

## DOKUMENTI I PROJEKTI

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**Nedovršeni posao**

**Veće za ratne zločine u Srbiji**





# Unfinished Business

## Serbia's War Crimes Chamber

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## Summary

The armed conflicts in the former Yugoslavia during the 1990s were marked by extensive violations of human rights and international humanitarian law. To ensure some measure of accountability for the widespread killings, rapes, destruction of property, and massive displacement of people, the United Nations established the International Criminal Tribunal for the former Yugoslavia (ICTY). As the first ad hoc international criminal tribunal, the ICTY has had important success in bringing individuals to trial for atrocities committed in the countries that comprise the former Yugoslavia. However, it was never intended to be the sole measure to end impunity for these crimes. Because the ICTY will only prosecute a relatively small number of perpetrators before it closes, prosecutions in national courts are essential to ensuring justice is done.

In order to try war crimes cases<sup>1</sup> in its national courts, Serbia established a War Crimes Chamber in July 2003 with support from the United States government and the ICTY.<sup>2</sup> In October 2004 Human Rights Watch issued a report, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, examining domestic efforts to prosecute these cases. Although the Serbian War Crimes Chamber was still in its early stages, the report highlighted a number of issues that might affect the Serbian court's effectiveness. Those issues included lack of political support for the trials, inadequate investigative support from the police, and lack of cooperation between Bosnia and Herzegovina,<sup>3</sup> Croatia, and Serbia. In addition, Human Rights Watch raised concerns about inadequate witness protection

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<sup>1</sup> For the purpose of this document, the term "war crimes" refers to violations of international humanitarian law committed during the armed conflicts in Croatia, Bosnia and Herzegovina, and Kosovo including genocide, crimes against humanity, and war crimes.

<sup>2</sup> The ICTY participated in the training of judges and prosecutors in the War Crimes Chamber, and provides technical assistance on matters such as regional cooperation, access to evidence, and witness protection. The US provided financial assistance for the creation and operation of the Chamber. See, for example, Ana Uzelac, "Serb Judges Meet Hague Officials," Institute for War and Peace Reporting, *Tribunal Update No. 358*, May 15, 2004; UN Security Council, 59<sup>th</sup> session, 4999<sup>th</sup> meeting, June 29, 2004, U.N. Doc. S/PV.4999 (2004), p. 7; Mark S. Ellis, "Coming to Terms with its Past – Serbia's New Court for the Prosecution of War Crimes," *Berkeley Journal of International Law*, vol. 22, 2004, p. 189; US Department of State, "U.S. Government Assistance to Eastern Europe under the Support for East European Democracy (SEED) Act," January 2004, <http://www.state.gov/p/eur/rls/rpt/37000.htm> (accessed May 10, 2007).

<sup>3</sup> Hereinafter Bosnia.

mechanisms, and about uncertainty regarding the doctrine of command responsibility and admissibility of ICTY evidence.

In the nearly three years since that report was issued, Serbia's War Crimes Chamber has made substantial progress in a number of ways. It has completed three trials so far (though one is currently in retrial) and three others are ongoing. The trials include the Ovcara case in which 16 people were tried for the murder of 200 non-Serbs taken from the hospital in Vukovar, Croatia, and killed at a nearby farm; and the Scorpion case relating to execution of Bosnian Muslim civilians from Srebrenica by Serb paramilitaries as caught on a now-notorious videotape shown at the ICTY trial of former President of Serbia and the Federal Republic of Yugoslavia Slobodan Milosevic. An estimated 32 to 35 cases are currently in the pretrial or investigative stage, including cases relating to Kosovo and mass crimes in Croatia. The fact that most of the cases involve prospective prosecution of Serbs for the killings of non-Serbs is in and of itself an important achievement.

Cooperation with Bosnia and Croatia has improved dramatically in the past few years. In fact, Serbia and Bosnia are currently undertaking a joint investigation into crimes that occurred in Zvornik, Bosnia. The War Crimes Prosecutor's Office is also now working successfully on investigations with the ICTY. The first case was officially transferred from the ICTY to Serbia in March 2007. A new comprehensive list of witness protection measures was enacted into law and a new Witness Protection Unit has been established and trained to put these measures into practice.

