁰¹ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Miroljub Vujović et al.*, Case no. K.V. 1/2003, Judgment, December 12, 2005, 71–80, 89 et seq.

²⁰² “Svedoci deluju izuzetno uplašeno” (“Witnesses Appear Very Scared”), *website B 92*, February 13, 2007 www.b92.net/info/emisije/poligraf.php?yyyy=2007&mm=02&nav_id=232420 (accessed July 22, 2007).

²⁰³ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007

²⁰⁴ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, Art. 221 (6).

²⁰⁵ Telephone interview with Dragoljub Todorović, attorney hired by the HLC as victims’ representative in war crimes trials before the War Crimes Chamber, July 23, 2007.

²⁰⁶ *Ibid.*

has been a leading human rights advocate in the territory of the former Yugoslavia, and she is held in high esteem by non-Serb victims in the region. Todorović is an experienced criminal lawyer. Kandić and Todorović have often contributed to clarifying important factual issues in the trials.²⁰⁷ In one trial (*Ovčara*), four additional persons acted as victims' representatives.²⁰⁸ The *Lekaj* and *Morina* trials are the only ones in which the witnesses were not represented because the HLC took the view that the cases should have been tried in Kosovo.²⁰⁹

Under Serbian law victims can seek compensation from the defendant regardless of whether they testified at the trial.²¹⁰ Although the trial panels are authorized to decide compensation claims, they usually refer the victims to take civil action instead.²¹¹ Victims in war crimes cases in Serbia, assisted by victims' representatives, also prefer pursuing claims in civil courts, where they can sue the state as well as the convicted perpetrators. The state's responsibility is based on the fact that the perpetrators belonged to government-controlled units. A conviction in a criminal case makes it easier to prove the allegation in civil proceedings. However, the victims represented by the HLC or other representatives in the trials before the War Crimes Chamber have not taken civil action because the judgments in the *Ovčara* and *Scorpions* cases have not become final, and other cases are still in the trial stage.²¹²

VI. RELATIONSHIP WITH THE ICTY

An important source of evidence for the OWCP, the WCC, and defense counsel has been the International Criminal Tribunal for the Former Yugoslavia (ICTY). Evidence from the ICTY has contributed to progress in investigations and trials. The indictment in the *Zvornik* case was in good part based on the evidence provided by the ICTY prosecutor, and the prosecutions in the *Ovčara* and *Suva Reka* cases, although initiated in Serbia, relied heavily on ICTY evidence. At the same time, cooperation with ICTY on evidence has been complicated.

A. Use of ICTY Evidence in Investigations

Article 11 *bis* of the ICTY Rules of Evidence and Procedure allows ICTY judges to refer to another jurisdiction a case involving "lower- and intermediate-rank accused" after the confirmation of an ICTY indictment but before the commencement of the trial.²¹³ Referral of an 11 *bis* case entails transfer of the evidence accumulated during the investigation. The ICTY has referred only one 11 *bis* case to the Serbian prosecutor, in November 2006.²¹⁴ It is unclear whether the trial will take place because of the mental condition of the accused, Vladimir Kovačević, a former officer in the Yugoslav People's Army (JNA).²¹⁵

The ICTY has also submitted to the national authorities a number of cases with investigations but no indictments. One such case, concerning crimes against Bosnian Muslims in Zvornik (BiH) in 1992, was

²⁰⁷ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007.

²⁰⁸ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Mirosljub Vujović et al.*, Case no. K.V. 1/2003, Judgment, December 12, 2005, 2.

²⁰⁹ Interview with Nataša Kandić, Belgrade, April 17, 2007.

²¹⁰ Criminal Procedure Code, *Official Gazette of the Federal Republic of Yugoslavia*, no. 70/2001, 68/2002, and *Official Gazette of the Republic of Serbia*, no. 58/2004, art. 206.

²¹¹ Along these lines is the decision of the War Crimes Chamber in the *Ovčara* case, Judgment, December 12, 2005, K.v. br. 1/2003, 15.

²¹² Telephone interview with Nataša Kandić, victims' representative in the Zvornik, Ovčara, Suva Reka, and Scorpions trials, Belgrade, September 2, 2007.

²¹³ Rules of Procedure and Evidence of the International Criminal Tribunal for the former Yugoslavia, IT/32/Rev. 36, July 21, 2004, Rule 11 *bis*.

²¹⁴ The ICTY has preferred transferring cases to BiH and Croatia as the states in whose territory most of the crimes charged by the ICTY prosecutor were committed. See Diane Orentlicher, *Impact of the ICTY* (forthcoming), Serbia Chapter, copy on file with ICTJ, section "Transfer of Evidence".

²¹⁵ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007.

trial-ready when the ICTY prosecutor handed it to the OWCP.²¹⁶ The Serbian prosecutor subsequently carried out a comprehensive investigation, which included taking statements from victim-witnesses the ICTY prosecutor had interviewed previously. The investigation in Serbia resulted in the inclusion of three additional suspects in the indictment.²¹⁷

In all other cases that went to trial the initiative to open an investigation came from Serbia. In the *Ovčara* case concerning the crime against ethnic Croats near Vukovar in 1991, the prosecutors in Belgrade and The Hague issued indictments concerning the same event.²¹⁸ This naturally led to extensive sharing of evidence between the two offices. In particular the trial benefited from crime scene investigations in 1997, as a result of which the ICTY investigators had established the types of weapons used at the execution site through the numbers and types of cartridges.²¹⁹ In the trial for crimes committed in Suva Reka against Kosovo Albanians in 1999, the OWCP also benefited from prior investigations by the ICTY prosecutor.²²⁰ In contrast, prosecutions in the *Scorpions* and *Lekaj* cases made scarce use of ICTY evidence. The chamber in the *Lekaj* case examined two pieces of documentary evidence received from the ICTY—a photo of the accused and a map of the area where the accused’s unit had carried out military operations.²²¹

The OWCP can also access ICTY evidence during ongoing investigations in which there have not been indictments.

B. Lack of Clarity Concerning Use of Evidence in Non-11 *bis* Trials

A provision added to the Serbian war crimes trials law in December 2004 stipulates, “After the transfer, evidence gathered by or introduced at the [ICTY] can be used in the criminal proceedings before a domestic court, provided that it was gathered or introduced in a manner prescribed by the [ICTY] Statute and the Rules of Procedure and Evidence.”²²² Relying on this provision the War Crimes Chamber has authorized presentation of witness statements and other material collected during the ICTY investigations and trials.

However, the wording of the provision quoted above (article 14(a), paragraph 4) has given rise to disparate interpretations regarding the category of cases in which ICTY evidence can be used. One possible interpretation of paragraph 4, favored by defense counsel, is that it pertains to 11 *bis* cases only. In two other paragraphs in article 14, the verb *ustupiti* (“to transfer”) and the noun *ustupanje* (“transfer”) clearly refer to 11 *bis* cases.²²³ According to this analysis, the use of *ustupanje* in paragraph 4 also means

²¹⁶ ICTJ telephone interview with representatives of the ICTY Office of the Prosecutor, April 5, 2007.

²¹⁷ Interview with Vladimir Vukčević, Belgrade, May 9, 2007.

²¹⁸ The ICTY prosecutor has indicted three officials from the then-Yugoslav People’s Army, while the Serbian prosecutor has charged 21 lower-ranking accused.

²¹⁹ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Miroljub Vujović et al.*, Case No. K.v. 1/2003, Judgment, December 12, 2005, 85.

²²⁰ ICTJ telephone interview with representatives of the ICTY Office of the Prosecutor, April 5, 2007.

²²¹ District Court in Belgrade (War Crimes Chamber), *Prosecutor v. Anton Lekaj*, Case no. K.V. 4/05, Judgment, September 18, 2006, 6–7.

²²² Law Amending the Law on the Organization and Competences of the State Organs in the Proceedings against the Perpetrators of War Crimes, December 21, 2004, *Official Gazette of the Republic of Serbia*, no. 135/04, art. 7 (introducing art. 14(a), para. 4).

