Humanitarian Law Center

TEN YEARS OF WAR CRIMES PROSECUTIONS IN SERBIA: CONTOURS OF JUSTICE

Analysis of the Prosecution of War Crimes in Serbia 2004-2013

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Contents

Acronyms and Abbreviations

Appeals Court Department - the Department of War Crimes of the Court of Appeal in Belgrade

BiH - Bosnia and Herzegovina

CPC - Criminal Procedure Code

EU - European Union

FRY - Federal Republic of Yugoslavia

Higher Court Department - the Department for War Crimes of the Higher Court in Belgrade

HLC - Humanitarian Law Center

ICTY - International Criminal Court for the Former Yugoslavia

Law on War Crimes Proceedings – Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings

LAPBM - Liberation Army of Preševo, Bujanovac and Medveđa

OSCE – Organization for Security and Cooperation in Europe

OWCP – Office of the War Crimes Prosecutor

Prosecutor - War Crimes Prosecutor

SAOC - State Attorney's Office of the Republic of Croatia

SFRY - Socialist Federative Republic of Yugoslavia

Support and Assistance Service - the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade

WCIS - War Crimes Investigation Service

YA - Yugoslav Army

Introduction

The institutions specialized in the prosecution of war crimes in Serbia had their tenth anniversary in early 2014. Given the extent and nature of the crimes committed in the former Yugoslavia during the wars of the 1990s, attempts to bring those responsible for such crimes to justice have been modest at best. Indifference of institutions towards the process of dealing with the past, and a superficial commitment to criminal justice for the crimes of the past, turned Serbia, a state on the on the doorstep of the European Union (EU), into an oasis of impunity for thousands of perpetrators of serious crimes.

Respect for the rule of law is one of the formal conditions for Serbia's EU accession. The legacy of systematic and largely unpunished human rights violations from the 1990s is one of Serbia's greatest challenges in meeting that requirement. In other words, the progress of what are the most serious social reforms in the modern history of Serbia, initiated by the state's European integration, could be compromised by Serbia's failure to deliver justice for the crimes of the 1990s.

The large number of unpunished crimes negatively impacts the reconciliation process among the former Yugoslav communities. The unwillingness of the authorities to bring the majority of perpetrators of war crimes to justice, deepens suspicions about the sincerity of Serbian officials' declared commitment to regional reconciliation, peace and partnership with Serbia's neighbors.

One of the reasons for the lack of progress in prosecuting those responsible for war crimes is the political institutions lack a clear position on the strategic issues surrounding the criminal prosecution for the mass atrocities of the 1990s. What is the long-term social and political vision of this process? What are the problems that hinder the provision of justice for all crimes? What must be done, and over what period, if these problems to be solved? How can existing mechanisms be made the most of, and the resources of all stakeholders in the prosecution of war crimes be strengthened? How can war crimes trials work alongside other transitional justice mechanisms to help encourage broader social dialogue about the past? These are just some of the questions about which stakeholders (survivors, families and communities affected by violence), institutions directly involved in the administration of justice for the crimes committed in the 1990s (courts, the prosecution service and the police), and the general public expect clear answers from political authorities.

Believing that a national strategy for the prosecution of war crimes is inevitable as part of Serbia's EU accession process, the Humanitarian Law Center (HLC), the only organization that has been continually monitoring and analyzing war crimes trials since 2002, contributes to this process with this Analysis of the Prosecution of War Crimes in Serbia, covering the period 2004-2013(Analysis). In general, the HLC's Analysis seeks to provide an objective insight into the key aspects of current practice in the prosecution of war crimes in Serbia, and thus provide a basis for dialogue among stakeholders on the draft of the National Strategy for War Crimes Prosecution for 2015-2025 (Strategy). After the publication of the Analysis, the HLC will hold a series of consultative meetings with representatives of relevant institutions, which will serve as a platform for discussion and the formulation of strategic guidelines on specific issues of war crimes prosecution for the next ten years. The Strategy proposal will be submitted to Ministry of Justice of the Republic of Serbia

The Analysis contains 15 chapters that portray the work of key institutions in the prosecution of war crimes, putting forward the issues important for the credibility of war crimes trials in Serbia, such as the compliance of indictments and convictions in domestic cases, with the facts established by the International Criminal Tribunal for the former Yugoslavia (ICTY). The Analysis concludes with 75 recommendations to state bodies of the Republic of Serbia and international stakeholders on how to improve almost all aspects of the prosecution of war crimes in Serbia.

We extend our gratitude to the War Crimes Department of the Higher Court in Belgrade, the War Crimes Department of

the Court of Appeal in Belgrade, the Office of the War Crimes Prosecutor, the Higher courts in Prokuplje, Novi Sad, Niš, Požarevac, Leskovac, Kraljevo, the Ministry of Justice of the Republic of Croatia, the Ministry of the Interior of the Republic of Croatia, the State Court of Bosnia and Herzegovina, the State Prosecution Service of Bosnia and Herzegovina, the Ministry of Security of Bosnia and Herzegovina, the Office of the Prosecutor of the International Criminal Tribunal for the Former Yugoslavia, the Commissioner for Information of Public Importance, the OSCE Mission to Serbia, the Serbian Bar Association, Documenta and others, for the data they provided.

The key contribution to the understanding of the practice of war crimes prosecution was provided by representatives of the Office of the War Crimes Prosecutor of the Republic of Serbia, the current and former judges of specialized war crimes departments of the Higher and Appeals Court in Belgrade, the Ministry of the Interior, representatives of the Support and Assistance Service, defense attorneys, representatives of non-governmental organizations, victims, former witnesses from the Protection Program for War Crimes Witnesses, legal experts and others. Through their interviews with HLC representatives (Nikola Čukanović, Edmir Veljović, Milomir Matović and Sandra Orlović), they presented their views on many aspects of war crimes prosecution in Serbia, casting light on the problems they encounter daily, on good practice as well as on errors, offering possible guidelines for the improvement of their institutions' operation. Common to all of them, is the belief that a long-term strategy for war crimes prosecution would contribute to the improvement of the operation of individual institutions, and to the overall results of this important social process.

The Context

The disintegration of the Socialist Federal Republic of Yugoslavia (SFRY), which followed Slovenia's declaration of independence in June 1991, resulted in a number of international and internal armed conflicts: in Slovenia (June-July 1991), in Croatia (1991-1995), Bosnia and Herzegovina (BiH) (1992-1995), Kosovo (1998-1999), and in Macedonia (February-August 2001). The wars in Croatia, BiH and Kosovo were marked by systematic atrocities against the civilian population, designed to ethnically cleanse whole territories.

Serbia played an active part in the armed conflicts in the former Yugoslavia. With the help of the Serbian leadership, headed by the President of Serbia, and later President of the Federal Republic of Yugoslavia (FRY), Slobodan Milošević, the Serbs in Croatia and BiH established their political-territorial units with the aim of to seceding from these states. [1] The area under Serbian control in Croatia was returned to the sovereignty of the Croatian authorities after two military-police operations, known as 'Flash' and 'Storm,' which the Croatian Army carried out in May and August 1995 respectively.[2] The armed conflict in BiH ended in November 1995. The armed conflict in Kosovo began in early 1998 and came to a conclusion in June 1999, following the NATO air intervention against Yugoslavia.

In the armed conflicts that took place in the former Yugoslavia between 1991 and 2001, more than 130,000 people lost their lives, about 4.5 million people fled or migrated, while 12,000 people from the region are still registered as missing persons.[3] Some 6,000 citizens of Serbia and Montenegro were killed or disappeared during the wars of the 1990s.[4] In this period, during and after the conflicts in Croatia and BiH more than half a million refugees poured into Serbia, while between 1999 and 2005 more than 200,000 internally displaced persons came from Kosovo.[5] The consequence is that Serbia has the highest number of refugees in Europe and one of the five countries in the world with the longest refugee crises.[6]

The specificity and common denominator of the wars in Croatia, BiH and Kosovo are numerous war crimes – among which

1 The Republic of Srpska Krajina was established in December 1991, while Republika Srpska was founded in January 1992.

2 See *Prosecutor v. Ante Gotovina, Ivan Čermak and Mladen Markač*, No. IT-06-90-PT, Indictment, 24 May 2007.

3 In the countries of the former Yugoslavia there is still no official (state approved) list of names of the persons killed in these armed conflicts. In the absence of official initiatives, non-governmental organizations have taken upon themselves the task of investigating, compiling, comparing and systematizing the available information about the victims and missing persons. In BiH, the task is being completed by the Research and Documentation Center (RDC) from Sarajevo, which in October 2012 published *The Bosnian Book of the Dead,* in which it presented the results of years of research. According to the RDC, between 1991 and 1995, 95,940 people were killed in the armed conflict in BiH. The HLC, in cooperation with Documenta from Zagreb and the Humanitarian Law Center Kosovo, is collecting the data on casualties and missing persons from the armed conflicts in Croatia and Kosovo. In addition, the HLC investigates human losses of citizens of Serbia and Montenegro in other armed conflicts in the former Yugoslavia. Information available at: http://www.hlc-rdc.org/?cat=266 and http://www.documenta.hr/hr/dokumentiranje-ljudskih-gubitaka.html. Accessed on: 8th August 2013.

4 Humanitarian Law Center data.

5 Data from the Commissariat for Refugees and Migration of the Republic of Serbia. Available at: http://www.kirs.gov.rs/articles/onama.php?lang=SER. Accessed on: August 28th, 2013.

6 Available at: http://www.b92.net/eng/news/society.php?yyyy=2013&mm=06&dd=20&nav_id=86691. Accessed: August 29th, 2013.

are the murder of civilians, enforced disappearances, detention of civilians in concentration camps, systematic rape and other forms of sexual violence. The crime that stands out by its seriousness was committed by Bosnian Serb forces in Srebrenica, where over the course of a number of days, they killed more than 8,000 Bosniak men and boys in July 1995. The International Criminal Tribunal for the former Yugoslavia (ICTY) defined the crimes in its judgments as genocide. The ICTY's qualification was subsequently confirmed by the judgment of the International Court of Justice.[7]

Several top political, military and police officials of Serbia were convicted by the ICTY for the crimes committed by Serbian forces during the armed conflict in the former Yugoslavia. In addition, in the case *Bosnia and Herzegovina against Serbia*, regarding Serbia's violation of the Convention on the Prevention and Punishment of the Crime of Genocide, the International Court of Justice found Serbia responsible for failing to prevent the Srebrenica genocide and punish those responsible for the crime.[8]

After a decade of war and the authoritarian rule of Slobodan Milošević, in October 2000 Serbia began its transition toward democracy. At the time, Serbia faced the challenge of building democratic institutions after more than half a century of communist regimes, but it also faced an economic transition to a market economy. There was also the delicate and sensitive issue of building a responsible attitude toward the legacy of war crimes committed by Serbian forces during the wars in the former Yugoslavia, one of the most important preconditions for reconciliation with its neighbors.

After he had made several successful steps in the process of political stabilization, the Prime Minister of the Republic of Serbia, Zoran Đinđić, was assassinated in March 2003 in what turned out to have been a joint operation of the Special Operations Unit of the Ministry of Internal Affairs of Serbia and the criminal group known as the 'Zemun clan,' one of whose objectives was to stop the country's cooperation with the ICTY.[9] In the elections held after the assassination of Prime Minister Zoran Đinđić, the coalition around nationalist Democratic Party of Serbia (DPS) and a center-left party, the Democratic Party (DP) held power for two terms (in 2004 and in 2007). The DPS-DS coalition was dissolved, due to opposing attitudes toward Serbia's integration into the EU and Kosovo's declaration of independence, in February 2008. After the 2008 elections, through its political coalition with the DP, the Socialist Party of Serbia (SPS), the party led by Slobodan Milošević until his death, entered government for the first time since Milošević's government was overthrown in October 2000.[10] Although Milošević's former associates began returning to power, during this government's mandate the remaining ICTY indictees, the Bosnian and Croatian Serb leaders, Radovan Karadžić, and Goran Hadžić and the Bosnian Serb Army General, Ratko Mladić, were arrested.

Although after 2000, Serbia achieved some success in the field of democratic and economic transition, the implementation of a comprehensive strategy for reconciliation and dealing with the legacy of the serious crimes committed in the past were not the political elite's priority. On the contrary, from the beginning of democratization in Serbia the elite kept actively denying re-

7 See: *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, judgment (February 26th, 2007) at http://www.icj-cij.org/docket/files/91/13685.pdf; *Prosecutor v. Krstić*, No. IT-98-33-A, ICTY Appeals Chamber Judgment, April 19, 2004; See *Prosecutor v. Popović et al.* No. IT-05-88, ICTY Trial Chamber Judgment, June 10, 2010.

8 *Ibid*.

9 Aleksandra Petrović and Dorotea Čarnić, *Process KP-5/03: The Assassination of Zoran Đinđić [Process KP-5/03: Ubistvo Zorana Đinđića]*, Vol. 3 (Beograd: DIN Sedma sila i Multinacionalni Fond Kulture, 2008), p. 494.

10 The DS was the most powerful political opponent of the regime of Slobodan Milošević. In 2002, the party's leader, the late Prime Minister, Zoran Đinđić, issued a decision to extradite Slobodan Milošević to the ICTY. In October 2008, the presidents of the DS and SPS signed the Declaration of National Reconciliation, designed "to put an end to the conflicts of the past." Before the signing of the Declaration, which was essential for the establishment of the new DS-SPS governing coalition, the then President of the Democratic Party, Boris Tadić, spoke about the necessity of cooperating with the party of the former Serbian president. He added that the two parties "share the same pain," equating the grief for Milošević with the grief for the murdered Prime Minister, Đinđić. "Ivica u vladu sa dva bola" ["Ivica Enters the Government, Twice Grieved"], *Glas Javnosti*, June 8th, 2008. Available at: http://www.glas-javnosti.rs/clanak/glas-javnosti-08-06-2008/ivica-u-vladu-sa-dva-bola. Accessed on: August 19th, 2013.

sponsibility for crimes committed by members of the Serbian forces, either relativizing the crimes or talking only of the crimes committed against the Serbs, thus making all warring parties equally responsible for the crimes.[11]

The experiment with the FRY's Truth and Reconciliation Commission (2001-2003), which focused exclusively on identifying the causes of the wars in Yugoslavia, rather than determining the facts of the crimes and victims,[12] has been seen as one of the least successful of all post-conflict strategies in determining the facts about crimes from the past.[13] Despite the fact that both the former and current President of Serbia, Boris Tadić and Tomislav Nikolić, have apologized for the Srebrenica crime, and despite the Serbian Parliament's 2010 adoption of a declaration condemning the crime committed in Srebrenica, these and other symbolic steps of acknowledging the truth about the crimes have not been accompanied by concrete reparative measures designed to establish a culture of respect for the rights of victims.[14]

Nor has much been achieved in the area of institutional reform in Serbia. Although a large number of decision-makers from the Milošević period were removed, immediately after Milošević's overthrow in 2000, the responsibility for war crimes and massive human rights violations has not been established as a criterion for institutional reform. As early as 2003, following the example of other Eastern European countries, Serbia adopted the Law on Responsibility for Human Rights Violations (the Lustration Law), but the validity of the law expired in 2013, without its having been implemented. Lack of institutional reform is a major obstacle to the process of Serbia's reconciliation with its neighbors, primarily because security forces – such as the army and police – remain unreformed, and persons suspected of involvement in crimes remain in prominent positions.[15]

As regards legal and administrative measures for victims' reparations, Serbia does not have an adequate legal framework in cases of war crimes or gross violations of human rights. The Law on the Rights of Civilian War Invalids recognizes 'victim status' only if citizens of Serbia were killed by members of enemy forces, and if they suffered severe physical disability.[16] Victims of human rights violations who turn to the courts for monetary compensation for suffering inflicted on them by members of the Serbian forces during the war often have their application rejected by the courts, and are subjected to inappropriate conduct toward them by judges, or are humiliated by the meager financial compensation awarded to them.[17]

Among the measures for addressing the legacy of war crimes committed during the 90's, visible progress has been recorded only in the prosecution and punishment of those responsible for the war crimes of the past, though many problems and shortcomings can be identified in this domain.

11 For more on public statements by institutional representatives, see the HLC analysis "Political and institutional discourse on war crimes" [Politički i institucionalni diskurs o suđenjima za ratne zločine] due for publication, October 2014.

12 Materials on the Commission for Truth and Reconciliation FRY. Available at: http://www.usip.org/publications/truth-commission-serbia-and-montenegro. Accessed: August 12th, 2013.

13 Priscilla Hayner, *Unspeakable Truths: Transitional Justice and Truth Commissions* (New York: Routledge, 2011).

14 The text of the Declaration is available on the website of the National Parliament of the Republic of Serbia: http://www.parlament.gov.rs/narodna-skupstina-.871.html. Accessed: August 29th, 2013.

15 At the end of 2011, the Humanitarian Law Center published its *Diković Dossier*, a document on the newly appointed Chief of Staff of the Serbian Army, who occupied a prominent command position during the war in Kosovo and in whose area ofresponsibility more than 250 Kosovo Albanians were killed and/or disappeared, and their property looted. Despite the serious allegations of war crimes, general Diković is still the Chief of General Staff of the Serbian Army. An investigation against him has never been conducted.

16 According to the Law on the Rights of Civilian War Invalids, several groups of victims are entirely excluded from the rights granted by this Law: Serbian citizens who were killed by members of the Yugoslav People's Army, the Yugoslav Army and the Ministry of the Interior (of the Republic of Serbia and also those killed by members of the Army of Republika Srpska and related armed forces; family members of missing persons, unless they declare a missing person dead; victims of sexual violence; and all those whose suffering does not result in physical disability greater than 50%. cf. Law on the Rights of Civilian War Invalids, *Official Gazette of the Republic of Serbia* [Zakon o pravima civilnih invalida rata, *Službeni glasnik Republike Srbije*], No. 52/96, Articles 2 and 3.

17 Humanitarian Law Center, *Exercising the right of victims to reparations in court proceedings in Serbia: Justice or relativization of crimes*, Report for 2012 [*Ostvarivanje prava žrtava na reparacije u sudskim postupcima u Srbiji: Uspostavljanje pravde ili relativizacija zlocina*, Izveštaj za 2012. godinu] (Belgrade: Humanitarian Law Center, 2013).

Summary

Before the entry into force of the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings (Law on War Crimes Proceedings) on July 1, 2003, only a handful of war crimes perpetrators had been tried in Serbia in the courts of general jurisdiction. The vast majority of these cases, some of which are still in progress, falls short of meeting the standards of fair and professional trials. Unprofessional actions of on the part of prosecutors in these cases has denied justice to victims of serious crimes.

The Law on War Crimes Proceedings transferred the jurisdiction for war crimes cases to specialized institutions for the prosecution of was crimes. This law regulates the institution, organization, jurisdiction and powers of state bodies and their organizational units for the investigation and prosecution of offenders as defined by this law. State agencies and organizational units involved in the prosecution of war crimes are: the Office of the War Crimes Prosecutor (OWCP), the Department for War Crimes of the Higher Court in Belgrade (Higher Court Department, formerly the Special Chamber for War Crimes of the Belgrade District Court), the Department of War Crimes of the Court of Appeal in Belgrade (Appeals Court Department), the War Crimes Investigation Service (WCIS), the Protection Unit (Unit), and the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade.

In the past decade, the work of the OWCP has been in the public eye far more than any other institution involved in the prosecution of war crimes. The process role of case initiators and OWCP's outreach commitment has certainly contributed to this attention, as did some of its decisions and actions which had a negative echo in the former Yugoslavia and elsewhere. Criticism of the OWCP pertains largely to its prosecutorial policy of taking up less demanding cases and lower-ranking perpetrators, the political impact on the work the OWCP, as well as a number of problematic practices in the context of regional cooperation. In recent years, a decline in prosecutorial activities has been noted as well.

The work of the Higher Court Department and the Appeals Court Department may generally be considered appropriate, professional and successful. However, certain aspects of these departments are subject to criticism. These include mild penal policies, particularly with regard to the implementation of the mitigating circumstances, a number of politically motivated judgments and a complete absence of the public relations program.

The current practice of prosecuting war crimes in Serbia is characterized by frequent deviation of the OWCP and the courts from the facts established by the ICTY, as well as by the lack of reliance on ICTY jurisprudence. Using the evidence presented before the ICTY has become a standard practice, although more often than not it happens that some important evidence remain unused in the process of understanding and solving some crimes.

Despite the positive trend regarding the activities of the WCIS since 2010, the general conclusion is that work of the WCIS could be more efficient and proactive – an improvement to which stronger relations with the OWCP would greatly contribute. In this regard, since the commencement of this police unit, the problem of redefining its position in relation to the OWCP has been at stake, as was the need for stricter criteria for the selection of its members, in order to avoid former members of the armed forces engaged in military operations to be involved in war crimes investigations.

Decision-makers and institutions involved in war crimes prosecution in Serbia do not seem to sufficiently understand the delicate position of victims and witnesses of war crimes and their importance in the court proceedings. Existing mechanisms for the protection of victims and witnesses from intimidation and assaults on their integrity, along with the support system for victims and witnesses, only partially fulfill this function. The most serious deficiencies have been recorded in the protection program designed to provide protection to former members of the military and police, as well as the psychological support for victims. The Protection Program is regulated by a solid legal framework. However, allegations of illegal and unprofessional conduct of the Protection Unit members point to serious problems in the implementation of protection programs.

The defense of the accused is one of the most neglected as-

pects of war crimes trials. The absence of criteria of competence with regard to appointing selected defenders, as well as serious problems in financing the costs of the defense, and their inability to collect evidence in other countries significantly impair the right of the accused to effective defense.

A Office of the War Crimes Prosecutor

In the last ten years, the work of the OWCP has been the focus of professionals and the general public, far more than any other institution involved in the prosecution of war crimes. The reason for this increased focus, among others, was the procedural role of those who initiated the proceedings, the OWCP's commitment to public relations, and certain OWCP decisions and actions that had a powerful resonance in the former Yugoslavia and beyond.

The OWCP's significant contribution to renewed post-war confidence in the institutions of the Republic of Serbia among neighboring countries and the international public, evident in the early years of OWCP's operation, has, in recent years, become less pronounced. This has been largely due to prosecutorial policy, which focuses on prosecuting less demanding cases and low-ranking perpetrators, but can also be attributed to problems with regional cooperation in the prosecution of war crimes.

1. Human Resources and Technical Requirements

The OWCP was designed as a state body exclusively responsible for the handling of war crimes cases. Its was established by the Law on Organization and Jurisdiction of Government Authorities in War Crimes Prosecution (hereafter the Law on War Crimes), adopted on July 1st, 2003.[18] This law stipulates that the work of OWCP be managed by the War Crimes Prosecutor (hereinafter referred to as the Prosecutor).[19] Vladimir Vukčević has been the Prosecutor since the establishment of OWCP.

Since its formation, the number of deputy prosecutors at the OWCP has increased. All of the deputies have been appointed and dismissed by the Prosecutor, in accordance with the law.[20] Initially, four deputy prosecutors were appointed; another was appointed at the beginning of 2006, and then in March of the same year, the Book of Regulations on the OWCP's Internal Organization and Job Descriptions was adopted, which established that the OWCP should have ten deputy prosecutors.[21] At the end of 2006, two new deputy prosecutors were appointed. Since 2009, the number of deputy public prosecutors, in each public prosecutor's office has been determined by the State Prosecutorial Council.[22] According to a council decision, the OWCP should have eight deputy prosecutors.[23]

In the first three years following its establishment, the OWCP had neither associates nor investigators. The OWCP currently employs two associates and three investigators.[24] One OWCP associate works for the ICTY Prosecutor in The Hague, as a liaison officer. There are 28 administrative staff employed at the OWCP.[25]

The OWCP has special teams responsible for dealing with cases related to different territories. Special teams have been formed to deal with the events that took place in BiH, Croatia and Kosovo. Each team consists of two deputies, two associates and a rapporteur.[26]

18 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 2 and Article 4, paragraph 1.

19 *Ibid.* Article 2, Paragraph 2.

20 Replies to a Humanitarian Law Center Questionnaire by the Office of the War Crimes Prosecutor, A No. 162/13, June 7th, 2013.

21 *Ibid*.

22 Pursuant to Article 75 of the Law on the Office of the Public Prosecutor, *Official Gazette of the Republic of Serbia* [Zakon o javnom tužilaštvu, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – decision US and 121/2012).

23 State Prosecutorial Council, decision on the number of deputy public prosecutors, A No. 543/13 of February 28th, 2013.

24 Replies to a Humanitarian Law Center Questionnaire on the, Office of the War Crimes Prosecutor , A No. 162/13, June 7th, 2013; Replies to a Humanitarian Law Center Questionnaire on the Office of the War Crimes Prosecutor, A No. 162/13, May 20, 2014.

25 Supplement to the information and explanations (Replies to the Questionnaire of the Humanitarian Law Center), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

26 Replies to a Humanitarian Law Center Questionnaire by the, Office of the War Crimes Prosecutor, A No. 162/13, June 7th, 2013.

In their meetings with the HLC, representatives of the OWCP said they believed that all employees had adequate working conditions. Each OWCP deputy prosecutor has their own office, while other employees have sufficient working space. The OWCP is sufficiently equipped with the necessary information technology and other technical equipment, mostly obtained using grants from the US Embassy.[27] All OWCP employees have at their disposal professional books and studies, and all of them have access to relevant electronic databases and other information. However, the OWCP has only three vehicles – an insufficient number, considering the number of OWCP deputies working in the field and the obligation to conduct independent investigations under the provisions of the Criminal Procedure Code (CPC), which entered into force on January 15, 2012 in war crimes cases. Due to this situation, some deputies use their own cars.[28]

Another obstacle to the OWCP's efficiency is the shortage of deputy prosecutors. OWCP representatives emphasized that with an adequate number of staff, the OWCP would be able to open 30 new cases within six months.[29] The OWCP also emphasized the need for more associate experts. Instead of the current two, the OWCP should employ at least eight associate experts, in order that each deputy prosecutor can work with an associate expert.[30] Furthermore, a larger number of investigators would greatly contribute to the OWCP's efficiency. OWCP representatives mentioned that the number of staff working for the ICTY Prosecutor (as liaison officers) should also be higher, in order for the OWCP to better use the evidence collected by the ICTY. OWCP representatives especially stressed the need to hire an analyst trained in database research.[31]

Furthermore, OWCP representatives stated that the number of employees working as technical or administrative staff (drivers, transcribers, employees at the registry office, office secretaries) was inadequate. The small number of employees in these positions often prevents specific tasks being carried out within the statutory deadline. As one examples of this problem, OWCP representatives say that the transcripts of witness statements, which must be submitted to the judge by a particular deadline, are often submitted late, due to the heavy workload and a lack of transcribers. The limited funds available to OWCP are an obstacle for hiring more staff into technical and administrative positions.[32]

2. Budget

The OWCP receives its funding directly from the budget of the Republic of Serbia.[33] For each fiscal year, the OWCP submits a request for funding approval to the Ministry of Finance's Department for Budget Preparation. The Ministry of Finance then forwards the OWCP's proposal to the Government of the Republic of Serbia, which approves funding for the OWCP's operation. In 2004, an audit of finances was carried out by the Budget Inspection Department of the Ministry of Finance; in 2011 the Ministry of Justice performed this task. As of 2013, the audit has been carried out by an auditor employed by the OWCP.[34]

The funds allocated to the OWCP are inadequate for the jobs and tasks that the OWCP fall under its remit, as stipulated by the law. In addition to the scarcity of human resources, the lack of resources is reflected in the performance of everyday activities, especially since the entry into force of the new CPC, which has significantly increased the prosecutorial responsibilities, primarily through the implementation of prosecutorial investigation (in the past, this task was carried out by an investigating judge). In this regard, the OWCP lacks funds for the work of its deputies when they need to take action in preliminary and investigative proceedings – i.e. the examination of witnesses, victims and suspects who more often than not reside outside Serbia.[35]

The OWCP does not have sufficient funds to pay the costs of *ex officio* defense attorneys, although under the new CPC this became the OWCP's responsibility.[36] There is also a

27 Data submitted to the HLC by the Office of the War Crimes Prosecutor, May 8th, 2013.
28 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.
29 *Ibid.*
30 *Ibid.*
31 *Ibid.*
32 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.
33 *Ibid.*
34 Supplement to the information and explanations (Response to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.
35 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.
36 *Ibid.*

lack of resources to cover expenses related to visits to the headquarters of the ICTY in The Hague, and consequently, OWCP deputies and their associates are often forced to cancel or shorten their visits to the ICTY.[37]

Since its founding, the OWCP has had additional sources of funding in the form of various donations. Particularly important were the donations from the OSCE and the US Embassy, which focused on training in the application of international humanitarian law, ICTY database search, obtaining IT and other technical equipment, technical literature and software for document search (Zajlab), funding research travel, and outreach activities.[38]

The largest part of the funds approved for the OWCP goes on salaries, which are double the salary of their professional counterparts in the comparable prosecutorial departments in Serbia.[39] A large part of the funds are spent on business travel, mostly to the ICTY in The Hague.[40]

3. Professional Capacities

On the establishment of the OWCP, Prosecutors with relevant experience in the field of criminal law were appointed. However, with the exception of the Prosecutor Vukčević, none of the appointees had had previous experience with, or had been trained in, the field of international criminal law.[41] In the circumstances, it could hardly have been otherwise, since national practice in this area of law was almost non-existent (except for a handful of cases conducted in the courts of general jurisdiction[42]), and only a small number of legal experts in Serbia were familiar with the work of international courts.

Since the establishment of the OWCP, the Prosecutor, his deputies and associate experts have taken part in numerous training events, seminars and symposia, where they became familiar with the field of international criminal law.[43] Professional observers believe that the OWCP's professional progress has been visible, but that it could have been more marked.[44] Prosecutors accept that there is a need for improvement and that they need additional training.[45] As regards professional training of OWCP prosecutors and associates, the Strategy for Judicial Reform in Serbia, adopted in June 2013, introduces some positive new elements. The Strategy provides for mandatory continuing training of judges and prosecutors.[46]

An additional problem is limited access to case law and professional literature written in languages other than Serbian. A good part of jurisprudence, as well as relevant legal opinions and research papers on war crimes is written in English, but the majority of OWCP deputies do not speak the language. This problem is somewhat remedied by the existence of the OWCP translation service, which translates the necessary textual segments from professional studies and literature.[47]

37 *Ibid.*

38 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

39 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 17; interview with Deputy War Crimes Prosecutor, May 8th and 9th, 2013.

40 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; also data submitted to the HLC by the OWCP, May 8th, 2013.

41 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 5.

42 For more on these cases, see Section: 'War Crimes Cases before the Courts of General Jurisdiction,' p. 82.

43 Supplement to the information and explanations (Responses to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

44 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a representative of the Belgrade Centre for Human Rights, June 17th, 2013.

45 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

46 The National Strategy for Judicial Reform for the period 2013-2018 was adopted on June 1st, 2013 by the National Assembly of the Republic of Serbia. The Action Plan for the implementation of the National Strategy stipulates that the principle of continuous training of holders of judicial and prosecutorial functions would be implemented by amendments to the Law on the Judicial Academy. The deadline for amending the law has not been determined. Available at: http://www.mpravde.gov.rs/. Accessed on May 11th, 2014.

47 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with deputies of the Prosecutor, May 8th and 9th, 2013.

The level of training of associate experts and investigators currently working at the OWCP is satisfactory. All employees have previously worked at the ICTY, and most of them were employed at the OWCP as part of an OSCE and ICTY joint project, during which they attended a variety of training events and professional seminars in the field of international criminal law.[48] Associate experts and investigators have good command of foreign languages, and are capable of consulting foreign literature in their everyday work. The OWCP sees them as a significant enhancement and as the natural heirs of the two OWCP deputies, who are to retire by mid 2015. Given their training and practice at the ICTY, their appointment as deputy prosecutors could significantly improve the professional capacity of the OWCP.[49]

3.1. Application of the New CPC – the New Role of the OWCP

According to the new CPC, which has applied to war crimes cases since January 2012, investigations now fall under the remit of prosecutors. Consequently, the training of prosecutors to effectively and appropriately handle an investigation process becomes a very important issue. The OWCP is expected to conduct independent investigations, something that entails the establishment and linking of facts, as well as collecting evidence. Previously, this element of an investigation was carried out by the police, although respondents to the HLC's inquiries point out that even before the introduction of prosecutorial investigation, the OWCP largely guided the police in the task of evidence gathering.[50] According to OWCP data, by the end of 2013, two out of the eight deputy prosecutors and the Prosecutor had been trained in the implementation of the new CPC.[51]

4. Efficiency

The data on the indictments issued and the characteristics of the cases prosecuted, indicate that in recent years there have been fewer prosecutions. Given the number of deputy prosecutors employed at the OWCP, the number of indictments remains small. Indictments against lower-ranking persons in political, military and police organizations are prevalent, as are indictments involving events with a smaller number of casualties and few perpetrators. Moreover, the indictments mainly concern cases that are the result of the exchange of evidence as part of regional cooperation programs with prosecutors in Croatia and BiH. There are only a handful of cases relating to Kosovo, the processing of which largely depends on the OWCP's initiative.

4.1. Prosecutorial Activity in Numbers

By the end of 2013, the OWCP had indicted a total of 149 persons in 45 war crimes cases.[52] Often, several cases concerned the same event: for example, for the crimes committed at the Ovčara farm (three cases), the crimes committed in Zvornik (three cases), and the crimes committed in the Kosovo municipality of Peć (two cases).[53] Statistically, given the total number of cases and the number of prosecutors engaged in them, each prosecutor has, on average, initiated five cases.

By the end of 2013, 35 cases had been completed with delivery of a final judgment, in which 65 persons were convicted and 32 acquitted.[54] The OWCP withdrew its indictments against five persons: in three cases due to lack of evidence, in one due to the death of the accused, and in one due to the incapacity of the accused.

48 The project 'Justice and War Crimes' focused on the transfer of knowledge about war crimes cases from the ICTY to the region, and on supporting the consolidation of the capacity of national criminal justice systems to prosecute war crimes. The project was carried out by the OSCE's Office for Democratic Institutions and Human Rights (ODIHR), the ICTY, the United Nations Interregional Institute for Crime and Justice Research (UNICRI), and the OSCE Mission in the region. For more, see: http://www.osce.org/sr/odihr/103841?download=true. Accessed on May 11th, 2014.

49 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

50 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with deputies of the Prosecutor, May 8th and9th, 2013.

51 Supplement to the information and explanations (Replies to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, June 19th, 2014, FHP IndexIn F95764.

52 See Annex.

53 *Ibid.*

54 Office of the War Crimes Prosecutor, *Ten Years On: Serbia on the path of justice and reconciliation* [*Deset godina posle: Srbija na putu pravde i pomirenja*] (Belgrade: Office of the War Crimes Prosecutor, December, 2013).

HLC interviewees suggest that the number of defendants is too low and that it does not meet the expectations of the interested parties (human rights organizations, victim groups, lawyers etc.)[55] In addition, over the last three years the OWCP has issued indictments in connection with crimes that are smaller in scope. The last complex case with a large number of victims (indictement expansion in the case *Ljubenić*) was initiated in 2011.[56] Due to the lack of prosecutorial activity, the existing capacities of the Higher Court Department remain unused. This can be inferred from the fact that the judges in this Department have additionally tried the cases in other areas of criminal law.[57]

Regarding the ethnic background of victims in the cases processed, by the end of 2013, 127 persons were indicted for the crimes against non-Serb victims (Albanians, Croats, Bosniaks, Roma and others), and 27 for the crimes committed against Serbs.

From its establishment through to June 2013, the OWCP has handled 135 criminal charges against 604 persons suspected of having committed war crimes.[58] The OWCP dismissed eight criminal charges due to a lack of evidence. The charges were filed by the Ministry of Interior of the Republic of Serbia, various state institutions and bodies, non-governmental organizations, citizens' associations, the prosecution services of regional states, and victims of war crimes.[59] It should be noted that these are only the criminal charges against identified individuals that, according to OWCP's assessment, contain sufficient evidence for further handling (KT register).[60] In addition, the OWCP keeps records of criminal charges against unknown perpetrators (KTN register), as well as records of other criminal cases (register KTR).[61]

According to data from 2013, 876 cases were in the pre-trial procedure.[62] Investigation during 2013 was conducted in 11 cases against 65 persons.[63]

4.2. Prosecutorial Activity with Regard to Crimes Committed in Kosovo

According to the HLC's findings, during the 1998-99 conflict in Kosovo, Serbian forces killed around 7,000 Kosovo Albanian civilians.[64] The ICTY cases *Šainović et al.* and *Đorđević* found that the crimes were the consequence of the joint criminal enterprise, carried out by the highest ranking political, military and police officials led by Slobodan Milošević. The goal of this enterprise was to establish the permanent control over Kosovo by expelling most of its population of Kosovo Albanians.[65] During the same period, about 450 Serb civilians and others who were not Kosovo Albanians were killed by the Kosovo Liberation Army.[66] Over 800 Serbs and other non Kosovo Albanians were killed

55 Interview with a Judge of the Court of Appeal in Belgrade; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

56 See, Annex I; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

57 Response of a judge of the War Crimes Department of the Higher Court in Belgrade to the HLC's Questionnaire, June 4th, 2014, HLCIndexIn: 79-F95112.

58 *Ibid*.

59 *Ibid*.

60 *Ibid*; Rules on Administration of the Public Prosecutor's Office, *Official Gazette of the Republic of Serbia* [Pravilnik o upravi u javnim tužilaštvima, *Službeni glasnik Republike Srbije*,], No.116/08 and 104/09, Article 136.

61 Rules on Administration of the Public Prosecutor's Office, Article 136.

62 Supplement to the information and explanations (Responses to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

63 Responses to the Humanitarian Law Center Questionnaire by the, Office of the War Crimes Prosecutor, A No. 162/13, May 20th, 2004.

64 Humanitarian Law Center, "The zone of (ir)responsibility" (press release), March 21st, 2014. Available at: http://www.hlc-rdc.org/?p=26404. Accessed May 11, 2014; Individualized register of human losses in Kosovo on the website of the Humanitarian Law Center. Available at: http://www.hlc-rdc.org/?cat=278. Accessed May 11th, 2014.

65 *Prosecutor v. Nikola Šainović, Nebojša Pavković, Vladimir Lazarević and Sreten Lukić*, IT-05-87, Appeals Chamber judgment, January 23, 2014; *Prosecutor v. Vlastimir Djordjević*, IT-05-87/1, Appeals Chamber judgment, January 27, 2014.

66 See: Individualized register of human losses in Kosovo on the website of the Humanitarian Law Center. Available at: http://www.hlc-rdc.org/?cat=278. Accessed May 11th, 2014.

or forcibly expelled in individual acts of violence, after the arrival of international forces in Kosovo.[67]

By the end of 2013, the OWCP had filed ten charges against 50 people for the crimes committed in Kosovo in 1998 and 1999. Six indictments against 30 persons were issued for the crimes against Kosovo Albanians, while four were issued against 20 persons for the crimes committed against ethnic Serbs and Roma. In five cases (*Lekaj, Podujevo, Suva Reka, Bytyqi* and *Gnjilane Group*) procedures have been completed, while one case (*Ćuška*) is currently before the Appeal Court Departmentv. First-instance trials are ongoing in four cases (*Kashnjeti, Morina, Ljubenić* and *Trnje*).[68]

With regard to the ethnicity of the accused and of the victims, neither the number nor the structure of these cases even remotely reflect the nature of the crimes committed and the scale of civilian casualties on both sides in the Kosovo armed conflict. The OWCP observes that the number of cases against ethnic Serbs for their crimes against Kosovo Albanians is not proportionate to the number of crimes committed by Serbs in Kosovo, by citing a number of problems that have contributed to the current ratio of indictments issued against ethnic Serbs and against Kosovo Albanians: the process of evidence-gathering is difficult since Serbia's refusal to recognize Kosovo means there is no intergovernmental contact and because of the reluctance of Kosovo Albanians to cooperate with the OWCP, the injured parties often fail to respond to OWCP summonses, and the identity of the perpetrators often remains unknown.[69] Regardless of the plausibility of these claims, through its contact with Kosovo Albanian victims the HLC has seen repeatedly that the low level of trust in the OWCP stems from the fact that crimes against Kosovo Albanians have gone largely unpunished.

Additionally, several cases of war crimes committed by Serbian forces have been in the pre-trial phase for more than 10 years. Thus, as early as 2005 the OWCP announced that "several indictments" were to be issued concerning the crimes against Kosovo Albanians whose bodies were buried in a mass grave in Batajnica.[70] The first indictment was issued in 2006 for the crime committed in Suva Reka. It was in 2012, another six years, before an indictment was raised for the crime committed in Ljubenić. At the beginning of 2004, the OWCP announced an investigation into several cases with a large number of victims (the crimes committed in Meja, Izbica, Korenica and in the Dubrava prison), but none of those investigations has yet been launched.[71] In the early years, the OWCP pointed out that the main problem in prosecuting these crimes was its limited access to witnesses in Kosovo.[72] However, after a period of troubled cooperation with the United Nations Mission in Kosovo (UNMIK), this problem has been overcome through the OWCP's cooperation with EULEX. The OWCP claims its cooperation with EULEX has progressed smoothly.[73]

In this respect, an illustrative case is that of the war crime committed in the village of Trnje. The information about the perpetrators of this crime became known to the public as early as 2002, when two protected witnesses testified at the trial of Slobodan Milošević. They were former members of

67 Humanitarian Law Center, *Abductions and Disappearances of Non-Albanians in Kosovo* [*Otmice i nestanci nealbanaca na Kosovu*] (Belgrade: Humanitarian Law Center, September 2001).