However, a number of substantial concerns remain. Overall, the number of prosecutions remains low. The political will necessary to support the trials remains problematic. The investigative unit is a major weak link in the court's operations and has until very recently been unwilling to do more than the minimum required by specific instructions from the prosecutor. Uncertainties still exist with respect to the prosecutor's ability to charge on the basis of command responsibility. Questions remain about how high up the chain of command the prosecutor is willing or able to go. A string of reversals by the primarily Milosevic-appointed Supreme Court is slowing the court's progress, and a recent conservative decision by the War Crimes Chamber on the Scorpions case has further undermined the credibility of the court in

the eyes of victims. Furthermore, although the War Crimes Prosecutor's Office has made significant efforts to change the attitude of the press about war crimes trials, it has had less success in reaching a broader audience in Serbia to educate people about the office's work. Outreach has been hampered by limited resources and stringent requirements effectively excluding television cameras from court; legislation making it easier to televise proceedings is stalled indefinitely. The War Crimes Chamber, the prosecutor's office and the Witness Protection Unit remain underfunded. Legislative restrictions prohibiting extradition of nationals also limit cooperation with Bosnia and Croatia.

In short, although the court has made significant progress, without increased backing from political leadership, including improved police support and possibly new Supreme Court appointments, there is a limit to how successful the War Crimes Chamber can be in prosecuting those responsible for atrocities.

## **Recommendations**

### **To the authorities in Serbia**

- The government should make public and unequivocal its support for the work of the War Crimes Prosecutor's Office and the War Crimes Chamber. Without public support from government officials at the highest levels, the chamber will be hampered in its ability to function effectively.
- Serbia should ensure that there are sufficient resources for witness support and witness protection to enable the War Crimes Chamber to provide enhanced support and protection for witnesses. Furthermore, the Ministry of Justice should increase funding to the War Crimes Prosecutor's Office to allow it to hire additional legal associates, conduct investigations abroad, and expand its outreach efforts.
- Serbia should pass legislation making it easier to allow television cameras in court. This would make trials much more accessible to the general population.
- Serbia should reform its legislation to remove the prohibition on extradition of nationals who are charged with war crimes.
- Serbia should make efforts to conduct additional joint investigations with Bosnia and Croatia and work out common standards for the collection of evidence to ensure that work done in each jurisdiction can be used elsewhere.

- Serbia should train prosecutors to prepare them to take over from investigative judges once the new criminal law reducing the number of investigative judges goes into effect in 2009.
- Compensation for members of the War Crimes Detection Unit should be set at a level appropriate to their assignment because of the sensitivity of the work and the need to attract more experienced police to the unit.
- The War Crimes Detection Unit should be placed directly under the authority of the War Crimes Prosecutor's Office, or given its own directorate.
- Serbia should cooperate fully with the ICTY and surrender the remaining fugitives to The Hague.

### **To the European Union and its Member States**

The European Union and its Member States should support the work of the War Crimes Chamber because it lays important groundwork for Serbia's integration into Europe. However, only sufficient resources can ensure that the court is able to function effectively. The EU should therefore consider providing funds to support domestic war crimes prosecutions including for:

- The education and training of investigators, judges and prosecutors;
- Expanded outreach efforts;
- Access of victims and witnesses to trials (traveling expenses, accommodation);
- Witness support (psychological services); and
- Support for the Witness Protection Unit, including consideration of resettlement of witnesses and their families who take part in the witness protection program.

### **To the Organization for Security and Co-operation in Europe**

- Ensure that the monitoring of domestic war crimes trials remains a priority for the OSCE Mission to Serbia.

## Overview

On July 1, 2003, the Serbian National Assembly adopted a law establishing a specialized war crimes chamber to prosecute and investigate crimes against humanity and serious violations of international humanitarian law as defined in Serbian law.<sup>4</sup> The legislation established a War Crimes Prosecutor's Office in Belgrade and provided for creation of a war crimes panel within the Belgrade District Court. The chamber consists of two panels of three judges each selected from the Belgrade District Court or seconded from other courts, and two investigative judges. The president of the Belgrade District Court is also president of the War Crimes Chamber. The law also established a specialized war crimes investigation service within the Interior Ministry to act on requests of the prosecutor for war crimes. Because war crimes and organized crime cases frequently involve a large number of defendants, the ordinary courtrooms in Belgrade could not accommodate them. New high-tech courtrooms were created with the assistance of the US government. The War Crimes Chamber's first trial, the Ovcara case, began on March 9, 2004.