²²³ Paragraph 1 of article 14(a) stipulates, “When the [ICTY], in accordance with its Statute and Rules of Procedure and Evidence, transfers a case to the Republic of Serbia, the war crimes prosecutor shall take over the criminal prosecution based on the facts on which the [ICTY] indictment was founded.” Paragraph 3 states, “In the criminal proceedings which is taking place in the Republic of Serbia after the transfer, the national law shall apply.”

that the transfer referred to is of an *11 bis* case. In other WCC cases evidence obtained from the ICTY should not be used at trial.²²⁴

The WCC has not yet ruled on defense counsel's motion to remove the ICTY evidence from the case files in the *Zvornik* case.²²⁵ It appears, however, that the lawmakers' intent was to allow for broader use of the ICTY evidence than only in *11 bis* cases. The word "transfer" in paragraph 4 should pertain to evidence from any ICTY case.²²⁶ Draft amendments to the Serbian law on war crimes prosecutions, which a government-appointed working group finalized in December 2006, clarify this point by allowing for broader use of ICTY evidence.²²⁷

C. Means of Accessing ICTY Evidence

In the ongoing investigations and during a trial, the Serbian prosecutor's office, like the state prosecutors' offices in Croatia and BiH, can access the ICTY's so-called Evidence Disclosure Suite (EDS). The suite contains nonconfidential material entered in evidence in The Hague, and the ICTY prosecutor maintains it. The ICTY prosecutor and Belgrade prosecutors signed an agreement in July 2006 providing for this arrangement.²²⁸ With regard to statements from protected witnesses or not entered into evidence, the prosecutor in Belgrade could obtain such evidence after submitting a request for assistance to the ICTY prosecutor.²²⁹ In July 2007, amended Rule 75 of the ICTY Rules of Procedure and Evidence came into effect, giving parties in national war crimes proceedings an avenue to seek access to confidential ICTY witness material. The new Rule 75 (H) allows a judge or bench in another jurisdiction or parties in another jurisdiction authorized by an appropriate judicial authority to apply to the President of the Tribunal for variation of court orders protecting victims and witnesses. (Unless exceptional circumstances exist, such variation will only be granted upon consent by the protected witness). Before this amendment came into force, only parties in proceedings before the Tribunal were authorized to seek variation of protective measures.²³⁰

The ICTY prosecutor interacts only with state agencies, and so defense counsel interested in the witness statements or other ICTY evidence can obtain it only by making a request to the Serbian authorities.²³¹ The representatives of the ICTY prosecutor interviewed for this report were not aware of any instance in which Serbian state agencies had requested evidence on behalf of defense counsel.²³²

Defense counsel can nonetheless access ICTY evidence because the Serbian prosecutor is obliged to submit all evidence to the investigating judge at the opening of the investigation; defense counsel can then inspect it freely. The investigating judge in the *Suva Reka* case recorded on compact disks the witness statements and documentary evidence, including statements and other evidence received from the ICTY, and distributed the disks to the defense.²³³ Subsequent investigations followed this precedent.²³⁴

²²⁴ Interview with Veljko Đurđić, defense counsel in *Suva Reka* trial, Belgrade, May 7, 2007; interview with the presiding judge in the *Zvornik* trial, Belgrade, May 9, 2007.

²²⁵ Interview with the presiding judge in the *Zvornik* trial, Belgrade, May 9, 2007.

²²⁶ Interview with OSCE expert to the working group, Belgrade, March 14, 2007.

²²⁷ *Ibid.*

²²⁸ Telephone interview with representatives of the ICTY Office of the Prosecutor, April 5, 2007; interview with Bruno Vekarić, OWCP spokesperson, Belgrade, July 17, 2007.

²²⁹ Telephone interview with representatives of the ICTY Office of the Prosecutor.

²³⁰ Email communication with the ICTY Office of the Prosecutor, December 12, 2007.

²³¹ Telephone interview with representatives of the ICTY Office of the Prosecutor.; interview with Đorđe Dozet, defense attorney in *Ovčara* trial, Belgrade, April 20, 2007.

²³² Telephone interview with representatives of the ICTY Office of the Prosecutor.

²³³ Interview with an investigating judge in the WCC, Belgrade, May 8, 2007; interview with Veljko Đurđić, defense counsel in the *Suva Reka* trial, Belgrade, May 7, 2007.

²³⁴ Interview with an investigating judge in the WCC, Belgrade.

D. Other Forms of ICTY's Contribution to War Crimes Trials in Serbia

In addition to making its evidence available to the OWCP, the ICTY has contributed to war crimes prosecutions in Serbia in several other ways, including training judges, prosecutors, and officials involved in witness support. The ICTY has also participated in training programs for prosecutors and judges organized by other institutions. The training concerned substantive international criminal law, including modes of liability such as command responsibility. In addition, all judges in the chamber and some of the prosecutors have visited the ICTY.²³⁵

The ICTY's work has been of great value to the Serbian judiciary in demonstrating how procedural innovations, such as giving testimony via video-link, can function in practice. The WCC decided to establish a victim and witness support unit after a conference in Sarajevo organized by the ICTY's Victim and Witness Support Unit.²³⁶ As described above, the employees of the VWSU have participated in two training sessions, the second of which (in March 2007) the ICTY organized in The Hague.²³⁷

The ICTY Office of the Prosecutor (OTP) actively participated in two conferences on regional cooperation regarding war crimes prosecutions in July 2007 (Brijuni, Croatia) and October 2007 (Hvar, Croatia). The main topic of discussion at both conferences was how to improve the regional cooperation among the war crimes prosecution offices in the countries of the former Yugoslavia. OTP encouraged visits of regional prosecutors to The Hague for training, consultations with OTP staff in related cases, and research.²³⁸

E. ICTY Oversight of Investigations and Trials

In February and May 2005 the Organization for Cooperation and Security in Europe (OSCE) and the Office of the ICTY Prosecutor exchanged letters establishing cooperation in the transfer of 11 *bis* cases to Croatia, BiH, and Serbia and Montenegro. The OSCE undertook to monitor these cases and submit reports to the prosecutor.²³⁹

As explained above, the only transfer of an 11 *bis* case to Serbia occurred recently (in November 2006), but it is unclear whether the accused will be fit to stand trial. In other (non-11 *bis*) cases, in which ICTY Prosecutor Carla del Ponte submitted substantial evidence to her Serbian counterpart, she has received regular information from the OWCP on the status of the investigations and trials.²⁴⁰ In the *Zvornik* case, which is largely based on evidence provided by the ICTY, a tribunal representative attended the investigation hearings conducted by the Serbian investigating judge in BiH.²⁴¹ The ICTY prosecutor has frequently sought and received information on an informal basis about the trials in non-11 *bis* cases from the Rule of Law Department of the OSCE Mission in Serbia.²⁴²

The communication between the ICTY prosecutor and the mission in BiH has been more formal and systematic, reflecting the fact that a number of 11 *bis* cases have been transferred to that jurisdiction. In total the ICTY has referred six 11 *bis* cases to BiH, and as of July 2007 four of these were ongoing and

²³⁵ See Diane Orentlicher, *Impact of the ICTY* (forthcoming), section "Transfer of 'Know How'".

²³⁶ *Ibid.*

²³⁷ Interview with the members of the Victims and Witness Support Unit, Belgrade, March 29, 2007.

²³⁸ Email communication with the ICTY Office of the Prosecutor.

²³⁹ Letter from the Chairman-in-Office of the OSCE to the ICTY prosecutor, May 19, 2005 (electronic transcript on file with the International Center for Transitional Justice).

²⁴⁰ Telephone interview with representatives of the ICTY Office of the Prosecutor.

²⁴¹ Interview with the presiding judge in the *Zvornik* trial, Belgrade, May 9, 2007.

²⁴² Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, May 4, 2007.

two first-instance trials had already been completed.²⁴³ The only 11 *bis* case transferred to Croatia began in Zagreb in June 2007.²⁴⁴

VII. REGIONAL COOPERATION

In recent years improved cooperation between the prosecutors and judges in Serbia, Croatia, and BiH in war crimes matters has greatly increased prospects for successful prosecutions. As recently as 2004 a Human Rights Watch report on war crimes prosecutions in the region found, “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.”²⁴⁵ By 2007 all of these modes of cooperation, as well as others, had become reality.

This progress does not mean that all contentious issues between the states in war crimes prosecutions have been resolved. In particular, no satisfactory arrangement yet exists to address the main problem concerning prosecutions in BiH. Alleged perpetrators of the crimes committed there have moved to Serbia and Croatia and acquired citizenship. The laws in force in those countries do not permit the extradition of nationals to other countries, including BiH. In turn the Bosnian judiciary is unwilling to transfer the prosecutions to the two neighboring countries.