68 HLC data.

69 OWCP's email replay to HLC's inquiry, April 16, 2014. HLC, IndexIN – 79-F93510.

70 Vojislava Crnjanski-Spasojević, „Indictments for Batajnica by the end of the year" [„Optužnice za Batajnicu do kraja godine"] *Nedeljni telegraf*, April 13, 2005.

71 Jasna Janković, "Del Ponte believes that we are the best, and she said that!" [„Del Ponte smatra da smo najbolji, i to je rekla!], Katarza, *Radio B92*, transcript available at: http://www.b92.net/info/emisije/katarza.php?nav_id=155853&yyyy=2004&mm=11. Accessed March 29th, 2014; Slobodan Kostić, "We Had Mladić in our Hand" [„Imali smo Mladića u šaci"], *Vreme*, No. 1032, October 14th, 2010.

72 Jasna Janković, „Del Ponte believes that we are the best, and she said that!" [„Del Ponte smatra da smo najbolji, i to je rekla!], Katarza, *Radio B92*, transcript available at: http://www.b92.net/info/emisije/katarza.php?nav_id=155853&yyyy=2004&mm=11. Accessed March 29th, 2014.

73 Tanja Šikanjić, "We are Looking for Mladić 24/7" [„Za Mladićem tragamo 24 sata dnevno"], *Nezavisne novine*, July 24th, 2010. Available at: http://www.nezavisne.com/novosti/drustvo/Vladimir-Vukcevic-Za-Mladicem-tragamo-24-sata-dnevno-64449.html. Accessed: April 3rd, 2014. For more details on OWCP's cooperation with UNMIK see: Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 32.

the Yugoslav Army (YA), and they identified a number of perpetrators.[74] However, an indictment against the two suspects mentioned in these testimonies was not issued until the end of 2013.[75] The expectation that a larger number of indictments should have been issued for the crimes committed by the Serbian forces in Kosovo is based on the fact that, unlike other conflicts in the former Yugoslavia, the Kosovo conflict was the only conflict that took place on the territory of Serbia, and that official Serbian forces were directly involved in the conflict for longer and to a greater extent than in other conflicts. Furthermore, the ICTY established the responsibility of the highest political, military and police officials of the former Federal Republic of Yugoslavia and the Republic of Serbia for the crimes committed in Kosovo.

It should be noted that in 2011, in relation to the investigation in one case (the case of the Leskovac Group) against members of the Ministry of the Interior for the crimes committed in Kosovo, the HLC raised serious allegations about the integrity of the prosecutor who acted in this and other Kosovo-related cases.[76] Despite the fact that there were witnesses who could confirm the HLC's allegations, neither the OWCP nor any other competent institutions conducted an independent investigation. The OWCP denied HLC's claims on its website.[77]

4.3. Reasons for the Lack of Efficiency

The reasons for the lack of efficiency should be sought by examining objective circumstances, such as the previously discussed lack of human and technical resources, and the problems that make cooperation with other relevant institutions difficult. From the very beginning of its work, the OWCP has drawn attention to the lack of commitment and initiative on the part of the police unit in charge of investigating war crimes, the War Crimes Investigation Service.[78] Although several personnel and organizational changes have taken place within the unit, serious objections still surround the unit's contribution to finding and obtaining evidence for war crimes cases.[79]

An additional burden in terms of resources was the OWCP's engagement in the search for individuals indicted by the ICTY who had avoided arrest for years. Specifically, in July 2006, the Government of the Republic of Serbia appointed Vladimir Vukčević the Government's Action Team Coordinator, to locate, arrest and transfer to the ICTY persons indicted for war crimes in the former Yugoslavia.[80] Another burden thrown on the OWCP was the responsibility for the prosecution of accomplices who had assisted in hiding "the Hague fugitives." This task came under the OWCP's jurisdiction in 2007.[81] Crimes committed in World War II (spe-

74 *Prosecutor v. Slobodan Milošević*, IT-02-54, witness K-32 and witness K-41. Transcript of the testimony in English available at: http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020906ED.htm. The witnesses repeated their claims, in 2006 and 2007 respectively, in the case *Prosecutor v. Milan Milutinović et al*. IT-05-07.

75 The Office of the War Crimes Prosecutor, "Pavle Gavrilović and Rajko Kozlina indicted for war crimes in Trnje in 1999" ["Podignuta optužnica protiv Pavla Gavrilovića i Rajka Kozline za ratni zločin u Trnju 1999 godine"], Press Release, November 9th , 2013.

76 Humanitarian Law Center, *Violations and Abuse of Power in the Prosecution of War Crimes in the Republic of Serbia* [*Nezakonitosti i zloupotreba ovlašćenja u procesuiranju ratnih zločina u Republici Srbiji*] (Belgrade: Humanitarian Law Center, September 2011).

77 "Objections to the report by the Humanitarian Law Center" [„Primedbe na izveštaje Fonda za humanitarno pravo"] (press release), November 14th, 2011. Available at: http://www.tuzilastvorz.org.rs/html_OWCP/VESTI_SAOPSTENJA_2011/VS_2011_11_14_LAT.pdf. Accessed: April 3rd, 2014.

78 Dejan Anastasijević, "We Could Prosecute Šešelj Too" ["Možemo da sudimo i Šešelju"], *Vreme*, No. 728, December 15th, 2004; Vojislava Crnjanski-Spasojević, "Indictments for Batajnica by the end of the year" [„Optužnice za Batajnicu do kraja godine"] *Nedeljni telegraf*, April 13th, 2005.

79 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

80 "Arrest Mladić by September" ["Uhapsiti Mladića do septembra"], *B92*, July 19, 2016; available at: http://www.b92.net/info/vesti/index.php?yyyy=2006&mm=07&dd=19&nav_category=11&nav_id=205157. Accessed: May 2nd, 2014.

81 Law on Amendments to the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o izmenama i dopunama Zakona o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 101/2007, Article 2(3).

cifically, the *Enger, Kepiro, Ešner* and *Nada Šakić* cases) also became part of the OWCP's workload.[82]

However, there are sufficient grounds to conclude that there were other, less objective reasons, for the OWCP's lack of efficiency in the prosecution of war crimes from the 1990s.

In recent years, the OWCP's prosecutorial policy has been marked by its commitment to prosecuting cases against foreign nationals who remain unavailable to Serbia's prosecutorial institutions, and who are charged with crimes committed outside the territory of Serbia (the cases *of Veljko Marić*, and *Ejup Ganić,* among others). This issue will be discussed in greater detail below, in the section Cooperation with Other War Crimes Prosecution Services in the Region (page 24). The problem is compounded by the absence of a clear prosecutorial strategy, anchored in clear criteria, which would prioritize the cases for prosecution. Such a strategy is a prerequisite for the successful and efficient prosecution of systemic mass crimes.[83]

To some extent, the OWCP has tailored its actions to the expectations of the public. Hence, at the end of 2012, after the ICTY issued judgments of acquittal in the *Gotovina* and *Haradinaj* cases, Deputy Prosecutor Bruno Vekarić publicly expressed reservations about the OWCP issuing a large number of indictments for crimes committed by Serbian forces, as the public would respond negatively.[84]

5. Focusing on Lower-ranking Political, Military and Police Suspects

The most frequent critique that the domestic and international public launches against the OWCP concerns the absence of indictments against persons who at the time of the conflicts occupied middle or high-ranking positions in military and police structures.[85] Of 149 war crimes indictees, six had held some kind of higher position in the military, police and political hierarchies.[86]

The OWCP's response to this criticism has changed over recent years. At first, the OWCP explained that its strategy of processing "the small fish" was a priority, in order to secure legitimacy in the eyes of the public.[87] Today, the OWCP emphasizes that criticism concerning higher-ranking officials comes only from the HLC, while at the same time, arguing that high-ranking officials have been prosecuted by the ICTY, and that, in any case, the OWCP has filed a number of indictments against persons in higher positions, as in the *Ćuška*, *Scorpions* and *Lovas* cases. The OWCP also points out that individual prosecutors are guided in their work only by existing evidence.[88]

The clear fact, however, is that in the ten years of its operation, the OWCP has not issued a single indictment against high-ranking officials for crimes committed against non-

82 Vladimir Vukčević, "Justice with inexcusable delay" [„Pravda sa neoprostivim zakašnjenjem"], *Vreme*, No. 1026, May 11, 2011; "The Warrant for the Late Nada Šakić" [„Poternica za preminulom Nadom Šakić"], *RTS*, July 15th, 2011. Available at: http://www.rts.rs/page/stories/sr/story/135/Hronika/925204/Poternica+za+preminulom+Nadom+%C5%A0aki%C4%87.html. Accessed: April 3rd, 2014.

83 Office of the United Nations High Commissioner for Human Rights, *Rule-of-Law Tools for Post-conflict Societies*, Prosecution Initiatives, United Nations (New York and Geneva: 2006), p. 5.

84 Bruno Vekarić, Introductory Remarks, Debate on War Crimes Trials in Serbia, Belgrade January 17th, 2013 (audio recording, HLC Archive, archive No. FHP-DT,XIX-1).

85 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with the former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with the judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with the representative of the Belgrade Center for Human Rights, June 17th, 2013; Fred Abrahams, *Dispatches: In Kosovo, Justice Welcome, but Incomplete*, February 14th, 2014. Available at: http://www.hrw.org/news/2014/02/18/dispatches-kosovo-justice-welcome-incomplete. Accessed: May 13th, 2014; Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 8; European Commission Progress Report on Serbia in 2013, October 16th, 2013.

86 Toplica Miladinović, Lieutenant of the Yugoslav Army (*Ćuška* case), Pavle Gavrilović, captain of the Yugoslav Army (*Trnje* case), Slobodan Medić, the commander of the Scorpions unit (*Scorpions* case), Radoslav Mitrović, commander of the 37th Special Police Units (*Suva Reka* case); Branko Grujić, President of the Provisional Government of the Zvornik municipality (*Zvornik II* case) and Miodrag Dimitrijević, lieutenant colonel of the Yugoslav People's Army (*Lovas* case).

87 Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 8.

88 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

Serbs, while at the same time it has conducted investigations and issued indictments against persons in high positions for crimes against Serbs (see the section on regional cooperation below). The OWCP, as this imbalance indicates, seems reluctant to process cases it deems 'sensitive' because of the possibility of antagonizing its relations with the police or the army, or of provoking a negative reaction from the public in Serbia.

The impression that the OWCP tends to avoid investigating more sensitive political cases is not only one held by the HLC. Rather, the impression is shared by the majority of observers and participants in the process of war crimes prosecution in Serbia.[89] Ivan Jovanović, a former legal adviser to the OSCE Mission to Serbia, which has been monitoring and supporting the OWCP and war crimes chambers since their inception, puts it this way: "After a number of years one can conclude, since this is an objective fact, that persons occupying middle- and higher-ranking levels of responsibility are not being indicted. In 2004, 2005 and 2006 this could only have been an assumption, but now it is a conclusion."[90]

This problem is especially apparent with regard to crimes committed by Serbian forces in Kosovo.[91] The OWCP indictments have been exclusively aimed at direct perpetrators and their immediate superiors, leaving out senior officials who, in the chain of command, stood between these indictees or their superiors, and those persons who occupied senior positions in the government of Serbia, whom the ICTY has already convicted for crimes against humanity and war crimes against Kosovo Albanians committed as part of a joint criminal enterprise. Add to this, the fact that the ICTY, in cases concerning the crimes in Kosovo, has gathered plenty of evidence, testimonies and official documents that serve to largely reconstruct the involvement of Serbian forces in the crimes in Kosovo.

Criticism regarding the OWCP's reluctance to indict higher-ranking officials, has come from judges in war crimes trials as well. In their explanations of the judgments in the *Lovas* and *Beli Manastir* cases, the presidents of trial chambers have publicly questioned why officers superior to the defendants on trial in these cases had escaped indictments, suggesting that the evidence presented in these cases indicated the responsibility of those senior figures for the crimes.[92]

Some of the people that the HLC has spoken to have pointed out that the application of the doctrine of command responsibility would have contributed to a more energetic prosecution of senior military, police and political officials.[93]

Specific knowledge and skills necessary for the prosecution of high-ranking officials

As noted previously in earlier reviews of the OWCP's work, lack of specialized knowledge and techniques for investigating systematic crimes is another obstacle to the prosecution of persons who occupied senior governmental positions.[94] Investigation of systematic crimes presupposes knowledge and skills in analyzing the patterns of activity of political, military and police structures, and this knowledge is often beyond the prosecutors.[95] The OWCP claims that the help of experts would be of great value in their investigations in this regard. Before 2013, the OWCP has hired specialists with specific expertise in just one case (*Media* case).[96]

89 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with the judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with a representative of the Belgrade Center for Human Rights, June 17th, 2013.

90 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

91 Fred Abrahams, *Dispatches: In Kosovo, Justice Welcome, but Incomplete*, February 14th, 2014. Available at: http://www.hrw.org/news/2014/02/18/dispatches-kosovo-justice-welcome-incomplete. Accessed: March 26th, 2014.

92 Transcript of the first instance verdict in the *Lovas* case available at: http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf; report from the reading of judgment in the *Beli Manastir* case. Available at: http://www.hlc-rdc.org/wp-content/uploads/2012/06/Beli-Manastir-izvestaj-sa-sudjenja-19-06-2012.pdf. Accessed: May 13th, 2014.

93 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade; interview with arepresentative of the Belgrade Center for Human Rights, June 17th, 2013. For more on the application of command responsibility, see p. 54.

94 Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 11.

95 Office of the United Nations High Commisioner for Human Rights, *Rule-of-Law Tools for Post-Conflict States*, Prosecution Initiatives, United Nations (New York and Geneva: 2006), p. 11.

96 OWCP's email reply to the HLC's request, April 16th, 2014. HLC Index IN - 79-F93510.

6. Cases Transferred from Military Prosecutors

In January 2005, after the military justice system in Serbia and Montenegro was brought to an end, ongoing military prosecution cases involving violation of international humanitarian law were transferred to the OWCP's jurisdiction.[97]

According to OWCP representatives, more than 100 cases were transferred from the former military prosecution service, but the vast majority of them were closed, as they had clearly been motivated by political rather than legal reasons.[98] A number of cases, which the OWCP took on, were closed after they had caused serious problems with ongoing regional cooperation. The section of this Analysis covering regional cooperation will discuss this issue in more detail.[99]

At the end of 2013, the OWCP was investigating 28 persons in three cases taken on from military prosecutors. In addition, the OWCP was continuing with the prosecution in one case it had received from the military prosecutor's office when it was at the indictment stage (case *Šeks at al.*) although the case was later returned to the investigation stage following a decision of the Higher Court Department. All four of those cases involve the crimes committed in Croatia.[100]

7. The Impact of Political Circumstances on the OWCP's Work

Political support for the OWCP has varied depending on the political elite in power – from being openly supported, to being ignored or directly attacked.[101] Most HLC respondents agreed in principle that there was political influence on the prosecution of war crimes, including the work of OWCP, although respondents rarely cited specific examples of such pressure.[102] While the OWCP cites specific examples of pressure on their work, it denies having succumbed to such pressures in any situation. However, politics seems to have visibly affected the work of OWCP on several occasions.

The pressures that the OWCP openly discusses are those exerted during the time that the so-called 'Kosovo Six' were extradited to the ICTY in 2004. The then Government of the Republic of Serbia, led by Vojislav Koštunica, demanded that the OWCP indict police and military generals who had earlier indicted by the ICTY, and try them before a court in Serbia. After the Prosecutor rejected this request, a proposal for his replacement was put before the National Assembly . That suggestion was abandoned under pressure from the international community.[103] The OWCP views budgetary cuts during the mandate of the same government to have been a form of political pressure as well.[104]

The next two governments, between 2007 and 2012, were dominated by the Democratic Party. During the government's second mandate (2008-2012) the Minister of Justice was Snežana Malović, a former associate of the OWCP. According to OWCP representatives, this period was marked by respect for the work OWCP from the Government of the Republic of Serbia.[105]

97 Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutors and the Military Prosecutor's Office, *Official Gazette of the Republic of Serbia* [Zakon o preuzimanju nadležnosti vojnih sudova, vojnih tužilaštava i vojnog pravobranilaštva, *Službeni glasnik Republike Srbije*], no. 137/2004, Article 5.

98 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

99 See Section: "Cooperation with Other War Crimes Prosecutors' Offices in the Region", p 24.

100 Supplement to the information and explanations (Replies to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

101 On public statements of representatives of political power in relation to war crimes and the work of the OWCP, see the forthcoming study by the HLC, "Political and Institutional Discourse on War Crimes" [*Politički i institucionalni diskurs o suđenjima za ratne zločine*]due for publication, October 2014.

102 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with the representative of the Belgrade Center for Human Rights, June 17th, 2013.

103 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

104 *Ibid*.

105 *Ibid.*

In the government formed in July 2012, the dominant parties were the Socialist Party of Serbia and the Serbian Progressive Party, both of which used to be close to the regime of Slobodan Milošević. This government showed no interest in OWCP's work or the prosecution of war crimes in Serbia in general. By the end of 2013, neither the Minister of Justice nor his immediate associates had met with OWCP representatives.[106] However, at the same time, the government had not been actively obstructive of the work of the OWCP.

During this government's mandate, open pressure and attacks on the OWCP have come from the National Assembly. At a meeting of the Parliamentary Committee for Kosovo and Metohija, called to discuss the ICTY's acquittal of Ramush Haradinaj, a Kosovo Albanian accused of war crimes against Kosovo Serbs, representatives of some political parties accused the OWCP of allegedly having contributed to the judgment of acquittal in this case.[107] The OWCP views this incident as a form of open pressure on their work.[108]

7.1. The Arrest of War Crimes Suspects during the Election Campaign

The arrest of five ethnic Albanians in May 2012, two days before the parliamentary and presidential elections in Serbia, was assessed by the professional community as an example of political pressure on the OWCP.[109] Although the OWCP denied this, the circumstances of the case strongly suggest that political considerations prevailed over legal ones, and that the arrest was used for the self-promotion of the then Minister of the Interior, Ivica Dačić, during the period from the end of campaigning to the election.

The public was informed of the details of the arrest and the charges against those arrested by Minister Dačić, who at the time was a presidential candidate in the elections that took place two days later.[110] The Minister announced that, pursuant to an order issued by the OWCP, former members of the Liberation Army of Preševo, Bujanovac and Medveđa (LAPBM) had been arrested on suspicion of having committed war crimes during the brief armed conflict in 2001 in southern Serbia. The arrest was carried out by a special unit of the Serbian police (the Gendarmerie), while the War Crimes Investigation Service learned about the upcoming arrests just before the start of the action, something that is contrary to the standard practice.[111] Furthermore, in contrast to the standard practice, a video recording of the arrest of these war crimes suspects was shown by the media.

The case was finally resolved ten days after the election, when the five arrested persons were released from custody, following the OWCP's explanation that the arrested men had been pardoned for the acts they were charged with. Specifically, the OWCP indicated that an investigation had been carried out against these suspects, but that the investigating judge, referring to the then newly adopted Law on Amnesty[112] for terrorist offenses of LAPBM members and their acts of association in the pursuit of hostile activities, terminated judicial proceedings because of the amnesty.[113]

That this was a hasty action, carried out without prior verification of all of the relevant circumstances, is corroborated by the Prosecutor's statement following the release from detention of the five arrested men. The Prosecutor said that the OWCP had not been aware of the fact that former members of LAPBM had been treated as terrorists by the state, or that they had been pardoned ten years earlier for the offenses.[114]

106 OWCP's email reply to anHLC request, April 16th, 2014. HLC Index IN - 79-F93510.

107 "Poor protection of witnesses, Tribunal's work was very sloppy" [„Loša zaštita svedoka, Tribunal radio veoma aljkavo"], *Blic*, December 11th, 2012. Available at: http://www.blic.rs/Vesti/Politika/357515/Vukcevic-Losa-zastita-svedoka-Tribunal-radio-veoma-aljkavo, Accessed: May 12th, 2014.

108 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

109 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; HLC, "War Crimes Prosecutor Acting on Political Orders: the Case of Albanians from Bujanovac" (Press Release), July 2nd, 2012.; Marija Ristic, "South Serbia suffers the consequences of arrests" ["Jug Srbije trpi posledice hapšenja"], *BIRN*, June 8th, 2012. Available at: http://www.balkaninsight.com/en/article/jug-srbije-trpi-posledice-izbornih-hapsenja, Accessed: March 27th, 2014.

110 "Five Albanians Arrested in the South" [„Uhapšeno pet Albanaca na jugu"], *B92*, May 4th, 2012. Available at: http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=05&dd=04&nav_category=16&nav_id=606236, Accessed: May 2nd, 2014.

111 Interview with representatives of the Service for Investigating War Crimes, August 6th, 2013.

112 Amnesty Law, *Official Gazette of the Republic of Serbia* [Zakon o amnestiji, *Službeni glasnik Republike Srbije*], No. 10/01 and Amnesty Law, *Official Gazette of Serbia and Montenegro*, No. 37/2002.

113 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Dorotea Čarnić, "Politics is Sometimes Stronger than Justice" [„Nekada je politika jača od pravde"], *Politika*, June 7th, 2012.

114 Dorotea Čarnić, "Politics is Sometimes Stronger than Justice" [„Nekada je politika jača od pravde"], *Politika*, June 7th, 2012.

7.2. OWCP's Reaction to the *Diković* case

The OWCP's reaction to the release of HLC's *Dossier on Ljubiša Diković* indicates that the political sensitivity of the case and the tension created by the public following the publication of this document had influenced the OWCP to depart from its legal obligation to conduct an independent and comprehensive investigation into the allegations laid out in the document.

In January 2012, the HLC released *The Ljubiša Diković Dossier*, an analysis of the available evidence on the crimes committed in the area of responsibility of the 37th Motorized Brigade of the YA, commanded by the current Chief of General Staff of the Serbian Army, Ljubiša Diković, during the Kosovo conflict. About 400 Albanian civilians were killed in those crimes. Evidence, suggests among other things, that crimes were committed either by this unit directly or in areas under its control. The HLC argues in the *Dossier* that Diković, given his command role, at least knew of the crimes, and that he was, therefore, not worthy of performing an important state function, such as the Chief of General Staff.[115]

The next day, the then minister of defense, and Democratic Party member, Dragan Šutanovac reacted vehemently to the *Dossier*, claiming that HLC's accusations about Diković were false.[116] One day after the Minister's statement, the OWCP issued a statement denying HLC's allegations and emphasizing the humane acts of General Diković in Kosovo.[117]

From the content of the OWCP's press release and the speed with which HLC's findings were allegedly verified, it is clear that the OWCP did not follow its statutory principles of operation, nor its legal obligation to protect injured parties.[118] The HLC *Dossier* lists nine separate crimes committed in 1998 and 1999 throughout Kosovo, in which about 400 civilians were killed. Given the scale of these crimes, a comprehensive and impartial investigation would require the taking of statements from a number of potential witnesses. A reasonable conclusion is that less than 48 hours is clearly insufficient to verify or otherwise, allegations of crimes of this magnitude. Even if the OWCP had had most of the statements made by witnesses to those events (something which can not be the case because in a statement dated January 25, 2012 the OWCP mentions that prosecutors already had 10 witness statements from Kosovo), it should be noted that the HLC *Dossier* pointed to Diković having command responsibility, an assessment of which requires a more complex approach, than one that solely relies on few witness statements.

8. Cooperation with Other War Crimes Prosecutors' Offices in the Region

Given that the constitutions of all of the successor-states of the former Yugoslavia prohibit extradition of their citizens, cooperation in the realm of war crimes prosecution amounts to the transfer of cases and exchange of evidence. The legal framework for cooperation consists of international conventions and treaties on mutual legal assistance, agreements between the OWCP and the national prosecutions of Croatia, Montenegro and BiH, and the Protocol of Cooperation signed between the Ministry of the Interior of the Republic of Serbia and the EULEX mission in Kosovo.[119] The individual protocols are the result of lengthy negotiations between representatives of the judiciary in the region, under the auspices of the international community, especially the OSCE and the EU.[120]

115 Humanitarian Law Center, "New Chief of Staff of the Army of the Republic of Serbia does not have clean past" [„Novi načelnik Generalštaba Vojske Republike Srbije nema čistu prošlost"] (Press Release), February 23rd, 2012.

116 M. Galović, "Kandić Accuses General Diković of War Crimes" [„Kandićeva optužila generala Dikovića za ratne zločine"], *Politika*, January 24th, 2012. Available at: http://www.politika.rs/rubrike/tema-dana/Sutanovac-ocekujem-reakciju-drzavnih-organa.lt.html. Accessed: June 2nd, 2014.

117 Office of the War Crimes Prosecutor, "General Diković not responsible for war crimes" ["General Diković nije odgovoran za ratne zločine"] (Press Release), January 25th, 2012. Available at: http://www.tuzilastvorz.org.rs/html_OWCP/VESTI_SAOPSTENJA_2012/VS_2012_01_25_LAT.PDF, Accessed: May 2nd, 2014.

118 Law on the Public Prosecutor's Office, *Official Gazette of the Republic of Serbia* [Zakon o javnim tužilaštvima, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – decision US, 121/2012 and 101/2013, Article 10a.

119 Supplement to the information and explanations (Replies to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, June 7th, 2013.

120 For more on the beginnings of regional cooperation, see OWCP's website: http://www.tuzilastvorz.org.rs/html_OWCP/saradnja_lat.htm. Accessed: May 11th, 2014.

The fact that almost half of the cases in which the OWCP has issued an indictment are the result of the OWCP's cooperation with prosecutors in the region, in the form of the mutual transfer of evidence and information, testifies to the importance of this cooperative aspect of war crimes prosecution.[121] While regional cooperation has been on the rise in recent years, and has been praised by the relevant actors in Serbia and by the international community, occasionally this cooperation was disrupted by the actions of the OWCP. Specifically, and in spite of adequate legal framework for cooperation, problems with regional cooperation emerged in those cases in which the OWCP named citizens of BiH and Croatia who had held important political, military and police functions, as suspects.

Although the principle of universal jurisdiction renders investigations and indictments against citizens of other states legally acceptable, the OWCP's practice of prosecuting citizens of other successor states of the former Yugoslavia can be criticized on the grounds of post-Yugoslav societies' specific needs to deal with the legacy of the crimes. This practice is contrary to the spirit of regional cooperation, which is based on mutual trust and respect, and on avoiding legal uncertainty for citizens of the successor states of the former Yugoslavia. Although some HLC interviewees claim that it is important, for the process of dealing with the past and the crimes committed in the name of a particular ethnic groups to be successful, to prosecute the perpetrators in a place where that ethnic group is dominant,[122] others believe that formal and legal reasons should prevail, and that trials should take place where the majority of witnesses reside, etc.[123]

The OWCP's further insistence on the prosecution of such cases, outside the framework of regional cooperation, could cause problems in the future.

8.1. Cooperation with the State Attorney's Office of the Republic of Croatia

By the 2005, the legal framework for cooperation between the OWCP and the State Attorney's Office of the Republic of Croatia (SAOC) was based on two documents: the Memorandum of Cooperation between the Federal Republic of Yugoslavia and the Republic of Croatia on Legal Assistance in Civil and Criminal Matters (signed in 1997)[124] and the European Convention on Mutual Legal Assistance in Criminal Matters.[125] In February 2005, the senior prosecutors of Croatia and Serbia concluded the Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime, including war crimes.[126] The main benefit of the Memorandum of Cooperation in the Prosecution of War Crimes, was that it established direct communication between prosecutors in the exchange of information, reports and documents, thus replacing the complicated procedures of international legal assistance, which until then had been the only legal framework for cooperation.[127] In October the following year, the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes Against Humanity and Genocide was signed.[128] The most important contribution of this Agreement, in comparison to the Memorandum, is the prosecutors' obligation to inform the other signatory of proceedings against its nationals.[129] In accordance with this Agreement, by the end of 2013 the

121 *Ibid*.

122 Interview with the former judge of the Higher Court in Belgrade, April 28, 2013; interview with the judge of the Higher Court in Belgrade, May 23rd and 28th, 2013.

123 Interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

124 *Official Gazette of the Federal Republic of Yugoslavia*, International Treaties [*Službeni list Savezne Republike Jugoslavije*, Međunarodni ugovori], 1/1998.

125 Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro* [*Pravda u opasnosti: Suđenja za ratne zločine u Hrvatskoj, Bosni i Hercegovini, i Srbiji i Crnoj Gori*], October 2004, p. 18.

126 The Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime [Memorandum o saglasnosti u ostvarivanju i unapređenju saradnje u borbi protiv svih oblika teškog kriminala] was concluded on February 5th, 2005 between Acting State Public Prosecutor of the Republic of Serbia, Slobodan Janković and War Crimes Prosecutor of the Republic of Serbia, Vladmira Vukčević and the Attorney General of the Republic of Croatia Mladen Bajić.

127 The Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime, Article 2.

128 The Agreement on Cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide [Sporazum o saradnji u progonu učinilaca krivičnih dela ratnih zločina, zločina protiv čovečnosti i genocida] was signed by War Crimes Prosecutor of the Republic of Serbia, Vladimir Vukčević, and the State Attorney General of the Republic of Croatia, Mladen Bajić on October 16th, 2006.

129 Agreement on Cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide, Article 3.

OWCP and the SAOC had exchanged a total of 116 pieces of evidence and information.[130]

According to the SAOC, the OWCP received data from the SAOC in 36 cases, against 63 persons, on the basis of which, the OWCP indicted 20 persons.[131] The OWCP claims it indicted 17 persons on the basis of the evidence shared by the SAOC.[132]

With regard to cases in which the OWCP shared its evidence with the SAOC, there is no precise data on the number or the result of these cases, because neither the OWCP nor the SAOC keep records of this information.[133]

Cooperation was seriously undermined in 2011, culminating in November of that year with the Croatian Parliament's adoption of the Law on Nullity in November 2011.[134] The law invalidated all legal acts of the former Yugoslav People's Army, its judicial bodies, the judicial bodies of the former Yugoslavia and of the Republic of Serbia relating to the war in the Republic of Croatia, which indicted, accused and/or convicted Croatian citizens for offenses which breach the norms of international humanitarian law.[135] This renouncement of the laws and legislative practice of the Republic of Serbia did not pertain to acts that were in accordance with the standards of Croatia's criminal law.[136]

The Law on Nullity followed the OWCP's action against several Croatia's citizens, in cases transferred from the military prosecutor's office. These were: *Purda*,[137] *Vesna Bosanac*[138] and *Šeks*.[139] The OWCP continued to prosecute the suspects in these cases, despite the fact that, even in their own opinion, these investigations did not meet procedural standards.[140] In doing so they prompted negative reactions from the then Croatian Government, whose Prime Minister called the OWCP procedures "an intolerable incursion of one state's jurisdiction onto the territory of another."[141]

130 Office of the War Crimes Prosecutor, *Ten Years On: Serbia on the path of justice and reconciliation* [*Deset godina posle: Srbija na putu pravde i pomirenja*] (Belgrade: Office of the War Crimes Prosecutor, December, 2013).

131 Reply of the State Attorney's Office of the Republic of Serbia to HLC's inquiry, A-482/07, March 31st, 2014.

132 Office of the War Crimes Prosecutor, *Ten Years On: Serbia on the path of justice and reconciliation* [*Deset godina posle: Srbija na putu pravde i pomirenja*] (Belgrade: Office of the War Crimes Prosecutor, December, 2013).

133 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Reply of the State Attorney's Office of the Republic of Croatia to HLC's inquiry, A-482/07, March 31th, 2014.

134 The Law on the Nullity of Certain Legal Acts of the Judicial Bodies of the Former Yugoslav People's Army, Yugoslavia and the Republic of Serbia, *Official Gazette of the Republic of Croatia* [Zakon o ništetnosti određenih pravnih akata pravosudnih tijela bivše JNA, SFRJ i Republike Srbije, *Narodne novine*], 124/11.

135 *Ibid,* Article 1, Paragraph 1.

136 *Ibid,* Article 1, Paragraph 2.

137 At the beginning of January 2011, in keeping with the Interpol warrant issued by the OWCP in 2007, Bosnian authorities arrested Tihomir Purda, a member of the Croatian Army on suspicion that he and two fellow soldiers had committed war crimes against three captured Yugoslav People's Army soldiers in Vukovar in Croatia in November 1991.

138 At the time of the siege of Vukovar, Vesna Bosanac was the director of the hospital in Vukovar. Prosecutors of the former Yugoslav People's Army charged Vesna Bosanac with malpractice and mistreatment of three Yugoslav People's Armysoldiers in the fall of 1991 near Vukovar. See "Indictment against Dr. Bosanac: Several Witnesses Testify about the 'Crimes' in the Vukovar hospital" ["Optužnica protiv dr. Bosanac: Nekoliko svjedoka daje iskaz o 'zločinima' iz Vukovarske bolnice"], Internet portal Index.hr, April 19th , 2011. Available at:http://www.index.hr/vijesti/clanak/optuznica-protiv-dr-bosanac--nekoliko-svjedoka-daje-iskaz-o-zlocinima-iz-vukovarske-bolnice/547851.aspx. Accessed: May 12th, 2014.

139 The indictment from the former Yugoslav People's Army Prosecutor's Office was issued in 1992 (official number and date illegible) against 44 citizens of the Republic of Croatia for the crimes of genocide and armed rebellion. Among the indictees were representatives of the then leadership of the Croatian Democratic Union, Croatian civilian and military authorities in Slavonia, and persons involved in the actions of the Croatian forces and authorities.

140 Emina Radosavljević, "Politics Cocneals Crimes" [„Politika prikriva zločine"], *Večernje novosti*, April 11, 2011. Available at: http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:328007-Vukcevic-Politika-prikriva-zlocine. Accessed: March 31st, 2014; "Serbia Gives Up Purda!" [„Srbija odustala od Purde!"], *Vesti-online*, March 3rd, 2011. Available at: http://www.vesti-online.com/Vesti/Srbija/121031/Srbija-odustala-od-Purde. Accessed: 30th March 2014.

141 "Bajic Against Nullity Law" [„Bajić protiv Zakona o ništetnosti"], *HRT*, October 6th, 2011. Available at: http://vijesti.hrt.hr/bajic-protiv-zakona-o-nistetnosti. Accessed: March 31st, 2014.

A range of circumstances contributed to the restoration of relations between two prosecutorial bodies. The controversial military cases were resolved in a manner that satisfied both sides. The case against Tihomir Purda was completed in March 2011, two months after the suspect's arrest, when the OWCP halted the prosecution.[142] The investigation in the case against Vesna Bosanac was terminated in July 2011.[143] The case against Vladmira Šeks and 42 other persons was returned to the investigation stage. The OWCP states that upon completion of the investigation, this case will be transferred to the SAOC, which will review the evidence collected and decide on further action.[144] In addition, the government formed in Croatia after the 2011 elections and the President of the Republic of Croatia have distanced themselves from the nullity law by filing a request for the evaluation of its constitutionality. The law was additionally criticized by the then State Attorney General.[145]

The OWCP points out that today, cooperation with the SAOC is very successful. It also notes that in several cases in which information and evidence were shared, and other forms of cooperation established, such as assistance in identifying and examining the witnesses, a final judgment had been rendered (the *Lora*, *Ovčara*, *Scorpions*, and *Operation Storm* cases, and others).[146] The SAOC also claims to have a positive view about the existing cooperation.[147] Both sides cite as an example the *Sotin* case, in which good cooperation resulted in the discovery of a mass grave with victims' remains.

8.2. Cooperation with the Prosecutor's Office of BiH

Between 2005 and 2013, the OWCP's cooperation with the State Prosecutor's Office of BiH, and that with the competent prosecutors of Republika Srpska and the Federation of BiH, was regulated by the legislation on mutual assistance and the Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime.[148] As with the Memorandum with the Republic of Croatia, signed the same year (2005), this Memorandum envisaged that the prosecutors' offices have direct communication for the exchange of evidence, information and notifications, which effectively bypassed the previous practice of cooperation through international legal assistance.[149]

During this earlier period of cooperation through international legal assistance, the OWCP received four cases (*Stari Majdan, Bihać, Bosanski Petrovac* and *Bijeljina*).[150]

However, this period was followed by the OWCP's insistence on launching proceedings against citizens of BiH who had committed crimes in Bosnia, and who had citizenship and permanent residence in BiH. These proceedings concerned crimes committed against Serbs. Despite having the option of sharing their evidence with the Bosnian Prosecutor's Office, the OWCP instead initiated proceedings and sought the extradition of BiH citizens to Serbia (the *Tuzla Convoy*[151]and *Dobrovoljčka Street*[152] cases). In several cases, prominent figures from the BiH political or military estab-

142 Office of the War Crimes Prosecutor, "War Crimes Prosecutor drops charges against Tihomir Purda" (press release), March 3, 2011.

143 OWCP's email reply to HLC's inquiry, April 16th, 2014. HLC, IndexIN - 79-F93510.

144 Interview with deputies of the Prosecutor, May 8th and 9th , 2013.

145 "HDZ's Nullity Law Beneficial Only to Criminals at Large" [„HDZ-ov Zakon o ništetnosti koristi samo zločincima na slobodi"], *HINA*, October 6th, 2012. Available at: http://www.dnevno.hr/vijesti/hrvatska/36440-hdz-ov-zakon-o-nistetnosti-koristi-samo-zlocincima-na-slobodi.html. Accessed: May 10th, 2014.

146 Interview with deputies of the Prosecutor, May 8th and 9th , 2013.

147 Reply of the State Attorney's Office of the Republic of Serbia to the HLC's inquiry, A-482/07, March 31st, 2014.

148 The Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime [Memorandum o saglasnosti u ostvarivanju i unapređenju saradnje u borbi protiv svih oblika teškog kriminala] was concluded on July 1st, 2005 between the OWCP and War Crimes Prosecutor's Office of Bosnia and Herzegovina.

149 The Memorandum on Advancement of Mutual Cooperation in Combating All Forms of Serious Crime, Article 2.

150 Office of the War Crimes Prosecutor, *Ten Years On: Serbia on the path of justice and reconciliation* [*Deset godina posle: Srbija na putu pravde i pomirenja*] (Belgrade: Office of the War Crimes Prosecutor, December, 2013), pp. 90-94, 103 and 109.

151 Office of the War Crimes Prosecutor, Indictment against Ilija Jurišić (press release), November 9th, 2007.

152 Office of the War Crimes Prosecutor "Request for investigation against Ejup Ganić and others" (press release), February 26th, 2009.

lishment were arrested in European countries or in Serbia, based on international arrest warrants issued by the Republic of Serbia. The OWCP's actions in these cases caused public outrage in BiH and drew extremely harsh criticism from human rights organizations, and additionally damaged the credibility of the OWCP in the region and internationally.[153]

At the beginning of 2013, following long negotiations and many delays, the Protocol on Cooperation between OWCP and the BiH Prosecutor's Office was signed.[154] According to the signatories themselves, one of the main goals of the Protocol was to avoid parallel investigations.[155] This was to be achieved by obliging the signatories to notify each other within three months from the signing of the Protocol of any proceedings initiated against the citizens of the other country. This provision, should the parties respect it in good faith, would effectively entail abandoning the practice of conducting investigations without the knowledge of the other signatory, and would thus contribute to the restoration of confidence in the OWCP by the Bosniak community in BiH, that had been damaged by the *Tuzla Convoy* and *Dobrovoljačka Street* cases. By the end of 2013, neither party was recorded as having initiated or revealed an ongoing investigation about which it had not informed the other side within the designated three-month period.[156] By the end of 2013, the OWCP gave evidence to the BiH Prosecutor's Office about three persons with respect to the *Tuzla Convoy* case. No evidence was shared in the *Dobrovoljčaka Street* case.[157]

In an interview with the HLC, the OWCP evaluated its cooperation with the Prosecutor's Office of BiH as being very positive. As an illustration of this assessment, the OWCP cites, among other things, monthly joint meetings, as well as the sharing of evidence by the BiH prosecution service in the *Srebrenica* case.[158]

8.3. Cooperation with EULEX

In keeping with the Republic of Serbia's refusal to recognize Kosovo as an independent state and, consequently, the validity of its institutions, the OWCP has no direct contact

153 See: "Dobrovoljačka: Immorality, History, and Law" [„Dobrovoljačka: Nemoral, historija i pravo"], *Radio Sarajevo*, May 6th, 2011. Available at: http://www.radiosarajevo.ba/novost/52434/dobrovoljacka-nemoral-historija-i-pravo. Accessed: March 31st, 2014; Haroon Siddique, "Extradition of former Bosnian president to Serbia blocked", *The Guardian*, July 27th, 2010. Available at: http://www.theguardian.com/world/2010/jul/27/extradition-bosnian-president-serbia-blocked, Accessed: March 31st, 2014; Dušanka Stanišić and Dorotea Čarnić, "The fierce reaction against the arrest of Divjak" ["Žestoke reakcije zbog hapšenja Divjaka"], *Politika*, March 5th, 2011. Available at: http://www.politika.rs/rubrike/Hronika/Na-beckom-aerodromu-uhapsen-Jovan-Divjak.lt.html, Accessed: March 31, 2014; HLC, "OWPC unprofessional, incompetent and politically-motivated" (press release), March 5, 2011; Nataša Kandić "OWCP blocks war crimes trials in Serbia" [„Tužilaštvo za ratne zločine blokira procesuiranje ratnih zločina u Srbiji"], *Politika*, March 9th, 2011; Society for Endangered Peoples, "The Arrest of Defenders of Sarajevo – Shame on Europe" ["Hapšenje branilaca Sarajeva sramota za Evropu"]. Available in German: http://www.gfbv.de/pressemit.php?id=2605. Accessed: June 4th, 2014.