In the nearly four years since the War Crimes Chamber began its work, indictments have been issued in six cases and three trials have been completed. The first, the "Ovcara" case, involved 16 defendants implicated in abducting and killing 200 non-Serbs in Vukovar, Croatia, in November 1991. The defendants were charged with war crimes against prisoners of war under the Serbian Criminal Code. The War Crimes Chamber convicted 14 of the defendants and acquitted two. The Supreme Court in December 2006 ordered a retrial on appeal, which began in March 2007.<sup>5</sup>

A second case, against former Kosovo Liberation Army member Anton Lekaj, resulted in a war crimes conviction on September 18, 2006. In that case, the defendant was accused of illegal imprisonment, killing, torture, rape, inhuman treatment, and inflicting injuries on members of the non-Albanian ethnic community (Roma) in a

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<sup>4</sup> Law on the Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Sluzbeni glasnik Republike Srbije* (Official Gazette of the Republic of Serbia), No. 67/2003, July 1, 2003.

<sup>5</sup> Two others are being tried individually in separate trials for crimes in Ovcara, and a third suspect was arrested in Norway in December 2006 and is expected to be extradited to Serbia soon.

hotel basement in Djakovica, Kosovo. The defendant was sentenced to 13 years' imprisonment. The conviction was upheld on appeal on April 5, 2007.

On April 11, 2007, the War Crimes Chamber completed a third case, the "Scorpion" case in which five former members of the Scorpion paramilitary unit were charged with killing six Bosnian Muslim civilians from Srebrenica in Godinjska Bara, Bosnia. The crimes became notorious when a videotape surfaced during Slobodan Milosevic's ICTY trial showing the defendants smoking cigarettes and taunting the Bosnian Muslims (some of whom were bound and barefoot) before loading them onto a truck and then lining them up in front of a ditch and shooting them in the back. Four of the defendants were convicted and sentenced to prison terms ranging from five to twenty years. The prosecutor is appealing the acquittal of one defendant, Aleksander Vukov, and the five-year sentence handed down against another, Aleksander Medic.<sup>6</sup>

Ongoing cases include one against seven men on charges of forcibly expelling 1,822 civilians from the villages of Skocic and Kozluk (near Zvornik, Bosnia) to Hungary and of killing 19 civilians near Zvornik, between May and July 1992. This is the first case transferred from the ICTY to the War Crimes Chamber while it was in the investigation stage. It is also a case in which Bosnian and Serbian authorities are working together to locate witnesses. A trial has also begun in the "Suva Reka" case in which eight police officers and former members of the Serbian State Security Service are charged with war crimes and violations of the Geneva Conventions in relation to the deaths of 48 members of two Albanian families in Suva Reka, Kosovo, on March 26, 1999. Indictments have been issued in the "Bitici brothers" case in which two former members of the Police Special Purpose Units are charged with war crimes against prisoners of war for allegedly taking part in the July 1999 murder of three Kosovo Albanian brothers who had US citizenship.

## **Witness Support**

One major challenge the court faces is getting witnesses from Bosnia, Croatia, or Kosovo to come to Serbia to testify. Witnesses from outside Serbia are under no

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<sup>6</sup> "Appeal against the Scorpions verdict soon to be filed by the Prosecutor," Republic of Serbia War Crimes Prosecutor's Office press release, April 10, 2007, [http://tuzilastvorz.org.yu/html\\_eng/saopstenja/s\\_12\\_07\\_2007.mht](http://tuzilastvorz.org.yu/html_eng/saopstenja/s_12_07_2007.mht) (accessed May 8, 2007).



obligation to testify in Serbia. Given the lack of trust the wars engendered, it is extremely difficult to convince people to come to Belgrade at the court's request: an invitation from a Serbian institution is generally seen as unwelcome by non-Serbs, particularly Kosovo Albanians. Without the intervention of the Humanitarian Law Center, a Belgrade-based nongovernmental organization (NGO), it is doubtful victims living outside Serbia would be prepared to cooperate with the court. The Humanitarian Law Center has been able to assist in the proceedings due to the reputation it developed for impartiality in documenting war crimes and the trust it has established with victims outside of Serbia. In addition to ensuring witnesses' participation in proceedings, the Humanitarian Law Center represents victims in court, provides psychological support during their stay in Serbia, and obtains important additional evidence and witnesses in furtherance of the prosecutor's ongoing investigations.