Serbia has been perhaps the main beneficiary of the cooperation with other countries in the region, because key witnesses and evidence are often located in the areas where the crimes occurred—Croatia and BiH. In 2005 the Serbian state prosecutor and the war crimes prosecutor signed cooperation agreements with the state prosecutors in the two other countries. The main purpose of these agreements is to simplify procedures for the exchange of evidence and other data in organized-crime and war crimes prosecutions.²⁴⁶ In addition to the cooperation agreements, in October 2006 the Serbian war crimes prosecutor and the Croatian state prosecutor entered into an agreement on transfer of evidence in situations in which the suspect does not live in the country where he allegedly committed the crime, but, owing to the legal impediments to extraditions, the trial can take place only in the country where the suspect now resides.²⁴⁷ The main rationale behind this agreement is to enable the prosecutor in Belgrade to start prosecuting individuals who may have committed war crimes in Croatia and moved to Serbia.

A. Cooperation with Croatia

Even before the signing of the 2005 cooperation agreement between Serbia and Croatia, the Serbian prosecutor and investigating judge were able to take statements from Croatian witnesses in the *Ovčara* case in the Croatian state prosecutor’s office in Zagreb. These witnesses eventually testified, some via video-link from the premises of the County Court in Zagreb.²⁴⁸ After the signing of the agreement, the Croatian prosecutor assisted the Serbian war crimes prosecutor with evidence in the investigation into war crimes committed in Lovas, eastern Croatia, in October 1991. On May 30, 2007, an investigating judge in the War Crimes Chamber opened an investigation against 12 persons arrested on suspicion of

²⁴³ In November 2006 Radovan Stanković was sentenced to 16 years in prison. Gojko Janković received a 34-year prison sentence in February 2007. Both had been accused of crimes against Bosnian Muslims in the area of Foča in 1992.

²⁴⁴ On June 18, 2007, the trial against two former officers in the Croatian army, Rahim Ademi and Mirko Norac, commenced at the County Court in Zagreb.

²⁴⁵ Human Rights Watch, *Justice at Risk*, 18.

²⁴⁶ The agreement with the Croatian prosecutor was signed February 5, 2005, and the agreement with the Bosnian prosecutor July 1, 2005.

²⁴⁷ Interview with Vladimir Vukčević, Serbian war crimes prosecutor, Belgrade, May 9, 2007.

²⁴⁸ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, March 13, 2007.

involvement in the crime. The Serbian prosecutor also assisted the Croatian state prosecutor, notably in persuading Serb witnesses from Serbia and BiH to testify in the high-profile *Lora* trial in Split (Croatia), in 2005 and 2006. Communications between the two offices have continued on a regular basis.²⁴⁹

The October 2006 agreement has recently resulted in a first concrete prosecution. During 2007, the Croatian prosecutor sent copies of six files to Belgrade for inspection. The OWCP investigated some of these cases during the second half of the year. On November 7, the Office issued an indictment against Zdravko Pašić, a Serb from Croatia, accused of a killing of a Croatian doctor in 1991.²⁵⁰

B. Cooperation with Bosnia and Herzegovina

Despite the excellent personal relations between the members of the OWCP and their colleagues in the Special Department for War Crimes of the BiH Office of the Prosecutor, cooperation between the prosecutors from the two countries is limited to cases with no conflict of jurisdiction. If the BiH prosecutor has already initiated investigation into a crime, BiH will not assist the prosecution of the same crime in Serbia.²⁵¹ Exchange of evidence in other cases is unimpeded, however.

The Serbian investigating judge has also taken statements in BiH from dozens of witnesses in the *Zvornik* case in Sarajevo and Brčko.²⁵² The case is based on evidence the OWCP received from the ICTY prosecutor, including statements by Bosniak witnesses.²⁵³ The investigating judge re-heard most of these witnesses as part of the investigation before the Serbian War Crimes Chamber.²⁵⁴

However, the BiH High Judicial and Prosecutorial Council, a national agency with responsibility for oversight of prosecutors and judges, has blocked an ambitious attempt by prosecutors from the two countries to agree on exchange of evidence and establishment of joint investigation teams. An agreement of this kind was concluded in Belgrade on January 26, 2007, with the cantonal prosecutor in Tuzla. The agreement should have facilitated the ongoing investigation into the crimes in 1992 in Zvornik, near Tuzla (the so-called *Zvornik II* case). The WCC is already trying one case concerning the crimes in that area, but the investigating judge and a deputy war crimes prosecutor also investigate other crimes there. Most of the Bosnian Muslim victims and witnesses now live in the Tuzla canton and gave statements to the Tuzla prosecutor in the past.²⁵⁵ The Bosnian state prosecutor supported the conclusion of the agreement between the Tuzla cantonal prosecutor and the Serbian WCC. At the beginning of May 2007, however, the High Judicial and Prosecutorial Council requested that the Tuzla prosecutor's office not extend the agreement after May 30, because allegedly it did not accord with national legislation, nor with international agreements to which BiH is a party.²⁵⁶

C. Failure to Access Witnesses in Kosovo

While cooperation with the relevant agencies in Kosovo is vital for successful work by the OWCP and the WCC, current practice leaves much to be desired. A majority of cases in which the OWCP and investigative judges have carried out pre-investigative activities concern the crimes in Kosovo, but there has

²⁴⁹ Interview with Vladimir Vukčević.

²⁵⁰ Office of the War Crimes Prosecutor, *Prosecutor v. Zdravko Pašić*, Indictment no. KTRZ 11/07, November 7, 2007.

²⁵¹ Interview with Bruno Vekarić, Belgrade, July 17, 2007.

²⁵² Presentation by Vaso Milinković, then-head of the Special Department for War Crimes of the Office of the BiH Prosecutor, Belgrade, February 5, 2007; interview with the presiding judge in the Zvornik trial, Belgrade, May 9, 2007.

²⁵³ Interview with the presiding judge in the Zvornik trial, Belgrade, May 9, 2007.

²⁵⁴ Interview with Vladimir Vukčević.

²⁵⁵ Interview with Bruno Vekarić, Belgrade, March 15, 2007.

²⁵⁶ Letter of the president of the High Judicial and Prosecutorial Council of BiH to the prosecutor of the Tuzla Canton, No. VSTV-08-0877-03052007 (May 3, 2007), www.hjpc.ba/pr/preleases/msword/PismoSporzaum%20.doc (accessed July 22, 2007).

been little progress in these cases.²⁵⁷ Failure to complete the investigations would have a devastating effect on the WCC's overall effectiveness. The many crimes committed against Kosovo Albanians in 1998 and 1999 would remain virtually unpunished. As a practical matter these crimes can be tried only at the WCC in Belgrade because most of the perpetrators now reside in Serbia.

The progress in investigations into the crimes in Kosovo depends on the assistance the OWCP and the investigating judges receive from the United Nations Mission in Kosovo (UNMIK). Serbian agencies have no independent means to locate and establish contact with Albanian witnesses in Kosovo because the Serbian state has had no authority over the province since UNMIK's establishment in June 1999. Even if Serbian prosecutors and investigating judges were in a position to establish initial contacts with potential witnesses, it is improbable that the witnesses would collaborate without mediation by a third party. Most Kosovo Albanian victims deeply distrust Serbian institutions, a distrust aggravated by the ongoing political conflict over the future status of Kosovo. Recent decisions by the Supreme Court of Serbia (quashing the convictions in the *Ovčara* case) and the War Crimes Chamber (*Scorpions* judgment) received very negative press in Kosovo and further discouraged potential witnesses.²⁵⁸

1. Serbian Critiques and UNMIK's Denials

With assistance from the ICTY, in 2005 an OWCP prosecutor and the investigating judge took statements in Kosovo from a limited number of witnesses in the *Suva Reka* case.²⁵⁹ After that the task of locating and persuading the witnesses passed to UNMIK. Through cooperation with UNMIK, the prosecutor met twice in 2005 with witnesses of a crime committed in the area of Peć in 1999.²⁶⁰ According to Milan Dilparić, the WCC investigating judge in charge of Kosovo investigations, UNMIK failed to arrange the meetings he requested in a dozen other cases with potential Albanian witnesses. The responses from Pristina allegedly contained personal data about the witnesses, but Dilparić asserts that UNMIK made little effort to facilitate the meetings.²⁶¹ "UNMIK never informed me that they at least tried to contact the witnesses," he said in an interview for this report.²⁶²