154 Protocol of the Office of the War Crimes Prosecutor of Bosnia and Herzegovina and the OWCP of the Republic of Serbia on cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide. Signed on January 31st, 2013 by Serbian War Crimes Prosecutor Vladimir Vukčević and Deputy Chief Prosecutor of Bosnia and Herzegovina, Jadranka Lokmić Misirača.

155 OWCP, "Prosecutors Vukčević and Salihović signed a protocol on cooperation in war crimes cases" (press release), January 31st, 2013. Emina Radosavljević, "Vukčević: Politics Conceal Crimes" [„Vukčević: Politika prikriva zločine"], *Večernje novosti*, April 11th, 2011. Available at: http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:328007-Vukcevic-Politika-prikriva-zlocine. Accessed: March 31st, 2014; Fahir Karalić, "The Victims Wait Too Long for Justice" [„Žrtve predugo čekaju pravdu"], *Dnevni Avaz*, September 23rd, 2013. Available at: http://www.avaz.ba/vijesti/intervju/zrtve-predugo-cekaju-pravdu. Accessed: March 31st, 2014.

156 While it occurred outside the time-period covered by this analysis, it is important to note that on January 29th, 2014 the OWCP announced that it is nevertheless conducting an investigation against five BiH citizens, about which, according to the Protocol, it should have informed the State Prosecutor's Office of Bosnia and Herzegovina. See: OWCP, "An investigation into Oric and others" (Press release). Available at: http://www.tuzilastvorz.org.rs/html_OWCP/VESTI_SAOPSTENJA_2014/VS_2014_01_29_LAT.pdf, Accessed: March 31st, 2014.

157 OWCP's email reply to the HLC's inquiry, April 16th, 2014. HLC, IndexIN – 79-F93510.

158 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

with representatives of Kosovo's judiciary. The OWCP, therefore, gathers all its evidence and information on the crimes committed in Kosovo through the EULEX mission. The legal framework for this cooperation is provided by the Protocol on Cooperation between the Ministry of the Interior of the Republic of Serbia and EULEX.[159] Prosecutors go to Kosovo where they examine the victim and witnesses, and collect other evidence. Prosecutors obtain approval to go to Kosovo from the Kosovo Ministry of Justice.[160] Cooperation with EULEX, according to the OWCP, is much better than its previous cooperation with UNMIK.[161]

The OWCP indicates that one of the issues that should be resolved in future, regarding the crimes committed in Kosovo, is the question of arrest warrants for about one hundred Kosovo Albanians for alleged war crimes. Namely, prior to the establishment of specialized institutions for the prosecution of war crimes, the courts of general jurisdiction had sentenced a number of Kosovo Albanians *in absentia*. In addition, arrest warrants had been issued for some of them during the investigation stages led by these courts.[162]

The OWCP believes that direct cooperation and communication with the judicial authorities of Kosovo should be established as soon as possible. Such cooperation would allow for more efficient working and potentially the opening of a larger number of cases.[163]

8.4. Meetings in the Brionian Islands

Of special importance for the OWCP's cooperation with other prosecutors in the region, with the exception of the Kosovo prosecutors and EULEX prosecutors, are the regional meetings of state prosecutors held on the Brionian Islands (Brijuni, Croatia), organized by the State Attorney's Office of the Republic of Croatia. These meetings have been held annually since 2007. Representatives of Prosecutor's Offices discuss practical problems and concerns. At the end of each meeting, participants jointly formulate conclusions, evaluating previous cooperation and set plans and goals for the future.[164]

8.5. Cooperation with the ICTY

The legal framework for the OWCP's cooperation with the ICTY was established by the Law on Cooperation between Serbia and Montenegro with the ICTY from 2002.[165] This legal framework is solidified by the Law on War Crimes Proceedings, which regulates the conditions under which the ICTY may refer a case to the Serbian judiciary, as well as the conditions under which the evidence used in proceedings before the ICTY can be used in war crimes proceedings before the Serbian courts.[166]

The ICTY has transferred to Serbia one case under Article 11bis of its Rules of Procedure and Evidence. This provision

159 The protocol entered into force on September 19th, 2009.

160 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

161 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Tanja Šikanjić, "We are Lookig for Mladić 24/7" [„Za Mladićem tragamo 24 sata dnevno"], *Nezavisne novine*, July 24th, 2010. Available at: http://www.nezavisne.com/novosti/drustvo/Vladimir-Vukcevic-Za-Mladicem-tragamo-24-sata-dnevno-64449.html. Accessed: April 3rd , 2014. For more details on OWCP's cooperation with UNMIK see: Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 32.

162 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

163 *Ibid*.

164 Conclusions from regional conferences of state prosecutors in the Brionian Islands, organized by the Office of the State Attorney of the Republic of Croatia; Supplement to the information and explanations (Replies to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

165 Law on cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia under in 1991., *Official Gazette of FRY* [Zakon o saradnji Srbije i Crne Gore sa Međunarodnim tribunalom za krivično gonjenje lica odgovornih za teška kršenja međunarodnog humanitarnog prava počinjena na teritoriji bivše Jugoslavije pod 1991. godine, *Službeni list SRJ*] No. 18/2002 and *Official Gazette of Serbia and Montenegro*, No. 16/2003.

166 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 14b.

allows for certain cases, once an ICTY indictment had been confirmed, to be passed on to the state in whose territory the crime was committed, the state in which the indictee was arrested, or the state which has jurisdiction over such a case and which is willing and adequately prepared to act on it. The case against Vladimir '*Rambo*' Kovačević, a First Class Captain in the Yugoslav People's Army, who was indicted for the shelling of Dubrovnik in 1991, was transferred to Serbia.[167] However, after the OWCP had issued an indictment in 2007, the procedure was terminated because of indictee's poor health.[168] The ICTY transferred the *Zvornik* case, which was in its investigation phase, to the OWCP.[169]

Access to evidentiary material in ICTY databases is critical for the prosecution of war crimes in Serbia. In 2006, the OWCP entered into an agreement with the ICTY Office of the Prosecutor, on access to the database holding such material.[170] This agreement enables the OWCP direct access to all witness statements, expert reports and other documents used as evidence before the ICTY. However, when it comes to unpublished material held by the ICTY Prosecutor, the OWCP does not have direct access such documents – instead, it can obtain them by sending a request to the ICTY Prosecutor in accordance with Rule 75H of the ICTY Rules of Procedure and Evidence.[171] The method and control of the use of the ICTY Prosecutor's non-public archives and the future location of the archive following the completion of ICTY's work, will be determined by the decision of the UN Security Council.[172] However, it is striking that despite the importance of this archive for war crimes prosecution before domestic courts in the future, not a single serious discussion has been initiated so far about the most appropriate model for future storage and use of the archive.

The OWCP's access to ICTY evidence has been facilitated by OWCP 'liaison officers' at the ICTY.[173] A 'liaison officer' is in direct communication with ICTY prosecutors, tasked with searching the ICTY database, identifying and locating the documents that contribute to the strengthening of evidence in specific war crimes cases.[174] The OWCP claims that although 'liaison officers' are of great benefit to the work of OWCP, just one is insufficient, given the type and scope of officer's work. One obstacle to hiring a larger number of 'liaison officers' is the lack of budgetary resources.[175]

9. Public Relations

From its inception, the OWCP has had a well-developed public relations program. With financial assistance from the OSCE Mission in Serbia, the OWCP's Outreach Office was established in 2003. This service is managed by the Deputy Prosecutor in charge of public relations. The Office employs one coordinator for public relations.

The OWCP informs the public about its work through reports, press release and participation in various forums and conferences in Serbia and abroad. In 2005, the OWCP began developing more purposeful activities aimed at informing the public about its work and the process of war crimes trials in Serbia and the region. Occasionally, the OWCP organizes press conferences devoted to current issues under the OWCP's jurisdiction. Between 2005 and 2011 the

167 Rule 11 bis of the ICTY Rules of Procedure and Evidence, Rules of Procedure and Evidence, with amendments, ICTY, UN, IT/32/Rev. 46, October 20th, 2011, Article 11bis (A).

168 Supplement to the information and explanations (Replies to the Questionnaire of the Humanitarian Law Center), Office of the War Crimes Prosecutor, A No. 162/13, July 21th, 2013.

169 *Ibid*.

170 The memorandum of agreement for access to documents through the system for electronic disclosure between the Prosecutor of the International Criminal Tribunal for the former Yugoslavia and the War Crimes Prosecutor of the Republic of Serbia, July 19th, 2006; Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

171 Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 28; Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

172 Reply of ICTY Prosecutor Serge Brammertz to HLC questionnaire from May 16, 2014.

173 The Appointment of a liaison officer is part of the "Visiting National Prosecutors," project funded by the European Commission since 2008. The project aims at improving cooperation between the ICTY and prosecutors in the region. Bojan Lapčević, "National Liaison Officers" [„Nacionalni oficiri za vezu"], Justice in Transition, No. 15, December 2010.

174 Bojan Lapčević, "National Liaison Officers" [„Nacionalni oficiri za vezu"], Justice in Transition, No. 15, December 2010.

175 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

OWCP published the journal *Justice in Transition* that dealt with a wide range of topics relating to the establishment of justice with regard to the crimes committed in the former Yugoslavia, as well as in other post-conflict societies. The journal was discontinued due to lack of funds.[176]

The OWCP is the only institution that professionally and regularly informs the public about war crimes trials in Serbia. Because of this, its experience and the recognition of its public service role should be used to a greater extent in the future. This could be achieved through regular public conferences or expert forums at which issues relevant to the work of the OWCP and the war crimes trials in general could be considered.

B The War Crimes Investigation Service

The first organizational unit within the Ministry of the Interior of the Republic of Serbia tasked with war crimes investigation was the War Crimes Unit. It was founded in 2001, after mass graves containing the bodies of Kosovo Albanians had been discovered in Serbia. Institutions specialized in the prosecution of war crimes were founded in March 2004, following which the unit became the Department for War Crimes. In November 2005, the department was again transformed, into the War Crimes Investigation Service (WCIS), a body integral to the Criminal Police.[177]

Despite WCIS's increased activity since 2010, its work could have been more efficient and proactive, and in particular, the relations between WCIS and the OWCP could be improved. In this regard, the question of the OWCP's formal powers over WCIS has remained unresolved since the very beginning of this police unit's operation. Another important question relates to the professionalism of those WCIS members who took part in the armed conflicts.[178]

1. Human Resources and Internal Organization

In October 2013, WCIS had some 50 employees, the highest number since the establishment within the Ministry of the Interior of special units for this purpose.[179]

From its inception until 2010, WCIS was grappling with the problem of inexperienced staff. For about half of the workforce, the Service was their first job. According to WCIS representatives, initially, experienced operatives did not want to work in this unit because of the nature of the work, where the 'nature of the work' meant working in a completely new field in which no one had had any experience.[180]

The WCIS employs police officers, either at their personal request or on the recommendation of their superior. No specific conditions need to be met for employment in the WCIS. As with all other employees of the Ministry of the Interior, the usual security assessments, background checks and tests are performed.[181]

Participation in the wars in the 1990s is not a barrier to employment in the WCIS. The WCIS currently employs a number of police officers who were involved in the armed conflict in Kosovo. Although WCIS claims not to keep strict records of the number of such personnel, it does emphasize that these officers performed tasks unrelated to combat operations (security of check-point, buildings, etc.), with the exception of one member who served in the Special Anti-

176 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Supplement to the information and explanations (Replies to the Questionnaire of the Humanitarian Law Center), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013.

177 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013.

178 For earlier analyses of the position of the police in the system of institutions dealing with war crimes see: Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 13; Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, October 2004, p. 15.

179 The Unit (2001-2004) had five and the Department had 15 (2004-2005) police officers. After its founding in 2005, the WCIS initially had 20 employees; in 2006 the number increased to 41; in 2007 the number of police officers involved was only 25. In 2008 there were 38, in 2009 there were 37, and in 2010, 35 police officers. Finally, following changes introduced in 2011 the number of employees was increased to 50. Interview with representatives of the War Crimes Investigation Service, August 6th , 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

180 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

181 *Ibid.*

Terrorist Unit.[182] However, regardless of their direct participation in combat operations, there remains the question of WCIS members' impartiality and professionalism in war crimes investigation (as many war crimes were committed by their former comrades). It is reasonable to assume that experience in the armed forces in a war zone would result in biases that may affect WCIS employees' objectivity.

Several HLC interviewees pointed to the problem of the old 'mindset' of police officers who generally resist the idea of war crimes trials. The same mindset seems to be prevalent within the WCIS, and this negatively affects the activity of this service.[183] This view is confirmed by the prosecutors, who said that some members of the WCIS complained about the OWCP over its tendency to only prosecute crimes committed by Serbs.[184]

At the beginning of 2010, WCIS went through a major personnel and organizational transformation. Dejan Marinković was appointed WCIS Head and four departments were formed: the Department for Investigation, the Department for Documentation and Analysis, the Department of the Search for Missing Persons, and the Department for Cooperation with the ICTY. Within the Department for Investigation, teams tasked to work on cases from the Kosovo, BiH, and Croatia have been formed for the first time. A number of more experienced operatives have also been employed.[185]

The WCIS does not lack special police experts, because along with its full-time employees, it occasionally, when the need arises, hires police officers and equipment from other organizational units of the Criminal Police.[186]

One of the more serious problems, as the WCIS points out, is the absence of legal mechanisms to remove members of the Service who do not meet the required standards of efficiency and dedication to the unit's work. The Head of the WCIS does not have adequate powers to replace or reward WCIS members.[187]

2. Training

WCIS employees have attended a range of training programs. The most important of them lasted several years and was organized by the Ministry of Justice of the United States America through the *International Criminal Investigative Training Assistance Program*.[188] In addition to this, WCIS members have received professional training at home and abroad, organized by the OSCE and the OWCP. Representatives of WCIS evaluate their training as generally useful and emphasize the need to be trained in the implementation of the new CPC, which came into effect in 2012. However, no external training is provided for incoming WCIS officers. Instead, existing WCIS employees are in charge of their training.[189]

3. Budget and Technical Equipment

WCIS does not have a separate budget, but instead receives funds from the Ministry of the Interior. WCIS participates in planning and allocating their own funds by submitting their list of needs to the Administration for Joint Services of the Ministry of the Interior. It often happens that funds requested by WCIS are not forthcoming due to budget constraints.[190]

182 *Ibid*.

183 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with the former judge of the Higher Court in Belgrade, April 28, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with the judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with the representative of the Belgrade Center for Human Rights, June 17th, 2013.

184 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

185 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

186 *Ibid*.

187 *Ibid*.

188 Program designed to train foreign police forces. For more on this program, see: http://www.justice.gov/criminal/icitap/

189 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

190 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with Head of the War Crimes Investigation Service, May 9th, 2014.

According to the Head of the WCIS, salaries in the service are "slightly higher" than in other comparable organizational units of the Ministry of the Interior. Generally, salaries are thought to be satisfactory in the context of the overall economic situation in the country and more particularly when compared to the wider police force.[191]

WCIS needs more vehicles. The current fleet is in very poor condition. In mid-2013, the WCIS had 10 vehicles, half of which were defective or under repair. In addition, the existing computers are outdated, causing great difficulties in entering and analyzing documents in the Geographic Information System.[192]

4. Efficiency

According to WCIS records, by the end of 2013 the Service had filed 66 criminal charges and 21 amendments to the charges filed. Since 2010, an increase in WCIS activity has been noted. By 2010, the WCIS had filed 26 criminal charges. In 2010 alone it filed 10, in 2011, 13 charges, in 2012 ten and in 2013 seven criminal charges.[193]

Not all criminal charges were of the same weight. Specifically, from the total number of charges (66), 45 were entered into the so-called 'KT' register of the OWCP (data from July 2013) which records only charges against known/identified perpetrators that are at the same time, according to the prosecutor, supported by solid evidence.[194] The WCIS emphasizes that those charges not entered into the KT register were filed before 2010. As of 2010, the WCIS has prepared all of its criminal charges in cooperation with the OWCP.[195]

The WCIS finds its initial data in the archives of the media, of state institutions, through the BIA, and in the reports issued by the HLC. Members of the WCIS have no direct access to the ICTY database, and must pass requests for data through the OWCP.[196]

5. The Geographic Information System

As of 2011, the WCIS has been using the Geographic Information System (GIS). GIS is a form of database, in which data is entered on war crimes, perpetrators and victims. Documents are first scanned and then analyzed by entering the data from them into charts. This data is then linked to specific crime sites ('crime mapping'). To protect the confidentiality of the data, only three persons in the Department for Documentation and Analysis have access to GIS.[197]

Since the introduction of GIS, the WCIS has focused on entering and analysis of the data gathered by the Committee for the Collection of Data on Crimes Against Humanity and International Law.[198] At the request of the WCIS, in 2011 the OWCP gave the WCIS the entire documentation of the committee, which largely consists of witness statements, given by people immediately after leaving the territory of BiH and Croatia, who had knowledge of crimes committed. The WCIS claims that before they started using them these documents had not been used sufficiently as a source of information about crimes.[199] From the contents of ten report of the Committee, one can draw the conclusion that this institution dealt exclusively with crimes committed against Serbs.[200]

191 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013.

192 *Ibid*.

193 Interview with Head of the War Crimes Investigation Service, May 9th, 2014; email correspondence with the Head of the War Crimes Investigation Service, May 12th, 2014.

194 Supplement to the information and explanations (Replies to the Humanitarian Law Center Questionnaire), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013; Regulations on Administration of Public Prosecutions, Article 136.

195 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with Head of the War Crimes Investigation Service, May 9th, 2014.

196 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013.

197 *Ibid*.

198 The Committee was established in 1993 by the Federal Government of the Federal Republic of Yugoslavia with the aim of collecting data on crimes against humanity and international law, carried out on the territory of the former Yugoslavia, from 1990 onward. The Committee's work was terminated in 2002. Regulation of the Committee for Compiling Data on Crimes against Humanity and International Law, *Official Gazette of FRY* [Uredba o Komitetu za prikupljanje podataka o izvršenim zločinima protiv čovečnosti i međunarodnog prava, *Službeni list SRJ*], no. 37/93, 29/99, 67/2000.

199 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013.

200 Impunity Watch, *Combating Impunity in Serbia: Possibilities and Obstacles* [*Suzbijanje nekažnjivosti u Srbiji: Opcije i prepreke*] (Beograd: Impunity Watch, 2008), p. 21.

6. Relationship with the OWCP

Since the establishment of specialized institutions for war crimes prosecution in 2003, the relationship between OWCP and WCIS has been one of the weakest points in the system. According to some interviewees, as the WCIS is not formally subordinate to the OWCP, the relationship between these two institutions has been problematic.

6.1. The Legal Framework

The relationship between OWCP and WCIS is defined by the CPC and the Law on War Crimes Proceedings.

After the new CPC came to effect and its implementation began (January 2012), the OWCP acquired strong powers with regard to directing and controlling the work of the police in the phase of preliminary investigation. In fact, during the preliminary investigation, WCIS is required to act on any OWCP request. In the case of non-cooperation or WCIS's inaction, the OWCP is authorized to request disciplinary proceedings, but also to notify the incident to the organization's immediate superiors – the Minister, the Government and the competent committee of the National Assembly.[201]

The Law on War Crimes Proceedings (2003, with subsequent amendments) provides that the Service act upon the Prosecutor's requests, and that the Prosecutor participate in the election of the Head of the WCIS as a consultative body, i.e. by giving his/her opinions about the candidates.[202] However, in the opinion of those speaking to the HLC, the Prosecutor's opinion in the process of selecting the WCIS Head should be binding rather than advisory.[203] The OWCP indicates that former Heads of the WCIS had actually slowed down the work on war crimes. One such appointee was Slobodan Borisavljević (from January to April 2006), head of the cabinet of Vlastimir Đorđević, a former official of the Ministry of the Interior and a person convicted by ICTY for the war crimes committed in Kosovo.[204] However, in none of the cases, including the appointment of Slobodan Borisavljević, did the Prosecutor give a negative opinion on the candidates. It is, therefore, impossible to determine whether his negative opinion would have, in fact, prevented the Minister of the Interior from appointing an inappropriate candidate to the position.[205]

Furthermore, the experts have been insisting for some time that in order for the WCIS to formally become an organization fully subordinate to the OWCP, it would have to be relocated from the Ministry of the Interior and brought under the auspices of the OWCP or the Ministry of Justice.[206] However, it seems that such proposals do not take into account the fact that moving WCIS from the organizational control of the Ministry of Interior, would mean that WCIS would lose the opportunity to interact with other Ministry of Interior units and this would make its work significantly more difficult.[207] The suggestion that the Prosecutor have direct management responsibility for WCIS members' careers seems to be the most appropriate solution. The Prosecutor would have a decisive role not only in appointing and dismissing the Head of the WCIS, but also in promoting, rewarding and dismissing members of the Service.

6.2. Problems in Cooperation between OWCP and WCIS

Interviewees from the WCIS and the OWCP point to problems in the relationship between the two institutions. The HLC is not in a position adjudicate on the majority of the problems the two institutions mention, since it has no access to the official correspondence between WCIS and OWCP.

201 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 44 and Article 285, paragraph 3 and 4.

202 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 167/2003, 135/2004, 61/2005, 101/2007 i 104/2009, Article 8.

203 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

204 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

205 OWCP's email reply to the HLC's inquiry, April 16th, 2014. HLC, IndexIN – 79-F93510.

206 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 13.

207 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013.

The OWCP notes that in some cases the WCIS has taken several years to respond to OWCP requests, for example in the *Štrpci* case. The OWCP claims to have repeatedly used the procedures embedded in the CPC to alert the Head of the WCIS to the inactivity of some of his employees.'[208] Officials from the WCIS claim, on the other hand, that the speed with which they respond to individual requests of the OWCP depends on the nature of the requests, and that with regard to certain requests it simply was not possible to respond more promptly. According to WCIS's records, by the end of 2013 the WCIS had responded to all of the requests sent by the OWCP. The WCIS acknowledges that for a while they were not prompt in responding to the OWCP's requests, but they emphasize that this was prior to 2010. The WCIS claims the OWCP to have been passive with regard to some cases – alleging that it took years before the OWCP issued an order to the WCIS to act on pending charges.[209]

The OWCP stresses that from the total number of cases in which they worked together with the WCIS, only about five percent were the result of WCIS's independent initiative.[210] The WCIS, on the other hand, stressed that the nature of their work is such that it entails consultation and cooperation with the OWCP in the phase of preparation of criminal charges.[211]

Particularly worrisome are the remarks of the OWCP that some members of the WCIS criticized them for their tendency to prosecute only crimes committed by Serbian forces.[212] High-ranking officials of the WCIS don't deny this, stressing that whilst they can not control the opinions and views of their members, who have a right to their own opinion, in practice all members of the WCIS treat all war crimes and suspects equally. To corroborate this statement, they cite the example of the arrest of former members of the Šakali unit (the *Ćuška* case), some of whom were active police officers at the time of their arrest.[213]

The WCIS has leveled serious criticism at the OWCP about the latter conducting an investigation without the WCIS's knowledge, despite it cooperating with other units of the Ministry of the Interior. In the case of the arrest of the group of ethnic Albanians from southern Serbia in May 2012, the WCIS was given information on the case on the day of the arrests.[214] Furthermore, the information came only after it had been requested to assist the Gendarmerie in this arrest. Nor was the WCIS involved in the arrest of the 'Gnjilane group'.[215]

7. Operational Fund for War Crimes Cases

Occasionally, the WCIS needs additional funds to cover operational costs. These are primarily costs (for example, travel expenses) linked with establishing or maintaining communication with potential witnesses, or with persons who may have relevant information for an investigation. The Operational Fund of the Ministry of the Interior cannot be used in these situations because funds from it can only be spent in cases involving persons who will later appear as a witness, and who are therefore entered into Ministry of Interior's system. The WCIS stresses that they often have to contact potential witnesses and that a fund that covered related expenses would make their work significantly easier. They suggest that an Operational Fund for War Crimes Cases be established within the OWCP, modeled on the current fund administered by the Prosecutor's Office for investigations into Organized Crime. The WCIS points out that on several occasions they approached the OWCP, urging it to press forward with this proposal and the establishment of such a fund.[216] The OWCP considers the WCIS's request to

208 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

209 Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

210 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

211 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

212 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

213 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

214 For more details on the case see page 23.

215 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013..

216 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

be justified and additionally believes that the existence of this type of fund would help finance operational activities during preliminary investigation.[217]

A fund for this purpose exists within a parallel unit in BiH, but decisions about the use of resources from the fund are made by the BiH Prosecutor's Office.[218]

8. Coordination with other Agencies

The WCIS claims that regular consultations with the OWCP and the Protection Unit, and other agencies that provide relevant information about war crimes perpetrators would improve their own work in the discovery of war crimes perpetrators. They primarily emphasize the role of the Military Security Agency and the Security Information Agency. Meetings with these bodies would contribute to improving efficiency and speed up the flow of information, and avoid situations in which requests submitted to some of these institutions remain unanswered for a long time. By the end of 2013, not a single joint meeting between WCIS representatives and any of the mentioned agencies or the OWCP had been organized.[219]

C The War Crimes Deaprtments of the Higher Court and the Court of Appeal in Belgrade

The Law on War Proceedings, adopted in 2003, gave the War Crimes Panel of the Belgrade District Court, exclusive jurisdiction for dealing with war crimes cases in the first instance.[220] The appeal authority was given to the Supreme Court of Serbia. Following the reform of the judiciary in 2009, jurisdiction in these cases was transferred to the Department for War Crimes of the Higher Court in Belgrade (hereafter the Higher Court Department) as the competent body for trial in the first instance, and onto the Department for War Crimes of the Court of Appeal in Belgrade (hereafter the Appeal Court Department) as the appellate body.

1. Composition of the War Crimes Panel

Since the establishment of the War Crimes Panel within the Belgrade District Court, later renamed the Higher Court Department, the number of judges has not changed. The Chamber employed seven judges as does the Department, six of whom serve on two court chambers, while one, who before the adoption of the new CPC had served as investigating judge, is now acting as the judge for preliminary proceedings.[221] Three judges serve in each of the two chambers. Given the relatively small number of on-going cases, there is no need to hire additional judges.[222]

The Higher Court Department currently employs seven judicial assistants, all in the capacity of senior associates.[223] Each of the seven judges has one judicial assistant.[224] The assistants perform various administrative duties, such as keeping records of arraignments, and the like.[225] The Higher Court Department has repeatedly requested an increase in the number of judicial assistants from the Ministry of Jus-

217 OWCP's email reply to the HLC's inquiry, April 16th, 2014. HLC, IndexIN – 79-F93510.

218 Written reply by the State Investigation and Protection Agency of Bosnia and Herzegovina, 16-01/3-50-2401/14 to HLC's request, April 10th, 2014.

219 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; Interview with representatives of the War Crimes Investigation Service, October 15th, 2013.

220 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 2.

221 The preliminary proceedings judge decides on the following issues: the status of protected witnesses, destruction of material evidence collected by special actions, ordering the secret surveillance of communication, hiring an undercover agent, imposing house arrest at the investigation stage, determination, extension and termination of detention, and the like. Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 10; written reply by the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th, 2013.

222 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20, 2013; interview with a judge of the Court of Appeal in Belgrade, Olivera Andjelković, April 28th, 2013; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013.

223 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20, 2013.

224 Interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013.

225 *Ibid*.

tice (the last such request was in 2012), but the requests have been rejected due to lack of resources.[226]

The Appeal Court Department consists of a single trial chamber with five judges. They are assisted by six judicial assistants.[227]

2. Working Conditions

The Higher Court Department is located in a building of the Higher Court in Belgrade on 29 Ustanička Street, together with the Special Department for Organized Crime of the Higher Court in Belgrade. The Judges of these two departments have at their disposal a total of only four courtrooms. The number of courtrooms is inadequate given the total number of cases handled by the two departments, and the number of defendants in each of these cases. Due to an insufficient number of courtrooms some war crimes trials, such as the *Lovas* case were held in the Palace of Justice, a courthouse inadequately equipped for a trial of this kind in terms of its physical characteristics and its technical and security capacities. Lack of courtrooms greatly affects the efficiency of trials because, as they have just the four overcrowded courtrooms available to them, the judges are unable to schedule hearings at short notice.[228] The Appeal Court Department is housed in a recently renovated building of the Court of Appeal in Belgrade, at 9 Nemanjina Street.

Each of the judges of the War Crimes Department has his/her own office. Judicial assistants generally have adequate working conditions, although several judicial assistants share the same office.[229] The Higher Court Department has standard IT equipment which, although it generally meets the basic requirements for the Department's operation, is relatively old.[230] Judges have access to a library with a solid collection of professional literature, as well as access to electronic databases of legal regulations.[231] Employees in the administrative services have adequate working conditions.[232]

Judges of the Higher Court Department have asked the President of the Court to hire a full-time military expert, i.e. a professional trained in the issues of military organization and methods, and techniques of military action.[233] Despite the fact that war crimes cases are, by their nature, closely related to issues of military and police organization and operation, and that the judges may have no specific training or knowledge about such issues, this request was denied due to a lack of funds.[234]

3. Budget

Departments don't have their own budgets. Instead, their work is funded through the allocation of funds from the budget of the Higher Court or the Court of Appeal. The Higher Court Department often receives donations in the form of technical and IT equipment, professional literature, various types of training, study tours, etc. The most significant donors so far have been the Embassy of the United States of America, the Netherlands Embassy, the Embassy of Norway, and the OSCE. [235]

The cost structure of the Higher Court Department is far more complex than the budgetary structure of the Appeal Court Department, as the latter includes almost exclusively judges' salaries. The cost of the Higher Court Department, in addition to judges' salaries, includes the costs of court-appointed experts, translation, interpreting, court-appointed defense counsel and other expenditures. At the same time, the Higher Court Department additionally funds the Service for the Support and Assistance to Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade (Support and Assistance Service), which, due to the nature its activities, may be in need at short notice, of additional funding, often in cash, to pay the costs of persons who travel to the court as witnesses.[236] Employees in

226 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th , 2013.

227 The annual schedule of activities for 2013, the Court of Appeal in Belgrade, Su. I-2 184/2012 of December 7th, 2012.

228 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th, 2013.

229 *Ibid*.

230 *Ibid*.

231 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th, 2013.

232 *Ibid*.

233 Interview with a judge of the Court of Appeal in Belgrade, April 28th, 2013.

234 *Ibid*; email correspondence with a former judge of the Higher Court in Belgrade, June 8th, 2014.

235 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

236 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th, 2013.

the Higher Court Department claim that the current budget is one third of what is needed, and that this court therefore has "huge debts to its creditors."[237]

4. Expert Competence of Judges

In 2003, the War Crimes Panel of the Belgrade District Court appointed judges with no previous training to work in the field of international criminal and humanitarian law. The criteria used in the appointment of judges and judicial assistants focused on the quality of their work and the scope of professional experience in criminal law.[238]

Since the establishment of specialized panels for war crimes, the authorities have not provided training for judges in the implementation and application of international humanitarian law. Judges gained their knowledge on substantive law, as well as on the necessary techniques, skills and relevant practice through programs provided by international organizations and local NGOs, or on their own initiative. This situation may change following the adoption of the National Strategy for Judicial Reform in 2013, which introduces continuous training of judges and other judicial employees.[239]

Various training programs were provided for judges, along with seminars, conferences and professional gatherings devoted to substantive, legal and procedural issues in the field of war crimes. They were also provided with training on how to take testimony from vulnerable witnesses, how to use databases, etc.[240] In 2012, the judges of the Higher Court Division attended professional seminars covering the implementation of the new CPC.[241]

In addition to the institutions' lack of interest in providing professional training for judges dealing with war crimes cases, another problem is the absence of a mechanism that would allow judges who have acquired extensive experience in war crimes cases to keep up to date in issues related to war crimes, and use their knowledge and experience to improve the quality of war crimes trials. In 2013, two judges who had been moved from the of the Higher Court Department in Belgrade to the Court of Appeal in Belgrade, were not subsequently appointed to the Department for War Crimes at the Court of Appeal. It should be noted that these two individuals were among the few judges who had close to a decade of experience in dealing with war crimes cases. The Appeal Court Department however, appointed two judges without significant war crimes experience.[242]

The judges found their meetings with their colleagues and counterparts from the region especially useful for addressing practical concerns and issues, given the same legal tradition of these countries. However, after the completion, in 2011, of the long-term OSCE project, through which the majority of these meetings had been organized, the meetings have almost entirely ceased.[243]

Most judges working on war crimes cases are not used to consulting professional literature in foreign languages. This represents an obstacle to their familiarization with foreign jurisprudence and literature, which is often available only in English.[244]

The judges stress the need for more frequent meetings with the judges working in their own department, where relevant legal issues and concerns can be considered.[245]

237 *Ibid*.

238 *Ibid*.

239 The National Strategy for Judicial Reform for 2013-2018 was adopted on June 1st, 2013 by the National Assembly of the Republic of Serbia. The Action Plan for the implementation of the National Strategy stipulates that the principle of continuous training of holders of judicial and prosecutorial functions would be implemented through amendments to the Law on the Judicial Academy. The deadline for amending the law has not been determined. Available at: http://www.mpravde.gov.rs/. Accessed on May 11th, 2014.

240 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

241 Interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

242 Interview with the former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

243 The project "Strengthening the capacities of judicial institutions in Serbia for war crimes prosecution" (2005-2011); interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; Interview with a former judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013.

244 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013.

245 interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st , 2013; interview with the former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

5. Inadequate Expertise of the 'Third-Instance Chamber'

In cases where it is possible to appeal against a second instance decision of the Appeal Court Department, these appeals are decided by the so-called third-instance chamber of the Court of Appeal in Belgrade.[246] This chamber is responsible for third instance decisions in all criminal law cases before the Court of Appeal. By the end of 2013, this chamber had decided upon only one war crimes case (the *Medak* case).[247]

Given that this council decides on complex issues of international criminal law, it is incomprehensible that during the appointment of judges to this body, attention is not paid to judges' expertise and/or experience in war crimes cases. The chamber is composed of judges from the Department for Organized Crime or from those chambers that process general criminal cases.[248] With the exception of one judge, these judges have no previous experience in war crimes cases. In the *Medak* case, a lack of expertise led to serious errors in the application of law. In its decision, the third-instance chamber invoked as a model, several cases tried before the ICTY, none of which were applicable.[249]

In addition, this chamber is characterized by relatively staff high turnover and frequent personnel changes. Specifically, the composition of the chamber changes every year, according to the annual work schedule of the Court of Appeal.[250] Even this schedule is subject to change if judges are unable to act in some cases. Hence, for example, in the *Medak* case, on which the third-instance chamber decided in 2012, only one judge sat on the panel, of the five who had been appointed according to the annual schedule.[251]

Given the fact that third instance decisions are very rare in practice, it is clear that this council will be engaged on a small number of cases. However, the appointment of judges to the third-instance chamber ought to be conducted on the basis of their knowledge of international humanitarian law or upon prior training in this field, so as to avoid the errors seen in the *Medak* case.

6. Number of Cases

From 2004 until the end of 2013 a total of 26 cases were conducted and completed before the first-instance specialized departments. In these 26 cases, 55 persons were convicted and 32 acquitted.[252] In addition to these, there were five cases involving people who had assisted ICTY indictees who were on the run, by hiding them. These cases resulted in the conviction of 10 persons.[253]

By the end of 2013, judgments were issued in six cases where appeals were possible.[254] One person was acquitted and 12 persons were convicted. Proceedings were pending in five cases, against 18 indictees before the Higher Court Department.[255]

246 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013 Article 464. See also Article 463: An appeal may be filed only against a judgment in which the court of appeal has reversed a first-instance judgment of acquittal and found the defendant guilty.

247 See the judgment of the Court of Appeal in Belgrade in the *Medak* case, Kz3 Po2 1/2012 from October 26th, 2012.

248 The annual schedule of activities for 2013, the Court of Appeal in Belgrade. available at: http://www.bg.ap.sud.rs/cr/articles/o-apelacionom-sudu/uredjenje/sudijski-pomocnici/godisnji-raspored-poslova-i-izmene-sudijski-pomocnici-i-zaposleni-2014..html. Accessed June 8th, 2014.

249 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013.

250 Of the five judges appointed to the third-instance chamber in 2011, three were re-appointed to this chamber in 2012. Two new judges who had not previously acted in war crimes cases were appointed to the third-instance chamber in 2013. The annual schedule of activities for 2013, the Court of Appeal in Belgrade. Available at: http://www.bg.ap.sud.rs/cr/articles/o-apelacionom-sudu/uredjenje/sudijski-pomocnici/godisnji-raspored-poslova-i-izmene-sudijski-pomocnici-i-zaposleni-2014..html. Accessed June 8th, 2014.

251 In the *Medak* case, the panel consisted of judges Zoran Savić, Vučko Mirčić, Mirjana Popović, Duško Milenković and Milena Rašić. The annual schedule for 2012 placed the following judges in the third-instance chamber: Slobodan Rašić, Zoran Savić, Sonja Manojlović, Veroljub Cvetković and Siniša Važić.

252 Cases: *Ovčara I, Ovčara II, Ovčara III, Djakovica, Zvornik I, Zvornik II, the Scorpions, Suva Reka, Velika Peratovica, Podujevo II, Slunj, Medak, Banski Kovačevac, Stara Gradiška, Stari Majdan, Tenja, Rastovac, Zvornik III/ IV, Prijedor, Bjeljina, Bytyqi Brothers, Lički Osik, Beli manastir, Vukovar, Gnjilane group and Ključ.*

253 Cases: *Lovre et al. M. Jegdić, B. Mladić, V.Lijeskić, and Lj.Lazić.*

254 Cases: *Skočić , Bosanski Petrovac, Ovčara V, Mark Kashnjeti, Tuzlanska kolona* and *Čelebići*.

255 Cases: *Ćuska, Tenja II, Bihać, Sanski Most* and *Beli Manastir.*

7. Promptness

The length of the proceedings before the first- and second-instance courts is largely influenced by the complexity of the cases, although in some cases the length of the proceedings was impacted by other participants in the proceedings.

The longest was the process in the *Lovas* case. It lasted 196 trial days. [256] The shortest was the procedure in the *Čelebići* case, which took just 10 trials days.[257]

Although the number of examples is limited, the errors on the part of the prosecuting counsel or the obstructive behavior of the defense counsel are generally the reasons for longer duration of the procedure.[258] In one case, the long duration of the trial was caused by the refusal of other state bodies to cooperate. In the *Lovas* case, a copy of the document from the Military Security Agency, showing that one of the indictees had been called up for military service. In its reply, the Military Security Agency indicated that such a document was not in its possession. However, the presiding judge believed this to be an obvious act of obstruction: the highly bureaucratic nature of the military made it difficult to accept that the Agency wouldn't have such a document. The panel was therefore forced to determine this fact through other evidence, which led to considerable delay.[259]

War crimes trials usually take place with lengthy intervals between court days. Some respondents believe that efficiency could be improved if judges prepared cases better, and if, in minor cases, the trial was planned to take place on consecutive days In addition, delays due to the absence of witnesses or experts could be avoided if all witnesses and experts were contacted before the trial and their attendance confirmed.[260]

The Appeal Court Department acts promptly in appeal proceedings. There have been no instances where the decision of the Appeal Court took an unreasonably long time.[261]

8. Sentencing Policy

The laws that were in effect at the time when these crimes were committed, prescribed a minimum sentence of five and a maximum sentence of 20 years in prison for the criminal offense of war crimes against civilians and war crimes against prisoners of war.[262] The current legislative framework stipulates a maximum sentence twice as high - 40 years in prison - for war crimes.[263]

The average sentence imposed on those finally convicted is a little over 11 years. Sentences handed down in first-instance proceedings are somewhat more severe, averaging 13 years.[264]

There is no consensus among persons and groups dealing with the issue of war crimes prosecution on the adequacy of the penalties imposed, nor is there consensus on this matter within the professional community. The prevailing view is that the sentences imposed so far have not been, on the

256 Fourteen persons were convicted in this case for the events that took place during October and November of 1991. During the trial, 193 witnesses and one expert testified.

257 One person was convicted in this case for the events that took place between June and August 1992. During the trial, 11 witnesses were examined.

258 Interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013.

259 Interview with a former judge of the Higher Court in Belgrade, April 28th, 2013; the judgment of the Higher Court in Belgrade in *Lovas*, K-Po2 22/2010 of June 26th, 2010, pp. 245-248.

260 Interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013.

261 See: Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2012*; and *Report on War Crimes Trials in Serbia in 2011*.

262 The Criminal Code of the Federal Republic of Yugoslavia, SFRY, *Official Gazette* [Krivični zakon Savezne Republike Jugoslavije, *Službeni list SFRJ*], No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and the *Official Gazette of the FRY*, No. 35/92, 37/93 and 24/94.