As the court establishes its credibility, the negative attitude many victims have about coming to Serbia may change. For example, the families of victims in the Ovchara case initially had a good experience with the War Crimes Chamber and spoke publicly and favorably about it in Croatia. The Bosnian war crimes prosecutor's office also noted that initially victims in Bosnia expressed concerns for their safety and were unwilling to cooperate with the Belgrade War Crimes Prosecutor's Office. However, the Bosnian prosecutor's office has been able to work with Serbian authorities to ensure witness safety. They have arranged for testimony to be taken via videolink in the preliminary stages of an investigation. This is often followed by an in-person interview conducted by a Serbian investigative judge at the Bosnian prosecutor's office.<sup>7</sup>

The court is also making an affirmative effort to be more hospitable to witnesses coming to testify from outside Serbia. Sinisa Vazic, president of the War Crimes Chamber, initiated the establishment of a Victim and Witness Unit. It consists of, as one official put it, "two nice ladies" taken from other departments who did not initially have any particular witness support skills but could help witnesses get to court.<sup>8</sup> They make travel arrangements for witnesses, meet them at the airport or

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<sup>7</sup> Human Rights Watch telephone interview with counsel at prosecutor's office of Bosnia and Herzegovina, May 23, 2007.

<sup>8</sup> Human Rights Watch interview with War Crimes Chamber official, Belgrade, March 30, 2007.

train station, and help them get to their hotel or to court. They work closely with the Humanitarian Law Center. The members of the unit have been to The Hague for training at the ICTY. Ideally, the unit would have some sort of psychological support available for victim witnesses, but it is not possible at the moment due to budgetary constraints. Nonetheless, the response so far to this unit from the victims has been very positive.<sup>9</sup>

Beyond the lack of psychological support, the unit faces other challenges. First, though the unit was provided for in the law establishing the court, it has no budget. The United States donated \$17,000, which enables the unit to buy tickets for witnesses and cover travel expenses, but it does not allow the unit to provide other support for victim-witnesses or to have a remote office closer to where the victims are mainly located. Another limitation the unit faces is that it can only help when a witness is called to court; it is unable to assist with witnesses during investigations. The Bosnian War Crimes Chamber has been able to establish a better model for witness assistance since it has a Registry capable of assisting all witnesses, be they for the defense, the prosecution, or the court, at all stages of the proceedings.

The overarching challenge the court faces is gaining the trust of victim-witnesses from outside Serbia. Although progress had been made in developing trust with Bosnian witnesses, that progress was undermined recently with the War Crimes Chamber's decision in the Scorpions case. In its ruling from the bench, the chamber indicated that there was no evidence that the victims were from Srebrenica, despite the fact that several relatives of the victims from Srebrenica testified to being separated from the victims during the events on July 11. This finding, which completely contradicted the Bosnian victims' testimony, was seen as particularly humiliating by the witnesses who viewed the court as "the same as during the Milosevic time."<sup>10</sup> The victims were also disappointed with the five-year sentence given to one defendant (viewing it as too lenient) and with the acquittal of another (see above).<sup>11</sup> The chamber had also followed the International Court of Justice ruling on Bosnia's case against Serbia for violating the Genocide Convention, which held

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<sup>9</sup> Ibid.

<sup>10</sup> Human Rights Watch interview with Natasa Kandic, head of the Humanitarian Law Center, New York, June 11, 2007.

<sup>11</sup> Ibid.

that Serbian organs did not directly take part in the genocide at Srebrenica and that the Scorpions were not *de jure* organs of Serbia in mid-1995. By following this reasoning, the court's ruling has the effect of denying the victims the opportunity to seek compensation for their suffering in civil actions against Serbia.