The competent agencies in UNMIK offer a different, if not fully consistent, account. According to a representative of the Legal Policy Division (LPD) in UNMIK's Department of Justice in Pristina, which deals with requests for cooperation, only in the *Lekaj* case did the requests pertain to examination of potential witnesses.²⁶³ A representative of the UNMIK Liaison Office in Belgrade, which receives cooperation requests and forwards them to the LPD, said, however, that there were other requests. He took the view that UNMIK was doing its best to persuade the witnesses to meet with the judicial officials from Belgrade, and that if the efforts were largely unsuccessful, it was because the Albanians' distrust of the Serbian state is difficult to overcome.²⁶⁴

In the *Lekaj* case efforts by UNMIK and Belgrade to achieve cooperation only resulted in new misunderstandings. One prosecutor from Belgrade and a judge in the case arrived in Pristina expecting that they would examine six witnesses; but UNMIK approved examination of only two, both witnesses for the accused, a Kosovo Albanian. The WCC judge refused to attend in protest. (UNMIK maintains that the request from Belgrade to examine the remaining witnesses came too late.²⁶⁵)

²⁵⁷ Interview with an investigating judge in the WCC, Belgrade, May 8, 2007; interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

²⁵⁸ Interview with a representative of the UNDP Mission in Kosovo, Pristina, April 24, 2007.

²⁵⁹ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007; interview with an investigating judge in the WCC, Belgrade, May 8, 2007.

²⁶⁰ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

²⁶¹ Interview with an investigating judge in the WCC, Belgrade, May 8, 2007.

²⁶² *Ibid.*

²⁶³ Interview with representative of the Legal Policy Division, UNMIK Department of Justice, Pristina, April 24, 2007.

²⁶⁴ Interview with a representative of the UNMIK Liaison Office, Belgrade, May 4, 2007.

²⁶⁵ *Ibid.*

Conflicting interpretations also characterize the accounts of the unsuccessful cooperation in the *Kompirović* case in mid-2006, when UNMIK sent a case file involving two Serb suspects to the OWCP in Belgrade. The prosecutor submitted a motion to open an investigation and ordered the arrest of the suspects. They were eventually released without being indicted. While UNMIK says that the evidence in the file should have led to issuance of an indictment, the prosecutor in Belgrade denies it and faults UNMIK with failing to facilitate the access of the Serbian investigating judge to Albanian witnesses in Kosovo.²⁶⁶

The cooperation between UNMIK and the OWCP in the provision of documents has been less controversial. For example, at a meeting held May 26, 2007, an OWCP prosecutor received abundant documentary evidence, recorded on compact disks, from UNMIK investigators.²⁶⁷

Before the establishment of the War Crimes Chamber, when all district courts in Serbia had competence to try war crimes cases, the HLC played a key role in bringing in Kosovo Albanian witnesses.²⁶⁸ In the ongoing *Suva Reka* trial in Belgrade, however, the HLC's efforts to encourage Albanian witnesses to testify at the main trial did not produce concrete results until the end of 2007, when three Albanian witnesses testified at the trial²⁶⁹

2. What Happens When UNMIK Leaves?

Domestic prosecutors, judges, and police play no role under current arrangements in Kosovo regarding assistance to Serbian prosecutors and judges in war crimes cases. This reflects the general division of labor in Kosovo in war crimes matters, with the international judges and prosecutors having sole responsibility for dealing with war crimes cases under UNMIK regulation 64. This might change if Kosovo gains independence in the near future and the European Union (EU) acquires an executive mandate in rule of law in Kosovo.²⁷⁰ The responsible official in the EU planning team expressed the view that international actors should not be the only ones involved in war crimes prosecutions. Tasks related to judicial cooperation with other countries would also be allocated to mixed teams of domestic and international judges, prosecutors, and investigators.²⁷¹

The future of the cooperation between Kosovo and Serbia in war crimes prosecutions will depend very much on the political conditions in Serbia. The major Serbian political parties have declared that their country should never recognize an independent Kosovo.²⁷² In case Kosovo achieves independence and Serbia withholds recognition, the OWCP and the WCC might face an insurmountable obstacle to cooperation with their counterparts in Kosovo. A future government in Pristina is likely to insist that the formal basis for cooperation be a bilateral or multilateral treaty, such as the European Convention on Cooperation in Judicial Matters. But an intransigent Serbian government would not enter into a bilateral agreement or consider itself bound by an international agreement to which it is a party, with respect to a state it does not recognize.²⁷³

²⁶⁶ Ibid; interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

²⁶⁷ Interview with a deputy war crimes prosecutor, Belgrade, May 8, 2007.

²⁶⁸ In the trial of Saša Cvjetan before the District Court in Belgrade, the HLC facilitated the testimony of key witnesses, four Kosovo Albanian survivors of a massacre in Podujevo, in July 2003.

²⁶⁹ Interview with Nataša Kandić, Belgrade, April 17, 2007; telephone interview with Nataša Kandić, December 19, 2007.

²⁷⁰ See *Fact sheet: EUPT and the future ESDP mission*, www.eupt-kosovo.eu/documents/Fact%20sheet%20EUPT%2028.02.2007_ENG.pdf (accessed July 22, 2007).

²⁷¹ Interview with Satu Seppanen, head of justice team, EU planning team, Pristina, April 24, 2007.

²⁷² The preamble of the Constitution of Serbia, adopted in November 2006, declares that Kosovo is an "integral part" of Serbia, and "from such status of the Province of Kosovo and Metohija follow constitutional obligations of all state bodies to uphold and protect the state interests of Serbia in Kosovo and Metohija in all internal and foreign political relations." The text of the Constitution is available at the Web site of the Serbian Ministry of Foreign Affairs, www.mfa.gov.yu/Facts/UstavRS_pdf.pdf (accessed July 22, 2007).

²⁷³ Interview with a deputy war crimes prosecutor, Belgrade, April 18, 2007.

The impasse in the communications between Serbia and Kosovo might effectively absolve the perpetrators of the crimes committed against ethnic Albanians, because the Serbian war crimes prosecutors and judges would be left without a legal basis to seek and receive assistance from the judiciary in Kosovo. Although the members of the OWCP acknowledge the likely challenge described here, at this stage they are not focusing their efforts on devising a strategy to meet it.²⁷⁴

VIII. DEFENSE

The Serbian legal system belongs to the inquisitorial (civil law) tradition, in which the judges in a criminal trial play an active role, especially in the questioning of witnesses. Judges are expected to use all available evidence to uncover the truth about the underlying crime. The importance of the defense lawyers is arguably less essential than in the adversarial (common law) system. Nonetheless, the overall role of the defense lawyers is critically important for the quality of the defense.

In war crimes trials in Serbia, counsel's ability to mount an effective defense is affected by financial limitations and the lack of mechanisms to facilitate investigations outside the country. There is no specialized criminal defense support body to provide legal assistance to defendants appearing before the War Crimes Chamber.²⁷⁵ The quality of the defense depends on the individual efforts and commitment of the lawyers.

A. Inadequate Payment of Court-Appointed Defense Counsel

As a rule, war crimes defendants hire lawyers after the issuance of the indictment and pay for their services in the initial period. Some defendants have the financial ability to retain a paid lawyer throughout the trial.²⁷⁶ More often, defendants at some point notify the president of the District Court in Belgrade that they are indigent and request appointment of a counsel. Thereafter usually the acting defense counsel will continue, but the court will pay the fees.²⁷⁷

The remuneration for court-appointed defense counsel in war crimes trials is identical to payment in trials for ordinary crimes of comparable gravity. Payment for a full day in court is approximately €150, half the rate for the same services performed by counsel of choice. Before 2001 the tariff for court-appointed defense counsel had been identical to that for counsel paid by the defendant.²⁷⁸

Although leading defense lawyers could make more if they withdrew from the case and returned to their customary client base, they rarely decide to do so when their client in a war crimes case becomes indigent. Professional interest and loyalty to the client have so far outweighed financial considerations.²⁷⁹ In the future, however, the comparatively low compensation might discourage high-quality lawyers from taking war crimes cases, and this might affect the quality of the defense.²⁸⁰ In some of the trials, including those

²⁷⁴ Interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007; interview with Vladimir Vukčević.

²⁷⁵ In Bosnia and Herzegovina, a Criminal Defense Support Section is part of the administrative and management structure of the Registry of the State Court in Sarajevo.