263 Criminal Code, *Official Gazette of the Republic of Serbia* [Krivični zakonik, *Službeni glasnik Republike Srbije*], No. 85/2005, 88/2005, 107/2005 -, 72/2009, 111/2009 and 121/2012, and 104/2013), Articles 371-374.

264 See the verdicts in war crimes cases from 2007 through the end of 2013 handed down by the Supreme Court of Serbia and the Court of Appeal in Belgrade (War Crimes Department), as well as the judgments rendered from 2006 through the end of 2013 by the Higher Court in Belgrade and the Belgrade District Court (War Crimes Department); Interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; S. Važić, "Penal policy in war crimes courts in Serbia" [„Kaznena politika sudova kod krivičnih dela ratnih zločina u Republici Srbiji"], 2012, available at: http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/strucni-radovi-i-izlaganja/

whole, proportionate with the responsibility of the offenders or the gravity of the offenses.[265]

In a significant number of cases conducted before war crimes chambers, the practice of issuing sentences at or around the legal minimum in effect at the time of the commission of the crime, is evident.[266] Although not illegal, these court decisions have often provoked severe criticism from human rights organizations and victims, and confirm allegations of Serbia's lenient sentencing policy.[267]

In several cases, the court used its powers of mitigation to reduce the sentence below the statutory minimum, despite the fact that mitigation should be an exception to normal sentencing and notwithstanding that sentences should remain within the prescribed penalty range.[268]

While taking into account mitigating factors – such as a defendant's family circumstances, absence of criminal record, and even the passage of time since the commission of the crime – that are prescribed in the law, those factors should not be evaluated in the same manner as in other crimes, given the specific nature of war crimes.[269]

Furthermore, lenience in sentencing is often the result of considering mitigating factors that concern the person and character of the defendant. Due to the severity of the crime, they should not be given such significance. The Higher Court Department gives excessive consideration in this regard, when compared with the practice of the ICTY and the State Court of Bosnia and Herzegovina. Specifically, in first-instance judgments, the panels often deemed the following mitigating circumstances important: the defendant's family circumstances and financial situation, absence of a criminal record, illness and deteriorating health condition, mental competence, age at the time of the crime, the defendant's conduct after the crime, remorse and confession, length of time from the commission of the crime.[270] In three cases, the Court inappropriately recognized as a mitigating

265 Interview with a judge of the Court of Appeal in Belgrade, Siniša Važić, May 23rd and 28th, 2013; Interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013.

266 See judgments in the *Scorpions, Ovčara, Zvornik II, Stara Gradiška, Skočić,* and *Lovas* cases.

267 Interview with a representative of the OSCE Mission to Serbia, May 31st , 2013; interview with defense attorney, May 22nd, 2014; Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2011* (Belgrade: Humanitarian Law Center, 2012); Humanitarian Law Center, 'Judgment for war crimes in the municipality of Zvornik did not bring justice to victims or the perpetrators" ["Presuda za ratne zločine u opštini Zvornik nije donela pravdu ni za žrtve, ni za optužene"], December 8th, 2010.

268 See judgments in the *Zvornik I, Ovčara II, Zvornik III/IV, Slunj, Beli Manastir* cases.

269 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, April 28th, 2013; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013. See also: Humanitarian Law Center, Report on War Crimes Trials in Serbia in 2011 (Belgrade: Humanitarian Law Center, 2012).

270 Judgment of the Belgrade District Court in the *Đakovica* case, KV No. 4/05 of September 18th, 2006, p. 38; judgment of the Higher Court in Belgrade in the *Prijedor* case, Kpo2 4/2011 of November 28th, 2011, p. 37; judgment of the Higher Court in Belgrade in the *Stara Gradiška* case, Kpo2 No. 32/2010 of June 25th, 2010, p. 36; judgment of the Higher Court in Belgrade, in the *Tenja* (Radivoj) case, Kpo2 38/2010 of November 17th, 2010, p. 48; judgment of the Belgrade District Court in the *Ovčara II* case, KV No. 2/2005 of January 30th, 2006, p. 50; judgment of the Higher Court in Belgrade in the *Zvornik II* case, Kpo2 No. 28/2010 of November 22nd, 2010, pp. 301-303; judgment of the Belgrade District Court in the *Suva Reka* case, KV 2/2006 of April 23rd, 2009, pp. 188-190; judgment of the District Court in Belgrade in the *Podujeve II* case, KV 4/2008 of 18th June 2009, pp. 60-61; judgment of the Higher Court in Belgrade in the *Medak* case, Kpo2 No. 36/2010 of June 15th, 2010, Ppp 46-47; judgment of the Belgrade District Court in the *Slunj* case, KV No. 4/2007 of July 8th, 2008, p. 43; judgment of the District Court in Belgrade in the *Ovčara IV* case, Kv: 9/2008 of June 23rd, 2009, pp. 57-58; judgment of the Belgrade District Court in the *Ovčara I* case, KV 4/2006 of March 12th, 2009, pp. 249-250; judgment of the Belgrade District Court in the *Grubišno Polje* case, KV 5/08 of May 27th, 2009, p. 29; judgment of the Belgrade District Court in the *Zvornik I* case, K.br. No. 5/2005 of June 12th, 2008, p. 183; judgment of the Belgrade District Court in the *Scorpions* case, KV 6/2005 of April 10th, 2007, pp. 116-117; judgment of the Belgrade District Court in the *Stari Majdan* case, KV 3/2009 of December 7th, 2009, p. 36; judgment of the Higher Court in Belgrade in the *Rastovac* case, K.Po2 47/2010 of September 23rd, 2011, p. 43; judgment of the Higher Court in Belgrade in the *Zvornik III* and *Zvornik IV* case, K.Po2 23/2010 of December 8th, 2011, pp. 123-124; judgment of the Higher Court in Belgrade in the *Lički Osik* case, K.Po2 17/2011 of March 16th, 2012, pp. 64-65; judgment of the Higher Court in Belgrade in the *Vukovar* case, K.Po2 40/2010 of November 1st, 2010, pp. 22-23; judgment of the Higher Court in Belgrade in the *Banski Kovačevac* case, K.Po2 25/2010 of March 15th, 2010, p. 35.

circumstance the fact that the defendants were refugees: in two cases, the defendants had fled from Croatia[271] (despite the fact that in one of those cases the defendant had been indicted for having taken part in the killing of 200 POWs at Ovčara near Vukovar), while in a third case, the defendant had fled from BiH.[272] The panel of judges even regarded as a mitigating circumstance the fact that "the weapons had been distributed to people with no prior training, and fighting and combat operations began immediately."[273] It should be mentioned that a member of the Territorial Defense Force who was on trial, at the time the offense was 32 years old and had previously undertaken regular military service in the Yugoslav People's Army. Contrary to this practice, the ICTY and the Court of Bosnia and Herzegovina give predominant importance to mitigating circumstances pertaining to the attitude of the defendant towards the crime that they committed – guilty plea, genuine remorse, and the defendants' efforts to alleviate the suffering of victims.[274] However, courts in Croatia, have admitted as a mitigating circumstance in some cases, defendants' participation in and contribution to, the Homeland War, as well as their merits and medals in the Homeland War.[275]

With regard to aggravating circumstances, the practice of the Higher Court Department, for the most part coincides with the practice of the ICTY and the courts in Bosnia and Herzegovina and Croatia. Judicial panels generally take aggravating circumstances to relate to the crime itself, such as: the number of acts, ruthlessness and persistence in committing the offense, specific characteristics of the victims (civilians, the old and infirm, women, children), criminal record, conduct after the commission of the crime, whether serious bodily harm and mental suffering were inflicted on victims, the number of victims, the lasting consequences,

271 The judgment of the Belgrade District Court in the *Ovčara II* case, KV No. 9/2008 of June 23rd, 2009, p. 57; judgment of the Belgrade District Court in the *Grubišno Polje* case, KV No. 5/08 of May 27th, 2009, p. 29; judgment of the Belgrade District Court in the *Stari Majdan* case, KV 3/2009 of December 7th, 2009, pp. 36-37.

272 The judgment of the Belgrade District Court in the *Stari Majdan* case, KV 3/2009 of December 7th, 2009, p. 36.

273 The Higher Court in Belgrade in the *Vukovar* case, K.Po2 40/2010 of November 1st, 2010, p. 23.

274 See Human Rights Action, Report: War Crimes Trials in Montenegro, May 2013. Available at: http://www.hraction.org/wp-content/uploads/Report-War-Crime-Trials-in-Montenegro.pdf (The second sentencing judgment of the ICTY Trial Chamber in *Prosecutor v. Dražen Erdemović* (IT-96-22-Tbis), March 5th, 1998, para. 16 (ii); Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Stevan Todorović* (IT-95-9/1-S), July 31st, 2001, para. 80 and para. 81; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Duško Sikirica et al.* (IT-95-8-S), November 13th, 2001, para. 149; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Predrag Banović* (IT-02-65/1-S), October 28th. 2003, para. 67; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Dragan Obrenović* (IT-02-60/2-S), December 10th, 2003, para. 111 and para. 117; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Dragan Nikolić*, December 18th, 2003, para. 233; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Momir Nikolić* (IT-02-60/1-S), December 2nd, 2003, para. 71, 72, and 150; Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Deronjić* (IT-02-61-S), March 30th, 2004, para. 236 and para. 241; judgment of the Appeals Chamber of the Court of BiH in *Rašević and Todović*, November 6th, 2008, p. 34; the first instance judgment in *Mejakić et al*. May 30th, 2008, pp. 214-215.

275 Marko Sjekavica, Jelena Đokić Jović and Maja Kovačević Bošković: "Do the courts in the Republic of Croatia tend to punish more severely Serb war criminals than Croat ones?" (Analysis of the statutory and judicial policy of punishing war crimes perpetrators) in "Monitoring War Crime Trials Report for 2013" (Documenta, Centre for Peace, Nonviolence and Human Rights - Osijek, and the Civic Committee for Human Rights). Available at: http://www.documenta.hr/assets/files/Godisnji%20izvjestaji/MonitoringWarCrimeTrialsReport_2013.pdf. See also the annual reports of Documenta, the Centre for Peace, Non-violence and Human Rights, and the Civic Committee for Human Rights on war crimes trials monitoring for the period 2005-2013.

motivation, and the defendant's function and position at the time of the offense.[276] Other circumstances that the ICTY considered as aggravating are: that the defendant's behavior had worsened the already grave conditions of the victims,[277] the perpetrator's level of education,[278] the defendant's attitude toward the proceedings,[279] the defendant's refusal to cooperate with the prosecution, denial of guilt,[280] and others. Other circumstances taken by the Court of Bosnia and Herzegovina as aggravating: the defendant's refusal to help in locating the remains of the victims (missing persons), grave consequences for the victims and their families, and the defendant's improper conduct in court.[281] In Croatia,

276 The judgment of the Belgrade District Court in the *Djakovica* case, KV No. 4/05 of September 18th , 2006, p. 38; judgment of the Higher Court in Belgrade in the *Prijedor* case, Kpo2 4/2011 of November 28th, 2011, p. 37; judgment of the Higher Court in Belgrade in the *Stara Gradiška* case, Kpo2 No. 32/2010 of June 25th, 2010, p. 36; judgment of the Higher Court in Belgrade, in the *Tenja* (Radivoj) case Kpo2 38/2010 of November 17th, 2010, p. 48; judgment of the Belgrade District Court in the *Ovčara II* case, KV No. 2/2005 of January 30th, 2006, p. 50; judgment of the Higher Court in Belgrade in the *Zvornik II* case, Kpo2 No. 28/2010 of November 22nd, 2010, pp. 301-303; judgment of the Belgrade District Court in the *Suva Reka* case, KV 2/2006 of April 23rd, 2009, pp. 188-190; judgment of the District Court in Belgrade in the *Podujeve II* case, KV 4/2008 of 18th June 2009., pp. 60-61 ;judgment of the Higher Court in Belgrade in the *Medak* case, Kpo2 No. 36/2010 of June 15th, 2010, Kpo 46-47; judgment of the Belgrade District Court in the *Slunj* case, KV No. 4/2007 of July 8th, 2008, p. 42; judgment of the District Court in Belgrade in the *Ovčara IV* case, Kv: 9/2008 of June 23rd, 2009, pp. 57-58; judgment of the Belgrade District Court in the *Ovčara I* case, KV 4/2006 of March 12th, 2009, pp. 250-51; judgment of the Belgrade District Court in the *Grubišno Polje* case, KV 5/08 of May 27th, 2009, p. 29; judgment of the Belgrade District Court in the *Zvornik I* case, K.br. No. 5/2005 of June 12th, 2008, pp. 183-84; judgment of the Belgrade District Court in the *Scorpions* case, KV 6/2005 of April 10th, 2007, pp. 117-18; judgment of the Belgrade District Court in the *Stari Majdan* case, KV 3/2009 of December 7th, 2009, pp. 36-37; judgment of the Higher Court in Belgrade in the *Rastovac* case, K.Po2 47/2010 of September 23th, 2011, p. 43; judgment of the Higher Court in Belgrade in the *Zvornik III* and *Zvornik IV* cases,K.Po2 23/2010 of December 8th, 2011, pp. 123-124; judgment of the Higher Court in Belgrade in the *Lički Osik* case, K. Po2 17/2011 of March 16th, 2012, p. 65; judgment of the Higher Court in Belgrade in the *Vukovar* case, K.Po2 40/2010 of November 1st, 2010, p. 22; judgment of the Higher Court in Belgrade in the *Banski Kovačevac* case, K.Po2 25/2010 of March 15th, 2010, p. 35.

277 Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Duško Tadić* (IT-94-1-Tbis-R117), November 11th, 1999, para. 19.

278 Sentencing Judgment of the ICTY Trial Chamber in *Prosecutor v. Blagoje Simić* (IT-95-9-T) of October 17th, 2003, para. 1108.

279 The judgment of the Appeals Chamber in *Prosecutor* v. Zdravko Mucić et al. (IT-96-21-A) of February 20th, 2001, para.786.

280 Sentencing Judgement of the ICTY Trial Chamber in Prosecutor v. *Duško Tadić (*IT-94-1-T) July 14th, 1997, para. 58.

281 *Bundalo Ratko*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-07/419, of December 21th, 2009; *Bundalo Ratko*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-07/419, of January 28th, 2011; *Božić Zdravko*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR/06/236, of November 6th, 2008; *Božić Zdravko*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-06/236, of October 5th, 2009; *Dragan Damjanović*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-05/51, of December 15th, 2006; *Dragan Damjanović*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-05/51, of June 13th, 2007; *Kovačević Nikola*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-05/40, of November 3rd, 2006; *Kovačević Nikola*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-05/40, of June 22nd, 2007; *Lazarević Sreten et al*. judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-06/243, of September 29th, 2008; *Lazarević Sreten et al.* second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-06/243, of September 22nd, 2010; *Ljubinac Radisav*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-05/154, of March 8th, 2007; *Ljubinac Radisav*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-05/154, of October 4th, 2007; *Mejakić Željko et al*. judgment of the Court of Bosnia and Herzegovina, Case No. X-KR/06/200, of May 30th, 2008; *Mejakić Željko et al*. second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-06/200, of February 16th, 2009; *Palija Jadranko*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-06/290, of November 28th, 2007; *Palija Jadranko*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-06/290, of April 24th, 2008; Stanković Radovan, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-05/70, of November 14th, 2006; *Stanković Radovan*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-05/70, of March 28th, 2007; *Tanasković Nenad*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR/06/165, of August 24th, 2007; *Tanasković Nenad*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ/06/165, of March 26th, 2008; *Vuković Radmilo*, judgment of the Court of Bosnia and Herzegovina, Case No. X-KR/06/217, of April 16th, 2007; *Vuković Radmilo*, second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ/06/217, of August 13th, 2008; *Todorović Mirko et al*. judgment of the Court of Bosnia and Herzegovina, Case No. X-KR-05/382, of April 29th, 2008; *Todorović Mirko et al*. second-instance judgment of the Court of Bosnia and Herzegovina, Case No. X-KRŽ-05/382, of January 23rd, 2009.

the county courts admit as aggravating circumstances cruel treatment, ruthlessness, persistence, and insensitivity.[282]

A positive example, of aggravating circumstances which were admitted, is the case in which the victim was a doctor by profession, and was tricked into leaving his office under the pretext of assisting the wounded.[283]

In addition to over-emphasizing the importance of mitigating circumstances in sentencing, it is evident that explanations of some of the mitigating and aggravating factors are quite poor.[284]

The Appeals Court Department has typically accepted all of the mitigating and aggravating circumstances found by the court of first instance. In adjusting the sentence, in some cases, this Department noted that such circumstances were either insufficiently appreciated, or overvalued.[285]

9. Controversial Judgments

Judgments from various war crimes chambers have provoked fierce criticism from a number of experts and victims for their problematic nature of their factual findings and their application of law, particularly in the area of sentencing.[286]

The *Scorpions* Case[287]

The judgment of the War Crimes Panel of the Belgrade District Court in the case of the murder of six Bosniak civilians from Srebrenica in July 1995 contains several serious errors in the way it evaluates the evidence and applies the law.[288] Serious omissions in the assessment of the evidence concern the relationship of the state of Serbia to the Srebrenica genocide, and that almost the entire trial period coincided with a case initiated by BiH against Serbia before the International Court of Justice, for Serbia's responsibility for the genocide in Bosnia, strongly suggest that the Trial Chamber was influenced by political motives with regard to certain of its findings.

The most serious error concerns the conclusions of the War

282 Marko Sjekavica, Jelena Đokić Jović and Maja Kovačević Bošković: "Do the courts in the Republic of Croatia tend to punish more severely Serb war criminals than Croat ones?" (Analysis of the statutory and judicial policy of punishing war crimes perpetrators) in "Monitoring War Crime Trials Report for 2013" (Documenta, Centre for Peace, Nonviolence and Human Rights - Osijek, and the Civic Committee for Human Rights), pp- 94-95. Available at: http://www.documenta.hr/assets/files/Godisnji%20izvjestaji/MonitoringWarCrimeTrialsReport_2013.pdf.

283 The judgment of the Belgrade District Court in the *Slunj* case, KV No. 4/2007 of July 8th, 2008, pp. 42-43.

284 Interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013.

285 The judgment of the Supreme Court of Serbia in the *Đakovica* case, Kž I rz 3/06 of February 26th, 2007, pp. 14-15; judgment of the Court of Appeal in the *Stara Gradiška* case, Kž 1 Po2 10/10 of January 24th, 2011, p. 5; judgment of the Court of Appeal in Belgrade in the *Tenja* (Radivoj) case, Kž 1 Po2 3/11 of April 11th, 2011, pp. 5-6; judgment of the Supreme Court of Serbia in the *Ovčara II* case, Kž I r.z. 2/06 of February 9th, 2007, p. 6; judgment of the Court of Appeal in Belgrade in the *Zvornik II* case, Kž 1 Po2 6/11 of October 3rd, 2011, p. 45; judgment of the Court of Appeal in Belgrade in the *Suva Reka* case, Kž 1 Po2 4/2010 of June 30th, 2010, pp. 21-22; judgment of the Court of Appeal in Belgrade in the *Podujevo II* case,Kž 1 Po2 3/2010 of May 25th, 2010, pp. 8-9; judgment of the Court of Appeal in Belgrade in the *Ovčara II* case Kž1 Po2 2/2010 of June 24th, 2010, p. 10; judgment of the Court of Appeal in Belgrade in the *Ovčara I* case, Kž. Po2 1/2010 of June 23rd, 2010, pp. 51-52; judgment of the Court of Appeal in Belgrade in the *Rastovac* case, Kž1 Po2 10/11 of March 5th, 2012, p. 7; judgment of the Court of Appeal in Belgrade in the *Zvornik III* and *IV* cases, Kž1 Po2 2/12 of October 4th, 2012, p. 24; judgment of the Court of Appeal in Belgrade in the *Lički Osik* case, Kž1 po2 3/12 of March 13th, 2013, pp. 15-18; judgment of the Court of Appeal in Belgrade in the *Vukovar* case, Kž1 Po2 1/11 of March 18th, 2011, p. 4; judgment of the Court of Appeal in Belgrade in the *Stari Majdan* case, Kž1 Po2 6/10 of March 26th, 2010, p. 3; judgment of the Supreme Court of Serbia in the *Zvornik I* case, Kž1 RZ 3/08 of April 8th, 2009, p. 14; judgment of the Supreme Court of Serbia in *the Scorpions* case, KžI r.z. 2/07 of June 13th, 2008, pp. 13-14.

286 See Humanitarian Law Center, "Analysis of the proceedings and judicial decisions in the *Suva Reka* case," 2011, HLC, "Judgment in the case of Mark Kashnjeti is based on inconclusive evidence" ["Presuda u slučaju Marka Kashnjetija zasniva se na neubedljivim dokazima"] (press release), November 20th, 2012. Available at: www.hlc-rdc.org/?p=22019. Accessed on May 13th, 2014.

287 Judgment of the War Crimes Panel in the *Scorpions* case, K.V.6/2005 and judgment of the Supreme Court of Serbia in the *Scorpions* case, KžI r.z. 2/07.

288 The judgment of the War Crimes Panel in the *Scorpions* case handed guilty verdicts to Slobodan Medić, Branislav Medić, Aleksandar Medić and Pera Petrašević, and sentenced each to several years in prison. In the same judgment, defendant Aleksandar Vukov was acquitted (K.V. 6/2005). The judgment came into effect in 2008.

Crimes Panel of the Belgrade District Court that insufficient evidence was presented during the trial to suggest that the victims of this crime had been brought from Srebrenica. Namely, the Court ignored the relevant testimonies of the victims' family members who claimed to have last seen the victims after the Army of the Republika Srpska had entered Srebrenica in July 1995.[289]

The Court's conclusion that the Scorpions unit was not associated with Serbia is similarly erroneous. The Court devoted a significant part of its judgment to explaining precisely this finding.[290] The *prima facie* evidence of the connection between the Scorpions and the Ministry of the Interior of the Republic of Serbia was rejected as logically unsound. (The proof of this argument consists of a telegram sent by the Special Police Brigade of Republika Srpska addressed to the then Deputy Minister of the Interior of the Republika Srpska Tomislav Kovač in which the Scorpions are referred to as a unit of Serbia's Ministry of the Interior).[291]

Another fact contributes to the overall impression of the political motivations that guided the Panel - namely, that during the proceedings, the Panel rejected the suggestion of the victims' legal representative that the statements on the status of the Scorpions of generals Obrad Stevanović and Aleksandar Vasiljević, from the case against Slobodan Milošević be obtained from the ICTY. The Panel found that "obtaining this evidence is unnecessary and superfluous." On these same grounds the Panel rejected suggestions to examine Franko Simatović, a former official of the Serbian State Security Service, on the status of the Scorpions.[292]

Furthermore, the Panel sentenced one of the accused, Aleksandar Medić, to the minimum prison sentence (five years) for aiding in the commission of the offense, although the law prescribes the same penalty for aiding as it does for complicity (the accomplices in this case were sentenced to 13 and 20 years). In addition, much of the evidence showed that Medić had the same intent as the other perpetrators to kill the civilians – he should, therefore, have been convicted as an accomplice rather than for aiding the commission of the offense.[293]

The Case of *Mark Kashnjeti*[294]

The judgment of the Higher Court Department, in the retrial was that Mark Kashnjeti be sentenced to two years in prison for the criminal act of war crime against civilians committed in Prizren in June 1999.[295] The conviction in both first-instance proceedings is based on flimsy and inconclusive evidence.

During these proceedings, the first-instance court gave no explanation of how it had determined one of the essential elements of the crime – the defendant being a member of one of the warring parties. In the ruling that overturned the first-instance judgment, the Appeal Court Department also emphasized the court's duty to determine this fact.[296] The court gave full confidence to the testimonies of witnesses – the injured party Božidar Đurović, and Milan Petrović, a police officer – who had allegedly identified the defendant. Đurović was unable to describe the defendant, nor could he explain how he was able to recognize a person he was not able to describe. At the same time, Đurović claimed that he had been arrested on the day in question and had been hit by a person between 25 and 30 years of age, although at the time covered by the indictment, the defendant was 46 years old. Witness Petrović, the former chief of the Criminal Police Department in Prizren (the Kosovo town where the alleged crime happened), and currently a member of the

289 *Ibid*, pp. 71-73.

290 *Ibid,* pp. 55-61.

291 The Court accepted Kovač's explanation given at the trial, according to which this letter was intended to boost the morale of the soldiers and officers by assuring them that Serbia too was participating in the operation. The court did not offer a logical explanation as to how the letter, originally intended only for officials of the Ministry of Interior of the Republic of Serbia, could affect the morale of ordinary members of the Ministry of Interior. Ibid, pp. 92-93.

292 *Ibid*, pp. 112-113.

293 For more on the shortcomings of this judgment, see the analysis in Serbian by Dragoljub Todorović, *The Scorpions - From Crime to Justice* (Belgrade: Humanitarian Law Center, 2007), [Škorpioni - od zločina do pravde (Beograd:Fond za humanitarno pravo, 2007)] p. 734.

294 Judgment of the Higher Court in Belgrade, War Crimes Department, case *Prizren*, K. Po2 3/2013.

295 Judgment of the Higher Court in Belgrade, War Crimes Department (K. Po2 3/2012 of November 19th, 2012) initially sentenced Mark Kashnjeti to two years in prison. Due to numerous errors and omissions, this judgment was quashed by the judgment of the Court of Appeal in Belgrade, Kž Po2 1/13 of March 8th, 2013, and the case has been remanded for retrial.

296 Decision of the Court of Appeal in Belgrade, War Crimes Department, in the *Prizren* case Kž1 Po2 1/13, p. 4.

WCIS, was suggested by the OWCP as a new witness only after Đurović's unconvincing testimony. Petrović claimed to have known the defendant only from "seeing him around" because his job was to "remember people's faces" and hence he remembered the defendant as the guy "atypical looking for an Albanian." In addition, the witness stated that, he remembered that Kashnjeti was about 30 years old at the time in question. He claimed to have seen a photo of him in 2000 in the media, from which he recognized Kashnjeti as one of the members of the KLA. The court did not provide a detailed analysis of these statements, nor did it explain the reasons for accepting them.

Acting on the orders of the Appeal Court Department, in the retrial the court ordered that anthropological experts be heard. However, the procedure was carried out without modern technology – it was based on ordinary observation and comparison of the blurred photo and the defendant. The experts found the similarity between the two to be high, indicating at the same time that the person in the photograph was between 25 and 50 years of age. The Court accepted this finding in its entirety, without any explanation as to how with such a large age range given for the person in the photo it was possible for the experts to identify a high level of similarity between the photo and the defendant.

Given the very unconvincing evidence on which the Court based its judgment, and given the media campaign that accompanied it, starting from the moment of the arrest of the indictee, and the OWCP's announcements through the media that a large number of witnesses and victims would identify the defendant,[297] the proceedings appear to have been conducted for reasons that were not entirely legal in nature.

10. Public Outreach

The importance of informing both communities affected by the violence and the general public about the process of determining liability and the facts about the crimes has been recognized by all international courts, beginning with the ICTY. This has resulted in the formation of special programs for outreach and public relations.

Neither the Higher Court Department nor the Appeal Court Department have a developed public relations program, or any special public relations service. This task is performed by the Public Relations Service of the Higher Court in Belgrade, and the Public Relations Service of the Court of Appeal in Belgrade.[298] Currently, the Higher Court Department informs the public about its actions and judgments solely through press releases concerning sentencing.

However, press releases are not issued for every sentencing judgment,[299] and when they are issued, press releases are very poor, containing only basic information about the judgment, the convicted persons and the sentences.[300] The Appeal Court Department does not issue press releases regarding its judgments; instead, it posts data on the website of the Belgrade Court of Appeal.[301]

Amendments to the Law on War Crimes Proceedings from 2009 enabled audio-visual recordings of trials to be broadcast in the media following the presiding judge's approval.[302] However, according to an HLC survey, by the end of 2013, the electronic media had not requested to be allowed to broadcast recordings of any of the proceedings.

297 Branka Mihajlović, "Belgrade: The arrests of Albanians does not violate the freedom of movement agreement" ["Beograd: Hapšenja Albanaca ne krše sporazum o slobodi kretanja"], April 17th, 2012. Available at: http://www.slobodnaevropa.org/content/beograd_hapsenja_albanaca_ne_krse_sporazum_o_slobodi_kretanja/24551193.htm Accessed: May 13th, 2014.

298 See "Public opinion survey on the attitudes of the citizens of Serbia to war crimes trials before domestic courts, the ICTY and the events of the war," February 2012, available in English at: http://www.osce.org/serbia/90422. Accessed: May 12th, 2014; interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

299 Since June 16th, 2010, when the website of the Higher Court issued the first statement regarding a judgment in a war crimes case, the Higher Court has failed to publish statements on as many as 17 judgments of conviction.

300 See Higher Court in Belgrade, "Judgment in the Ilija Jurišić case" [„Presuda protiv optuženog Ilije Jurišića"] (Press Release), December 3rd, 2012. Available at: http://www.bg.vi.sud.rs/lt/news/sluzba-za-odnose-sa-javnoscu/vesti-i-saopstenja/presuda-protiv-optuzenog-ilije-jurisica.html. Accessed: May 11th, 2014; Higher Court in Belgrade, Press Release. March 14th, 2011. Available at: http://www.bg.vi.sud.rs/lt/news/sluzba-za-odnose-sa-javnoscu/vesti-i-saopstenja/saopstenje-za-javnost-14.03.2011. godine.html. Accessed: May 11th, 2014.

301 See web page of the Court of Appeal in Belgrade: http://www.bg.ap.sud.rs/lt/

302 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 16a.

10.1. Redaction of Judgments (Anonymization)

Access to judgments handed down in war crimes cases by the Higher Court Department and the Appeal Court Department was restricted in 2012 and 2013 by the process of anonymization (redaction by way of blackouts and editing) of their written judgments. In some cases, courts would redact even the names of the defendants, their attorneys, the names of judges, witnesses, experts and even whole paragraphs and pages of a judgment. In this way, judgments become entirely unusable for legal analysis, and knowledge of the crimes committed is denied to victims and society as a whole.[303]

As the only non-governmental organization that monitors and analyzes war crimes trials in Serbia, the HLC often requests written judgments from war crimes departments. Until 2012, the courts would deliver judgments in their complete version, and only thereafter have they started the practice of sending redacted versions. In rejecting HLC's request for non-redacted judgments, the courts typically invoke the Law on Personal Data Protection. However, this law does not provide protection in these cases. Specifically, Article 5 states that the protection does not apply to information "available to everyone, and published in the press or available in archives, museums and other similar organizations." Given that the information from redacted judgment is available to the public through the media, individuals or organizations which monitor war crimes trials, the data from these judgments can not be protected under this law. The HLC filed a complaint to the Commissioner for Information of Public Importance, concerning the redaction practices of the Higher Court in Belgrade.[304]

The Appeal Court Department's practice is even contrary to its own Redaction Ordinance which expressly forbids redaction of data on defendants and convicted persons in court decisions concerning war crimes cases.[305] The Higher Court in Belgrade is yet to adopt a redaction rule book.[306]

Furthermore, in 2012 and 2013 the Higher Court Department even refused the HLC's requests for non-final judgments. Following the HLC's complaint to the Commissioner for the Information of Public Importance, the Higher Court Department's action was declared illegal.[307]

D Using the Legacy of the ICTY in War Crimes Trials in Serbia

The current practice of prosecuting war crimes in Serbia is characterized by frequent deviations by the OWCP and other courts from facts previously established by the ICTY, and by insufficient reliance on the practice of the ICTY. Using evidence established by the ICTY has become a practice, but it often happens that important pieces of evidence remain unused in resolving some crimes.

1. Using the ICTY's Evidence

Amendments to the Law on War Crimes Proceedings in 2004 created a formal legal basis for the use of evidence collected by the ICTY in war crimes trials in Serbia.[308] In the first years of application of the relevant legal provisions, there was some uncertainty concerning the interpretation of the use of such evidence. More concretely, there was doubt as to whether it was possible to use evidence only from the cases that were transferred to Serbia from the ICTY under Rule 11bis, or if it was possible to use evidence from other cases as well.[309] The Supreme Court of the Republic of Serbia resolved the dilemma in 2008 in the *Zvornik II* case, which

303 Humanitarian Law Center, "Redaction of War Crimes Judgment Contrary to National and International Regulations" [„Anonimizacija presuda za ratne zločine suprotna domaćim i međunarodnim propisima"] (Press Release), January 14th, 2014.

304 In his the conclusion of March 17th, 2014 (07-00-00337/2014-03) the Commissioner for Information of Public Importance found that the Higher Court's practice of redaction of judgments was not in keeping with the Law on Personal Data Protection. The Commissioner ordered the court, under threat of fine, to deliver the unredacted judgment to the Humanitarian Law Center.

305 See Article 4, para. 3 of the Rules of the Court of Appeal in Belgrade on Amendments of the Regulations on the minimum redaction of court decisions [Pravilnika Apelacionog suda u Beogradu o izmenama Pravilnika o minimumu anonimizacije sudskih odluka]. Available at: http://www.bg.ap.sud.rs/lt/articles/sudska-praksa/. Accessed: May 13th, 2014.

306 Written reply from the Higher Court in Belgrade to the HLC's inquiry, VIII Su No. 46/13-159, May 20th, 2013.

307 Decision of the Commissioner for the Information of Public Importance, 07-00-01776/2012-03, August 30th, 2012.

308 The Law on Amendments to the Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o izmenama i dopunama Zakona o organizaciji i nadležnosti državnih organa u postupku protiv učinilaca ratnih zločina, *Službeni glasnik Republike Srbije*], No. 135/2004.

309 The only case transferred to the Serbian judiciary under Rule 11*bis* is the case against Vladimir Kovačević (the *Dubrovnik* case).

had been initiated on the basis of the evidence transferred to the Serbian judiciary by the Office of the Prosecutor of the ICTY in the investigation phase.[310] Serbia's Supreme Court ruled that the witness statements collected by the Office of the Prosecutor of the ICTY could be used in this process, and that their evidential value should be assessed in accordance with the principle of the free assessment of the evidence by the court.[311]

In practice, the OWCP and the Higher Court Department often use ICTY evidence. However, the frequency of use has declined recently, because the cases prosecuted in recent years were less complex and with fewer victims, and consequently not of interest to the ICTY.[312] However, in some cases evidence used before the ICTY with great evidential value that would be valuable to clarify important facts in trials in Serbia were not used by the domestic courts.

In the *Zvornik I* and *Zvornik II*, cases, the OWCP did not use the testimony of three witnesses on whose testimony the ICTY almost entirely based its findings in the *Stanišić and Župljanin* case, about the crimes committed in Zvornik in May 1992.[313] In *Stanišić and Župljanin*, important evidence about the crimes in Zvornik were held in the personal journal of the commander of the Army of Republika Srpska, Ratko Mladić, which was discovered by the Serbian police in Belgrade in early March 2010.[314] In the journal, Mladić explicitly describes the forcible expulsion of Muslims from Divič and Kozluk (in the municipality of Zvornik).[315] However, the journal was not presented as evidence in the *Zvornik II* case heard before the Higher Court Department, although the trial was concluded in November 2010, giving the OWCP enough time to become familiar with the contents of this document, and to ask that it be included as evidence.

In the *Suva Reka* case, where, among the defendants for crimes against Kosovo Albanians was the commander of the 37th Special Police Unit, the OWCP did not take into account the order of the Serbian Ministry of Interior, used as evidence in the ICTY judgment in the *Djordjević* case in connection with the crime committed in Suva Reka. Issued one month before the crime, the order requests a deployment of the 37th Special Police Unit in Suva Reka and requires readiness for action.[316]

In the *Scorpions* case,[317] the court rejected the proposal of the plaintiff's proxy to use as evidence, the statement of Aleksandar Vasiljević given before the ICTY in the *Milošević* case. Vaslijević, former deputy chief of the Security Service of the YA claims in this statement the Scorpions were members of the Special Anti-Terrorist Unit of the Serbian Ministry of Interior in Kosovo.[318] Hence, the court ignored key evidence linking the Scorpions to the Ministry of the Interior of the Republic of Serbia which may have been relevant to in the incidents in BiH.

310 The *Zvornik* case was created by the ICTY ceding its evidence after its investigation had been completed but before indictments were issued.

311 Decision of the Supreme Court of Serbia Kž II RZ 22/08 of May 21st, 2008.

312 See Annex.

313 See: testimony of Petko Panić (a Bosnian Serb police officer from Zvornik) in *Stanišić and Župljanin* of November 11th, 12th and 13th, 2009; testimony of Ramiz Smajlović (a Muslim from Glumin who was imprisoned and tortured in Novi Izvor in Zvornik in May 1992) in *Stanišić and Župljanin* of November 6th, 2009; and testimony of Milorad Davidović (former chief inspector of the Federal Ministry of the Interior) in *Stanišić and Župljanin* of March 15th, 2005.

314 Judgment of the ICTY Trial Chamber in *Prosecutor v. Mićo Stanišić and Stojan Župljanin,* No. IT-08-91, of March 27th, 2013, para 891, 1591 and 1686.

315 See Exhibit P1755, *Prosecutor v. Mićo Stanišić and Stojan Župljanin,* No. IT-08-91, Journal of Ratko Mladić, for the period May 27th-July 31st, 1992, pp. 253-254.

316 See Exhibit P1234, Prosecutor v. *Vlastimir Djordjević*, No. IT-05-87/1, Ministry of Interior Order to break up and destroy the STS (Shiptar Terrorist Forces/Šiptarske terorističke snage] in the regions of Malo Kosovo, Drenica and Mališevo, February 19th, 1999.

317 For more on the *Scorpions* see the "Controversial Judgment" section of this report, p. 44.

318 Testimony of Aleksandar Vasiljević on February 14th, 2003 in Prosecutor v. *Slobodan Milošević*, IT-02-54, p. 425. Available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/Milosevic/Transkripti/Transkripti%20sa%20sudjenja%20Slobodanu%20Milosevicu%20%2831%29/Transkript%20sa%20sudjenja%20Slobodanu%20Milosevicu%20-%2014.%20februar%202003..pdf. Accessed: June 8th, 2014.

Access to ICTY documentary material and its archives will be possible after the completion of ICTY's work. A Resolution of the United Nations Security Council decided that the ICTY archive, after completion of the court's work, will be managed by the Mechanism for International Criminal Tribunals.[319]

2. Relying on the Practice of the ICTY and the Norms of International Law

In recent years, there has been a clear increase in the number of legal issues which have relied on ICTY jurisprudence. Of 77 first-, second- and third-instance judgments of the Higher Court Department and the Appeal Court Department for War Crimes, in 10 judgments the courts referred to the practice of the ICTY.[320]

Although significant progress has been achieved in recent years, the opinion of a number of actors who either participate in or monitor war crimes trials is that, after ten years, the courts' familiarity with international criminal law should be stronger.[321] As an illustration of the inadequate knowledge of international law, respondents list rare or erroneous citation of the norms of the Geneva Conventions and Protocols,[322] references to ICTY jurisprudence which are too general and do not name specific judgments,[323] and confusion in the application of the norms relating to international and internal conflicts.[324]

The Higher Court Department and the Appeal Court Department most frequently referred to the decision of the ICTY Appeals Chamber in the *Tadić* case on the defense's Interlocutory Appeal on jurisdiction, both with respect to the spatial and temporal validity of international humanitarian law.[325] In resolving the same issue in the *Bytyqi Brothers* and *Lekaj* cases the Higher Court Department referred generally to the practice of the ICTY without specifying the source on which it based its conclusion.[326]

319 The Resolution of the United Nations Security Council, No 1966 (2010).

320 See: Judgment of the War Crimes Department, Court of Appeal in Belgrace, in the *Zvornik II* case of October 3rd, 2011, p. 35; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Zvornik III* and *IV* cases of December 8th, 2011, p. 84; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Zvornik V* case of February 22nd, 2013, p. 148; Judgment of the Department for War Crimes of the Court of Appeal in Belgrade in the *Ovčara I* case of June 23rd, 2010, p. 19; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Ovčara III* case of June 23rd, 2009, p. 19; Judgment of the War Crimes Department of the Higher Court in Belgrade in the retrial of the *Mark Kashnjeti case* of June 21st, 2013, p. 29; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Lekaj* case of September 18th, 2006, p. 26; Judgment of the War Crimes Department of the Higher Court in Belgrade, in the retrial of the *Bytyqi Brothers* case of May 9th, 2012, p. 23; Judgment of the Department for War Crimes of the Court of Appeal in Belgrade in the *Medak* (Đaković) case of October 26th, 2013, p. 4.

321 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a representative of the Belgrade Center for Human Rights, June 17th, 2013; email correspondence with a representative of the OSCE Mission to Serbia, March 13th, 2014.

322 See: Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Lički Osik* case of March 8th, 2011, p. 3; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Stara Gradiška* case of June 25th, 2010, p. 2; and the Judgment of the War Crimes Department of the Higher Court in Belgrade in the retrial of the *Podujevo II* case of September 22nd, 2010, p. 30.

323 See: Judgment of the War Crimes Department of the Higher Court in Belgrade in the retrial of the *Bytyqi Brothers* on May 9th, 2012, p. 23; and the Judgment of the War Crimes Chamber of the Belgrade District Court in the *Lekaj*, case, September 18th, 2006, p. 26.

324 See: Judgment of the War Crimes Chamber of the Belgrade District Court in the *Lekaj* case of September 18th, 2006, p. 2; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Prizren* case of November 9th, 2012, p. 2; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Gnjilane Group* case of January 21st , 2011, p. 4; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Lički Osik* case of March 14th, 2011, p. 3; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Stara Gradiška* case of June 25th, 2010, p. 2.