## Witness Protection

When the War Crimes Chamber was established, Serbian law did not include witness protection measures. Indeed, pursuant to Serbian criminal procedure law, the judge read the home address of each witness before examining the witness. This was problematic in the initial attempts at war crimes prosecutions that took place in ordinary courts.<sup>12</sup>

The 2003 law establishing the War Crimes Chamber included a provision allowing the court to protect the personal information of a victim or witness. However, a law to provide more comprehensive witness protection was not enacted until January 1, 2006. The new "Law on the Program to Protect Parties to Criminal Proceedings" provides for a set of measures to protect the life, health, physical integrity, liberty or property of a person, suspect, defendant, witness, injured party, expert, or a person related to any of these, before and during a trial and after its termination. The law allows for witness relocation, changing of identities, and use of pseudonyms.

These measures have been put into effect. Pseudonyms have been used for 10 witnesses so far in the Zvornik case, though more than one observer suggested that pseudonyms have limited value in Serbia and Bosnia, as the defendants and people closely following the case know who the witnesses are since they are often from small towns.<sup>13</sup> Pseudonyms provide protection from public curiosity but cannot completely protect a witness from identification. Apart from pseudonyms, a special screened booth has been set up in the courtroom to shield protected witnesses' identities. Witnesses who refuse to come to Belgrade have also been able to testify via videolink.

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<sup>12</sup> See Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004, <http://hrw.org/reports/2004/icty1004/>, pp. 21-22.

<sup>13</sup> Human Rights Watch telephone interview with staff member from Bosnian War Crimes Chamber, May 24, 2007.

In addition to these measures inside the courtroom, a professional Witness Protection Unit has been created within the Interior Ministry for witnesses in criminal matters in Serbia, including war crimes cases. This unit was trained by U.S. Marshals who have been responsible for administering witness protection in the United States since the U.S. Witness Security Program began in 1971. By all accounts, the Serbian Witness Protection Unit is running quite professionally and is well regarded internationally. This unit protects witnesses in war crimes cases when they are in Serbia. The unit has also successfully relocated witnesses outside of Serbia on both a temporary and permanent basis in other sensitive criminal cases. Regional cooperation on these matters has gone well.

However, the unit lacks money and vehicles.<sup>14</sup> The staff is underpaid. The unit faces other challenges as well: in cases where the accused are members of the police, it may be difficult for protected witnesses to have confidence in police protection. This is particularly true in situations in which the protected witness is a former police officer himself who is cooperating with the prosecution. One such witness was thought of by police as a “traitor” and was not comfortable in protective custody in Serbia. Eventually the ICTY called the person as a protected witness in another trial and he was able to leave the country safely.<sup>15</sup>

Ultimately, witness safety will to some degree depend on a greater shift in attitudes about the importance of these prosecutions. Greater public support by Serbia’s leaders for war crimes trials would help both encourage witnesses to come forward and keep those who testify safe from retaliation.

## **Outreach**

The War Crimes Prosecutor’s Office has a small office specifically dedicated to outreach. It comprises a spokesperson and a public information coordinator, the latter position funded by the Organization for Security and Co-operation in Europe (OSCE). This breaks new ground as it is the first time that any Serbian prosecutor has

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<sup>14</sup> Human Rights Watch interview with U.S. government official, Belgrade, March 30, 2007.

<sup>15</sup> Human Rights Watch interview with civil society member, Belgrade, March 29, 2007.

had a spokesperson. The outreach office's primary strategy has been to sensitize journalists to war crimes issues generally.<sup>16</sup> The office has also attempted to provide information to the press about the ICTY's work and, in particular, the fact that non-Serbs are being prosecuted for war crimes. The War Crimes Prosecutor's Office views the ICTY as a key operational partner as they are both working towards the same objective—prosecution of war crimes committed in the region—and both also face some common challenges with presentation in the media. As part of its outreach, the office assisted in arranging a visit for 20 young Serbian journalists to the ICTY and co-sponsored (with the OSCE) visits of Serbian journalists to courts in Bosnia and Croatia and to crimes scenes. The spokesperson has been on a number of OSCE panels and has appeared on local television stations. The office has published a magazine, "Justice in Transition," which is distributed to the media, politicians, and members of parliament.<sup>17</sup> The office is also involved in efforts to reform the law to allow television cameras into court (see below).<sup>18</sup>