²⁷⁶ In the Suva Reka trial, for example, four out of eight defendants have paid their lawyers during the whole trial. Interview with Veljko Đurđić, defense counsel in the Suva Reka trial, Belgrade, May 7, 2007.

²⁷⁷ Interview with Siniša Važić, president of the District Court in Belgrade and president of the War Crimes Chamber, Belgrade, March 30, 2007; interview with Milomir Šalić, defense counsel in the Zvornik trial, Belgrade, March 29, 2007; interview with Đorđe Dozet, defense counsel in the Ovčara trial, Belgrade, April 20, 2007.

²⁷⁸ Interview with Miroslav Đorđević, defense counsel in the Zvornik trial, Belgrade, April 20, 2007; interview with Veljko Đurđić.

²⁷⁹ Interview with Milomir Šalić; interview with Đorđe Dozet; interview with Veljko Đurđić.

²⁸⁰ Interview with Miroslav Đorđević.

in the *Zvornik* and *Scorpios* cases, participants in the proceedings have already noted insufficient commitment on the part of the defense counsel.²⁸¹

The Criminal Procedure Code does not provide for compensation for investigative activities the court-appointed counsel might conduct on behalf of an accused. The law recognizes claims to reimbursement only for court-related activities (such as representing the defendant at the trial, submitting a motion, visiting the defendant in detention, and examining the case file). If the counsel locates and contacts potential defense witnesses or otherwise pursues evidence to support the defense, the state has no obligation to compensate.²⁸²

Reimbursement for expenses for examination of a witness outside the court, or for an on-site investigation, is allowed only if the court ordered such acts and the court-appointed defense counsel attends.²⁸³ Counsel does not receive any cash advances in those cases, due to lack of sufficient funds at the District Court in Belgrade.²⁸⁴

The financial constraints are a disincentive for defense counsel to fully investigate the case. Not surprisingly, they rarely travel to the neighboring countries to conduct investigations, and they propose few defense witnesses to testify.²⁸⁵ The defense case mainly consists of cross-examining the witnesses proposed by the prosecutor. As a substitute for effective defense, some defense counsel resort to theatrical conduct and making political speeches.²⁸⁶

B. Hindrances to Access to Evidence outside Serbia

The ability of the defense counsel to represent persons accused of war crimes is also crippled by the absence of arrangements facilitating counsel activities outside Serbia, in the areas in which the crimes were committed and where the witnesses reside. The limited ability to gather evidence in Croatia, BiH, and Kosovo casts defense counsel in a passive role, mainly responding to evidence collected by the prosecutor and submitted to them through the chamber.

In particular, defense counsel has virtually no access to evidence and witnesses in Kosovo,²⁸⁷ where even the prosecutors and investigating judges from Serbia find it difficult to operate. With regard to Croatia and BiH, the Serbian war crimes prosecutor is in a position to obtain incriminating evidence through cooperation with the prosecutors in the two countries. In contrast the Serbian defense counsel has no means to encourage the authorities there to provide exculpatory evidence.

C. Lack of Training in International Humanitarian Law

Defense counsels have received little systematic training in issues of international humanitarian law (IHL).²⁸⁸ Also, Serbian lawyers who have acquired experience as counsel at the ICTY rarely participate in the trials in Belgrade because of their continued commitments in The Hague and the relatively low earnings for the trials at home.

²⁸¹ Interview with Nataša Kandić, Belgrade, April 17, 2007; interview with a deputy war crimes prosecutor dealing with the crimes in BiH, Belgrade, April 3, 2007.

²⁸² Interviews with Milomir Šalić, Đorđe Dozet, Veljko Đurđić, and Miroslav Đorđević; interview with a WCC judge, Belgrade, May 9, 2007.

²⁸³ Interview with Milomir Šalić; interview with Đorđe Dozet.

²⁸⁴ Interview with Milomir Šalić; interview with Miroslav Đorđević; interview with the presiding judge in the Zvornik trial, Belgrade, May 9, 2007.

²⁸⁵ Interview with Milomir Šalić; interview with Miroslav Đorđević.

²⁸⁶ Interview with Nataša Kandić, Belgrade, April 17, 2007.

²⁸⁷ Interview with Veljko Đurđić. See VII C, above.

²⁸⁸ Interviews with Milomir Šalić, Đorđe Dozet, Veljko Đurđić, and Miroslav Đorđević

In most cases tried until now the lack of expertise in this area of law has not put defense counsel at a serious disadvantage compared to the prosecutors, because the charges in the *Ovčara*, *Scorpios*, *Zvornik* and *Suva Reka* cases pertained to ordinary crimes (such as murder) and raised few IHL issues. However, knowledge of IHL could become indispensable in future cases. At the time of writing, for example, the OWCP is conducting an investigation in the so-called *Zvornik II* case, which includes allegations of forcible expulsion, a crime under IHL.²⁸⁹

IX. PUBLIC INFORMATION AND OUTREACH

Although the situation is improving, public awareness of the progress in war crimes trials remains limited. A major opinion poll conducted in December 2006 by the leading Serbian pollster, Strategic Marketing, showed that the public knew little about the work of the OWCP, the WCC, and the crimes they have investigated and tried. Only one-third of the respondents knew of the War Crimes Chamber, even though the figure was 16 percent higher than in the previous year. The work of the OWCP was better known: 50 percent had heard of the office, compared to 23 percent in 2005. With respect to specific crimes tried before the WCC, 22 percent of the respondents knew of the *Ovčara* trial, while none of the remaining trials was known to more than 10 percent of the respondents. Of perhaps greater concern, it seems that the contribution of the trials to increasing public acceptance of the facts of war crimes is still limited. For example, although one in three respondents was familiar with the allegations that Kosovo Albanians were victims of expulsion during the NATO bombing campaign, only 15 percent of the respondents believed them.²⁹⁰

Surveys such as this show that the public reaction to war crime trials is general indifference. One illustration is the popular Web site of Radio-Television B-92, a rallying point for ordinary citizens who oppose nationalism. The visitors post numerous comments concerning political and social developments in Serbia, but the news about domestic war crimes trials provokes virtually no reaction.²⁹¹ When the WCC spokesperson tried to conduct regular biweekly press briefings in late 2004 and early 2005, she abandoned the idea early on because only a few journalists showed up.²⁹²

These attitudes reflect a fundamental problem in Serbian society since the beginning of the wars in the former Yugoslavia: an unwillingness to frankly examine the past and the crimes committed by various Serb formations. Although the OWCP and the WCC cannot change deep-rooted predispositions by themselves, these offices should take even more steps to increase their public information and outreach efforts.

A. Public Information and Outreach Sections

Both the OWCP and the WCC have outreach and public information sections. Each section has an outreach coordinator and a spokesperson. The WCC's spokesperson is also the spokesperson of the whole District Court. The two outreach coordinators are employed and paid by OSCE in Serbia.²⁹³ They jointly organized training in 2005 for Serbian journalists covering war crimes trials, as well as visits (in 2005 and 2006) to the courts and crime scenes in Croatia and BiH, public meetings, and several visits to

²⁸⁹ Interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007.

²⁹⁰ Belgrade Center for Human Rights, OSCE Mission in Serbia and Strategic Marketing, *Public Opinion in Serbia: Views on Domestic War Crimes Judicial Authorities and the Hague Tribunal*, December 2006, slides 12, 13, 15, and 24.

²⁹¹ The comments can be read at www.b92.net/info/vesti/naslovi.php.

²⁹² Interview with Ivana Ramić, media coordinator in the District Court in Belgrade, May 7, 2007.

²⁹³ *Ibid*; interview with Jasna Janković, public information coordinator in the OWCP, Belgrade, May 6, 2007.

the court by victims' groups and law students.²⁹⁴ The OSCE Mission in Serbia facilitated and funded many of these activities.²⁹⁵

Despite the regional dimension in which the crimes took place in the 1990s, outreach efforts in the different countries have remained largely separate. For example, at no town hall meetings in Croatia or BiH has the work of the Serbian war crimes prosecutors and judges been presented. Outreach officers in Belgrade and Sarajevo have not worked together on any initiatives, and outreach offices do not exist in Croatia. To their credit the outreach sections of the OWCP and the WCC have organized visits by Serbian journalists covering war crimes trials to Croatia and BiH.²⁹⁶

One factor tying the hands of the two outreach sections is the small number of final judgments (only two) as of August 2007. The scarcity of jurisprudence limits the scope to embark on outreach projects, such as presenting a judgment or series of judgments concerning certain areas at town hall meetings in Serbia or in the part of the former Yugoslavia where the crimes occurred.