325 The decision of the Appeals Chamber of the ICTY fon the Interlocutory Appeal on Jurisdiction in the *Tadić* case IT-94-1, of October 2nd, 1995. See: Sentencing Judgments of the War Crimes Department of the Higher Court in Belgrade in the *Zvornik V* case of March 22nd, 2013, p. 148; Judgment in the retrial of the War Crimes Department of the Higher Court in Belgrade in the *Mark Kashnjeti* case of June 21st, 2013, p. 29.

326 See: Judgment of the War Crimes Department of the Higher Court in Belgrade in the retrial of the *Bytyqi Brothers* case on May 9th, 2012, p. 22 and the Judgment of the War Crimes Chamber of the Belgrade District Court in the *Lekaj* case September 18th, 2006, p. 26.

The Higher Court Department and the Appeal Court Department have followed ICTY practice on other issues, for example when analyzing forms of accountability,[327] presentation of legal conclusions with respect to the crime of inhuman treatment,[328] and the prohibition of forced movement of civilians due to conflict.[329]

In the appeal judgement in the *Ovčara I* case,[330] the Appeal Court Department relied on the ICTY's opinion on the principle of the court's freedom to assess and evaluate evidence, according to which the acting chamber is best placed to determine whether a witness is credible and at the same time to decide which witnesses to have faith in, without necessarily having to explain every step of the reasoning that led to that decision.[331]

3. Deviation from the Facts Established before the ICTY

In several cases the Higher Court Department, the Appeal Court Department and the OWCP have taken a completely opposite view from the ICTY, with regard the facts established before the ICTY. Namely, in the seven completed cases involving war crimes in BiH, the OWCP – and later the special councils – took the position that an internal armed conflict took place between 1992 and 1995 in this former Yugoslav republic.[332] The conclusion comes despite the numerous ICTY judgments, from the very first judgment in the *Tadić* case, which all found that what had taken place on the territory of BiH was an international armed conflict, due to the significant involvement of Serbia and Croatia.[333]

327 See, Fisrt-instance judgment in the *Zvornik III* case of December 8th, 2011, p. 84.

328 In the third-instance judgment in the *Medak* (Djaković) case of the Court of Appeal in Belgrade KZ3 Po2 1/2012, of October 26th, 2012, the Trial Panel relied upon the judgment of the Trial Chamber of the ICTY in *Prosecutor v. Mladen Naletilić*, IT-98-34 of March 31st, 2003 and the Judgment of the Appeals Chamber of the ICTY in *Prosecutor v. Zdravko Mucić,* IT-96-21 of February 20th, 2001.

329 See: Judgment of the Department for War Crimes of the Court of Appeal in Belgrade in the *Zvornik II* case of October 3rd, 2011, p. 34 where the acting Trial Panel relied on the judgment of the Trial Chamber of the ICTY in *Prosecutor v. Milan Martić*, Case No. IT-95-11 of June 12th, 2007, and the Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Zoran Kupreškić*, IT-95-16 of January 14th, 2000.

330 Appeal judgment of the War Crimes Chamber of the Court of Appeal in Belgrade in the *Ovčara I* case of May 23rd, 2010, p. 19.

331 Judgment of the Appeals Chamber of the ICTY in *Prosecutor v. Zoran Kupreškić*, IT-95-16 of October 23rd, 2001.

332 The Judgment of the War Crimes Chamber of the Belgrade District Court in *the Scorpions* case of April 10th, 2007, p. 99; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Zvornik I* case of June 12th, 2008, p. 176; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Bijeljina* case of June 4th, 2012, p. 64; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Prijedor* case of December 1st, 2011, p. 32; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Stari Majdan* case of December 4th, 2009, p. 32; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Zvornik II* case of November 22nd, 2010, p. 291; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Zvornik III* and *IV* cases of December 8th, 2011, p. 115.

333 See: Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Duško Tadić*, IT-94-1 of May 7th, 1997, para. 569; Judgment of the Appeals Chamber of the ICTY in *Prosecutor v. Zejnel Delalić*, IT-96-21-A of February 20th, 2001, para. 33; Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Tihomir Blaškić*, IT-95-14-T of March 3rd, 2000, para. 744.

This same discrepancy between the findings of national courts and the ICTY is a characteristic of war crimes trials in Croatia.[334] Furthermore, despite the fact that in several cases the ICTY found that the Scorpions were a unit of the Serbian Ministry of Interior,[335] the OWCP and other domestic courts have characterized it as a paramilitary unit.[336] These deviations are clearly politically motivated and aimed at minimizing Serbia's involvement in the armed conflict in BiH and Croatia.

An example when the factual findings of the ICTY have been accepted by domestic courts, is found in the *Ovčara III* case. The acting trial panel fully accepted the substantial factual findings of the ICTY in the *Mrkšić et al.* case – such as, that the Yugoslav People's Army handed over prisoners of war to the Vukovar Territorial Defense Force.[337]

E Using Specific Types of Evidence

The specific nature of war crimes cases, in particular the length of time between the event and the trial, as well as the limited traditionally available evidence (witnesses, paraffin glove test, etc.), inspired the need for special arrangements in domestic law which would facilitate the presentation of evidence in such cases. These types of evidence are, in the order they became a part of the criminal-procedural legislation, a cooperating witness (2003), a plea agreement (2009) and agreement on the testimony of the defendant, i.e. 'defendant-witness' (2012). A cooperating witness and a defendant-witness are usually persons convicted of having committed a criminal offense, who have agreed to testify against other persons accused of having committed an offense. A defendant who pleads guilty, is not obliged to testify against others.

Despite their long-standing presence in the domestic law, the above means of evidence are rarely used in war crimes cases. Their infrequent use can be partly attributed to the inactivity of the OWCP, the body that initiates and then concludes such agreements.[338] Additionally, defendants who have information about other offenders and offenses fear that were they to give evidence it would expose them, and the people close to them, to harm. Serious problems in the operation of the programs for the protection of this category of witness, which have been widely publicized, further discourage witnesses from testifying.[339] Finally, high-ranking political figures occasionally express support for war crimes suspects, and this creates and cultivates a social climate in which war crimes suspects are heroes. For example, Ivica Dačić, the then Minister of the Interior, said in March 2009 that the Prosecutor's decision to arrest members of the Special Police Units, on suspicion of having committed war crimes in Kosovo, "creates anxiety and concern" among police officers.[340] The current Minister of

334 The Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Ante Gotovina et al.* IT 06-90-T of April 15th, 2011, para. 1698: "*In conclusion, the Trial Chamber finds that an international armed conflict existed throughout the Indictment period and area*." See also: Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Stara Gradiška* case of June 25th, 2010 p. 25; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Ovčara III* case of June 2nd and ,3rd 2009, p. 52; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Grubišno Polje* case of May 27th, 2009, p. 28; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Banski Kovačevac* case of March 15th, 2010, p. 34; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Slunj* case of July 8th, 2008, p. 41; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Ovčara I* case of March 12th, 2009, p. 242; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Vukovar* case of November 1st, 2010, p. 2 and 17; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Tenje* case of November 17th, 2010, p. 35; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Rastovac* case of September 23rd, 2011, p. 39; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Lički Osik* case of March 16th, 2012, p. 58; Judgment of the War Crimes Chamber of the Belgrade District Court in the *Ovčara II case* of January 30, 2006.

335 See Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Vujadin Popović et al*. IT-05-88 of June 10th, 2010, para. 597; Judgment of the Trial Chamber of the ICTY in *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69-T, May 30th, 2013, para. 2021.

336 See Judgment of the War Crimes Chamber of the Belgrade District Court in the *Scorpions* case, KV6/2005 of April 10th, 2007, p. 93.

337 Judgment of the War Crimes Chamber of the Belgrade District Court in the *Ovčara III* case of June 23rd, 2009, p. 19 in which the Chamber invoked the judgment of the Trial Chamber of the ICTY in *Prosecutor v. Mrkšić*, IT-95-13/1 of September 27th, 2007.

338 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013.

339 On witness protection program, see p. 71.

340 G.J., "We need clear evidence of guilt" [„Potrebni jasni dokazi krivice"], *Blic*, May 15th,2009. Available at: http://www.glas-javnosti.rs/clanak/hronika/glas-javnosti-15-03-2009/potrebni-jasni-dokazi-krivice. Accessed April 11th, 2014.

Justice, Nikola Selaković, having visited 11 Serbian prisoners in the ICTY in January 2013, announced stronger support for Serbian citizens in the Hague.[341] Within this social and political atmosphere, defendants are reluctant to testify against others accused of committing war crimes.

Also, as there have been many single defendant cases (20 out of 45 cases), almost half of the cases were, for that reason, unsuitable for the application of defendant-witness measure.[342]

In future, these important instruments should be used much more commonly in war crimes proceedings. Such agreements should be, first of all, concluded with direct perpetrators in order for commanders and organizers of the crimes to be prosecuted.[343]

1. Cooperating Witnesses and Defendant-witnesses

A cooperating witness is a person who provides information to the prosecutor and testifies against other defendants in exchange for no prosecution, a more lenient sentence, or reduced charges.[344]

In the early years of the OWCP and the War Crimes Departments, the use of the cooperating witness as a means of evidence was possible under the provisions of the Law on War Crimes Proceedings (2003), which stipulated that war crimes proceedings may incorporate those specific provisions of the CPC that pertain to the procedure for organized crime.[345] If, in agreement with the prosecutor, a member of a criminal organization who has been charged with a criminal offense or is under investigation, consented to testify against others persons, and then truthfully did testify, the prosecutor would have to drop all charges.[346] By amendments to the CPC brought in 2009, a cooperating witness could be handed the minimum sentence prescribed for the offense which he/she admitted to having committed and which the procedure had proven; this sentence would then be reduced by half, though it could not amount to less than 30 days in prison.[347] The 2009 amendments to the CPC provide an additional option – namely, that at the prosecutor's request, under certain conditions prescribed by law, a previously convicted person can acquire the status of a cooperating witness.[348]

By 2012, the OWCP had requested that the courts grant cooperating-witness status to four persons, and the court acceded to their request in all cases. The cases in question were: The *Gnjilane Group* case, the *Ćuška* case, and three cases involving the crimes in Ovčara. Cooperating-witness status was given both to members of the units that committed crimes and to those who individually participated in the commission of the crimes. In all three cases involving the crimes committed in Ovčara, the same two persons were granted cooperating-witness status.

According to the CPC applied in war crimes cases starting from 2012, cooperating-witness status was replaced by agreement on defendant's testimony.[349] The agreement de-

341 "Selaković all day with detainees" ["Selaković ceo dan sa pritvorenicima",], B92, January 18th 2013. Available at: http://www.b92.net/info/vesti/index.php?yyyy=2013&mm=01&dd=18&nav_category=64&nav_id=678489. Accessed: April 11th, 2014.

342 See Annex I.

343 Interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

344 Criminal Procedure Code, *Official Gazette of the FRY* [Zakonik o krivičnom postupku, *Službeni list SRJ*], No. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010, Articles 540o and 504 ć.

345 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 13.

346 Law on the Amendments of the Criminal Procedure Code, *Official Gazette of the FRY* [Zakon o izmenama i dopunama Zakonika o krivičnom postupku, Službeni list SRJ] No, 68/2002, Article 504z.

347 La on the amendments of the Criminal Procedure Code, *Official Gazette of the FRY* [Zakon o izmenama i dopunama Zakonika o krivičnom postupku, *Službeni list SRJ*], No. 72/2009, Article 504t.

348 *Ibid*. Article 504ć.

349 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 320.

termines the type, extent, or range of punishment, and it allows for a defendant's acquittal or for the withdrawal of his/her prosecution.[350] The differences between a 'cooperating witness' and this new 'defendant-witness' are minimal. Specifically, the public prosecutor may conclude an agreement on defendant's testimony in a war crimes case with a person who has been convicted of any form of criminal offense, while a cooperating witness could be only a person who was involved in the case in which he/she was to testify.[351] Furthermore, just as in the previous law, the current CPC provides for the possibility that a convicted person, under certain circumstances, may conclude an agreement to testify.[352]

By the end of 2013, only one defendant in war crimes trials (in the *Ćuška* case) had concluded such an agreement.

Several participants in this research point out that evidence from defendant-witnesses should be viewed cautiously.[353] In a well known case, the ICTY did not give credence to the testimony of a person who was a cooperating witness in a Serbian court in the *Ovčara* case, while the domestic court accepted his testimony in its entirety.[354] In a second case, although in a first first-instance trial the court granted this status to a cooperating witness and partly accepted his testimony, in the retrial his testimony was completely discarded.[355]

2. Plea Agreement

Through a guilty plea agreement – renamed a 'guilty plea agreement on a criminal offense' following the changes to the CPC in 2012 – the suspect or the accused pleads guilty to a criminal offense with which he is charged. In turn, the court determines a lesser sentence, within limits agreed by the prosecutor and the defense counsel.[356] The main difference between a guilty plea agreement and a cooperating witness, or defendant-witness, is that in the case of the plea agreement the defendant does not necessarily agree to testify against another person. The value of this mechanism lies in its `ability to speed up the trial process.

The possibility of entering into a plea agreement was introduced by the amendments to the CPC in 2009. Until 2009, such a mechanism was limited to offenses that carried a maximum penalty of 12 years in prison. Amendments to the Law on War Crimes Proceedings from 2009 lifted this restriction for offenses under the jurisdiction of the OWCP.[357]

According to the CPC which was in force until 2012, the court had to summon the injured party to a hearing at which the agreement was concluded. One of the conditions for approval of the agreement was that "the plea agreement did not violate the rights of the injured party, or that it is not contrary to the principles of fairness."[358] Furthermore, the injured party had the right to appeal the approval of the

350 *Ibid.* Article 321, para. 3.

351 See: Criminal Procedure Code, *Official Gazette of FRY* [Zakonik o krivičnom postupku, *Službeni list SRJ*], No. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010, Articles 540o, and the Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 320.

352 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 327.

353 Interview with a judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with deputies of the Prosecutor, May 8th and 9th, 2013; interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013.

354 Witness Spasoje Petković; Interview with a judge of the Court of Appeal in Belgrade, May 27th and 31st, 2013; interview with a defense attorney, May 14th, 2013.

355 See description of the *Gnjilane Group*, case in Humanitarian Law Center, "Report on War Crimes Trials in Serbia in 2012," p. 61.

356 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 314.

357 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009.

358 Criminal Procedure Code, *Official Gazette of FRY* [Zakonik o krivičnom postupku, *Službeni list SRJ*], No. 70/2001 and 68/2002 and *Official Gazette of the Republic of Serbia*, No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010, Articles 282v, para. 8, count 5.

agreement.[359] Amendments to the CPC in 2012 revoke this right.[360]

In war crimes cases only one plea agreement had been concluded by the end of 2013.[361] In the *Jataci* cases (cases against persons who helped ICTY fugitives in hiding) agreements were reached in 11 instances.[362]

F Open questions about the application of command responsibility and crimes against humanity

1. Command Responsibility

According to the principle of command responsibility, a superior in the military or civilian authorities is held responsible if he/she fails to prevent unlawful conduct of his/her subordinates or punish such conduct. The principle of command responsibility for the acts of his subordinates is defined in customary international, as well as international treaty law.[363] This principle applies to international and non-international armed conflicts.[364] Command responsibility is regulated by the statutes of international criminal tribunals, and is frequently used in practice.[365]

The Criminal Code of the SFRY and the Criminal Code of the FRY, both of which were applied in war crimes proceedings before the courts of the Republic of Serbia, did not provide for command responsibility as a form of accountability (certainly not explicitly), or as a criminal offense. In the new Criminal Code, adopted in 2005, command responsibility is classified as a criminal offense, the formal designation of which is "failure to prevent the commission of criminal offenses against humanity and other goods protected by international law."[366] Under this provision, the superior is held responsible for failing to prevent the act of genocide, crimes against humanity or war crimes. With regard to the failure of commanders to initiate the punishment of subordinate perpetrators of some of the above offenses, the basis for the punishment of the superior is the second legal provision that generally criminalizes "the failure to report the crime and the offender," and as such refers to other offenses as well, not just those protected by international law.[367] Since the establishment of specialized institutions for the prosecution of war crimes, only one person has been charged on the basis of specific forms of accountability which by their nature fit the principle of command responsibility (Branko Popović in the *Zvornik II* case).[368]

359 *Ibid*. Artivle 282g, para 2.

360 Interview with deputies of the Prosecutor, May 20th, 2013.

361 On September 13th, 2013, in the *Ključ* case, the War Crimes Department of the Higher Court in Belgrade upheld a guilty plea for a war crime against civilians which the defendant Milan Škrbić concluded with the OWCP. See: OWCP, Press Release, September 13th, 2013. Available at: http://www.tuzilastvorz.org.rs/html_OWCP/VESTI_SAOPSTENJA_2013/VS_2013_09_13_LAT.pdf.

362 The *Jataci* case refers to the proceedings conducted against several persons for hiding Ratko Mladić and Stojan Župljanin-Lovra and others (K-Po2 no. 52/10); Branislav Mladić (K-Po2 no. 5/12); Ljubiša Lazić (SPK-Po2 no.1/13-CK, 5/2012); Miroslav Jegdić (SPK-Po2 no.4/12); Milan Škrbić (SPK-Po2 no.2/2013, K-Po2 no. 6/2013); Vladimir Lijeskić (SPK-Po2 no. 5/12).

363 Additional Protocol I to the Geneva Conventions of August 12th, 1949 pertaining to the Protection of victims of international armed conflicts, Articles 86 and 87, *Official Gazette of SFRY – International Treaties* [Dopunski protokol I uz Ženevske konvencije od 12. avgusta 1949. godine o zaštiti žrtava međunarodnih oružanih sukoba, *Službeni list SFRJ – Međunarodni ugovori*], No. 16/78. See judgment of the Trial Chamber of the ICTY in *Prosecutor v. Zdravko Mucić*, IT-96-21-T, November 16th, 1998.

364 Additional Protocol I to the Geneva Conventions of August 12th, 1949 pertaining to the Protection of victims of international armed conflicts, Articles 86 and 87, *Official Gazette of SFRY – International Treaties* [Dopunski protokol I uz Ženevske konvencije od 12. avgusta 1949. godine o zaštiti žrtava međunarodnih oružanih sukoba, *Službeni list SFRJ – Međunarodni ugovori*], No. 16/78. See judgment of the ICTY Appeals Chamber on an Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility in *Prosecutor v. Enver Hadžihasanović*, IT-01-47-AR72, June 16th, 2003.

365 ICTY Statute, Article 7, para 3, Statute ICTR, Article 6, para 3, Statute ICC, Article 28.

366 Criminal Procedure Code, Official Gazette of the Republic of Serbia [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009 and 121/2012, *and 104/2013*), Article 384.

367 *Ibid*. Article 332.

368 "The *Zvornik* case" [„Slučaj *Zvornik*"], in *Justice in Transition* [*Pravda u tranziciji*, No. 15, December 2010. Available at: http://www.tuzilastvorz.org.rs/html_OWCP/(CASOPIS)/SRP/SRP15/2266.htm. Accessed: June 8th, 2014.

Experts have voiced three views on the ways in which the principle of command responsibility is implemented.

a) Application of command responsibility violates the constitutional principle of legality

A number of professors of international law, as well as some judges and legal practitioners, hold that the application of command responsibility for the crimes committed during the 1990s is not possible because command responsibility had not been envisaged by the Criminal Code. Applying command responsibility violates the constitutional principle of legality, according to which no one can be convicted for an act which at the time of its commission was not envisaged or defined by law, and for which no penalty was stipulated (*nullum crimen, nulla poena sine lege*).[369]

However, the practice of the OWCP, the Belgrade District Court and the European Court of Human Rights has engendered an interpretation, according to which, direct application of international conventions is not a violation of the principle of legality. In 2008, the OWCP submitted a request to the District Court in Belgrade for the investigation of Peter Egner for genocide and war crimes committed during World War II.[370] The Belgrade District Court upheld the decision of the investigating judge to conduct the investigation, even though those offenses had not been provided for by law, at the time of its commission.[371] The Trial Chamber in the *Egner* case found that the principle of legality was not violated, given the provisions of the International Covenant on Civil and Political Rights and the European Convention for the Protection of Human Rights and Fundamental Freedoms, both which stipulate that the principle of *nullum crimen sine lege* cannot be violated if the criminal offense is enshrined in international law.[372]

This interpretation is supported by recent jurisprudence of the European Court of Human Rights. Specifically, in *Šimšić v. Bosnia and Herzegovina*, the European Court held that the Court of Bosnia and Herzegovina had not violated the principle of legality by applying the 2003 Criminal Code, which for the first time defined crimes against humanity, despite the fact that the offense had not been defined as criminal at the time of its execution. The court based its conclusion on a number of international treaties and other laws enacted prior to the commission of the criminal act in question, which define crimes against humanity as a criminal offense.[373]

b) Direct application of international law

Many experts, judges and other stakeholders in the sphere of war crimes trials find that the doctrine of command responsibility can be applied in domestic war crimes trials by direct application of the Geneva Convention (its Additional Protocol I), which at the time of the conflict in the former Yugoslavia were part of domestic law. Namely, the constitutions (of the SFRY, FRY, and RS) provide that international treaties and generally accepted rules of international law, which include command responsibility, are part of the state's internal legal order.[374] In addition, the 1988 Directive

369 Branislav Ristivojević, "Command responsibility is not part of customary international law" [„Komandna odgovornost nije deo međunarodnog običajnog prava], *Collection of Essays*, Vol. 32, No. 1-3, pp. 121-136; Milan Škulić, "Vučurević and Command Responsibility" [„Vučurević i komandna odgovornost"], *Politika*, April 19th, 2011; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

370 OWCP. No. 8/08, August 29th, 2008.

371 Decision of the War Crimes Chamber of the District Court in Belgrade in the *Peter Egner* case, Kv.V. 23/09, March 24th, 2009.

372 Article 15, para. 2 of the International Covenant on Civil and Political Rights from 1966 stipulates: "Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations." Article 7, paragraph 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms from 1950 prescribes: "This article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

373 Article 6 of the Statute of the International Military Tribunal (1945); Resolution 95 of the General Assembly of the United Nations (1946); Principles of International Law recognized in the Charter and Judgement of the International Military Tribunal at Nuremberg (1950); Sections 1, 2, and 3 of the Convention on Non-Applicability of Statutory Limitations on War Crimes and Crimes Against Humanity (1968); Article 5 of the Statute of the ICTY (1993); and Article 7 of the Statute of the International Criminal Court (1998). See also: Decision of the European Court of Human Rights in *Simsic v. Bosnia and Herzegovina* (51552/10), April 10th, 2012, para. 8-13.

374 Siniša Važić, "Toward clear answers and precise attitudes" ['Ka jasnim odgovorima i preciznim stavovima"] in *Transitional Justice* No. 7, December 2006. See also Marko Milanović, *International Customs and Serbian Laws* [*Međunarodni običaji i srpski zakoni*], *Vreme*, No. 710, August 12th, 2004.

on the implementation of international humanitarian law was in effect at the time, wherein the principle of command responsibility was defined in accordance with the above protocol.[375]

In 2005, this view was taken by the Council of the State Union of Serbia and Montenegro for the Cooperation with the ICTY, in a filing submitted to the ICTY in connection with the transfer of the *Vukovar Three* case to the Serbian judiciary. Moreover, the motion set forth an interpretation of the Law on War Crimes Proceedings, according to which the Statute of the ICTY (which proscribes command responsibility) was an integral part of domestic law.[376]

c) Application of alternative criminal offenses or forms of responsibility

The principle of command responsibility can be applied in cases of war crimes committed during the 1990s in the former Yugoslavia through the application of different provisions of the laws in effect in the 1990s (aiding and abetting, failure to prevent, or abetting by omission).[377] In the *Zvornik II* case, the OWCP's indictment charged two indictees that 'they knew about the illegal acts [of other defendants] and the others [who remain unidentified or are deceased] against detainees, but did nothing to prevent them.'

The overall impression among stakeholders in the sphere of war crimes prosecution whom the HLC interviewed, there is no disagreement that that the principle of command responsibility should be incorporated into the practice of prosecuting those responsible for war crimes during the 1990s. In its early years, several times the OWCP publicly acknowledged that it was able to prosecute individuals who were held responsible for the crimes under the principle of command responsibility.[378] Prosecutors whom the HLC interviewed for the purposes of this analysis consider, in turn, that the implementation of this doctrine requires that a binding official position on the application of command responsibility be reached, either by the Supreme Court of Cassation or some other legal authority or forum, in order to avoid having someone released due to an erroneous application of the law.[379] However, judges and experts believe that that the OWCP should open a specific case that could lead to the establishment of case law in this matter.[380]

2. Crimes against humanity

The same problem occurs in practice with regard to crimes against humanity. A crime against humanity is a criminal offense that covers a range of serious offenses such as murder, persecution, torture, rape and the like. These acts are part of a systematic and widespread attack against the civilian population. Unlike war crimes, crimes against humanity may be committed in peacetime.[381]

Before the Criminal Code from 2005 had been enacted, a crime against humanity did not constitute part of the crimi-

375 See Articles 20-21, Guidelines on the Application of International Humanitarian Law, *Official Military Gazette* [Uputstava o primeni međunarodnog humanitarnog prava, *Službeni vojni list*], No. 10/88.

376 *Prosecutor v. Mrkšić et al.* IT-95-13/1-PT, Submission by Serbia and Montenegro to Refferal Bench, April 28th, 2005, para. 14, 15, 16.

377 Additional Protocol I to the Geneva Conventions of August 12th, 1949 pertaining to the Protection of victims of international armed conflicts, Articles 86 and 87, *Official Gazette of the SFRY – International Treaties* [Dopunski protokol I uz Ženevske konvencije od 12. avgusta 1949. godine o zaštiti žrtava međunarodnih oružanih sukoba, *Službeni list SFRJ – Međunarodni ugovori*], No. 16/78.

378 Darko Zlojutro, "A Cover-Up of the Truth about Organ Trafficking" [„Zataškavaju istinu o trgovini organima"], internet portal *Telegraf*, January 2nd, 2013; Vojislava Crnjanski-Spasojević, "Indictments for Batajnica – by the End of the Year" [„za Batajnicu do kraja godine"], *Nedeljni telegraf*, April 13th, 2005; "The Mačkatica Results – Soon" [„Uskoro rezultati za Mačkaticu"], *Radio B92*, April 14th, 2005, transcript of the radio program, "Kažiprst." Available at: http://www.b92.net/info/emisije/kaziprst.php?yyyy=2005&mm=04&nav_id=166464. Accessed: March 28th, 2014; "Challenges to Command Responsibility" [„Izazovi komandne odgovornosti], *B92 web site*, May 13th, 2005. Available at: http://www.b92.net/info/vesti/index.php?yyyy=2005&mm=05&dd=13&nav_id=168383. Accessed: March 28th, 2014.

379 Interview with a Deputy War Crimes Prosecutor, May 20th, 2013.

380 Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade, April 28th, 2013; interview with a former judge of the Higher Court in Belgrade, May 23rd and 28th, 2013; interview with the representative of the Belgrade Center for Human Rights, June 17th, 2013; interview with a defense attorney, May 22nd, 2013; interview with a defense attorney, May 14th, 2013.

381 Statute of the International Criminal Court, Article 7.

nal law, and so far not a single person has been charged with this crime before Serbian courts.[382]

As in the case of command responsibility, there are opinions, both among judges and prosecutors, and within the professional community that the existing legal framework in Serbia allows for criminal proceedings to be brought for crimes against humanity without the violation of the principle of legality.[383]

The position that there is no obstacle to the prosecution of crimes against humanity by the Serbian courts clearly results from the European Court's decision in the *Šimšić* case.[384]

G Support for Victims and Witnesses

Support for victims and witnesses during trials, is a given element of international courts that prosecute serious violations of international humanitarian law.[385] In many states, support for victims and witnesses is an integral part of the national judicial system. Through the amendments to the Law on Organization of Courts from November 2013, Serbia adopted this standard, although in cases of war crimes, the principle of support for victims and witnesses had been established as early as 2006.[386] However, current capacities and regulatory frameworks for the support to victims and witnesses in war crimes cases are not fully in keeping with international standards and do not meet the challenges that usually accompany testimonies in war crimes cases.

1. Service for the Support and Assistance for Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade

The Law on War Crimes Proceedings assigns the task of providing support to witnesses and victims in war crimes trials to the Service for the Support and Assistance for Victims and Witnesses of the Department for War Crimes of the Higher Court in Belgrade (the Support and Assistance Service).[387] Established in 2006, it is directly subordinate to the president of the Higher Court in Belgrade. It provides logistical and emotional support to witnesses and injured parties (emotional support is defined as expressing attention and care, encouragement and respect for a witness or a victim involved in the case.[388])In practice, the Support and Assistance Service provides a form of psychological support, but this service has yet to be professionalized. Having been modeled on similar services within international and regional tribunals, the Support and Assistance Service has the same set of obligations toward prosecution witnesses and witnesses for the defense.

1.1. Human Resources and Technical Equipment

From its founding through to 2010, the Support and As-

382 Criminal Procedure Code, Official Gazette of the Republic of Serbia [Zakonik o krivičnom postupku, *Službeni list Republike Srbije*], No. 85/2005, 88/2005, 107/2005, 72/2009, 111/2009 and 121/2012, and 104/2013, Article 371.

383 Interview with a defense attorney, May 14th, 2013; interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; interview with a defense attorney, May 22nd, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with the representative of the Belgrade Center for Human Rights, June 17th, 2013.

384 See p. 55.

385 On the system of protection and support within the International Criminal Court, see: http://www.icc-cpi.int/en_menus/icc/structure%20of%20the%20court/protection/Pages/victims%20and%20witness%20unit.aspx; on the system of protection and support within the ICTY, see: http://www.icty.org/sid/158; on the system of protection and support within the International Criminal Court for Rwanda, see: http://www.unictr.org/AboutICTR/ICTRStructure/WitnessesVictimsSupportSectionWVSS/tabid/106/Default.aspx. Accessed: May 13th, 2014.

386 The Law on Courts' Organization, *Official Gazette of the Republic of Serbia* [Zakon o uređenju sudova, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011 and 101/2013, Article 23, paragraph 3, and Article 51, paragraph 2; Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 11.

387 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 11.

388 Social Support, *Encyclopedia of Applied Psychology*, Charles Spielberger ed. (Boston: Elsevier Academic Press, 2004), vol. III, p.435.

sistance Service had only two employees. Since 2010, the Service has employed three persons – an associate and two clerks.[389] The staff point out that the Service has an optimal number of employees, which is proportionate to the number of cases, given that the new CPC (which came into force in 2012) has introduced prosecutorial investigation. Before the introduction of prosecutorial investigation, it was also involved in investigations, led by an investigating judge. With the introduction of prosecutorial investigation the care of witnesses was transferred on the OWCP. The Support and Assistance Service has no formal authority to be involved in investigation.[390]

The criteria for employment is a college degree in social sciences and four years of experience.[391]

Employees of the Support and Assistance Service went through a number of different training courses on how to approach witnesses and victims in criminal proceedings. The training was organized by the OSCE. The training was evaluated as a useful but insufficient by the Service's staff. They believed that the training was too theoretical and broad, with no concrete solutions for specific situations. They pointed out that they needed additional training in working with victims of sexual violence, with victims with post-traumatic stress disorder, as well as in strategies to overcome the stress to which Service employees themselves were exposed during their work.[392]

According to contemporary standards of victim support in criminal proceedings, the involvement of psychologists in the support services is not obligatory, but it is preferable if the circumstances permit.[393] The Support and Assistance Service does not have a full-time psychologist, but instead, occasionally hires a juvenile delinquency psychologist employed in the Higher Court in Belgrade. His involvement in war crimes was arranged through a spoken, rather than written agreement between the Support and Assistance Service and the then president of the Higher Court. Employees believe that a full-time psychologist would be useful to have, but point out that given the short time witnesses and victims spend with representatives of the Support and Assistance Service, a psychologist's involvement is not necessary. They not submitted a request to the authorities for the hire of a psychologist.[394]

The Support and Assistance Service has at its disposal, three rooms in the Belgrade Higher Court building: two reception rooms for the witnesses, and one for the employees themselves.[395] The rooms used by witnesses have been equipped and furnished with the help of the U.S. Embassy and the OSCE Mission to Serbia.[396] Employees point out that the two rooms for the reception of witnesses and victims, which are connected, are insufficient because it often happens that witnesses due to testify in the same case are able to communicate with each other before the trial, which is not a desirable practice. By contrast in the ICTY and the Court of Bosnia and Herzegovina, every witness has his/her own separate room.[397]

The Support and Assistance Service has a special program for the records of witnesses and victims, which was developed within of the Higher Court Department. General data on witnesses is entered into the program, along with notes recording distinctive aspects of witnesses' character and their testimony. The Support and Assistance Service has the option of monitoring trials from their rooms, via video screen.[398]

389 The Rulebook on Internal Organization and Job Classification of the Higher Court in Belgrade [Pravilnik o unutrašnjem uređenju i sistematizaciji radnih mesta u Višem sudu u Beogradu], Belgrade, May 19th, 2010.

390 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

391 The Rulebook on Internal Organization and Job Classification of the Higher Court in Belgrade [Pravilnik o unutrašnjem uređenju i sistematizaciji radnih mesta u Višem sudu u Beogradu], Belgrade, May 19th, 2010.

392 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

393 Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Article 9.

394 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013; The Rulebook on Internal Organization and Job Classification of the Higher Court in Belgrade [Pravilnik o unutrašnjem uređenju i sistematizaciji radnih mesta u Višem sudu u Beogradu], Belgrade, May 19th, 2010.

395 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

396 Interview with the representative of the OSCE Mission to Serbia, May 31st, 2013; interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

397 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

398 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014.

1.2. The Competencies of the Support and Assistance Service

The Support and Assistance Service acts as soon as it receives information that the victim or the witness has been summoned to testify, until the time of his/her departure from court after testifying. The competencies of the Service involve assistance in organizing the arrival of victims and witnesses, giving information about the trial, reimbursement of expenses, emotional support before testimony and, in some cases, emotional support during and immediately after the trial.[399]

The Service for Witness and Victims' Support at the Court of Bosnia and Herzegovina, is responsible for video transmission (video-conferencing) in its courts. Thanks to an agreement, the Support and Assistance Service communicates directly with the Witness Support Section of the Court of BiH (the Section) on matters concerning preparation for videoconferencing.[400]

Because there is no agreement with Croatia, on victim/witness support cooperation, the Support and Assistance Service has no formal powers in organizing video-conference links. However, given the solid interpersonal relationships between Support and Assistance Service employees and personnel of the Division for Victim/Witnesses Support in criminal and war crimes proceedings, which is part of the Ministry of Justice of the Republic of Croatia (the Division), the two services exchange, through direct communication, the data necessary for the organization and preparation of videoconferencing.

The Support and Assistance Service has no authority to organize video-conferences with Kosovo. Instead, these are organized through direct contact between the chamber and EULEX.[401]

1.2.1. The Support and Assistance Service Following the Adoption of the New CPC

Since the introduction of the new CPC in 2012, the Support and Assistance Service, as a body of the court, no longer has formal authority to provide assistance and support to witnesses during the investigation, but only immediately before, during and after the trial. This change was introduced when investigation was transferred from the jurisdiction of the court (the investigating judge) to the jurisdiction of the OWCP.

Both the OWCP and the Support and Assistance Service maintain that it is necessary to provide support to witnesses during the investigation, but different stakeholders have different opinions on the role the Support and Assistance Service should play. Representatives of the OWCP hold that, after the entry into force of the new CPC, the Support and Assistance Service should be transferred to the jurisdiction of the OWCP.[402] However, representatives of the Support and Assistance Service believe that remaining under the jurisdiction of the Higher Court is the only way to guarantee that witnesses will perceive them as impartial in the process.[403] For now, only in exceptional circumstances do they provide support for witnesses who testify in an investigation, at the request of the OWCP, and then only with the prior approval of the president of the Higher Court. From the moment the new CPC came into force through to the end of 2013, the Support and Assistance Service provided support and assistance to a total of 50 witnesses during the investigation phase, at the request of the OWCP.[404]

2. Victim Support Measures[405]

Support for victims in criminal proceedings should be integral to a comprehensive support system for victims of seri-

399 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013; for more details on the authorities of the Service, see section "Support for Victims in Court Proceedings," p. 60.

400 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014.

401 *Ibid*.

402 Interview with deputies of the Prosecutor, May 8th and 9th, 2013.

403 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013

404 Phone Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, June 6th, 2014.

405 HLC's findings relating to victim support during criminal proceedings apply also to witnesses' support with regard to information and logistical support for a victims arrival at the court. Support measures for victims have been focused on because of the complex nature and elaborate international standards.

ous crimes, and involve institutions with various responsibilities, operating on different levels.[406]

The main task of victim support measures during criminal proceedings is protecting victims from reliving the trauma.[407] Measures taken to this effect must be put in place at the earliest stages of criminal proceedings, and tailored to individual needs.[408] Institutions and other stakeholders who come into contact with victims must be trained to work with them.[409]

Support measures for victims of war crimes trials in Serbia do not meet the above requirements, and the complex challenges that victims face, remain unaddressed. With the introduction of the new concept of criminal proceedings (in January 2012), in which investigation was transferred from the jurisdiction of the court (an investigating judge) to the jurisdiction of the OWCP, the support system for victims of war crimes has been further weakened.

2.1. Support for Victims in Court Proceedings

The support for victims who testify in war crimes cases before the Higher Court in Belgrade encompasses three measures: a) informing the victims about aspects of the trial, b) assisting victims on their arrival at court, and c) emotional support before and during their testimony.

The existing support system for victims has not been adjusted in line with the new procedures for criminal proceedings, in which investigation has been transferred from the jurisdiction of the court (an investigating judge) to the jurisdiction of the OWCP.

2.1.1. Providing Information

According to standards mandatory for all EU member-states, the victim must be informed of all the stages in the proceedings, as well as of their rights in the proceedings, and of available support and protection measures.[410]

Before the new CPC was implemented, the Support and Assistance Service informed victims during an investigation of much of the relevant information. This is now the task of deputy prosecutors, prosecutorial assistants and OWCP investigators.[411] However, given that the OWCP employs only three investigators, and that they have many other duties, the support that they provide to victims is neither as professional nor as comprehensive as was the specialized assistance victims received from the Support and Assistance Service. The OWCP's determination to respond to the needs of victims with its existing capabilities is certainly commendable, but the new CPC is a retrograde step when it comes to this aspect of support for victims.[412]

Along with a summons to testify, the Support and Assistance Service gives the witness a brochure on its work, describing its jurisdiction, and the protective measures it provides. The brochure additionally includes contact information.[413] On the day of the testimony, representatives of the Support and

406 Victims Support Europe, *Handbook for Implementation of Legislation and Best Practice for Victims of Crime in Europe*, available at: http://victimsupporteurope.eu/activeapp/wp-content/files_mf/1385974688NewVersionVSEHandbookforImplementation.pdf. Accessed: May 13th, 2014

407 Re-traumatization entails a significant increase in the symptoms of post-traumatic-stress-response to previous trauma. Ulrich Orth and Andreas Maercker, "Do Trials of Perpetrators Retraumatize Crime Victims?," *Journal of Interpersonal Violence*, 19, No. 2 (2004), p. 212-227

408 Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Articles 8, 9 and 18.

409 *Ibid*, Article 25.

410 The UN General Assembly, "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power," A/RES/40/34, 29 November 1985 Article 6, paragraph a); Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Articles 4 and 6.

411 OWCP's reply to HLC inquiry, A br. 162/13, June 7th, 2014.

412 OWCP's email reply to HLC's inquiry, April 16th, 2014, FHP, IndexIN – 79-F93510.

413 The Higher Court in Belgrade, War Crimes Department, Service for Support and Assistance to Victims and Witnesses, information brochures for witnesses, Belgrade, 2010

Assistance Service welcome the victim at the entrance to the court. After a short conversation in a closed room, reserved for the victims, the victim is taken to the court and given an explanation about where the various parties involved in proceedings will be seated, his/her position during testimony, the use of microphone, etc. Support and Assistance Service representatives also familiarize the witness with his/her rights and obligations under the CPC. For example, they inform the witness of the possibility of a property claim or, in the case of a victim who is under protection, explain that at the hearing, the witness does not have to answer questions that might reveal his/her identity. They also explain the nature of direct and cross-examination, and alert the witness to the possibility of potentially hostile questions.[414]

After the trial, in the event that, in the Support and Assistance Service's assessment, a victim is in need of professional psychological support, they advise the witness to seek help from one of the non-governmental organizations providing psychological support.[415]

With regard to the victims' rights to be informed about the course of the proceedings, victims are not provided with the opportunity to receive information about relevant procedural actions (the launch or termination of an investigation, for example) or about the completion of legal proceedings, the release of the accused from custody, or information on any prison sentences.[416]

2.1.2. Assistance to Victims on Arrival at Court

Providing assistance to victims, by organizing their arrival to and stay in the place where the trial takes place is an obligation of institutions for victim support.[417] Because most of the victims who come to testify before the Higher Court Department come from other countries, assistance in arranging their arrival is extremely significant. However, this part of the victim support program, especially with those victims coming from BiH, is markedly deficient.

Victims from Serbia are contacted by the Support and Assistance Service by telephone after receiving confirmation that he/she has been summoned to testify. The Support and Assistance Service inquires about the most convenient way for the victim to come to testify, takes care of logistical needs, and for ill or elderly witnesses, assess whether there is a need for a chaperone to accompany the witness. They also arranges for hotel accommodation and transport.[418]

Summonses to testify before the Higher Court Department are sent to witnesses from Croatia using the special procedure for international legal assistance. The Service receives the information about witnesses needs through the Division for Victim/Witnesses Support of the Republic of Croatia. After an interview with the witness, the Division directly communicates with the Support and Assistance Service, informing them whether or not the witness wishes to answer the summons to testify, the way in which he/she prefers to travel, and whether or not he/she has any special needs concerning a chaperone, police protection and the like. If a witness requires police protection, they convey that information to the court panel assigned to the case, which then notifies the police. The Support and Assistance Service points out that their cooperation with the Division is impeccable and that it greatly facilitates witnesses' arrival, because it significantly shortens the time needed for communication when compared to the procedure for international legal assistance.[419] However, they do point out that presently there is no official framework regulating the communication between the Support and Assistance Service and the Division,

414 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013; email correspondence with a representative of the Service for Support and Assistance to Victims and Witnesses, May 5th, 2014.

415 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014; phone Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, April 24th, 2014.

416 Interview with arepresentative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013. A victim's right to be informed about the proceedings is stipulated in Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Article 6.

417 Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Article 9.

418 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13, 2013.

419 International legal assistance between the Republics of Croatia and Serbia on the basis of the Agreement between the FRY and the Republic of Croatia on legal assistance in civil and criminal matters, *Official Gazette of the Republic of Serbia*, International Agreements [Međunarodna pravna pomoć između Republike Hrvatske i republike Srbije na osnovu Ugovora između SRJ i Republike Hrvatske o pravnoj pomoći u građanskim i krivičnih stvarima, *Službeni glasnik Republike Srbije*, Međunarodni ugovori], 9/2011.

and that this communication currently operates on the basis of good collegial relations.[420]

Witnesses from BiH do not receive support from the Support and Assistance Service in this respect, or from the Witness Support Section of the Court of Bosnia and Herzegovina. The reason is that the Support and Assistance Service and the Section interpret the agreement in this area, signed between the Higher Court in Belgrade and the Court of BiH, as relevant and binding only in their cooperation over testimonies via video-conference.[421] There is, however, no justification for this restrictive interpretation of the Agreement, since the document contains no provision that limits the two courts' cooperation in such a way.[422] Because of this interpretation, the Support and Assistance Service has no contact with witnesses from BiH before a trial. Summonses for testimony before the Higher Court in Belgrade are submitted through the procedure for international legal assistance.[423] The summons that the Ministry provides contains no information on the Support and Assistance Service or its activities. Until the day of trial and the appearance of the witness in the courthouse, the Support and Assistance Service has no information as to whether the witness will attend trial or not, and the witness, in turn, knows nothing about the Support and Assistance Service, or even that it even exists.[424]

In the case of Kosovo, the Support and Assistance Service has no contact with witnesses before their arrival at the courthouse. The chamber invites witnesses from Kosovo via EULEX. Members of the EULEX mission act as chaperones to the witnesses until they reach the court building in Belgrade, where the Service takes over.[425]

Following their testimony, representatives of the Support and Assistance Service reimburse the witnesses for their travel expenses. Employees suggest that reimbursement can be allocated inconsistently as the presiding judge decides on every single expense in each case and the same costs are treated differently by different presiding judges. These problems could be avoided if the Support and Assistance Service had a separate budget and if it could independently decide on witnesses' and victims' expenses.[426]

Up to 2010, the HLC played an important role in arranging and organizing the arrival of victims from Croatia, BiH, and Kosovo. The HLC would conduct an initial interview on the needs of the witness, logistical preparation and organization of his/her arrival. [427]

2.1.3. Emotional Support

According to EU standards, emotional support to victims should be provided before, during and – in some cases – after criminal proceedings.[428]

420 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15, 2014

421 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014. The agreement in question is one between the Belgrade District Court and the Court of Bosnia and Herzegovina on understanding and cooperation in the area of witness support and their participation in criminal proceedings, from 2007.

422 For example, Article 6, Paragraph 2 of the Agreement states that the signatories will cooperate in assisting coordination of efforts to organize witness' travel from one state into the other (point 1).

423 Agreement between Serbia and Montenegro, and Bosnia and Herzegovina on Legal Assistance in Civil and Criminal Matters, February 24, 2005, *Official Gazette of the State Union Serbia and Montegro* – International Treaties [Ugovor između Srbije i Crne Gore i Bosne i Hercegovine o pravnoj pomoći u građanskim i krivičnim stvarima od 24. februara 2005. godine, *Službeni list SCG* - Međunarodni ugovori], 6/2005; Agreement between the Republic of Serbia and Bosnia and Herzegovina on Amending the Agreement between Serbia and Montenegro and Bosnia and Herzegovina on Legal Assistance in Civil and Criminal Matters, *Official Gazette of the Republic of Serbia*, International Agreements [Ugovor između Republike Srbije i Bosne i Hercegovine o izmenama i dopunama Ugovora između Srbije i Crne Gore i Bosne i Hercegovine o pravnoj pomoći u građanskim i krivičnim stvarima, *Službeni glasnik Republike Srbije-Međunarodni ugovori*], no. 13/10.

424 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014; phone interview with assistant expert of the Department for Witness Support of the Court of BiH, Amil Džinajlija, May 7th, 2014; phone interview with the representative of the Service for Support and Assistance to Victims and Witnesses, April 22nd, 2014.

425 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th , 2014.

426 *Ibid*.

427 Humanitarian Law Center, Victim/Witness Counselling and Legal Representation: A Model of Support – Project implementation report, February 2007, available at: http://www.hlc-rdc.org/?p=13582. Accessed: 13th May 2014.

428 Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Articles 8 and 9.

Emotional support provided by the Support and Assistance Service to victims is limited to the period of the of victims' attendance at court on the day of their testimonies. The time that Support and Assistance Service representatives spend with the victims before their testimonies is very short, and consequently emotional support for the witnesses is often inadequate. Witnesses usually arrive at the court building between half an hour and one hour before testifying. Representatives use that time to inform them about important aspects of the trial, to encourage them through discussion, and to neutralize any negative emotions that may impair their ability to testify. Support and Assistance Service employees try not to go over the content of the testimony with the witnesses, either before or after their testimony, which helps them to remain impartial.[429]

Support and Assistance Service representatives do not hold meetings with witnesses prior to their arrival, because that is not part of Service's remit. In addition, they do not have their own vehicle and have such limited access to the court's vehicle, that not a single Support and Assistance Service representative has ever used it. Representatives believe that direct communication with witnesses prior to their arrival at the court should fall under their jurisdiction, because in some cases, direct contact has proved very helpful to the victims.[430]

Before the arrival of a victim at court, the Support and Assistance Service has no information about them that could be of help during an initial interview – such as information about how the victim behaved during the investigation, whether they were an eyewitness to the crime, etc. The data they receive contains only contact information and the date of the testimony, along with clarification as to whether this is a victim or some other category of witness. The Support and Assistance Service obtains this scant information from the court clerk or the judicial assistant. Information about the witness could potentially be provided by the chamber that summons the witnesses or in the case of an investigation, the OWCP.[431]

Sometimes, at the request of the victims and with the approval of the presiding judge, a Support and Assistance Service representative remains in the courtroom during the testimony. According to a survey that the Support and Assistance Service has been conducting with witnesses since 2011, 85 percent of victims and witnesses pointed out that during the testimony, the presence of Support and Assistance Service staff was the most important thing to them. Representatives point out that victims and witnesses feel relief when a representative of the Support and Assistance Service remains in the courtroom, and say that their permanent presence in the courtroom would be useful. In addition, a representative should have the authority to intervene, if necessary, as their counterparts in the Department for Witness Support at the Court of Bosnia and Herzegovina do, drawing the attention of the presiding judge to any deterioration in the psychological state of the witness, during testimony.[432]

In some cases, when a victim is visibly upset by the testimony, representatives of the Support and Assistance Service work on 'stabilizing' the victim after the trial – by talking to her/him, they try to help him/her manage the strong emotions brought up by the testimony. After they assess that the victim's condition is stable, the representatives send her/him off from the courthouse. This is where the Support and Assistance Service's engagement ends.[433]

3. Absence of Psychological Support System

Psychological support for victims constitutes one of the basic mechanisms of victim support systems. This form of support is different from emotional support in that the emotional support is aimed at giving attention and care, respect and encouragement to the victim, while the psychological support aims at preventing the victim's re-traumatization and re-victimization. To achieve this, psychological support includes certain psycho-therapeutic procedures, applied in general psychological and psychiatric practice.[434]

Psychological support must be available before, during and

429 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014; phone interview with the representative of the Service for Support and Assistance to Victims and Witnesses, April 22nd, 2014.

430 *Ibid*.

431 Interview with the representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014.

432 *Ibid*. See UNDP, *Needs Assessment in Witnesses and Victim Support in Bosnia and Herzegovina* (Sarajevo, 2011) p. 31.

433 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014.

434 Zoran Ilić, „Psychological preparation of witnesses – victims of torture as a prevention of re-traumatization" *in: Torture in War: Consequences and Rehabilitation: the Yugoslav Experience* [„Psihološka priprema svedoka - žrtava torture kao prevencija retraumatizacije" u: *Tortura u ratu, posledice i rehabilitacija: Jugoslovensko iskustvo*], Ed. Željko Špirić *et al* (Beograd: IAN, 2004), pp. 357-358.

after the trial. Support should be provided by the services within institutions involved in criminal proceedings or, alternatively, those services should, in the absence of adequate conditions, refer the victim to specialized organizations or institutions.[435]

In war crimes cases before the Higher Court Department, victims are not given psychological support. Instead, depending on the country of their origin, victims are sent to specialized institutions, agencies or NGOs. Victims from Croatia, Bosnia and Herzegovina, and Kosovo have access to psychological support systems in their own countries. The backbone of these systems are centers for social work (BiH), mental health institutions (Croatia), and specialized non-governmental organizations (Croatia, BiH, Kosovo).[436] The Service refers victims from Serbia to specialized NGOs.[437] Only a handful of organizations have the capacity for this work. Despite their significant experience in providing psychological, emotional and informational support and assistance to victims of criminal offenses, these organizations are plagued by financial sustainability problems, and some have had to close for that reason.[438] Opinions of the victims about the content and availability of support offered by NGOs has not been the subject of any research so far.[439]

In some cases, the Service contacts witnesses after the trial. If it is a witness from Serbia or Bosnia and Herzegovina who was greatly distressed during their testimony, the Service contacts him/her again within 15 days of the testimony. If it finds that the witness doesn't feel well, the Service refers him/her to the non-governmental organizations involved in victim support programs (Serbia), or to the state agency (BiH).[440]

The Service does not direct the witnesses to centers for social work, which, in keeping with the scope and nature of their activity, ought to play an active role in this area.[441] According to the Victims' Society of Serbia, some centers for social work have expressed a willingness to provide this type of support to victims of war crimes, but the Society is skeptical about their capacity for such work.[442]

4. The HLC's Support Model

Between 2004 and 2008, the HLC, organized for victims and their families to monitor the trials in a number of war crimes cases. Their presence in the first war crimes trials strengthened confidence in the newly established institutions for the prosecution of war crimes in Serbia, and served as a strong incentive for witnesses from the community of victims from BiH, Croatia and Kosovo to participate in the trials in Serbia. The HLC organized their arrival and stay in Belgrade and Niš, and provided psychological support during the process.[443]

435 Directive 2012/29/EU of the European Parliament and of the Council "Establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework 2001/220/JHA", Articles 8 and 9.

436 The Law on Protection of Witnesses under Threat and Vulnerable Witnesses, *Official Gazette of Bosnia and Herzegovina* [Zakon o zaštiti svjedoka pod prijetnjom i ugroženih svjedoka, *Službeni glasnik Bosne i Hercegovine*], 3/03, 21/03, 61/04, 55/05, Articles 5 and 6; UNDP, *Needs Assessment in Witnesses and Victim Support in Bosnia and Herzegovina*, p. 52. See also the web page of the Victim and Witness Protection Office in Croatia: http://zrtveisvjedoci.pravosudje.hr/Default.aspx?sec=128, and of the Kosovo Center for the Rehabilitation of Victims of Torture, http://www.krct.org/web/index.php?lang=en. Accessed: May 12th, 2014.

437 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013; interview with the Director of Victimology Society of Serbia, May 12th, 2014.

438 Interview with the Director of Victimology Society of Serbia; Vesna Nikolić Ristanović "Challenges of providing assistance to victims in Serbia" in *The rights of victims and the EU, challenges of providing assistance to victims* [„Izazovi pružanja pomoći žrtvama u Srbiji", *Prava žrtava i EU, Izazovi pružanja pomoći žrtvama*], Eds. Vesna Nikolić Ristanović and Sanja Ćopić, Belgrade [Prometej], 2011.

439 Interview with the director of the Victimology Society of Serbia, May 12th, 2014.

440 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013 and April 15th, 2014; phone interview with a representative of the Service for Support and Assistance to Victims and Witnesses, April 22nd and 24th, 2014.

441 Phone interview with a representative of the Service for Support and Assistance to Victims and Witnesses, Slavica Peković, April 24th, 2014; on social service centers, see the Law on Social Welfare *Official Gazette of the Republic of Serbia* [Zakon o socijalnoj zaštiti, *Službeni glasnik Republike Srbije*], No. 24/2011, esp Article 10, para. 3, point 14; Articles 24, 29, 41, para. 3, Article 46, para. 1.

442 Sanja Ćopić, "Victim support services in Serbia: survey results", *Temida*, June 2007: 13; Interview with the director of the Victimology Society of Serbia, May 12th, 2014.

443 Proceedings in *Sjeverin*, *Ovčarai I*, *Zvornik*, *The Scorpions*, *Suva Reka* and *Emini* (the latter was held before the Disctrit Court in Niš against two defendants, for the murder of Isa Emini in Priština, May 1999).

Before and after their testimony, the victims followed the whole course of the trial from the public gallery, in the presence of a psychologist. The psychologist was with the victims from the moment of their arrival in Belgrade. Before and after the trial, a psychologist talked with the victims about their expectations, fears, and the reactions of other participants in the process, and helped them to overcome stressful situations during the trial. In addition to this, the psychologist was in contact with the victims between the two elements of the trial, and once the trial had ended. The HLC's legal team explained certain stages of the procedure to the victims and answered their questions and concerns.

Experiences from the application of this model of victim support indicate that the involvement of a psychologist is necessary long before the commencement of the process, as that allows the person giving support the opportunity to get to know the victims and establish a relationship of trust with them. The powerful psychological reactions of the victims who monitored the trials indicate that they need psychological support during the testimony. Their encounter with the defendants and with the unfamiliar surroundings of the courtroom, and their own recollection of the events, are just some of the causes of severe stress that the victims are exposed to.[444]

The conduct of the court guard, which often lacks any understanding and respect for the victims' families while showing empathy with the families of the accused, caused great emotional upset to the victims.[445]

5. Institutional Representatives' Preparedness to Work with Victims

A large number of institutional representatives who come into contact with victims testifying in war crimes trials have not been trained to work with victims. In fact, apart from Service representatives, only a handful of judges, prosecutors, members of the Protection Unit and WCIS have been through this type of training.[446] According to information available to the HLC, the training was a one-off event, given only to certain representatives of the above-mentioned institutions and the Service. Members of the court guard are an exception here – in 2013 they were trained to work with victims and vulnerable witnesses.[447]

A specific example of how institutional representatives without prior training act when dealing with victims, concerns securing the testimony of victims from other countries before the Higher Court Department. In some cases, victims require police escort from the border to the courthouse. For many years this type of protection was provided solely by members of the Protection Unit. According to the representatives of the Service, members of the Unit were well trained to work with victims and often positively influenced victims' ability to shake off fear before their testimony. However, in recent years, in addition to the Protection Unit, other organizational units of the Ministry of the Interior have provided protection to victims. The decision on which unit is to be engaged is made by the Police Director. Due to high turnover of police officers engaged in this work, the officers in direct contact with the victims often lack the necessary sensitivity to work with victims. Thus, it often happens that officers engaged in this work wear uniforms, which, according to representatives of the Service, is unacceptable.[448]

H Protection measures for War Crimes Witnesses

In the last ten years, the system for protecting war crimes witnesses in Serbia has been marked by constant modifications to the legal framework, insufficient implementation of procedural protection measures, and a failure to provide protection to former members of the armed forces who testify in war crimes cases. The Protection Unit does not meet professional standards of conduct and seriously undermines the prospects for war crimes trials in Serbia.[449]

444 Interview with the former HLC psychologist, April 23rd, 2014.

445 *Ibid*.

446 Interview with representatives of the War Crimes Investigation Service, August 6th, 2013; interview with a representative of the Service for Support and Assistance to Victims and Witnesses, May 13th, 2013.

447 Email correspondence with a representative of the OSCE in Serbia, May 13th, 2014; letter of the Higher Court in Belgrade to HLC, Su br. 42/14-111, May 30th, 2014.

448 Interview with a representative of the Service for Support and Assistance to Victims and Witnesses, April 15th, 2014.

449 Interview with deputies of the Prosecutor, May 8th and 9th, 2013; interview with a representative of the OSCE in Serbia, May 31st, 2013; interview with a judge of the Court of Appeal in Belgrade, May 23rd and 28th, 2013; interview with a judge of the Court of Appeal in Belgrade.

Witness protection includes: a) measures to protect the integrity of the witness; b) protection of particularly vulnerable witnesses; c) measures to protect witnesses who are at risk because they are giving evidence. These measures are applied during the execution of procedural actions (procedural protection measures) or independently of these actions (non-procedural protection measures).

1. Procedural Protection

Procedural protection measures apply during trial and during investigations. At the trial, they are implemented by the court, while during the investigation they are implemented by the prosecutor.[450]

Before the 2006 CPC, the legal provisions on the protection of witnesses were formulated in such a way as to only generally prescribe witness protection, without going into its specific modes. These provisions provided that 'the presiding judge, the president of the court or the public prosecutor' take care of the basic protection of witnesses, including the injured party.[451] The 2006 CPC introduced special measures to protect the witnesses in criminal proceedings (measures of procedural protection).[452] Section VII of the new CPC, the application of which in war crimes cases began on January 15, 2012, also provides several measures of procedural witness protection.[453]

1.1. Protecting the Integrity of Witnesses

The court or the prosecutor are obliged to protect the witness from insults and threats, or other forms of assault on his/her integrity that come from other participants in the process. To achieve this, the court may issue a reprimand and a fine of up to 150,000 dinars, while the prosecutor can issue only a reprimand.[454]

In war crimes trials in Serbia, it is not uncommon that the accused and the defense counsel insult the witness; witnesses who receive the status of a protected witness are most commonly subjected to insults.[455] The reaction of the court most often is to deliver an informal warning to the accused or defense counsel, or the court does not react at all. In the investigation phase, a reprimand or a warning is issued by the prosecutor. Due to the confidentiality of the investigation process, the frequency of, and the extent to which prosecutors hand down warnings to defense attorneys for improper conduct toward witnesses is unknown.

In the *Suva Reka* case, the presiding judge allowed the defendant – a Serb police officer in Suva Reka (Kosovo) – to address a Roma witnesses using "ti" (an informal and very personal "you") instead of the appropriate "vi" (a more formal and respectful "you"), which in the opinion of observers who followed this case was disrespectful to witnesses. Following the prosecutor's objection that the way in which the witnesses were treated was unacceptable, the judge said the question was "absolutely irrelevant."[456]

In the *Tenja II* case, during cross-examination, the accused Božo Vidaković grossly insulted the witnesses of the injured party. To one witness he said that he was "not normal," while he addressed the other in an inappropriately superior tone, demanding that the witness "look [him] in the eye." The presiding judge warned him that such treatment of the witness was unacceptable, but did not impose a formal reprimand or other punishment.[457]

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450 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013 Articles 102-111.

451 Criminal Procedure Code, *Official Gazette of the FRY* [Zakonik o krivičnom postupku, *Službeni glasnik SRJ*], 70/2001 and 68/2002, and Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 58/2004, 85/2005, 115/2005, Article 109.

452 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 46/06, 47/09 and 122/08. Articles 107, 110, and Articles 117-122.

453 *Ibid,* Articles 102-111

454 *Ibid*. Article 102, Paragraphs 1 and 2; Goran P. Ilić et al. *Commentary of the Criminal Procedure Code* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 308.

455 Examination of protected witnesses are closed to the public. However, representatives of the Humanitarian Law Center, in the capacity of expert monitors, monitored the testimony of protected witnesses in cases before the Higher Court in Belgrade, and noted that the defendants and their counsel often insult witnesses, while the presiding judge often fails to react adequately.

456 Transcript of the trial of April 5th, 2007, p. 84. Available at: http://www.hlc-rdc.org/Transkripti/suva_reka.html. Accessed: May 13th 2014. Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 24.

457 *Tenja II*, Case, examination of witness Joza Knezevic at the trial on October 10th, 2013; examination of witness Josip Valentić on July 3rd, 2013. Available at: http://www.hlc-rdc.org/Transkripti/tenja2.html. Accessed: May 21st, 2014.

In the *Ćuška* case, the accused were laughing and shouting during the testimony of the witness Fazila Hiseni. The presiding judge warned them informally, asking them to show respect to the witness whose child was killed, and who was still looking for the child's remains.[458] In the same case, Dejan Bulatović, the former chief of security in the Peć Military Department, said he did not know one of the accused and had no knowledge of the crimes in the municipality of Peć, which were the subject of the indictment. Following this, the defense attorney said that given his testimony Bulatović should lose his job at the Ministry of Defense. The presiding judge handed a formal reprimand to the defense attorney.[459]

In addition to reprimands and fines, the court has at its disposal two so-called preventive measures that it can impose when the integrity of a witness had been violated or assaulted: to make the hearing closed to the public, and to remove the accused from the courtroom.[460] The latter was done during the hearing of a witness victim of sexual violence in *Bijeljina*.[461] The first measure – closed session – has never been used as an independent protection measure. Instead, it was administered as part of the protection measure for witnesses with special status (protected witnesses).

1.2. Protecting Highly Vulnerable Witnesses

Measures designed to protect highly vulnerable witnesses were introduced by the CPC that came into force in January 2012.[462] The purpose of these measures is to prevent the re-victimization of witnesses.[463]

According to the CPC, a highly vulnerable witness is one whose vulnerability is the result of his/her age, life experience, gender, health, nature, the manner or the consequences of the crime, or other circumstances.[464] The measures applied for this type of witness are examination through a council, a single judge or the prosecutor (depending on the stage of the proceedings), examination with the help of a social worker, psychologist or other professional, or examination by technical means of video and sound transmission. A highly vulnerable witness can not be confronted with the defendant, unless the defendant requests this and the authorized body allows it, taking into account the degree of sensitivity of the witnesses and the rights of the defendant.[465]

From the introduction of these measures until the end of 2013, only one witness (in the *Ćuška* case), was given the status of a highly vulnerable witness. Examination by a judicial panel was the measure applied in her case.[466] However, it seems that in this case, neither the prosecutor, the court, nor the witness's proxies, acted in a timely fashion to request the status of a highly vulnerable witnesses or some other protection measure (closed session, the removal of the accused, etc.). This witness (G.N.) was 13 years old when she was a victim of sexual violence and was an eyewitness to a crime. Before her hearing, an expert psychiatrist described her as psychologically unstable, prone to suicide, and said there was the potential for "emotional breakdown" during her testimony that would have serious consequences on her health. Moreover, her testimony during the investigation suggested that she had been a victim of sexual abuse, although this was not explicitly mentioned. All of the above, therefore, indicated that this was a highly vulnerable witness, and that her testimony could negatively impact her mental health.

458 *Ćuška* Case (K-Po2 48/2010), examination of witness Fazlia Hiseni at the trial on June 6th, 2013, p. 53, available at: http://www.hlc-rdc.org/wp-content/uploads/2014/04/71-06.06.2013.pdf. Accessed: May 13th, 2014.

459 Transcript of the trial of May 22nd, 2012, p. 17. Available at: http://www.hlc-rdc.org/wp-content/uploads/2012/06/46-22.05.2012.pdf. Accessed: May 13th, 2014.

460 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 363, Paragraph 4 and Article 390, Paragraph 5.

461 See the section: "Protection of Victims of Sexual Violence", p.68.

462 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Articles 103 and 104.

463 Goran P. Ilić et al. *Commentary of the Criminal Procedure Code* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 310.

464 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 103.

465 *Ibid.* Articles 103-104.

466 Transcript of the testimony on November 27th, 2013, p.29. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/05/82-27.11.2013.pdf. Accessed: May 13th, 2014.

Despite all this, witness G.N. didn't receive the status of a highly vulnerable witness until the defense's cross-examination began. It is obvious that in this case the court should have granted the status of a vulnerable witness at the very beginning of the witness's examination, and followed that decision with other protection measures at its disposal. Examination by the judicial panel was applied consistently. The presiding judge issued a formal reprimand to the defense counsel, because it approached the witness directly, instead of asking questions through the panel.[467]

1.3. Protection of Endangered Witnesses

If there are circumstances indicating that a witness, by testifying or answering certain questions, would endanger their own life, health, freedom or property of that of their loved ones, the court may grant to this witness the status of a protected witness.[468] Most often, this pertains to members of the military, paramilitary and police units that participated in the commission of the crime, and also often the case that they themselves were involved in the commission of the crime. The primary purpose of witness protection measures is to protect their identity, and prevent it from becoming public.[469] By the end of 2013, 54 witnesses had been granted such protection measures.[470]

According to the CPC, the measures for protected witnesses are these: closed session, a ban on publicizing the identity of a protected witness, and the withholding of information about the identity of a protected witness from the defendant and his counsel. The latter measure is used only in exceptional circumstances and can be used for no more than 15 days before the commencement of the trial. These measures are implemented by the amendment or redaction of data concerning the identity of a protected witness from the trial record, concealing the appearance of a protected witness or his/her examination in a separate room with voice distortion, or examination of protected witnesses by way of video and audio conference.[471]

Once granted protection, the witness is given a pseudonym used during the process and also in public, instead of his/her authentic identity.[472] A breach of this rule constitutes the criminal offense of a violation of the confidentiality of the proceedings.[473]

By the end of 2013, the identity of protected witnesses had been disclosed in several cases, and the courts did not act in accordance with the law. The most extreme example was in the *Zvornik I* case, in which the president of the judicial panel herself revealed the identity of the witness, and then failed to take adequate steps to mitigate the consequences of her mistake (removal of the name of the protected witness from the transcript).[474]

1.4. Protection of Victims of Sexual Abuse

The specific nature and vulnerability of victims of sexual violence calls for special protection measures in criminal proceedings. This is precisely the reason why international frameworks have developed specific institutional standards and obligations for dealing with victims of sexual violence during court proceedings. Among these measures are closed sessions (exclusion of the public during the testimony), direct testimony by closed circuit television, special rules regarding the assessment of the testimony of the victims (for example, it is not necessary to corroborate the testimony of victims of sexual violence by other evidence, the victim's consent is not grounds for exemption from liability

467 *Ćuška* case, examination of highly vulnerable witness at the trial on November 27th, 2013. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/04/71-06.06.2013.pdf. Accessed: May 13th, 2014.

468 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 105.

469 Goran P. Ilić et al. *Commentary on the Criminal Procedure Code* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 314.

470 Written reponse of the Higher Court in Belgrade, Department of War Crimes, to the HLC's inquiry, May 19th, 2014.

471 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No.72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 108.

472 *Ibid*. Paragraph 2.

473 Criminal Code, *Official Gazette of the Republic of Serbia* [Krivični zakonik, *Službeni glasnik Republike Srbije*], No. 85/2005, 88/2005, 107/2005, 72/2009 and 111/2009, Article 337.

474 Transkript of the trial from May 31st, 2006, p. 2. Available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Zvornik%20I%20za%20sajt/transkripti/27-31.05.2006..pdf. Accessed: May 12th, 2014.

if the victim had been subjected to violence or intimidation or if she/he feared for herself/himself or a person close to them, prior sexual conduct of the victim is not admissible evidence).[475]

With regard to successor states of the former Yugoslavia, in addition to the usual procedural protection measures, Croatia and BiH have adopted a rule rejecting reference to the victims' past sexual life as defense evidence.[476] In Serbia, this norm was intended by the CPC that was in force between 2006 and 2009.[477]

In contrast to the law in BiH and Croatia, the CPC does not contain specific measures for the protection of victims of sexual violence. Hence, only the usual procedural protection measures apply.[478]

When war crimes trials began in Serbia, the courts had only the measure of closed session at their disposal to protect victims of sexual abuse. However, during the testimony of S.T. (in the *Lekaj* case), who was raped as a 14-year-old girl, even this measure was omitted. The state in which S.T. testified was corroborated by the court transcript, which stated that the witness was crying during her testimony.[479]

The status of protected witnesses was granted to victims of sexual violence in two cases – *Skočići* and *The Gnjilane Group*. In the *Skočići* case, the status was given to three victims, who testified from a separate room in a closed session.[480] Two victims in *The Gnjilane Group* also testified under pseudonyms and in a closed session.[481] During the examination, one of the defense attorneys offensively alluded to the witness's previous sex life, and the presiding judge described the manner of cross-examination and impermissible and issued an informal reprimand. In the same case, the defense counsel insulted the protected female witness, telling her that she was "a well-prepared witness," that she had to read her statement, and that someone was helping her to do that. After several warnings, the president fined the defense counsel 200,000 dinars – not for insulting the witness but for violation of the dignity of the court.[482]

A positive example was recorded in the *Bijeljina* case. The court applied the maximum protective measures by removing the defendants from the courtroom, and by examining one of the witnesses in her home town.[483] Another victim of rape in the same case, H.A. due to the trauma she experienced during the commission of the crime, did not want to meet with the accused or to see their photographs. The presiding judge questioned her on the premises of the Embassy of the Republic of Serbia, in Vienna, where the victim resided.

2. Non-procedural Protection

Non-procedural witness protection is achieved by apply-

475 See for example, Article 75 and Article 96 of the Rules of Procedure and Evidence, Article 24 of the UN Convention against Transnational Organized Crime, *Official Gazette of FRY* – International Treaties [*Službeni glasnik SRJ* – Međunarodni ugovori], No. 6/2001 and the Resolution 1212 of the Council of Europe (2000) on rape in armed conflicts, para. 6.

476 See the Criminal Procedure Code of the Republic of Croatia (edited text), *Official Gazette* [Zakon o kaznenom postupku Republike Hrvatske (Uredničći pročišćeni tekst), *Narodne novine*], No. 152/08, 76/09, 80/11, 91/12 – Decisions and Resolutions CCRC 143/12, 56/13 and 145/13, Article 422, Paragraph 1, and the Criminal Procedure Code, *Official Gazette of Bosnia and Herzegovina* [Zakon o krivičnom postupku BiH, *Službeni glasnik Bosne i Hercegovine*], No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, Article 264, para. 1.

477 "No witness or the injured party is to be asked questions relating to his or her sex life and sexual preferences, political and ideological orientation, race, national or ethnic origin, moral criteria, other purely personal and family circumstances, except in extraordinary circumstances, if answers to such questions directly and obviously relate to the need to clarify the essential elements of the crime that is the subject of the proceedings." Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 46/06, Article 107.

478 See the section: "Procedural Protection", p. 66.

479 *Lekaj* Case, the Belgrade District Court, case No. K.V. br. 4/05; witness S.T. testified on December 20th, 2005.

480 *Skočići* Case, the Higher Court in Belgrade, case No. K-Po2 42/2010.

481 *The Gnjilane Group* Case, the Higher Court in Belgrade, case No. K-Po2 33/2010.

482 Humanitarian Law Center, *Report on War Crimes Trials in Serbia for 2010*, p. 30.

483 *Bijeljina* Case, the Higher Court in Belgrade, case No. K.Po2 7/2011, transcript from the trial on October 17th, 2011, p. 26. Available at: http://www.hlc-rdc.org/wp-content/uploads/2011/10/04-Bijeljina-transkrpt-sudjenja-17.10.2011.pdf. Accessed: May 13th, 2014. See also: Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], 58/2004, 85/2004, 115/2005, 46/2006, 79/2009, Article 324.

ing regular institutional mechanisms for the protection of fundamental human rights and freedoms (non-procedural protection in the narrow sense), and through the special protection program.[484] The Law on the protection of participants in criminal proceedings introduced the special protection program into Serbia's legal system in 2005.[485]

2.1. Regular Witness Protection Mechanisms

According to the CPC, witnesses who during proceedings inform the court and the prosecutor that they have been threatened, have no adequate protection because the court and the prosecutor in such situations are not obliged to request police protection for these witnesses. Instead, the law allows the court and the prosecutor to do something in this regard, but doesn't oblige them.[486] If a request is forwarded to the police, the measures that can be used in such cases by the police are the common procedures for the protection of all citizens.[487] The prosecutor is legally obliged to take legal action upon learning of an act of violence against or a serious threat to the witness, or to inform the competent prosecutor.[488]

In several cases, the witnesses – former or active members of the security forces – complained during the trial of having received threats because they were testifying. Only in one case did the Trial Chamber clearly inform the public that it had contacted the police about such threats, while in other cases it is not possible to determine whether the court acted in accordance with its obligations under the CPC. However, the OWCP emphasizes that in such situations the Prosecutor generally complies with the law and notifies the police. Nevertheless, following an HLC inquiry about the specific cases in which the prosecutor had acted in this way, no information was forthcoming.[489] Although the law does not mention that the prosecutor and the court have an obligation to inform the trial participants and the public of the measures taken and whether the police were notified, this practice may well encourage and support witnesses who receive threats or who feel threatened due to what, and how much, they know.

In the *Bytyqi* case, police officers Aleksandar Nikolić and Vukasin Sperlić said during their testimony at the trial that colleagues had threatened them not to testify. Neither during nor after the trial did the Trial Chamber notify the participants in the process whether the police had been informed about this.[490] The Trial Chamber also failed to do so in the *Suva Reka* case, where the witness, an active police officer Velibor Veljković claimed to have been subjected to threats and intimidation.[491]

484 Goran P. Ilić et al. *Commentaryonf the Criminal Procedure Code* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 307.

485 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005; this law provides for the protection of other participants in criminal procedures (Articles 1 and 3).

486 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 102, Paragraph 4, and Criminal Procedure Code, *Official Gazette of FRY* [Zakonik o krivičnom postupku, *Službeni glasnik SRJ*], No. 70/2001 i 68/2002 and Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 58/2004, 85/2005, 115/2005, 85/2005, 49/2007, 20/2009, 72/2009 and 76/2010, Article 109, Paragraph 13.

487 The Law on the Police, *Official Gazette of the Republic of Serbia* [Zakon o policiji, *Službeni glasnik Republike Srbije*], No. 101/2005, 63/2009 and 92/201, Article 75: "If and when there are justifiable reasons, the police will take appropriate measures to protect the victim and any other person who has given or may give information relevant to the criminal proceedings or a person in some way related to these persons, if they are in danger from the offender or other persons"; Goran P. Ilić et al. *Commentary on the Criminal Procedure Code* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 307.

488 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 102, Paragraph 5.

489 OWCP's email response to HLC's inquiry, April 16th, 2014. FHP, IndexIN – 79-F93510.

490 See transcripts from the trial on February 9th, 2007, pp. 13-14, and February 8th, 2007, pp. 12-13. Transcripts available at: http://www.hlc-rdc.org/Transkripti/bitici.html

491 See transcripts from the trial on November 8th, 2006, p. 25 and *passim*; transcript available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Mitrovic_Radoslav_i_dr/08-08.11.2006.pdf. Accessed: May 13th, 2014.

One finds an example of good practice in the *Podujevo II* case, in which a former member of the "Scorpions," Nikola Kovačević, stated in court that he had been threatened by phone before giving statements to the investigating judge.[492] The Trial Chamber contacted the competent Ministry of Interior office and notified the parties involved in the proceedings.[493]

Also, in *Ćuška case*, during his testimony at the trial on January 25th, 2012, witness Zoran Rašković said that he and his family had been threatened, and asked the Trial Chamber to provide protection, because he didn't want, as he put it, to "end up" as some other protected witnesses.[494] The presiding judge took note of the threats, had them entered in the court record, and then informed the public that she had received from the prosecutor, in writing, information that he, too, had been notified of the threats. At the next hearing, the presiding judge informed the public and the parties involved that the threats had been reported to the relevant authorities.[495]

2.2. The Protection Program for War Crimes Witnesses

The Protection Program for War Crimes Witnesses (Protection Program) is part of a broader protection mechanism which, in addition to war crimes, applies to cases of organized crime and crimes against constitutional order and security.[496] In addition to witnesses and cooperating witnesses, the program applies to suspects, defendants, victims, expert witnesses and experts.[497]

The Protection Program is anchored in a solid legal framework. However, allegations of illegal and unprofessional conduct by one of the two most important bodies for the implementation of the Program – the Protection Unit – draw attention to serious problems in the implementation of the Program. These problems point to the astonishing neglect by political authorities of their own obligation to create the institutional conditions for the prosecution of war crimes. Despite sharp criticism from the international community and experts, the authorities have been ignoring this problem completely for years.

2.2.1. The Legal Framework

The Protection Program is aimed at witnesses and persons close to them whose collaboration in providing the relevant information in criminal proceedings puts them at risk. The program aims to ensure the protection of life, health, physical integrity and personal property of such persons.[498] The Protection Program initiated before, during and after the completion of the proceedings.[499]

Commencement, renewal, suspension or termination of the Program is decided by the Committee for Implementation of the Protection Program (the Committee).[500] The Committee consists of three members: a Supreme Court Judge (presently the Supreme Court of Cassation), appointed by the President

492 See transcripts from the trial on November 10th, 2008, pp. 79-80. Available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Podujevo2/06-10_11_2008.pdf. Accessed: May 13th, 2014.

493 The Presiding Judge in this case was the judge Snežana Nikolić-Garotić; see transcript from the trial on November 12th, 2008, p. 54 and from December 11th, 2008, p. 2; transcripts available at: http://www.hlc-rdc.org/Transkripti/podujevo_2.html. Accessed: May 13th, 2014.

494 See transcripts from the trial on January 25th, 2012, pp. 14-18, available at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf. Accessed: May 12th, 2014. There is no reliable way to determine what Rašković alluded to when he said this, but it is reasonable to assume that he was referring to the assassination of Zoran Vukojević, one of the protected witnesses in the assassination of Serbian Prime Minister Zoran Djindjić.

495 Transcript from the trial on January 26th, 2012, p. 79, available at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/36-26.01.2012.pdf. Accessed: May 12th, 2014.

496 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005, Article 5.

497 *Ibid*, Article 3, Paragraph 1, Count 1. According to the CPC (Article 133, para. 3, and Article 298, para. 4), experts provide the necessary technical explanations to the competent authorities in the course of the investigation. These are, among others, forensic experts, transportation experts, medical experts, etc.

498 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005, Articles 1 and 2.

499 *Ibid*. Article 4.

500 *Ibid*. Article 7, para. 1.

501 *Ibid*. Article 7.

of that court, Deputy Public Prosecutor, appointed by the State Public Prosecutor, and the Head of the Unit.[501]

The Committee meets and decides, by majority vote, provided that the member who submitted the request to include a person in the Protection Program, to extend or suspend the Program may not participate in the decision.[502] All the decisions have been made unanimously so far.[503]

The Protection Program affords four measures: 1) physical protection of persons and property; 2) change of residence or relocation to another prison facility; 3) concealing the identity and personal information; 4) change of identity. The Unit decides on the application of the first three measures. Permanent identity change is adjudicated on by the Commission, on the advice of the Unit; this measure can be resorted to, only if the purpose of the Protection Program cannot be achieved by other measures.[504] Employees of the Unit point out that this type of measure has never been applied because of the essentially incomplete legal framework which is not accompanied by the secondary legislative provisions necessary for the implementation of these types of measures. [505]

Furthermore, in contrast to persons associated with cases of organized crime, not a single person in the care of the Protection Program regarding the prosecution of war crimes, has been relocated abroad so far. The Unit's employees state that the one family that was offered the chance to be relocated abroad, declined the offer because it was satisfied with the existing relocation arrangements. According to representatives of the Unit, there was no need for this measure in other cases.[506]

However, the OWCP cites the example of a witness, Dejan Demirović, a former member of the Scorpions, who testified in the *Podujevo I and II cases*. After completion of criminal proceedings, Demirović left the Protection Program because the Unit ignored several of his requests to be relocated to a third country. Requests for Demirović's relocation were sent by the OWCP as well.[507]

Inclusion in the Protection Program may be proposed by a prosecutor, a judge for preliminary proceedings, the presiding judge or a participant in the process; the Protection Unit can do so, after the conclusion of criminal proceedings.[508] The Agreement between the unit and the protected person about his/her joining the Program is formally concluded with the commencement of the implementation of the Protection Program. [509]

Depending on the types of measures that are implemented, the protected person has the right to economic, social, legal and psychological support.[510] The Protection Unit's obligations to ensure that these support measures are implemented are set out in the Agreement for the Inclusion in the Protection Program, but the content of these obligations is not defined by law. According to Protection Unit representatives, the obligations concern monthly compensation in the amount of the national average earnings in the public sector for the protected person and his/her spouse, health care, education opportunities, and a secure living space with all costs covered.[511]

2.2.2. The Protection Unit

The Protection Unit is a specialized unit within the Ministry of the Interior.[512] It is managed by the Head of the Unit, and

502 *Ibid*. No. 85/05, Article 10.