The staff of the public information and outreach sections have undertaken several creative initiatives. One example is the bimonthly review publication, "Justice in Transition," financially supported by the OSCE, the United States Embassy in Belgrade, and the Open Society Institute. The review, published by the OWCP, carries high-quality articles on specific war crimes cases and related legal issues. One-thousand copies of the review are distributed to all court and prosecutorial offices in Serbia, members of Parliament, political parties, the media, embassies, and nongovernmental organizations. The unit also facilitated visits of Serbian journalists to BiH and Croatia in October 2005 and May 2006, respectively. Partly as a result of these efforts the number of articles about war crimes and trials appearing in the Serbian press doubled from 2005 to 2006, according to the unit's press monitoring.²⁹⁷

Around 2,500 articles mentioning the OWCP appeared during 2007 in the Serbian press, five times more than one year earlier.²⁹⁸ Most of these articles were either neutral or positive in their treatment of the office's work. The spokesperson for the OWCP is a frequent guest on television and radio programs in Serbia. (On the other hand, outreach coordinators rarely appear at public meetings, particularly in the interior.²⁹⁹) The media show less interest, however, in interviewing the WCC spokesperson. The difference reflects the fact that the OWCP spokesperson represents a party in the proceedings and can speak more candidly. In contrast the WCC spokesperson often avoids controversial points when addressing the media to maintain the appearance of impartiality.

Cooperation among the WCC, the OWCP and leading nongovernmental organizations in Serbia has been reasonably good.³⁰⁰ As mentioned, HLC has assisted the OWCP and the WCC in bringing numerous witnesses from Bosnia and Croatia. In mid-2007 the Youth Initiative for Human Rights selected a group of students who will spend three months as interns at the OWCP and three months at the WCC later on. Another leading organization, the Belgrade Center for Human Rights, together with the OWCP outreach section and the OSCE mission in Serbia, has commissioned two major opinion polls surveying the attitude of the public vis-à-vis war crimes trials.

²⁹⁴ Interview with Ivana Ramić; interview with Jasna Janković.

²⁹⁵ Interview with a representative of the Rule of Law and Human Rights Department, OSCE Mission in Serbia, Belgrade, May 4, 2007.

²⁹⁶ Interview with Jasna Janković, Belgrade, July 17, 2007.

²⁹⁷ Interview with Jasna Janković, May 6, 2007. The source of the figure is the Documentation Center of the Friedrich Ebert Foundation in Belgrade.

²⁹⁸ Telephone interview with Jasna Janković, December 19, 2007.

²⁹⁹ Interview with Jasna Janković, May 6, 2007.

³⁰⁰ *Ibid.*

B. Web Site and Broadcasting

The Web sites of the OWCP and the WCC could be improved to increase public access to the progress of war crimes cases.³⁰¹ The sites do not contain detailed information about specific trials, and the court schedule is often out-of-date. In addition the sites do not contain the text of the first-instance judgments. The ICTJ understands that the District Court believes that debates about the content of non-final judgments would amount to pressure on the appellate court (the Supreme Court of Serbia), as well as on the chamber that might retry the case. This cautious approach seems unwarranted. It is unlikely that a debate in the public realm would prevent the Supreme Court and the trial chamber from reaching independent and reasoned decisions. Instead, publishing the judgment would seem like an inherent part of a right to a trial subject to public scrutiny. In BiH, where all judgments of the State Court in war crimes matters are instantly available on the Web site, there have been no reports of negative consequences. In contrast, recent fiery debates in Serbia about the Supreme Court decision to quash the judgment in the *Ovčara* case suffered from the public's lack of knowledge of the details of either decision.

An issue receiving insufficient attention by the WCC and the OWCP is the presence of cameras in the courtroom. All public sessions are video-recorded, and journalists can watch the trial on the screen in the media room. Observers can also watch it on two screens in the public gallery in the court building. However, neither the trials nor excerpts from the sessions have been broadcast to the public.

The draft law on war crimes prosecutions, finalized by a government-appointed group of experts in December 2006, improves the legislative framework in this regard. Unlike the general Criminal Procedure Code, the new law on war crimes prosecutions entrusts the president of the WCC with the authority to approve public broadcasts. (Under the Criminal Procedure Code only the president of the Serbian Supreme Court can make the decision.) The presiding judge would be obligated to hear the opinion of, rather than seek assent from, the defendant on the proposal to broadcast the session.³⁰²

Little international attention is given to the trials before the War Crimes Chamber. The only exceptions were the pronouncements of the verdicts in the *Ovčara* and *Scorpios* cases, which received considerable coverage in the international press. This fact reflects the general decrease of media interest in the developments in the former Yugoslavia compared to the previous decade and a near-exclusive focus on Serbia's cooperation with the ICTY as the dominant issue related to the conflicts in the 1990s.

X. PLANNED CHANGES IN LEGISLATION

A new Serbian Criminal Procedure Code is expected to enter into force on December 31, 2008. The new law places greater responsibility on criminal prosecutors, including those in war crimes cases, by introducing prosecutorial investigation. This provision is intended to speed the investigation and enable the prosecutor to be fully in command of facts and legal aspects of the case.³⁰³ The responsibility to conduct investigations will pass from investigating judges to prosecutors and put greater demands on the prosecutors than in the past.

The investigating judge's inherent powers in the investigation will be reduced to reviewing prosecutors' decisions on the opening of the investigation, deciding on suspects' detention or bail terms, ordering

³⁰¹ The website of the OWCP is located at http://www.tuzilastvorz.org.yu/html_trz/index_eng.htm, and the website for the WCC is at http://okruznisudbg.org.yu/list_cases?type=war_crime.

³⁰² Interview with OSCE expert to the working group, Belgrade, March 14, 2007.

³⁰³ Ministry of Justice of the Republic of Serbia, "Explanation [of the Criminal Procedure Code]," undated, www.lawinitiative.com/Srpski/Zakoni/03.05.06.%20-%20Novi%20predlozi%20zakona/Predlog%20zakonika%20o%20krivicnom%20postupku.doc (accessed July 22, 2007).

searches and seizures, and ordering exhumations.³⁰⁴ Investigating judges will complete the investigations initiated before December 31, 2008.³⁰⁵ In the new cases, investigating judges will be able to carry out some activities in the investigation if the prosecutor requests.³⁰⁶ Both these provisions should enable the prosecutors to adapt gradually to the new rules.

Members of the OWCP believe they are ready for this new role because they have been conducting similar activities during the pre-investigation stage of the war crimes proceedings.³⁰⁷ However, the greater demands will affect the staffing needs of the OWCP. The war crimes prosecutor estimates that the office might need as many as 10 associate legal officers.³⁰⁸ As described earlier, the office currently does not employ any legal officers.

Criminal prosecutors will also be able to transfer significant investigative powers to the police, with the novel possibility of the use in trials of witness statements taken by the police. In the context of war crimes cases, it means that officers in the interior ministry's WCIS will be able to take statements and the prosecutor will be able to use them in the trials.³⁰⁹

Parliament is also expected to enact a new law on war crimes prosecutions.³¹⁰ A working group established by the Ministry of Justice submitted a draft law to the government in December 2006.³¹¹ The working group included a professor of criminal procedure at the Belgrade Law School, representatives of the WCC and the OWCP, and a representative of the justice ministry.³¹² Parliamentary elections in Serbia took place a month after the group finalized the draft, and a new government was elected in May 2007. The delay in the government's formation postponed all legislative activities in Serbia, including work on the draft law on war crimes prosecutions. In addition, the postponed implementation of the new CPC until December 31, 2008, affected the timetable for the law's enactment and implementation.³¹³

The motive for changing the legislation was to address some complex issues not fully anticipated when the original law was drafted in 2003 because of the absence of domestic jurisprudence at the time. According to one of the new law's drafters, the impetus for the change came from within. The ICTY has not requested changes to be made to the 2003 law, notwithstanding the fact that the working group considered the possibility that 11 *bis* cases might be transferred to Serbia as well as the need to develop suitable legislation.³¹⁴

The main changes the group proposed should address several of the issues raised in this report, such as clarifying the rules governing the use of ICTY evidence in national war crimes trials, strengthening the position of the war crimes prosecutor vis-à-vis the War Crimes Investigation Service in the Serbian police,

³⁰⁴ Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, no. 46/2006, Arts. 272, 274 and 275.

³⁰⁵ *Ibid.*, art. 552 (1).

³⁰⁶ *Ibid.*, art. 270 (2).

³⁰⁷ Interview with Vladimir Vukčević, Belgrade, May 9, 2007; interviews with deputy prosecutors, Belgrade, April 3, 2007, and April 18, 2007.

³⁰⁸ Interview with Vladimir Vukčević.

³⁰⁹ Interview with Aleksandar Kostić, head of WCIS, Belgrade, May 14, 2007.

³¹⁰ The exact title is Law on the Organization and Jurisdiction of the State Bodies in War Crimes Proceedings.

³¹¹ Interview with Bruno Vekarić, OWCP spokesperson, Belgrade, March 15, 2007.

³¹² Interview with OSCE expert to the working group, Belgrade, March 14, 2007. The president of the District Court in Belgrade and a deputy war crimes prosecutor also actively participated in the work of the group of experts.

³¹³ The Serbian Parliament was expected to enact the new law on war crimes prosecutions in the second half of 2007 or early 2008. The working group drafting the law made the draft's provisions consistent with the content of the new Criminal Procedure Code (2006), which should have been implemented as of June 1, 2007. On May 29, however, the parliament decided to postpone the implementation of the CPC until December 31, 2008. It appears that until that date the government does not intend to submit a new law on war crimes prosecutions to Parliament for adoption. Telephone interview with OSCE expert to the Working Group, Belgrade, September 3, 2007.

³¹⁴ Interview with the OSCE expert assigned as a consultant to the working group, March 14, 2007. On the transfer of 11 *bis* cases, see VI above.

and providing for greater transparency of the trials. The law would also extend the mandate of the deputy war crimes prosecutors from four to six years.³¹⁵

The new criminal procedure code and the amended law on war crimes prosecutions would introduce important changes regarding plea bargaining and the status of the so-called witness-collaborator. Under the Criminal Procedure Code now in force, the possibility of plea bargaining does not exist. In contrast the current law contains detailed provisions on the witness-collaborator, a criminal-organization member charged with a crime or under investigation, who can testify against other persons. If the prosecutor and the suspect agree on the arrangement and the suspect testifies truthfully, the prosecutor has to drop the charges altogether. Under the new arrangements, however, the effect of the witness-collaborator's cooperation will be a 50 percent reduction of the sentence instead of dismissal.³¹⁶ Exceptionally, if the prosecutor requests, the court can free the accused from serving the sentence despite the conviction, if the importance of his or her testimony, demeanor before the court, earlier life, and other circumstances justify such a decision.³¹⁷ Representatives of the OWCP assess that the change will restrict the possibilities to offer favorable deals to insider witnesses because they probably will have to serve a sentence and could be subject to vengeance while in prison.³¹⁸

While the main rationale for the category of witness-collaborator is to obtain evidence against other suspects, the purpose of plea bargaining is to speed the proceedings against the specific accused (who does not have to be a member of a criminal organization) and reduce the cost of the proceedings. The new Criminal Procedure Code will allow for plea bargaining in crimes punishable by a maximum of 10 years' imprisonment.³¹⁹ However, the law on war crimes prosecutions, as *lex specialis*, will allow for plea bargaining regardless of the severity of the maximum penalty.³²⁰

The proposed changes in the CPC and the law on war crime trials could have considerable positive effect. The strengthened role of prosecutors and the possibility of plea bargaining could speed investigations and trials, thereby freeing resources that can be used in other cases. The newly proposed legislation could facilitate improved coordination between the war crimes prosecutor and the WCIS. The relaxation of conditions governing the use of cameras in the courtroom should contribute to making war crimes trials more present in the public mind than they are now.

However, the extent to which the legislation will be helpful in practice will depend on how it is implemented. Staffing needs of the Office of the War Crimes Prosecutor will increase greatly, and the government will have the responsibility for addressing them. Other potential improvements could be frustrated by the absence of commitment on the part of the WCIS staff who will be involved in investigations or judges who will have the discretion to decide about the presence of cameras in the courtroom.

XI. CONCLUSION

Justice in the former Yugoslavia cannot be fully done unless Serbia makes a major contribution to the efforts to bring war criminals to trial. The ICTY has closed its investigations and is in the process of winding down. The tribunal has mainly addressed the criminal responsibility of those in the highest positions in the government, police, and army. In other parts of former Yugoslavia the efforts to establish accountability are limited by the nonavailability of the suspects, many of whom relocated following the

³¹⁵ Ibid.

³¹⁶ Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, no. 46/2006, art. 163 (1).

³¹⁷ Ibid, art. 163 (3).

³¹⁸ Interview with a deputy war crimes prosecutor, Belgrade, April 3, 2007; interview with Bruno Vekarić, Belgrade, July 17, 2007.

³¹⁹ Criminal Procedure Code, *Official Gazette of the Republic of Serbia*, no. 46/2006, art. 304 (1).

³²⁰ Interview with the OSCE expert to the working group, Belgrade, March 14, 2007.

cessation of hostilities. In particular, members of armed units or paramilitary groups who committed crimes in Croatia, Bosnia and Herzegovina, and Kosovo, subsequently moved or returned to Serbia. As a practical matter only Serbia can bring these individuals to justice.

More than three years after the establishment of the War Crimes Chamber and the Office of the War Crimes Prosecutor in Serbia, it may be too early to draw conclusions about the contribution of these offices to the overall efforts to establish accountability for war crimes. On one side of the balance sheet, the number of trials remains low, and each aspect of the investigations and trials show shortcomings described in this report that need to be seriously addressed. On the other side the WCC and the OWCP have established themselves as institutions, their mandate is beyond dispute, and their capacity to fulfill this mandate is increasing. Although far from perfect, the expertise and skills the two bodies have developed are considerable. The individuals working in these structures have responded to well-meant critiques and suggestions. In many ways against the odds, all of these achievements have taken place before a backdrop of political ambivalence. On these bases, one can cautiously hope that Serbia will be increasingly capable of dispensing justice in war crimes matters.

To avoid underachievement or failure, however, the executive branch of the Serbian government must make a crucial contribution. Elected May 15, 2007, the new government includes non-nationalist parties that built the foundations for the establishment of the OWCP and the WCC in 2003. Yet the government also includes those who held power between 2004 and 2007 and made little, if any, positive contribution to the work of the specialized structures during that period. Furthermore, the government has made little effort to develop broader and complementary processes that demonstrate a commitment to openly dealing with Serbia's responsibility for its part in the regional conflicts. In the months and years ahead the government should provide the appropriate political and financial support to allow the war crimes prosecutors, police investigators, and judges to carry out their important work successfully. As the prospect of membership in the European Union increases, the international community must ensure that domestic progress in Serbia toward accountability for past atrocities remains on the public agenda. The Serbian government should seek—and be encouraged to seek—to create an environment in which these trials not only succeed, but are seen to benefit Serbia as a whole and the entire region in coming to terms with its past.

XII. RECOMMENDATIONS

To the Serbian Government

- Publicly express unequivocal support for the work of the OWCP and the WCC in establishing accountability for war crimes committed in the territory of the former Yugoslavia;
- Increase the funds for the OWCP to ensure that work-related travel and accommodation costs abroad are adequately covered;
- Ensure that the OWCP has sufficient funds to hire an adequate number of analysts and legal officers;
- Give clear instructions to the interior ministry's WCIS to actively seek information about perpetrators of war crimes, at its own initiative or at the request of the OWCP;
- Engage in frank discussion with the OWCP about the need to place the WCIS under the formal authority of the war crimes prosecutor;
- Increase the salaries of WCIS members to an appropriate level given the sensitivity of their work and as an incentive to perform their tasks with greater resolve;
- If Kosovo attains a status equivalent to independence recognized by the international community, make a good-faith effort to find mechanisms whereby the OWCP and the WCC continue their cooperation with counterparts in Kosovo in war crimes matters and separate this issue from the purely political considerations that may inform Serbia's general stance vis-à-vis Kosovo;

- Amend the Criminal Procedure Code by providing compensation for defense counsel's investigative activities on behalf of the accused in war crimes matters;
- Increase the tariff for court-appointed defense counsel in war crimes trials to provide them with stronger incentives to commit themselves to the case and provide the defense necessary to ensure a fair trial.