503 Interview with a representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013.

504 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005, Article 15.

505 Interview with a Deputy Prosecutor for War Crimes, May 20th, 2013; Interview with a representative of the OSCE Mission to Serbia, May 31st, 2013; Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013.

506 Interview with representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013; written response of the Protection Unit of the Serbian Ministry of Interiorto HLC's inquiry, 03/8, br 2-57/14, May 7th, 2014.

507 Interview with a Deputy Prosecutor for War Crimes, May 20, 2013.

508 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005, Article 25.

509 *Ibid*, Article 29, para. 2.

510 *Ibid*, Articles 12, 15 and 30, para 1, count 5.

511 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10, 2013; written response of the Protection Unit of the Serbian Ministry of Interior to HLC's inquiry, 03/8, br 2-57/14, May 7, 2014.

512 The Law on the Protection of Participants in Criminal Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], 85/2005, Article 12, Paragraph 1.

appointed by the Minister of the Interior.[513] The Director of the Police is the direct superior of the Head of the Unit.[514] Despite solid human resources and technical conditions, for years the Unit's engagement in the protection of former members of the Serbian military and police forces has been the subject of heavy criticism among experts and relevant international institutions.

The Protection Unit has significant powers and responsibilities in relation to the persons it protects, including their rights and freedoms, and the provision of basic necessities. However, the legal framework establishes ineffective control mechanisms for monitoring the work of the unit. Inadequate legal provisions and the political indifference of the authorities to the numerous objections to the Protection Unit's work, have a detrimental effect on the prosecution of war crimes. In several cases, the problems associated with the protection of this category of witness endangered the lives of protected persons and prevented the administration of justice in the trial of war criminals.

2.2.2.1. Human Resources

When it was established, the Protection Unit had 200 members. The current number of members is confidential. According to Protection Unit officials, the number of employees is optimal with respect to the scope of the work in war crimes and organized crime cases, with which the unit is in charge. The officials do note, however, that due to internal delegation and redistribution of assignments within the Ministry of the Interior, they have often performed tasks that are not formally under their jurisdiction. Thus, until 2010, they guarded government officials and the ICTY indictees who, following a decision of the Court, were on temporary release. Until November 2012, they provided the Prosecutor's security as well.[515]

The average age of Protection Unit members is between 35 and 40. The Unit lacks psychologists, sociologists and medical staff to be able to perform its duties properly.[516]

While those in professional circles largely believe that the very specific nature of the Protection Unit's competence requires a different approach to the selection and appointment of its members, the employment criteria and conditions in the unit are identical to those generally applicable to employment criteria in the police.[517] The consequence of this, is that among members of the Protection Unit there are persons who, as members of the armed forces of Serbia, participated in the conflicts of the 1990s, including units that committed crimes.[518] Representatives of the Protection Unit have confirmed that the unit initially employed members of the Special Operations Unit (JSO), but they were eventually removed from the Unit.[519] Today, the Unit still employs

513 *Ibid*, Article 13, Paragraph 2.

514 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10, 2013.

515 *Ibid*.

516 *Ibid*.

517 Goran P. Ilić et al. *Commentary on the Law on the Protection of the Participants of Criminal Proceedings* [Goran P. Ilić i dr., *Komentar Zakona o programu zaštite učesnika u krivičnom postupku*] (Belgrade: OSCE, 2006), p. 62.

518 *Ibid*. The Council of Europe, "Witness protection as the foundation of justice and reconciliation in the Balkans," Report of the Special Rapporteur Tomas Gardetto, November 29th, 2010, para 119; The Council of Europe, Thomas Hammarberg's Report, Council of Europe Commissioner for Human Rights, following his visit to Serbia on June 12th-15th, 2011, Para. 18-23.

519 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013. The Special Operations Unit was established in May 1991, initially called *Knindzas*, then the *Special Purpose Unit*, and then the *Special Operations Unit of the Republic of Serbian Krajina and the RSK* Ministry of Interior, only to be renamed the *Red Berets* in August 1991. In August 1993, renamed the *Unit for Anti-Terrorist Operations*, it officially became part of the Serbian State Security. In 1996 it changed its name to the *Special Operations Unit* (JSO). The unit participated in the commission of crimes in Croatia, Bosnia and Herzegovina, and Kosovo. Three active members of the JSO participated in the assassination of the Serbian Prime Minister Zoran Đinđić. The unit was disbanded by the decision of the Ministry of the Interior on March 25, 2003; see: ICTY, *Prosecutor v. Jovica Stanišić and Franko Simatović*, Trial Chamber, Case No. IT-03-69, para. 1423 and 1443; ICTY, Trial Chamber, *Prosecutor v. Jovica Stanišić and Franko Simatović*, IT-03-69, para. 46-64, 65-80, 81-85, 108-137; ICTY, Trial Chamber, *Prosecutor v. Šainović et al*, IT-05-87, para. 733, and 735; ICTY, Trial Chamber, *Prosecutor v. Vlastimir Djordjević* [IT-05-87] para. 271; ICTY, *Prosecutor v. Vlastimir Đorđević*, IT-05-87, Exhibit D.00933; ICTY, *Prosecutor v. Šainović et al.*, IT-05-87, Exhibit 6D01330; Judgment of the Department for Organized Crime of the District Court in Belgrade, KP5/03; the Decision on the Special Operations Unit of the Ministry of the Interior, *Official Gazette of the Republic of Serbia* [Odluka o jedinici za specijalne operacije Ministarstva unutrašnjih poslova, *Službeni glasnik Republike Srbije*], No. 31, March 25th, 2003.

members who were involved in formations that took part in the conflict, but they are not high-ranking officials of the Unit.[520]

About 85 per cent of Protection Unit's members went through some form of vocational training, such as close protection, driving armored vehicles, anti-stress training, etc. The training was organized by the government or international organizations. Unit employees believe additional training to be necessary.[521]

2.2.2.2. Budget and Technical Equipment

The Protection Unit does not have its own budget; instead, it receives all of its funds from the Ministry of the Interior. The Protection Unit proposes its annual budge to the Ministry of Interior, based on an analysis of expenditures for the previous year. The unit is generally satisfied with the funds provided although its representatives stress that it would be helpful to use any funds carried over from the previous year to purchase additional equipment, as they explain is the practice in Croatia and some other Western European countries. The current practice is such that the Protection Unit is obliged to return all unused funds.[522]

The salaries of Protection Unit members are the same as the salaries of other members who work in other departments of the Ministry of Interior.[523]

The Protection Unit's technical equipment requires some updating. There are about 35 vehicles, all of which have long been in use. Three vehicles are armored, but employees reasonably fear that such vehicles are readily recognizable precisely because they have been used for such a long period of time. In addition to newer vehicles, the Protection Unit requires modern encrypted (protected) phones, new portable computers, and a central server holding the data necessary for their work.

Modern equipment was to be obtained through the European Commission's support program and donations intended for the Protection Unit in the Western Balkans.[524] However, at the time of writting this report the equipment under this program has not yet been donated.[525]

2.2.2.3. Protection of Victims (Injured Party Witnesses)

The Protection Unit provides protection for witnesses of injured parties who come from other countries to testify before the Higher Court Department. There has been no problem so far concerning this aspect of the unit's operation. According to one of the victims in the *Podujevo II* case, Protection Unit members treated her professionally during her stay in Belgrade. Her only criticism concerned the lack of information victims received on the number of members of the unit protecting them, on whether or not they were armed, with whom they were cooperating (e.g. local police) and with whom they themselves should communicate during their stay in Belgrade.[526]

2.2.2.4. Protection of Former Members of Serbian Forces

Former members of the military and police who were involved in the conflict are the most valuable source of information on crimes, because these witnesses to crimes can accurately identify the perpetrators. At the same time, they are the most vulnerable category of witnesses in Serbia. The Protection Program has proved to be ineffective for this type of witnesses, because some members of the Protection Unit are openly hostile toward them, and this occasionally results in illegal actions. The experiences of three former members of the Serbian forces during the conflict in Kosovo, who were in the Protection Program, clearly illustrate the extent of this problem.

520 Interview with a representatives of the Protection Unit, May 10, 2013.

521 *Ibid*.

522 *Ibid*.

523 *Ibid*.

524 Available on the Europewn Commission web page: http://ec.europa.eu/enlargement/pdf/financial_assistance/ipa/2012/multi-beneficiary/pf5_ipa-2012_winpro-ii_final.pdf. Accessed: May 13, 2014.

525 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10, 2013.

526 Saranda Bogujevci's email response to HLC's inquiry, April 25, 26, 2014.

A witness in the *Leskovac Group* case,[527] B.Z., spoke of the threats, insults, humiliation and psychological harassment to which members of the Protection Unit subjected him and his family. The many acts carried out made life impossible for him and his family. According to B.Z. members of the Protection Unit, including the Unit Head, his associate and deputy, openly encouraged him to cease testifying. After two years in the Protection Program, witness B.Z. and his family abandoned the Program and returned to their home town. There, B.Z. was subjected to constant threats and harassment, and eventually sought, and received, asylum in a foreign country. The case in which he was to testify is pending.[528]

Zoran Rašković, a witness in the *Ćuška* case, describes almost identical treatment. He spoke publicly, during his testimony at the trial on January 25th, 2012, of having been directly threatened by a high-ranking police official in charge of his security, because of his decision to testify against members of the Serbian forces.[529] While involved in the Program, Rašković was housed in extremely poor conditions, in an apartment with no heating during the fall and winter.[530]

Slobodan Stojanović another witness in *The Leskovac Group* case was also included in the Protection Program. His involvement in the Program was terminated after four months, following his repeated attempts to alert the authorities' to the poor standard of his living conditions and to the unprofessional treatment he was being subjected to by the Unit.[531]

Representatives of the Protection Unit deny all these allegations, although they admit that some individuals involved in the Protection Program did file "minor complaints" about their work, noting that the unit members who behaved improperly were reprimanded by the Head of the Unit, although they gave no details on the type of sanction imposed.[532]

2.2.2.5. Lack of an Effective and Independent Control Mechanism

Serious allegations of misconduct by the Protection Unit have not been adequately investigated, as mechanisms for the oversight and control of the Program's are either not in place or are inadequate.

The Law on the Protection of the Participants of Criminal Proceedings has failed to establish a mechanism for the verification of individual complaints filed by persons protected by the Program, or for checking the circumstances of their decision to leave the Program. The only form of verification of these allegations is an internal investigation into allegations of wrongdoing by individual members. However, this is a non-transparent and deficient process, because it is not public and because the Unit itself examines complaints of unprofessional conduct filed against its members. Moreover, it is unclear whether this procedure is even prescribed by any legal act, since the Protection Unit, when asked, failed to specify the act in which this procedure is laid out. Instead, they stated that, "during an initial interview with protected persons, the procedure was specified, as was their right to file a complaint about anything with regard to their treatment by the Protection Unit."[533] The unit stresses that

527 At the request of the OWCP, the Serbian Ministry of the Interior arrested on March 12, 2009 four police officers, against whom the HLC had filed a criminal complaint. The next day, on March 13, 2009, the OWCP filed to the investigating judge a request for investigation against five members of the 37th unit of the PJP, on suspicion that they had committed a war crime against civilians. Already on March 14, 2009, the investigating judge issued a decision to open an investigation against the said five members of the Serbian Ministry of the Interior. After the hearing, four of them were given one-month custody. The key evidence against these defendants were the statements of four police officers, former members of the 37th PJP unit.

528 Humanitarian Law Center, *Report on War Crimes Trials in Serbia for 2010*, "Remarks by the HLC's protected witness," available at: http://www.hlc-rdc.org/wp-content/uploads/2014/04/Izvestaj_o-domacim-sudjenjima-za-r-zl_srpski.pdf. Accessed: May 13th, 2014.

529 Transcript of the trial in *Ćuška/Qushk*, January 25th, 2012, Available at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf. Accessed: 13th.May 2014.

530 "Threats from the police, humiliation from the Prosecution," *E-novine*, February 4th, 2012: http://www.e-novine.com/mobile/srbija/srbija-tema/58452-Pretnje-policije-ponienja-Tuzilatva.html. Accessed April 9th, 2014.

531 Humanitarian Law Center, Report on illegalities in war crimes trials in Serbia (Belgrade, September 2011), 57.

532 Interview with representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013.

533 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013; written response of the Protection Unit of the Serbian Ministry of Interiorto the HLC's inquiry, 03/8, br 2-57/14, May 7th, 2014.

persons involved in the Program may file a complaint to the Commission and to the OWCP, but has not provided details about this procedure, nor do they cite the legal document that authorizes it.[534]

The Commission for the implementation of the Protection Program submits its annual reports to the National Assembly of the Republic of Serbia – this constitutes the only form of oversight of this body.[535] However, the specified procedure is vague and does not identify the competent committee, nor does it prescribe further procedures and responsibilities to be undertaken by the competent committee with regard to the report. In practice, this legal solution has therefore led to a complete lack of oversight of the work of the Commission.

As of 2006, the Commission has been submitting its annual reports to the Committee on the Judiciary, Public Administration and Local Self-Governance, as well as to the Committee on Security and Internal Affairs of the National Assembly of the Republic of Serbia (these were previously the Committee on Justice and Administration, and the Committee for Defense and Security). According to the National Assembly's interpretation of the Law on the Protection of Participants in Criminal Procedure, the competent committees are not obliged to consider the reports of the Commission.[536] The Committee on Security and Defense nevertheless reviewed and formally adopted one of its reports (The Report for 2009).[537]

The Protection Unit submits its annual report to the Director of the Police.[538] The HLC has not been able to obtain the Police Director's assessment of the work of the Unit because the Office of the Police Director has repeatedly ignored the HLC's requests for information regarding the Unit.

In the case of the witness Slobodan Stojanović, after his involvement with the Protection Program had been terminated, the Ombudsman, responding to Stojanović's complaint, initiated a procedure for assessing the legality of the Protection Unit's actions, but the process has proven unsuitable.[539] Having heard both sides, the Ombudsman decided that it was impossible to determine whether any illegalities had been committed by the Protection Unit. The Ombudsman then urged Stojanović to "determine the disputed facts through an adversarial court procedure."[540]

2.2.2.6. Indifference of State Authorities to the Witness Protection Program

International governmental and non-governmental organizations have expressed their concern about the serious allegations unprofessional conduct on the part of the Unit members. Among these organizations are the European Commission,[541] the European Parliament,[542] the Council of

534 *Ibid*.

535 The Law on the Protection of Participants in Criminal Proceedings, Official Gazette of the Republic of Serbia [Zakon o programu zaštite učesnika u krivičnom postupku, *Službeni glasnik Republike Srbije*], no. 85/05, Article 11.

536 Response of the National Assembly of the Republic of Serbia to HLC's request for access to public information, November 17, 2013, No. 9-4147/13.

537 *Ibid*.

538 Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10, 2013.

539 The Ombudsman is an independent body that, within its jurisdiction, among other, protect the rights of citizens and controls the work of the state administration, ensuring the protection and promotion of human rights. The Law on Ombudsman, *Official Gazette of the Republic of Serbia* [Zakon o Zaštitniku građana, *Službeni glasnik Republike Srbije*], No. 79/2005 and 54/2007, Article 1, paragraphs 1 and 2. Action by civil complaints, or upon the initiative of the Ombudsman, is regulated by Articles 24-31 of this Law.

540 Ombudsman's written reponse to Slobodan Stojanović, del. No 160004, June 5th, 2013.

541 From its first report on Serbia's progress towards the EU accession in 2005, the European Commission expressed concerns regarding the witness protection system. The report for 2009 contained a remark that specifically addressed the problem of the intimidation of witnesses who testified about the atrocities committed in Kosovo. The report for 2012 explicitly states that the problems in witness protection prevent the completion of sensitive cases. The reports are available in English at: http://ec.europa.eu/enlargement/countries/strategy-and-progress-report/index_en.htm. Accessed August 27, 2014.

542 The European Parliament Resolution on the European Integration of Serbia, March 29th, 2012, para 20. Available at http://www.europarl.europa.eu/sides/getDoc.do?pubRef=-%2f%2fEP%2f%2fTEXT%2bTA%2bP7-TA-2012-0114%2b0%2bDOC%2bXML%2bV0%2f%2fEN&language=EN. Accessed June 11th, 2014.

Europe,[543] the OSCE Mission to Serbia,[544] and Amnesty International.[545] The OWCP also has publicly expressed complaints about the Unit's operation.[546] The reports and the findings of these organizations and institutions often suggest that, in order to eliminate the irregularities, the Unit should be re-assigned from the Ministry of the Interior to the Ministry of Justice.

Despite criticism of the work of the Unit, much of which dates back to the very beginning of its work, the institutions of the Republic of Serbia have taken no action to rectify these problems.[547] They have remained silent even after individual protected persons addressed them directly – persons who had the option of tuning to another institution while involved in the Protection Program. Witnesses B.Z. and Slobodan Stojanović unsuccessfully addressed their issues, among others, the President of the Republic, the Minister of Justice and the Minister of the Interior, and drew their attention to the problems they faced while in the Program.[548]

The flaws of the Witness Protection system are perhaps best illustrated by the response of the Police Director, following the OWCP's protests concerning irregularities in the work of the Unit. The Director of the Police told OWCP representatives that he was powerless to implement any measures, because the Head of the Unit was related to a senior official in the ruling Socialist Party of Serbia.[549]

I Defense

Currently, the defense of persons accused of war crimes in Serbia is only of marginal interest among relevant national and international actors, although the right of the accused to effective and competent defense, constitutes one of the basic requirements for a fair trial and for the credibility of judicial proceedings.

The circumstances in war crimes cases which significantly reduce the effectiveness of defense, and consequently the right to a fair trial in Serbia, are the lack of any criteria for competence for defense attorneys in the realm of international humanitarian law, the problems of financing the defense, and poor access to sources of evidence in other countries. Another reason why the defense is often relegated to the background in war crimes cases is the unprofessional behavior of some defense lawyers, who have not been reprimanded or punished by the Bar Association.

1. Defense Attorneys' Competence

Continuous professional development for defense counsel in matters of international humanitarian law is a prerequisite for the effective defense of war crimes indictees.[550] This is because of the complex nature of war crimes trials, and the limited opportunity to acquire knowledge and practice in the field of international humanitarian law in the domestic courts, as well as from constant evolution of this branch of law. However, in practice, expertise and experience in this area of law is not a condition for entry into the circle from which defense counsels are chosen for a particular war crimes case. Indictees in war crimes cases can choose any lawyer from any discipline of law.[551] Lawyers who handle war crimes cases in Serbia gain knowledge in this area solely

543 The Council of Europe, "Witness protection as the foundation of justice and reconciliation in the Balkans," Report of the Special Rapporteur Tomas Gardetto, November 29th, 2010, para. 113-124; The Council of Europe, Report by Thomas Hammarberg, Council of Europe Commissioner for Human Rights, following his visit to Serbia, June 12th-15th, 2011, para. 18-23

544 "OSCE Mission concerned about threats to witnesses" (Press Release), February 2nd, 2012. Available at: http://www.naslovi.net/2012-02-02/beta/misija-oebs-zabrinuta-zbog-pretnji-svedocima/3149268. Accessed: May 12, 2014.

545 Amnesty international, Annual Report for 2013, Serbia. Available at http://www.amnesty.org/en/region/serbia/report-2013. Accessed: April 10th, 2014.

546 Branka Trivić, „Witnesses intimidated by their protection units" [„Svedoke zastrašuje jedinica za njihovu zaštitu"], Radio Free Europe, December 27th, 2011. Available at: http://www.slobodnaevropa.mobi/a/svedoke_zastrasuje_jedinica_za_njihovu_zastitu/24435346.html. Accessed May 12th, 2014.

547 See: The European Commission Progress Report on Serbia's accession to the EU in 2006, p. 10. Available at: http://ec.europa.eu/enlargement/pdf/key_documents/2006/nov/sr_sec_1389_en.pdf. Accessed: May 13th, 2014.

548 Humanitarian Law Center, *Report of the illegalities in war crimes trials in Serbia* (Belgrade, September 2011), 69. Interview with the representatives of the Protection Unit of the Serbian Ministry of Interior, May 10th, 2013.

549 Interview with deputy of the Prosecutor, May 20th, 2013.

550 Interview with a representative of the OSCE Mission to Serbia, May 31, 2013; interview with the defense attorney, May 14, 2013.

551 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 73.

through personal initiative and enthusiasm.[552]

As regards defense counsel appointed by the court and the prosecutor, the law provides more stringent criteria in terms of their expertise and experience. In practice, however, the list of court-appointed defense lawyers may include lawyers without any training in international humanitarian law.

According to the Law on War Crimes Prosecution, the court-appointed defense counsel must have "at least 10 years of professional experience in the field of criminal law and [must] possess the necessary knowledge and experience in the field of international humanitarian law and human rights."[553] Fulfillment of these conditions is determined by the Bar Association, which submits a list of lawyers who meet these criteria to the court. However, according to data provided by the Bar Association of Serbia, it is sufficient to submit a "certificate of training in the field of human rights," but not necessarily international humanitarian law, to be included on the list of court-appointed defense lawyers in war crimes cases.[554]

An example of a successful and transparent mechanism for encouraging professional development that contributes to better defense of the accused, was established in BiH, through the Criminal Defense Section.[555] Criteria requiring expertise and mandatory continuing education are a prerequisite for war crimes defense in BiH, regardless of whether defense lawyers are elected or appointed.[556]

Until specialized institutions for war crimes trials began to operate, a negligible number of lawyers in Serbia had the opportunity to represent defendants in war crimes proceedings before the courts of general jurisdiction and the ICTY.[557] Between 2007 and 2010, the OSCE organized several defense counsel training cycles. The training covered substantive and procedural issues, as well as the skills necessary for successful defense (such as, creating a defense team, devising a defense strategy, etc.). The OSCE identified selection of lawyers as a problem, given that a large number of lawyers are allowed to – and do – act in these cases.[558]

In order to improve the expertise of lawyers, the Bar Association of Serbia, the Department of Criminal Justice and the Department of International Law established the Bar Academy in 2013. By the end of 2013, the Academy had organized training cycles focused on the implementation of the CPC.[559]

2. Unprofessional Conduct of Some Defense Counsels

In war crimes cases, defense counsels often tend to obstruct or delay proceedings to the detriment of the defendant.[560] Furthermore, some defense attorneys often treat the witnesses, victims and victims' legal representatives unprofessionally and disparagingly.[561]

During the trial in the *Gnjilane Group* case, the defense counsel shouted at protected female witnesses C1 and C2, and insulted them, resulting in C2 becoming visibly upset during her testimony. Some defense lawyers told her that she had been told to say what she said, that she was reading her statement and that someone had helped her write it.[562]

552 Interview with the defense attorney, May 14, 2013; interview with the defense attorney, May 22, 2013.

553 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 14, paragraph 1.

554 Interview with a representative of the OSCE Mission to Serbia, May 31, 2013; response of the Bar Association of Serbia to HLC's inquiry, No. 441/14, May 22, 2014.

555 Criminal Defense Section within the Ministry of Justice is the institution that ensures the highest standards of defense in the war crimes trials in Bosni and Herzegovina. For more details, see: http://www.okobih.ba.

556 Rules of amendments to the Rules of Procedure of the Court of Bosnia and Herzegovina, July 26, 2011, Article 2.

557 See section: "Cases before the Courts of General Jurisdiction", on p. 82.

558 Interview with a representative of the OSCE Mission to Serbia, May 31th, 2013; Email correspondence with a representative of the OSCE Mission to Serbia, June 13th, 2014.

559 Reply by the Bar Association of Serbia to HLC's inquiry, No. 441/14, May 22nd, 2014.

560 *Ibid*; interview with OWCP deputies, May 8th and 9th, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

561 See HLC's reports on war crimes trials for 2011 and 2012.

562 Humanitarian Law Center, *The Report on War Crimes Trials in Serbia for 2010 (*Belgrade, April 2013), p. 30. Available at: http://www.hlc-rdc.org/wp-content/uploads/2014/04/Izvestaj_o-domacim-sudjenjima-za-r-zl_srpski.pdf. Accessed: May 13th, 2014.

A striking example of defense counsel misconduct aimed at obstructing the proceedings was recorded in the *Lovas* case. The defense attorney of one of the accused took part in the trial, although he knew he was not allowed to do so, because his name had been deleted from the directory of lawyers. For this reason, certain evidentiary actions had to be repeated. The same individual had often hindered the work of the court in the past, interrupting his own client and responding on his behalf to his questions. Because of the continuous disturbance in the courtroom, which he continued even after having been warned and fined several times, the court removed him from the proceedings.[563]

In some cases, defense attorneys insulted and disparaged the attorneys and legal representatives of the victims, attempting to deny them their right to participate in the proceedings.[564] In addition, defense lawyers sometimes use the courtroom to express their political views and the political views of the defendants.[565]

According to the Law on the Bar, lawyers are subject to disciplinary proceedings in the event of both serious and minor damages to the reputation of the legal profession. Such situations are regulated by the statute of the Bar Association.[566] The Statute of the Bar Association of Serbia considers misconduct against the court, witnesses and experts, a serious breach of duty, which damages the reputation of the legal profession, and which may be punished by a fine or removal from the directory of lawyers.[567] Disciplinary proceedings are initiated by a Disciplinary Prosecutor of the Bar Association, on the basis of an application submitted by an individual or a governmental body.[568] In addition, if a sentence for disrupting the order in the courtroom or the removal of a lawyer from proceedings is handed down, the CPC obliges the presiding judge to inform the Bar Association of such actions. In this case, the Bar Association is obliged to inform the court of the measures it has taken.[569] However, so far no disciplinary action has been initiated against any lawyer in any war crimes case.[570]

3. Problems Financing the Cost of Defense Counsels

Engaging a defense lawyer in war crimes cases is expensive, and charges are among the highest in the Bar's tariff list, due to the complexity of war crimes cases and due to the high prison sentences for these offenses. Defense costs include the costs of the defense of the accused at the preliminary investigation and the investigative process, and the presence of an attorney for any procedural action[571], regardless of whether it took place or not, an interview with the defendant who has been deprived of liberty, the defense at the trial or the hearing, preparation of submissions, the submission of legal appeals and extraordinary legal submisions remedies, and the costs of carrying out activities outside the defense counsel's office. According to the Bar tariffs, the compensation for defense at a trial amounts to 61,500 RSD, for preparing an appeal 120,000 RSD, and for other submissions 60,000 RSD.[572]

563 Transcripts of the trial in *Lovas*, June 24th, 2009, pp. 3-4. Available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/58-24.06.2009.pdf. Accessed: May 13th, 2014.

564 Humanitarian Law Center, *The Report on War Crimes Trials in Serbia for 2012 (*Belgrade, April 2013), p. 11. Available at: http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, accesed May 13th 2014.; case *Ćuška/Qyshk*, transcript from the trial of December 20th, 2012, p. 26. Available at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Cuska/1%20Cuska%20Transkript%20sudjenja-20.12.2010..pdf. Accessed: May 13th 2014.

565 Humanitarian Law Center, *Report on War Crimes Trials in Serbia for 2012* (Belgrade, April 2013), p. 11. Available at: http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, accesed May 13th 2014.

566 The Law on the Bar [Zakon o advokaturi *Službeni glasnik Republike Srbije*], 31/11 and 24/12, Article 75.

567 The Statute of the Bar Association of Serbia, *Official Gazette of the Republic of Serbia* [Statut Advokatske komore Srbije, *Službeni glasnik Republike Srbije*], 85/11, 78/12 and 86/13 Article 241, Paragraph 2, Count 15 and Article 242.

568 *Ibid.* Article 201.

569 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014, Article 370, Paragraph 3 and Article 372, Paragraph 1.

570 Reply by the Bar Association of Serbia to HLC's inquiry, No. 441/14, May 22nd, 2014; interview with a defense attorney, May 14th, 2013; interview with a defense attorney, May 22nd, 2013.

571 The procedural action, pursuant to the Bar Tariffs, means any action by the police, the prosecutor or the court about which a minute must be compiled.

572 The tariff on cost reimbursement for attorneys, issued by the Steering Committee of the Bar Association of Serbia, *Official Gazette of the Republic of Serbia* [Tarifa o nagradama i naknadama troškova za rad advokata, *Službeni glasnik Republike srbije*], No. 12/2012. Available at: http://www.advokatska-komora.co.rs/propisi_lat/TARIFA_10032012.pdf. Accessed May 13th, 2014.

The long duration of these cases (an average of four years from the start of the investigation until the final judgment) suggests that the accused need significant resources for their defense. Often, in the course of the proceedings, the accused terminate their attorney's services because they are unable to bear the costs of the defense. In such situations, the court often appoints the same attorney in the capacity of an official court-appointed attorney.[573]

Court-appointed attorneys face serious problems in receiving reimbursement for their services. The prevailing practice in the Higher Court Department is to approve the expenses of court-appointed attorneys in stages throughout the duration of the procedure.[574] However, often, because the courts have limited funds, lawyers' expenses are often reimbursed as late as one year from the time they were incurred.[575] It should be added that, according to the Regulations on remuneration for court-appointed attorneys, the amount paid to court-appointed attorneys is 50% of the fee level in the Bar's published tariff.[576] Because of all these circumstances, lawyers, especially those with more expertise and experience, have little incentive to act as court-appointed attorneys in war crimes cases.[577]

The novelty in the implementation of the CPC, which has been in effect since January 2012, is that the defendant and the defense counsel may collect evidence for the defense in the form of procedural actions during the investigation.[578] However, the costs incurred in carrying out these actions are not covered as part of the proceedings costs.[579] Hence, low income defendants cannot finance the collection of evidence in their defense, and hence the fundamental principle of adversarial criminal proceedings is violated – the underlying principle of 'equality of arms.'[580]

4. Defense Access to Evidence Abroad

The unequal position of the defense in relation to the plaintiff and the prosecutor is reflected in the collection of evidence during the investigation – in particular, evidence located on the territory of other states.[581] In the absence of appropriate international agreements, lawyers collect their evidence on their own initiative, using their own resources.[582]

J The Injured Party in War Crimes Proceedings

The injured party is a person whose personal or property rights have been infringed upon or threatened by a criminal offense.[583] Among the rights allowing the victim an active role in the process are the following: the right to attend the examination of witnesses and experts in the investigation; the right to suggest that the prosecutor ask the defendant, witness or expert certain questions;[584] the right to briefly explain,

573 Interview with a defense attorney, May 14th, 2013; interview with a defense attorney, May 22nd, 2013.

574 Interview with a judge of the Appeals Court in Belgrade, May 23rd and 28th, 2013; interview with a former judge of the Higher Court in Belgrade, April 28th, 2013.

575 Interview with the judge of the Appeals Court in Belgrade, April 28, 2013; interview with the defense attorney, May 22, 2013.

576 Rules on awards for court-appointed defense attorneys *Official Gazette of the Republic of Serbia* [Pravilnik o visini nagrade za rad advokata za odbranu po službenoj dužnosti, *Službeni glasnik Republike Srbije*], no. 23/2014.

577 Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 34.

578 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 301 Goran P. Ilić et al. *Commentary on the Criminal Procedure* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 646.

579 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Section XIII; interview with a defense attorney, May 14th, 2013; interview with a defense attorney, May 22nd, 2013.

580 "Equality of arms requires that each side has a reasonable opportunity to present their case under conditions that do not result in a substantial disadvantage, when compared to the other side," the European Court of Human Rights, *Brandstetter v. Austria* (Application No. 11170/84, 12876/87, 13468/87), Judgment, 1991, p. 41-69.

581 Bogdan Ivanišević, *Against the Current: War Crimes Prosecutions in Serbia* (International Center for Transitional Justice, 2007), p. 35.

582 Interview with a defense attorney, May 14th, 2013.

583 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 2, Paragraph 1, Count 11.

584 *Ibid*. Article 300, para. 1, 3, and 8.

at the trial, after the opening statements, his or her property claim;[585] the right to propose the presentation of new evidence, and to have previously rejected proposals revisited;[586] the right to put questions to defendant, the accused, the witnesses, the expert and the consultant;[587] the right to request additional evidentiary proceedings;[588] and the right to have the final say and respond to the closing arguments of the counsel and the defendant.[589] A significant limitation of the victim's role is the fact that he/she is not allowed to appeal the verdict, except with regard to the costs of the criminal proceedings and any property claim judgment.[590]

1. Hiring an Attorney

The injured party (victim) in war crimes cases in Serbia can hire an attorney who will represent them and actively participate in the court proceedings. The possibility for victims to have a representative in court proceedings is in line with modern trends to strengthen the role of victims in all of the initiatives aimed at establishing truth and responsibility in the cases of human rights violations.[591] In a large number of war crimes cases conducted before the District Court in Belgrade and then before the Higher Court Department, victims' legal representatives have played an active role in casting light on the crimes in question and in determining the responsibility of the perpetrators.

In the proceedings, the injured party can be represented by a legal representative or an attorney. Before January 15, 2012, the victim's representative could be any person whom the victim designated to represent him/her in the proceedings. With the implementation of the new CPC, only professional lawyers can be hired by plaintiffs as their attorney.[592]

This legal solution does not respect the specific nature of war crimes cases in which the injured party, in most cases, comes from other countries and ethnic groups. It is reasonable to assume that, because crimes were committed by Serbian forces, victims' confidence in the institutions of the Republic of Serbia, including the OWCP, is not particularly strong. At the same time, victims are largely unfamiliar with the professional lawyers' community in Serbia. Furthermore, this solution is an additional burden on the injured party because it requires them to pay for a lawyer.

The Constitutional Court of Serbia declared the same provision unconstitutional in the Law on Civil Procedure.[593] Therefore, it seems illogical that the victim's representative in criminal proceedings must be a lawyer, although, unlike the parties in a civil action, the injured party in the criminal proceedings is not a party but a participant in the proceedings (the injured party in criminal proceeding has fewer procedural rights).

Before this legislative change, the victims in many cases tended to opt to be represented by human rights defenders. In most war crimes cases in Serbia, the victims were represented by the HLC and its then executive director and human rights expert, Nataša Kandić, as well as by lawyers with extensive experience in representing the victims of human rights violations.[594] The HLC played many roles in war crimes cases. Thanks to questions from the HLC's attorneys' and representatives' during trials, various aspects of particular crimes were illuminated, often aspects that had not been included in the indictment. In some cases, an investigation was subsequently initiated. For example, by examining the witnesses during the trial in the *Zvornik I* case, the victims' legal representatives pointed to crimes that had not been covered by the indictment, and these then became the subject of the OWCP's investigations and indictments in *Zvornik II*.[595]

585 *Ibid*. Article 393, para. 4.
586 *Ibid*. Article 395, para. 1.
587 *Ibid*. Article 398, para. 1, and Article 402, para 5.
588 *Ibid*. Article 408, para. 1.
589 *Ibid*. Article, para. 1 and 2, Article 413, para. 2, and Article 414, para. 3.
590 *Ibid*. Article 50.
591 For example, Article 68, paragraph 4 of the Statute, and Article 91 of the Rules of Procedure of the ICC, provide that victims legal representatives, can take part in the trial, can ask questions, bring up issues related to an interest of the victim, etc.
592 *Ibid*. Article 50, para. 1, count 3 and Article 56.
593 The decision by the Constitutional Complaint, IUz-51/2012, *Official Gazette of the Republic of Serbia*, 49/2013, June 5th, 2013.
594 Lawyer Dragoljub Todorović, lawyer Mustafa Radoniqi, lawyer Teki Bokshi and others.
595 Interview with the attorney of the injured parties in the *Ovčara I*, *Podujevo I and II*, *Sjeverin*, *Zvornik* and, *Bytyqi* and *Suva Reka* cases, September 17th, 2013.

2. The Right to Compensation

According to the CPC, a court panel in criminal proceedings may award an injured party a property claim.[596] Conditions that must be met in order to discuss such a request are the following: (1) the property claim should relate to damages resulting from a criminal offense,[597] (2) the authorized person should submit a request that the property claim be discussed,[598] (3) the request should not significantly delay criminal proceedings, and (4) the request should relate to compensation, restitution of property, or the annulment of a legal business.[599] However, despite the existence of legal rights, the practice of the courts in all criminal law matters, as well as in war crimes cases, is to direct the injured party, without exception, to address their property claims in civil proceedings.[600]

The injured parties, therefore, after the completion of the criminal proceedings, must attempt to exercise their right to recover damages in a civil action in which they sue the state of Serbia. As a rule, human rights organizations initiate these proceedings on behalf of the victims, because the victims rarely do this on their own – out of fear, lack of confidence in the courts, or because of the high cost of legal services. Their claims are usually dismissed on the grounds of alleged limitation of the right to claim damages.[601]

K War Crimes Prosecutions in Courts of General Jurisdiction

The 2003 Law on War Crimes Proceedings envisages that proceedings for offenses of war crimes, in which the indictment was issued before the entry into force of the law, would be completed before the courts that had previously been responsible for these cases.[602] The courts of general jurisdiction (district courts) and military courts were authorized to try these cases. After the ending of military courts and military prosecutors in 2004, cases being conducted before military courts were transferred to the district courts.[603]

596 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 258, para. 4.

597 Kž. No. 848/91, the Supreme Court of Serbia, October 15th, 1991.

598 Kž1. No. 760/08, the Supreme Court of Serbia, May 5th, 2008.

599 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 252. See: Goran P. Ilić et al. *Commentary on the Criminal Procedure* [Goran P. Ilić i dr. *Komentar Zakonika o krivičnom postupku*] (3rd revised edition) (Belgrade, 2013), p. 551.

600 See: K-Po2-44/2010 of September 22nd, 2010; K. 1419/04 of July 15th, 2005, and others.

601 The case of Saranda, Jehona and Lirie Bogujevci (war crime in Podujevo, March 1999) in Humanitarian Law Center, "Serving Justice or Trivializing Crimes" (2013), p. 76.

602 Law on Organization and Jurisdiction of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* [Zakon o organizaciji i nadležnosti državnih organa u postupku za ratne zločine, *Službeni glasnik Republike Srbije*], No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 21.

603 The Law on Military Courts provided that they try, as ordinary courts, offenses committed by military personnel and for crimes affecting national defense and security such as treason and espionage. They were also to try disputes related to service in the Yugoslav Army (The Law on Military Courts, *Official Gazette of FRY* [Zakon o vojnim sudovima, *Službeni list SRJ*], No. 11/95, 1/96, 74/99, 3/02, 37/02, Article 1). In the event that by the date of entry into force of the indictment a defendant's status as a military person or a civilian employee of the Army had been terminated, the case would be transferred to a regular court (Article 13). Military courts and prosecutors' offices were abolished by the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutors and the Military Attorney to Authorities of the Member States, which came into force on January 1, 2005 (*Official Gazette* [Zakon o prenošenju nadležnosti vojnih sudova, vojnih tužilaštava i vojnog pravobranilaštva na organe država članica, *Službeni Glasnik*], No. 55/2004). The law on the Transfer of the Jurisdiction of Military Courts, Military Prosecutors and Military Attorneys stipulates that the jurisdiction of military courts in Serbia be transferred to the district courts in Novi Sad, Niš and Belgrade, and the jurisdiction of military prosecutor's office transferred to the relevant prosecutor's office (Law on the Transfer of the Jurisdiction of Military Courts, Military Prosecutors and Military Attorneys, Official Gazette of the Republic of Serbia [Zakon o preuzimanju nadležnosti vojnih sudova, vojnih tužilaštava i vojnog pravobranilaštva, Službeni glasnik Republike Srbije], No. 137/2004, Articles 3 and 5). As far as the courts of general jurisdiction are concerned, their jurisdiction over these cases was stipulated by the Law on Courts, *Official Gazette of the Republic of Serbia* [Zakon sudovima, *Službeni glasnik Republike Srbije*], No. 46/91, 60/91, 18/92 i 71/92, 63/01, 42/02, 27/02, 27/03, 20/04, and the Law on Courts' Organization, *Official Gazette of the Republic of Serbia* [Zakon o uređenju sudova, *Službeni glasnik Republike Srbije*], No. 63/01, 42/02, 27/03, 20/04, 101/05, 46/06, and by the new Law on Courts' Organization, *Official Gazette of the Republic of Serbia* [Zakon o uređenju sudova, *Službeni glasnik Republike Srbije*], No. 117/2008,104/09, 101/10, 31/11,101/11 and 101/13.

According to HLC data, since the beginning of the armed conflicts (the 1990s), 20 prosecutions for war crimes and ethnically motivated crimes during the armed conflict in the former Yugoslavia – which, in view of the circumstances of the cases must be defined as war crimes – have been conducted before district, and then higher courts, in Serbia. In the majority (12) the offenses were not defined and treated as war crimes by the authorities. A total of 35 persons have been prosecuted. Most of these cases concern crimes committed during the conflict in Kosovo (17).

So far, 16 cases have completed and a final judgment delivered, with 17 persons convicted.[604] Nine persons were acquitted.[605] Two cases, against six persons, are currently at the appeal phase,[606] while two cases, each with one defendant, are in the trial phase.[607] In one case, proceedings were suspended after the prosecution withdrew its case.[608] These cases, with the exception of the cases conducted before the Belgrade District Court, are marked by serious flaws following omissions by the prosecutors and the judges. In some cases, tthe Public Prosecutor's Office, prosecutors of the general jurisdiction and OWCP have failed to transfer prosecutions to the OWCP due to their passive attitude.