To Office of the War Crimes Prosecutor

- Demonstrate commitment to prosecuting war crimes suspects, regardless of their political and social status, by conducting credible investigations supported by evidence of individuals who hold important positions in the institutions of the Republic of Serbia;
- Instead of relying excessively on the transfer of evidence from the prosecutors in Croatia and BiH to initiate war crimes investigations, start using additional sources—such as evidence generated before the ICTY—to identify crime scenes and potential perpetrators. After reconstructing the incidents in considerable detail on this basis, request assistance from the prosecutors in the neighboring countries in approaching witnesses and obtaining other evidence;
- Take a firmer approach regarding prosecution on the basis of command responsibility and apply the doctrine against superiors who were aware of the criminal nature of their acts of commission or omission and failed to act otherwise;
- Develop multidisciplinary investigation techniques to address prosecution of system crimes ;
- Avoid politicized allegations in the indictments and make greater use of ICTY legal findings, such as defining the armed conflict in Bosnia and Herzegovina as an international armed conflict.

To the War Crimes Chamber

- Refrain from political considerations in decision-making and adhere strictly to professional standards, including during examination of crimes committed against non-Serbs in other parts of the former Yugoslavia;
- Use ICTY jurisprudence concerning issues of substantive law, giving special consideration to its elaborate jurisprudence concerning the nature of the armed conflicts in Kosovo and BiH;
- Ensure that witnesses receive clear instructions before appearing in the courtroom regarding the use of names of other witnesses who testified using a pseudonym;
- Do not weaken the effect of the protection aimed at concealing identity by leading witnesses who testify under a pseudonym to state other personal identification data, such as names of family members;
- Avoid exposing witnesses to danger by asking their precise address at the beginning of the examination;
- Without prejudice to the right to defense, prevent the accused or their counsel from intimidating vulnerable witnesses;
- Allow for broader use of ICTY evidence in non-11 *bis* cases;
- Update and expand the scope of information regarding war crimes trials on the WCC Web site, including the court schedule;
- Publish the text of first-instance judgments on the WCC Web site to satisfy the public's legitimate interest in their contents;
- Take the necessary steps to ensure that war crimes trials are broadcast nationally.

To the European Union and the International Community

- The European Union should make clear to the authorities in Serbia that integration in the EU is not possible unless Belgrade demonstrates continued progress on domestic war crimes trials;
- The international community in Kosovo (UNMIK and its possible successor under the auspices of the EU) should make every effort, together with the Kosovo authorities, to

- persuade and assist ethnic Albanian witnesses to meet with the judicial officials from Belgrade investigating war crimes in Kosovo;
- Continue support for the work of the War Crimes Chamber, the Office of the War Crimes Prosecutor, and the WCIS, but consider making it conditional on a demonstrated increased commitment to vigorously investigate allegations against mid- and high-level defendants.

ANNEX I. SUMMARY OF CASES BEFORE THE WCC

Case	Description	Stage (as of October 2007)
<i>Bitiqi Brothers</i> (Case no. K.V. 3/2006)	Two Serbian police officers charged with war crime against three Bitiqi brothers, prisoners of war and U.S. citizens who fought as volunteers during Kosovo conflict in 1999. According to the indictment, on July 9, 1999, the accused surrendered the three prisoners to unidentified police who then executed them.	Ongoing first-instance trial (opened November 13, 2006)
<i>Bulić</i> (Case no. K.V.02/03)	Milan Bulić, Serb from Croatia, found guilty of cruel treatment of prisoners of war in Ovčara, near Vukovar (Croatia); sentenced to eight years' imprisonment at first-instance trial.	Completed (first-instance judgment January 30, 2006, confirmed in part March 1, 2007, sentence reduced to two years' imprisonment)
<i>Lekaj</i> (Case no. K.V. 4/05)	Anton Lekaj, ethnic Albanian, sentenced to 13 years' imprisonment for murder of four civilians, as well as rape, illegal detention, inhuman treatment, and torture, in June 1999. His victims were Kosovo Roma from Đakovica/Gjakova.	Completed (first-instance judgment September 18, 2006, confirmed April 5, 2007)
<i>Morina</i> (Case no. K.V. 02/07)	Sinan Morina, ethnic Albanian, charged with crimes against Serb civilians in Orahovac municipality, Kosovo, in July 1998. The crimes include: attack against civilian population resulting in death; torture; infliction of bodily injuries; forced displacement; and, destruction of property.	Ongoing first-instance trial (opened October 17, 2007)
<i>Ovčara</i> (Case no. K.V. 1/2003)	14 accused members of Serb "Territorial Defense" and paramilitary unit "Leva Supoderica" found guilty of inhuman treatment and murder of at least 200 Croat prisoners of war in November 1991. Eight accused received maximum (20 years) prison sentence; three others sentenced to 15 years. Three defendants received 5–12 years; two defendants acquitted.	Appeal (first-instance judgment December 12, 2005; retrial ongoing)
<i>Radak</i> (Case no. K.V. 03/2005)	Saša Radak, arrested during main <i>Ovčara</i> trial, sentenced for same crimes to 20 years' imprisonment at separate trial. At retrial of <i>Ovčara</i> case, Radak's case joined with other defendants'.	Appeal (first-instance judgment September 6, 2006; retrial ongoing)
<i>Scorpios</i> (Case no. K.V. 6/2005)	Trial concerned videotaped murder of six young Bosnian Muslims from Srebrenica in July 1995. Perpetrators belonged to notorious Scorpios unit, paramilitary formation closely connected with Serbian State Security Service. Unit leader and one accomplice each sentenced to 20 years' imprisonment, one indictee to 13 years, and one more to five years. Trial chamber acquitted fifth accused.	Appeal (first-instance judgment April 10, 2007)

<p><i>Suva Reka</i> (Case no. K.V. 2/2006)</p>	<p>Eight members of Serbian police charged with murder of 48 ethnic Albanian civilians in Suva Reka (Kosovo), in March 1999. 13 children aged 1–13 among victims.</p>	<p>Ongoing first-instance trial (opened October 2, 2006)</p>
<p><i>Zvornik</i> (Case no. K.V. 5/05)</p>	<p>Six Serbs from BiH and Serbia charged with forcible expulsion of 1,822 civilians from villages of Skočić and Kozluk (near Zvornik, BiH) to Hungary and killings of 19 civilians near Zvornik in mid-1992.</p>	<p>Ongoing first-instance trial (opened November 28, 2005)</p>

ANNEX II. RELEVANT TREATIES TO WHICH SERBIA IS A PARTY

Convention	Signed	Ratification
International Covenant on Civil and Political Rights	N/A	March 12, 2001
Optional Protocol to the International Covenant on Civil and Political Rights	March 12, 2001 ³²¹	September 6, 2001
International Covenant on Economic, Social, and Cultural Rights	N/A	March 12, 2001
Convention on the Prevention and Punishment of the Crime of Genocide	N/A	March 12, 2001
International Convention on the Elimination of All Forms of Racial Discrimination	N/A	March 12, 2001
Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes Against Humanity	N/A	March 12, 2001
International Convention on the Suppression and Punishment of the Crime of Apartheid	N/A	March 12, 2001
Convention on the Elimination of All Forms of Discrimination against Women	N/A	March 12, 2001
Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	N/A	March 12, 2001
Optional Protocol to the Convention against Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment	September 25, 2003	September 26, 2006
Convention on the Rights of the Child	N/A	March 12, 2001
Geneva Conventions I–IV	N/A	October 16, 2001
Geneva Conventions Additional Protocol I (1977)		October 16, 2001
Geneva Conventions Additional Protocol II (1977)		October 16, 2001
Second Optional Protocol to the International Covenant on Civil and Political Rights, Aiming at the Abolition of the Death Penalty		September 6, 2001
Convention for the Protection of All Persons from Enforced Disappearance	February 6, 2007	N/A
Rome Statute of the International Criminal Court	July 18, 2003	May 7, 2004
European Convention on Human Rights		March 3, 2004
European Convention on Human Rights Protocol No. 1		March 3, 2004
European Convention on Human Rights Protocol No. 4		March 3, 2004
European Convention on Human Rights Protocol No. 6		April 1, 2004
European Convention on Human Rights Protocol No. 7		June 1, 2004
European Convention on Human Rights Protocol No. 12		April 1, 2005
European Convention on Human Rights Protocol No. 13		July 1, 2004

³²¹ Succession to Signature