1. Professional and Technical Capacities

War crimes proceedings and trials for killings committed during the armed conflict were conducted before the District (later Higher) courts in Prokuplje (3), Kraljevo (4), Novi Sad (1), Niš (5), Požarevac (1) Belgrade (2), Leskovac (1), Vranje (1), Šabac (1) and Valjevo (1). These cases were assigned to judges randomly, in accordance with the Rules of the Court.[609] The judges who have acted or are still acting in these cases did not have any kind of specific education or training in international humanitarian law. With the exception of the Higher Court in Leskovac, no other court before which these cases are being or were conducted has the A/V equipment for audio-visual recording of trials.[610]

2. Sub - standard Trials

With the exception of the judgments handed by the Belgrade District Court in *Sjeverin*[611] and *Podujevo*[612], no other judgment in cases conducted before the courts of general jurisdiction was delivered following proceedings that met the standards of a fair and professional trial. There were numerous shortcomings in these trials and the judgments delivered in them, with regard to the definition of the offense, the penal policy, and the duration of the proceedings.

Omissions by Prosecutors and Courts

In a large number of cases, omissions on the part of prosecutors and/or the Court resulted in the acquittal of persons, despite the fact that serious evidence indicated their involvement in and responsibility for crimes against civilians. To follow are several examples.

604 *Žute ose* Case, Kž. I 1913/96, October 8th, 1998, the Supreme Court of Serbia; *Ivan Nikolić* Case, Kž. I 1594/02, January 16, 2013, the Supreme Court of Serbia; *Dragiša Petrović et al.* Case PK No. 112/03, September 30th, 2003, the Supreme Court of Serbia; *Slobodan Jovanović* Case, Kž. I 94/03 March 11th, 2003, the Supreme Court of Serbia; Case *Sjeverin*, Kž I 1807/05, April 13th, 2006, the Supreme Court of Serbia; *Podujevo I* Case , Kž I 1874/05, December 22nd, 2005, the Supreme Court of Serbia; *Pakšec* Case, Kž I 198/08, December 2nd, 2008, the Supreme Court of Serbia; *Dušan Mladenovski*, Case Kž. 1721/00, December 21st, 2000, the Supreme Court of Serbia; *Nenad Bulatović* Case, Kž. I 1841/06, November 20th, 2006, the Supreme Court of Serbia; *Drago Stojiljković* Case, 1Kž.1.No.552/11, February 2nd, 2012.

605 *Oto Palinkaš et al.* Case, Kž 1-3791/11, October 6th, 2011, the Court of Appeal in Kragujevac; Case *Emini*, Kž.1. No. 3520/10, November 17th, 2011, the Court of Appeal in Niš; *Radoje Ivanjac* Case, November 17th, 2011, the Court of Appeal in Niš; Case *Radočaj Igor*, K. No. 27/2002, April 30th, 2004, the District Court in Niš.

606 *Kušnin* Case, K No. 46/10, Higher Court in Niš; *Orahovac* Case, 2K 25/11, Higher Court in Požarevac.

607 *Miloš Lukić*, Case K No. I/10, Higher Court in Prokuplje.

608 *Stevan Jekić* Case, Ki. No. 26/00, June 14th, 2000, the District Court in Valjevo.

609 Rules of Procedure of courts (Court Rules), *Official Gazette of the Republic of Serbia* [Pravilnik o unutrašnjem poslovanju sudova (Sudski poslovnik), *Službeni glasnik Republike Srbije*], 91/93, 27/95 and 29/2000, Article 120.

610 Written submissions: The Higher Court in Kraljevo, Su. VIII 42/13-10, April 18, 2013; The Higher Court in Leskovac, VIII Su. No. 109/13, April 29th, 2013; The Higher Court in Niš, Su VIII 42-13/13, April 29th, 2013; The Higher Court in Novi Sad, Su-VIII-42-22/13, April 18th, 2013; The Higher Court in Požarevac, Su VIII-42 8/13, April 18th, 2013, and The Higher Court in Prokuplje I su 1/13-27, April 19th, 2013.

611 K. 1419/04, The District Court in Belgrade, July 15th, 2005.

612 K. 1823/04, The District Court in Belgrade, June 17th, 2005.

i. The case against Igor Radočaj, a former member of the YA, was conducted before the District Court in Niš, for the murder in Orahovac of a Kosovo Albanian in June 1999.[613] Based on the testimony of eye-witnesses (members of the YA), the court found that the defendant killed two Kosovo Albanians, but not the one included in the indictment. However, as the acting prosecutor during the trial failed to adjust the factual description in the indictment disposition, using the facts established during the trial, the court had no option but to acquit the defendant. Had the court acted otherwise, it would have transgressed the indictment, a serious breach of procedure and the reason for the cancellation of the judgment.[614]

ii. The case against Radoje Ivanjac, a former member of the YA, for the criminal offense of murder, was conducted before the District Court in Prokuplje. Ivanjac was charged with the murder of an unknown Kosovo Albanian civilian in April 1999 in the village Livadice (in the municipality of Podujevo). He was acquitted and the prosecution did not appeal. In the explanation of the decision, the court panel described the events of the case using the defendant's version, describing his conduct as heroic, and using phrases more fitting for an action movie scenario, than a court ruling.[615] For example, in describing the actions of the defendant during the event in question, the ruling stated:

> "He is hidden, but the terrorists spot him; they are housed in a series of Shqiptar houses. Then he is fired upon by a sniper and by automatic weapons. Luckily for him, he is composed, courageous, and with the spirit of a trained soldier, so he keeps close to the wall of the building, making it impossible for them to hit him. Bullets rain into the area in front of him, but don't affect him. They simply shower him with mud and water, falling into a puddle behind the building which was used as shelter."

iii. The case against Miloš Lukić, a former member of the police, is being conducted before the Higher Court in Prokuplje. Lukić is charged with the murder of a Kosovo Albanian civilian in April 1999 in Podujevo. In 1999 the court declared Lukic guilty of the murder charge, and handed down a suspended sentence![616] The Supreme Court of Serbia accepted an appeal by the Municipal Public Prosecutor of Prokuplje and overturned the verdict.[617] In its decision, the Supreme Court of Serbia referred to the decision of the criminal sanction, and clarified that a suspended sentence cannot be handed down in a case of murder. After the retrial, the trial court, with the same presiding judge, again declared Lukić guilty and sentenced him to 18 months in prison.[618] In 2012, the Supreme Court again quashed the first-instance verdict in this case, and remanded the case for retrial.[619] By the end of 2013, the case was still pending. Although the HLC has no information regarding the proceedings between 2002 and 2012, there has undoubtedly been undue delay. For example, in 2012, only one trial day was held and in 2013, not a single one.

iv. The *Oto Palinkaš et al.* case was conducted before the Higher Court in Kraljevo. Palinkaš and two other indictees, former members of VJ, had been charged with the murder of eight Kosovo Albanian civilians in the vicinity of Srbica in mid-April 1999. After a re-trial, in 2011 the Higher Court in Kraljevo acquitted the three, a decision the Court of Appeal in Kragujevac confirmed in October of the same year. The Higher Court in Kraljevo copied, almost verbatim, the explanation of the first instance decision, which the Supreme Court of Serbia had quashed and remanded the case for a retrial. The trial court only partially complied with the decision of the Supreme Court of Serbia, presenting just a small part of the evidences requested by the Supreme Court of Serbia, and then pronounced its judgment of acquittal on the basis of the same conclusions.[620]

Unduly Lengthy Proceedings

The dominant characteristics of war crimes cases, with the exception of those conducted before the District Court in Belgrade, is their long duration. In six cases, the procedure lasted, or is has been on-going, for more than 10 years (three cases are still pending). The most extreme example is the

613 The District Court in Niš-K No. 27/02.

614 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakonik o krivičnom postupku, *Službeni glasnik Republike Srbije*], No. 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 438, Paragraph 1, Count 9.

615 The District Court in Prokuplje, K No. 65/99. The Panel was presided over by Judge Branislav Niketić.

616 The judgment of the District Court in Prokuplje, K no. 58/99, June 25th, 1999, President judge, Branislav Niketić.

617 Decision VSS Kž I 1153/99, March 23rd, 2000.

618 The judgment of the District Court in Prokuplje, K No. 21/00, June 7, 2001.

619 Decision VSS Kž I 1122/01, April 2nd, 2002.

620 For a more detailed analysis of this case, see: Humanitarian Law Center, *Report on War Crimes Trials in Serbia for 2011* (Belgrade, April 2012), p. 39.

case of *Orahovac*, on-going before the Higher Court in Požarevac, which commenced in 1999.[621] *Oto Palinkaš et al.* which was conducted by the District Court, and then transferred to the Higher Court in Kraljevo, commenced in 1999, and was not completed until 2011.[622]

Incorrect Definition of Offenses

In 12 cases, criminal offenses that in all respects should be defined as war crimes, have been defined as murder.[623] In three cases, the alleged offenses were subsequently re-defined during the trial, and the actions of the defendants were defined as war crimes.[624] The Prosecutor in charge and the first instance court were both responsible for the subsequent re-definition.[625] Nor did the Supreme Court of Serbia, when it quashed the first instance judgments, draw the attention of the first-instance courts to this particular omission. The problems concerning legal definition apply equally to the judgments of acquittal and to the judgment of conviction in court decisions.

Inappropriately Lenient Sentencing Policy

With regard to punishment, with the exception of the *Podujevo I* and *Sjeverin* cases very lenient sentences have been imposed so far. In the *Orahovac* case for example, the accused Boban Petković was found guilty of a war crime against civilians (murder of three Kosovo Albanian civilians) and was sentenced to five years in prison, while the defendant in the *Drago Stojiljković* case was convicted of the murder of a Kosovo Albanian civilian and sentenced to three years.

3. The Passivity of the Public Prosecutor of Serbia, prosecutors of the general jurisdiction and OWCP

The miscarriage of justice in these cases is the result of unprofessional work of the prosecutors and the judges, but also the passivity of the Public Prosecutor's Office of the Republic of Serbia. The Public Prosecutor's Office have missed the opportunity to transfer these cases to the jurisdiction of the OWCP, which has a far more established professional and technical capacity to act in these cases.

The Law on War Crimes Proceedings (2003) envisages that war crimes cases before the courts of general jurisdiction, in which the indictment was issued prior to the adoption of the Law, should be completed before these courts. On the other hand, the cases that at the moment of the law's implementation were erroneously defined as acts other than war crimes, completely fell under the radar of any institution. There were nine such cases against 16 persons (two of which, against four persons, are pending) for the offenses of murder, kidnapping, and rape committed in the context of an armed conflict.[626]

Intentionally or due to incompetence, prosecutor's offices failed to redefine these acts as war crimes, and thus enable their transfer to the OWCP. The Public Prosecutor's Office of the Republic of Serbia, as the highest-ranking body in the prosecutorial hiearachy, whose duty is to supervise the work of lower prosecutorial offices, has a responsibility in these cases. As such, the Public Prosecutor of the Republic of Serbia must react in cases where there has been an obviously incorrect definition of an offense, and must transfer such cases to the jurisdiction of the OWCP.[627] The Public Prosecutor's Office did not respond to the HLC's inquiries about these issues.

With regard to the cases defined as war crimes, it seems that they too, in keeping with the Law on Public Prosecution, could have been transferred to the OWCP. The law allows a higher prosecutorial body to authorize a lower-ranking public prosecutor's office to act on matters within the competence of another lower-public prosecutor when the com-

621 District Attorney's Office of Požarevac, KT 118/99-108, November 12th, 1999.

622 Kž 1-3791/11, Court of Appeal in Kragujevac, October 6th, 2011.

623 In all cases that involve acts committed during the armed conflict, there is a causal link between the conflict and the acts. In such cases, victims are protected under international law.

624 *Orahovac*, *Kušnin* and *Ivan Nikolić* Cases

625 Criminal Procedure Code, *Official Gazette of the Republic of Serbia* [Zakon o krivičnom postupku, *Službeni glasnik Republike Srbije*], 58/2004, 85/2005, 115/2005, 46/2006, 49/2007, 122/2008, 20/2009 and 72/2009, Article 351, Paragraph 2.

626 *Oto Palinkaš et al.* Case District (Higher) Court in Kraljevo, *Emini* Case, District (Higher) Court in Niš, *Miloš Lukić* Case, District (Higher) Court in Prokuplje, *Igor Radočaj* Case, District Court in Niš, *Paksec* Case, District Court in Novi Sad, Drago Stojiljković Case, Higher Court in Vranje; *Tomislav Milenković* Case, Higher Court in Niš, *Nenad Bulatović* Case, District Court in Kraljevo, *Nebojša Stefanović et al.* Case, Higher Court in Niš.

627 The Law on Public Prosecution, Official Gazette of the Republic of Serbia [Zakon o javnom tužilaštvu, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – Decisions US, 121/2012 and 101/2013, Article 29, Paragraph 3, Count 2 and Article 20, Paragraph 1.

petent public prosecutor is prevented, for legal or factual reasons, to act in a particular case.[628] In this case, the Public Prosecutor of the Republic of Serbia, as a higher-ranking prosecutorial body, should have authorized the OWCP, as a lower-ranking prosecutorial body, to act in war crimes cases in which the acting Higher Public Prosecutor's Offices (formerly District Public Prosecutor's Offices) previously acted.[629] Valid reasons for such transfer of jurisdiction could be the objective lack of specialist knowledge in the field of international humanitarian law, or a lack of technical capacity.

A related solution concerns organized crime cases. The Public Prosecutor of the Republic of Serbia may, 'for the purpose of ensuring efficient proceedings or for other important reasons,' authorize a prosecutor for organized crime from another prosecutor's jurisdiction to act in a particular case. [630] Similarly, this procedure should be available in war crimes cases.

Finally, the Public Prosecutor of the Republic of Serbia is authorized to act to resolve conflicts of jurisdiction between the war crimes prosecutor and other prosecutors – consequently, war crimes cases could be assigned to the OWCP.[631] The OWCP can reasonably argue that the Law on War Crimes Proceedings bestows on it exclusive jurisdiction over war crimes cases – hence, other, non-specialized prosecution offices should not have jurisdiction in such cases.

At the time of the writing of this Analysis, the trial of Miloš Lukić is on-going in Prokuplje. Because Lukić has been charged with the crime of murder, there are no legal grounds for the case to be transferred to authorized, specialized institutions. Furthermore, the Public Prosecutor of the Republic of Serbia and the OWCP should look into the case of the Higher Prosecutor's Office in Gjilane (based in Vranje), against Nebojša Stojanović and several unidentified persons, who have been charged with the crime of genocide committed in the vicinity of Gnjilane in May 1999. The case has been in the investigative phase since 1999.[632]

I Confiscation of Property Acquired through War Crimes

The Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, also applies in cases of war crimes.[633] While the OWCP points out that looting was undoubtedly the motive in a large number of war crimes, by the end of 2013 only one procedure for the confiscation of property acquired during the commission of war crimes had been initiated,[634] and even that request was rejected by the court. Sixty five persons in nine cases were investigated for property acquisition through war crime, a procedure which comes before a request for property confiscation.[635]

Considering the poor practice in this area, it is only possible to analyze the legal norms and anticipate possible problems in their implementation.

An order from the Prosecutor against a person who is believed to have acquired considerable assets through war crimes, initiates an investigation. The investigation is led by the Prosecutor. If there is reasonable suspicion that a person has committed a war crime, and if there is also a risk that seizure of such assets at a later time would be difficult or impossible, the Prosecutor may submit a request for temporary seizure of property. The court considers the request and makes its decision. Temporary seizure of assets can last only until the court decides on the request for permanent confiscation.[636]

The Prosecutor files a request for permanent confiscation of property within three months of the date of delivery of the

628 The Law on Public Prosecution, Official Gazette of the Republic of Serbia [Zakon o javnom tužilaštvu, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – Decisions US, 121/2012 and 101/2013, Article 20, Paragraph 1.

629 The Law on Public Prosecution, Official Gazette of the Republic of Serbia [Zakon o javnom tužilaštvu, *Službeni glasnik Republike Srbije*], No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 – Decisions US, 121/2012 and 101/2013, Article 16.

630 *Ibid*. Article 20, para. 2.

631 *Ibid*. Article 17, para. 2.

632 Written response of the Higher Public Attorney's Office in Vranje, PI.No.17/14, May 15th, 2014.

633 Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, *Official Gazette of the Republic of Serbia* [Zakon o oduzimanju imovine proistekle iz krivičnog dela, *Službeni glasnik Republike Srbije*], 32/2013, Article 2, Paragraph 1 Count 9.

634 Supplement to the information and explanations (Replies to the Questionnaire of the Humanitarian Law Center), Office of the War Crimes Prosecutor, A No. 162/13, July 21st, 2013; interview with OWCP deputies, May 8th and 9th, 2013.

635 *Zvornik I*, *Zvornik V*, *Lovas*, *Ovča*r*a*, *Podujevo*, *Ćuška*, *The Scorpions*, *Bijeljina* and *Beli Manastir* Cases

636 Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, *Official Gazette of the Republic of Serbia* [Zakon o oduzimanju imovine proistekle iz krivičnog dela, *Službeni glasnik Republike Srbije*], 32/2013, Article 19, 23-37.

final judgment. After a final decision to permanently confiscate assets, funds obtained from the sale of those assets become the property of the Republic of Serbia.[637]

A serious omission in this law is that it establishes a limit on the value of property seized. The procedure can be initiated only if the value of the assets in question exceeds 1,500,000 dinars.[638] In this way, the law essentially gives an amnesty to a large number of persons who, during the war, stole cars, furniture and jewelry from civilians. The OWCP has also been critical of the limit-value definition, primarily because of the difficulty of proving the actual sum in each case.[639] Of all the countries of the former Yugoslavia, only the Law on the Seizure of Property Acquired through Criminal Activity of Republika Srpska also provides for a limit value, in the amount of 50,000 convertible marks, which is almost double the limit in the Republic of Serbia.[640]

According to the OWCP, an additional difficulty is that the law places the burden of proving the origin of the property on the OWCP rather than on the side of the accused.[641] The Criminal Code of the Federation of Bosnia and Herzegovina, and the Law on Seizure and Confiscation of Property Acquired from Criminal Activity of Republika Srpska, both offer a solution that comes closer to meeting the OWCP's concerns. According to these two laws, the prosecutor must provide sufficient evidence that assets have been acquired through criminal activity. Subsequently, the burden of proof switches to the defendant, who must provide evidence that the property had been acquired legally.[642]

At the same time, the Law does not specify what the seized assets and funds will be used for once they become the property of the Republic of Serbia at the conclusion of the procedure. Only when the seized assets have historical, artistic and scientific value does the Law state that the Directorate should donate them to the institutions responsible for protecting and conserving such property.[643] The purpose of the seized assets should, instead, be determined in accordance with the international standards, such as the standard of the Statute of the International Criminal Court, according to which assets seized from perpetrators are added to a fund from which reparations to victims are provided.[644] This standard was integrated into the laws of all the countries in the region, except Republika Srpska's. These laws provide that settlements to the injured be obtained from the assets confiscated from perpetrators of the crime.[645] These laws also allow the injured party, who at the time of the property seizure had not filed a property claim, to seek compensation from the confiscated property within a certain period following the decision on confiscation.[646]

637 *Ibid.* Article 62.

638 *Ibid.* Article 2, Paragraph 10.

639 *Ibid.* Article 25, Paragraph 3; interview with OWCP deputies, May 8th and 9th, 2013.

640 Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, *Official Gazette of Republika Srpska* [Zakon o oduzimanju imovine stečene krivičnim djelom, *Službeni glasnik Republike Srpske*], 12/10, Article, Paragraph 2.

641 Interview with OWCP deputies, May 8th and 9th, 2013.

642 The Criminal Code of Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina* [Krivični zakon FBiH, *Službene novine Federacije Bosne i Hercegovine*], No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, Article 114; Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, *Official Gazette of the Republika Srpska* [Zakon o oduzimanju imovine stečene krivičnim djelom, *Službeni glasnik Republike Srpske*], 12/10, Article 24, Paragraph 2.

643 Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, *Official Gazette of the Republic of Serbia* [Zakon o oduzimanju imovine proistekle iz krivičnog dela, *Službeni glasnik Republike Srbije*], 32/2013, Article 62, Paragraph 2.

644 ICC Statute, Articles 75 and 79.

645 The Criminal Code of Federation of Bosnia and Herzegovina, *Official Gazette of the Federation of Bosnia and Herzegovina* [Krivični zakon FBiH, *Službene novine Federacije Bosne i Hercegovine*], No. 36/03, 37/03, 21/04, 69/04, 18/05, 42/10, Article 116; the Law on Confiscation of the property acquired by criminal act and breach, *Official Gazette of the Republic of Croatia* [Zakon o postupku oduzimanja imovinske koristi ostvarene kaznenim djelom i prekršajem Republike Hrvatske, *Narodne novine*]. Article 1, Paragraph 3; Criminal Code of Montenegro, *Official Gazette of Montenegro* [Krivični zakonik Crne Gore, *Službeni list Republike Crne Gore*], No. 70/03, Article 114.

646 *Ibid*.

RECOMMENDATIONS

To the Government of the Republic of Serbia

1) Adopt a strategy to prosecute war crimes during the period 2015-2025 which will determine the objectives, directions, the resources needed and the action plan for implementation of that strategy;

2) Express continuous public support for the institutions that prosecute war crimes in Serbia, for the former members of Serbian forces and other witnesses who are willing to assist in the prosecution of these offenses by offering valuable information;

3) Ensure that all state authorities, without delay and non-selectively, submit to the OWCP and the courts, the documentation necessary for the prosecution of war crimes;

To the Ministry of the Interior of the Republic of Serbia

4) Provide continuous training on the rights, needs and support measures for victims, to all members of the law enforcement agencies that come into contact with victims of war crimes (police officers from the WCIS, the Protection Unit, and others) with special emphasis on special categories of victims (e.g. victims of sexual violence, etc.);

5) Provide training on the CPC, which came into force in 2012, to members of the WCIS;

6) Modernize the equipment of the Protection Unit and the WCIS;

7) Enable the Protection Unit to carry-over potential savings from one fiscal year to another in order to update its equipment and the training of its members;

8) Introduce specific criteria for employment in the WCIS and the Protection Unit, which ensure that these units do not employ persons who participated in armed conflicts, in any capacity;

9) Strengthen the powers of the Chief of the WCIS in terms of dismissing, appointing and remuneration of the members of the WCIS;

10) Establish a permanent police service which will provide escorts for victims arriving from other countries;

11) Hire a psychologist and other medical professionals for the Protection Unit to work on providing support to parties in the Protection Program, and also to the members of the Unit;

12) Establish an operational fund to finance the WCIS's actions in preliminary proceedings;

To the Ministry of Justice of the Republic of Serbia

13) Provide a significant increase in the financial resources available to the OWCP, especially given the widening of the scope its jurisdiction in the investigation phase;

14) Provide continuous training for prosecutors and judges in the sphere of international humanitarian law, with the leading role in identifying the needs, as well as in designing and implementing the training given to the Judicial Academy. Special attention must be given to the training of newly appointed judges, who have not had suitable training in the early years of the existence of the Higher Court Department and the Appeal Court Department;

15) Provide continuous training on the rights, needs and support measures for victims to *all* representatives of all of the institutions and agencies that come into contact with victims (judges, prosecutors, court guards, the Service, etc.), with special emphasis on special categories of victims (e.g. victims of sexual violence, etc.);

16) Initiate amendments to the law, that will make the Chief of the WCIS and the Protection Unit subordinate to the Prosecutor (for example, by rendering the Prosecutor's opinion binding in the appointment of the chiefs of these units, and/or rendering his role indispensable in the career development of members of these units;

17) Initiate changes to the law with the goal of relocating the Protection Unit from the jurisdiction of Ministry of the Interior to the Ministry of Justice;

18) Propose an amendment to Article 102, paragraph

5 of the CPC, which will *oblige* the courts and the prosecution service to require the protection of the police for witnesses who complain about being threatened;

19) Propose an amendment to the CPC which would introduce a provision prohibiting the submission of evidence of the prior sexual experience of victims of sexual violence;

20) Propose amendments to the Law on the Protection of Participants in Criminal Proceedings which will: a) establish an effective and independent mechanism for the investigation of complaints by persons under protection about reasons for any suspension of the Program; b) specify the obligations of the Protection Unit, for the support of the persons in the Program, in terms of social protection, economic, legal and psychological assistance and establish a control mechanism to ensure that these obligations are met; c) strengthen the mechanism for monitoring the Commission, by competent committees of the National Assembly, by introducing a mandatory review and evaluation of the program's implementation;

21) Propose the adoption of bylaws that will regulate all matters necessary for a complete change of identity for persons in the Protection Program;

22) Initiate discussions on a unique regional protocol for the support of victims and witnesses which would provide information on the procedures to be expected, the defendants, the support that they could expect to receive and other relevant information, and provide assistance in the organization of their travel to another state to testify;

23) Establish functional regional cooperation in monitoring the welfare of witnesses and victims, in particular, following their testimony, and form a single register of non-governmental organizations and institutions involved in supporting witnesses;

24) Map out all the institutions and non-governmental organizations that provide assistance and support to victims, their activities and needs;

25) Establish a sustainable funding system for non-governmental organizations dealing with the psychological support of victims;

26) Introduce the licensing of defense lawyers in war crimes trials, with periodic renewal of licenses, modeled on the system in place in BiH;

27) Initiate the establishment of an institution to deal with improving the standard of defense in cases of war crimes, following the example of the Criminal Defense Section of the Ministry of Justice of Bosnia and Herzegovina;

28) Initiate the signing of a regional agreement that would establish a formal framework for the collection of evidence by defense teams;

29) Propose an amendment to article 50, paragraph 1, count 3 and Article 56 of the CPC in accordance with the decision of the Constitutional Court of Serbia IUz-51/2012 to enable representatives who are not professional lawyers to represent victims (injured parties);

30) Propose an amendment to the Law on the Seizure and Confiscation of Property Acquired through Criminal Activity, in order to: a) allow the use of funds raised from property seized under this Act for the payment of fair compensation to victims of war crimes; b) to reduce the minimum value of the property that can be seized under the procedure provided for in this law; c) to facilitate the process of evidence gathering/collection;

31) Ensure regular payment of costs to court-appointed defense counsels;

32) Propose an amendment to the CPC that would treat the costs for the collection of evidence by the defendant and defense counsels during the investigation phase as defense costs.

To the Office of the War Crimes Prosecutor of the Republic of Serbia

33) In consultation with experts and bearing in mind the lessons learned from other prosecutors in the region, establish clear criteria with which to determine the priorities in the prosecution of war crimes for a period of five to ten years;

34) Intensify work on cases in which investigation has been on-going for an unreasonably long time;

35) Introduce the practice of consulting experts on issues related to systematic crimes (large scale crimes planned or implemented by institutions);

36) Ensure that decisions to launch investigations and issue indictments are devoid of any political influence, or undertaken in response to the pressure from the political leadership or the public;

37) Apply the principles of command responsibility and crimes against humanity when indicting persons for the crimes committed in the 1990s;

38) Initiate the establishment of a service for the support and assistance of victims and witnesses during an investigation;

39) Put more effort into protecting witnesses from threats that they may be exposed to outside the courtroom, through the consistent use of legal mechanisms and by adequately informing the public about such threats and the response of institutions to them;

40) Initiate regular coordination meetings with the Ministry of Justice, WCIS and other authorities and organizations, at which problems in the prosecution of war crimes should be discussed;

41) Strengthen the Public Relations Service, which should devise and organize a variety of activities to inform the public about the OWCP, as well as topics related to the prosecution of war crimes, including professional meetings, press conferences, educational projects, and the like.

42) Strengthen regional cooperation and mutual trust among stakeholders, between war crimes prosecutors, through the transfer of the proceedings against foreign nationals to their countries' institutions, by informing prosecutors in the region of all the cases they are working on that involve citizens of other countries, and through the transfer of evidence on those cases;

43) Initiate the signing of a formal agreement between the OWCP and the Kosovo Public Prosecutor's Office concerning the exchange of evidence, and cooperation in the prosecution of war crimes;

44) Initiate the establishment of a commission between the OWCP, the Kosovo Public Prosecutor and EULEX, which should resolve the question of warrants for Kosovo Albanians convicted *in absentia* before the courts in Serbia, prior to the establishment of the OWCP;

45) Do not deviate from the facts established by the ICTY;

46) Be consistent in using the evidence of the ICTY, and in following the norms of international humanitarian law and the practice of international criminal tribunals;

47) Put more effort into concluding a larger number of plea agreements;

48) Provide evidence to substantiate the property claims of injured parties;

49) Intensify investigations into property obtained through the commission of war crimes;

50) Initiate a procedure for resolving the conflicts of jurisdiction with prosecutors of general jurisdiction;

To the Public Prosecutor of the Republic of Serbia

51) Review all war crimes cases and cases involving other offenses committed during the armed conflict which have elements of war crimes, under the jurisdiction of the Higher Prosecutors, and publish a list of such cases;

52) Transfer all war crimes cases and cases of other offenses committed during the armed conflict to the OWCP to the jurisdiction of Higher Prosecutors, using the powers under the Law on Public Prosecution;

To the War Crimes Investigation Service

53) Ensure that persons who took part in the conflict are not engaged in intelligence work during the investigation of war crimes;

54) Expand the number of data sources and documents to be entered into the GIS;

55) Hold to account members of the Unit who make

inappropriate comments directed at other actors in the war crimes trials;

To the Higher Court Department in Belgrade and Appeal Court Department

56) Ensure that decisions on individual responsibility for war crimes be freed from any political influence or from being tailored to the reactions of the political leadership and the public;

57) When deciding on sentences, and the application of mitigating and aggravating circumstances, greater attention should be given to the specific nature and severity of war crimes, taking into account the practice of the ICTY and other courts in the region;

58) Do not deviate from the facts established by the ICTY;

59) Decide on the merits of compensation claims of victims during the trial;

60) Apply all witness protection mechanisms with more consistency;

61) Put more effort into protecting witnesses from threats they are exposed to outside the courtroom, through consistent use of legal mechanisms, and by adequately informing the public about the threats and the response of institutions to them;

62) Notify the competent authorities of the Bar Association, of defense attorneys' excesses, in accordance with Article 370, Paragraph 3 of the CPC;

63) Revise the current system of how judges are appointed to the third-instance Chamber, in order to ensure that judges of this Chamber have expert knowledge of international humanitarian law – e.g. introduce mandatory training for judges who are appointed to the Chamber;

64) Establish public relations services within the Higher Court Department and Appeal Court Department, which will adequately report on the work of the departments, and design activities that will raise the profile of war crimes with the public;

65) Provide additional facilities for victims and witnesses who come to testify;

66) Hire a permanent psychologist in the Support and Assistance Service;

67) Hire a full-time professional expert for military and security matters;

68) Strengthen the procedure for informing victims about the stages of the proceedings, especially after their testimony;

69) Establish a separate budget for the Support and Assistance Service;

70) Provide psychological support to staff in the Support and Assistance Service who support and assist victims and witnesses;

To the Bar Association of the Republic of Serbia

71) Provide continuous training in international humanitarian law; introduce a wider circle of lawyers to the current practice of the ICTY and to war crimes cases, before domestic courts and in the region;

72) Punish misconduct by defense lawyers in war crimes trials;

To International Stakeholders (EU, OSCE, UN and others)

73) Support frequent regional meetings and consultation among prosecutors and judges from former Yugoslav countries, including prosecutors and judges from Kosovo;

74) Initiate and support professional discussion on unresolved and open issues concerning the use of the archives of the ICTY Prosecutor's Office and other archives of this court, upon the completion of the ICTY's work (access modes, control of the use of archives, etc.);

75) Conduct research on the needs and concerns of victims in relation to war crimes proceedings in Serbia.

Annex – Overview of OWCP's indictments for 2004-2013.

	Case name	Case number	Cooperation with other institutions	Number of indictees	Indictment issued	Outcome or Phase	Trial commencement date
1.	Ovčara I	KTRZ 3/03	-	18	2003	Final judgment	March 9 2004
2.	Ovčara II	KTRZ 4/03	-	1	2005	Final judgment	January 27 2005
3.	Zvornik I	KTRZ 17/04	ICTY	4	2005	Final judgment	November 28 2005
4.	Morina	KTRZ 1/07	-	1	2005	Trial ongoing before the Higher Court Department	October 17 2007
5.	Đakovica (Lekaj)	KTRZ 7/04	-	1	2005	Final judgment	October 12 2005
6.	The Scorpions	KTRZ 3/05	-	5	2005	Final judgment	December 20 2005
7.	Suva Reka	KTRZ 5/05	-	8	2006	Final judgment	October 2 2006
8.	Bytyqi	KTRZ 5/06	--	2	2006	Final judgment	November 13 2006
9.	Dubrovnik	KTRZ 5/07	ICTY	1	2007	County Court of Belgrade (War Crimes Department) dismissed indictment based on neuropsychiatric examination of indictee Kovačević	/
10.	Slunj	KTRZ 11/07	SAOC, County Court of Karlovac (Croatia)	1	2007	Final judgment	February 1 2008
11.	The Tuzla Convoy	KTRZ 5/04	-	1	2007	Trial before the Appeals Court Department (retrial)	February 22 2008
12.	Lovas	KTRZ 7/07	-	14	2007	Trial before the Higher Court Department (first-instance judgment dismissed)	April 17 2008
13.	Velika Peratovica (Trbojević)	KTRZ -4/07	SAOC , County Court in Bjelovar (Croatia)	1	2008	Final judgment	September 26 2008
14.	Ovčara III	KTRZ 4/03	-	1	2008	Final judgment	December 23 2008
15.	Zvornik II	KTRZ 17/04	-	2	2008	Final judgment	December 29 2008
16.	Zvornik III	KTRZ 8/07	-	2	2008	Final judgment	September 4 2008
17.	Podujevo	KTRZ 12/07	-	4	2008	Final judgment	September 8 2008
18.	Banski Kovačevac	KTRZ 13/07	SAOC, County Court of Karlovac (Croatia)	2	2008	Final judgment	September 2 2008
19.	Medak	KTRZ 10/07	SAOC, County Court of Gospić (Croatia)	5	2009	Final judgment	November 23 2009
20.	Stara Gradiška	KTRZ 14/07	SAOC, County Court in Požega (Croatia)	1	2009	Final judgment	September 17 2009
21.	Prijedor	KTRZ 2/08	Prosecutor's Office of the Republika Srpska, Banja Luka District Court (BiH)	1	2009	Final judgment	February 18 2009

	Case name	Case number	Cooperation with other institutions	Number of indictees	Indictment issued	Outcome or Phase	Trial commencement date
22.	The Gnjilane Group	KTRZ 16/08	-	17	2009	Final judgment	September 23 2009
23.	Stari Majdan	KTRZ 3/08	Cantonal Court in Bihać (BiH)	1	2009	Final judgment	September 18 2009
24.	Tenja	KTRZ 9/08	SAOC, County Court of Osijek (Croatia)	1	2010	Final judgment	May 6 2010
25.	Zvornik IV	KTRZ 1/10	-	1	2010	Final judgment	May 13 2010
26.	Skočići (Zvornik V)	KTRZ 7/08	-	7	2010	Trial before the Higher Court Department	September 14 2010
27.	Vukovar	KTRZ 3/09	-	1	2010	Final judgment	September 6 2010
28.	Rastovac	KTRZ 5/10	-	1	2010	Final judgment	October 7 2010
29.	Beli Manastir	KTRZ 5/09	County Court of Osijek (Croatia)	4	2010	Final judgment for one defendant; trial ongoing before the Higher Court Department (first-instance judgment dismissed for three other persons)	November 1 2010
30.	Ćuška, Pavlan (2011), Zahać (2011) i Ljubenić (2011)	KTRZ 4/10	-	13	2010	Trial before the Appeals Court Department	December 20 2010
31.	Lički Osik	KTRZ 06/10	-	4	2010	Final judgment	October 4 2010
32.	Bijeljina	KTRZ 7/10	-	3	2011	Final judgment	July 4 2011
33.	Ovčara IV	KTRZ 6/11	-	1	2012	Trial before the Appeals Court Department	November 15 2012
34.	Bosanski Petrovac	KTO 3/12	Cantonal Court in Bihać (BiH)	2	2012	Trial before the Higher Court Department	November 13 2012
35.	Kashnjeti	KTO 4/12	-	1	2012	Trial before the Appeals Court Department	September 13 2012
36.	Tenja I	KTO 1/12	SAOC (Croatia)	2	2012	Trial before the Higher Court Department	October 29 2012
37.	Sotin	KTO 9/13	SAOC (Croatia)	5	2013	Trial before the Higher Court Department	2014
38.	Bihać	KTO 3/13	Cantonal Court in Bihać (BiH)	1	2012	Trial before the Appeals Court Department	June 25 2013
39.	Ključ	KTO 4/13	Cantonal Court in Bihać (BiH)	1	2013	Final judgment	September 13 2013
40.	Sanski Most	KTO 2/13	Cantonal Court in Bihać (BiH)	1	2013	Trial before the Higher Court Department	June 12 2013
41.	Čelebići	KTO 6/13	-	1	2013	Final judgment	September 11 2013
42.	Crevar	KTRZ 1/09	County Court of Zagreb (Croatia)	1	2013	Pre-trial before the Higher Court Department	2014
43.	Trnje	KTO 7/2013	-	2	2013	Trial before the Higher Court Department	2014
44.	Ljubenić	KTO 8/13	-	3	2013	Pre-trial before the Higher Court Department	2014
Total			**18**	**150**			

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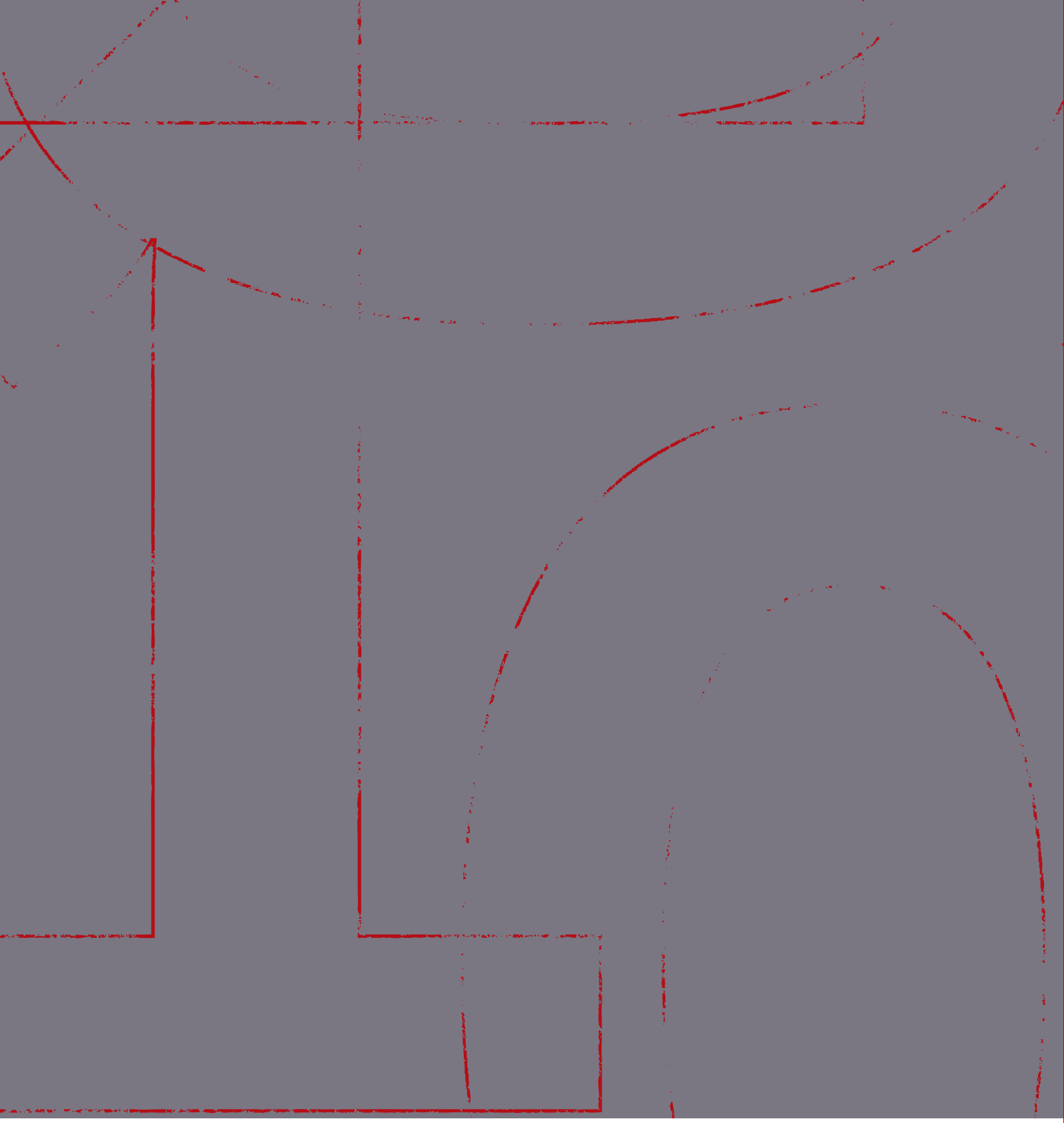

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