With respect to its main objective of shifting the attitudes of the press, the outreach office has met with some success. Initially the prosecutor's office faced attacks from the press, which was still under Milosevic-era influences. The image then presented by the press was predominantly that Serbs were victims and had not committed war crimes. This has changed over time. The fact that people were not gathered outside War Crimes Chamber premises protesting trials was itself viewed as an outreach victory by the press office.<sup>19</sup>

Though the press coverage has been reasonably positive about the prosecutions, it is not extensive.<sup>20</sup> In a December 2006 public opinion survey conducted for the OSCE and the Belgrade Center for Human Rights, the majority of respondents felt the

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<sup>16</sup> Human Rights Watch interview with War Crimes Prosecutor's Office prosecution and outreach staff, Belgrade, March 30, 2007.

<sup>17</sup> Human Rights Watch e-mail correspondence with War Crimes Prosecutor's Office outreach staff, June 27, 2007. For further information on the "Justice in Transition" magazine, see [http://www.pravdautranziciji.com/?change\\_lang=en](http://www.pravdautranziciji.com/?change_lang=en) (English version) and [http://www.pravdautranziciji.com/?change\\_lang=sr](http://www.pravdautranziciji.com/?change_lang=sr) (Serbian version).

<sup>18</sup> *Ibid.*

<sup>19</sup> *Ibid.*

<sup>20</sup> Human Rights Watch telephone interview with Ivan Jovanovic, national legal advisor on war crimes, OSCE Mission to Serbia, May 14, 2007; Human Rights Watch email correspondence with Sonja Prostran, municipal court judge and former spokesperson for the War Crimes Chamber, May 24, 2007.

public should be more informed about the trials, with 72 percent indicating that media coverage of domestic war crimes prosecutions in Serbia is insufficient.<sup>21</sup> Although public awareness about these trials has improved somewhat as a result of efforts by the prosecutor's office and the chamber to educate the public about war crimes directly through websites, more remains to be done.<sup>22</sup> The same survey indicates much greater awareness of the war crimes prosecutor's work in 2006 than in previous years, but still only half the respondents considered themselves at least "a little" familiar with the work of the prosecutor's office.<sup>23</sup>

In this regard, some observers expressed frustration that the War Crimes Prosecutor's Office is not learning from the ICTY experience and being more proactive in going to communities to talk about its work, as was done by the Special Court in Sierra Leone.<sup>24</sup> They feel the office has not been able to reach communities to educate the population about the War Crimes Chamber. The lack of success in reaching the public was demonstrated in interviews with applicants for joint internships with the War Crimes Chamber and the ICTY.<sup>25</sup> The Youth Initiative for Human Rights, with Swiss government support, sponsored an eight-month internship for Serbian law students whereby they would spend six months in The Hague at the ICTY and two months at the War Crimes Chamber in Belgrade to gain practical experience in international and domestic law relating to war crimes.<sup>26</sup> Most internship applicants (despite likely being interested in these cases) knew little about the War Crimes Chamber's work; some could not name any of its cases.<sup>27</sup> Indeed, the December poll found that most citizens surveyed (59 percent) were unable to name a single case before the domestic war crimes courts (though this

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<sup>21</sup> Strategic Marketing Research, "Public Opinion in Serbia: Views on domestic war crimes judicial authorities and The Hague Tribunal," December 2006, <http://www.osce.org/item/23518.html> (accessed June 18, 2007), pp. 19, 20.

<sup>22</sup> Human Rights Watch email correspondence with Sonja Prostran, May 24, 2007.

<sup>23</sup> Strategic Marketing Research, "Public Opinion in Serbia," pp. 13, 14.

<sup>24</sup> Human Rights Watch interview with civil society member, Belgrade, March 29, 2007. For further information on the Special Court for Sierra Leone's outreach program, see Human Rights Watch, *Justice in Motion: The Trial Phase of the Special Court for Sierra Leone*, vol. 17, no. 14(A), November 2005, <http://hrw.org/reports/2005/sierraleone1105/>, pp. 28-29.

<sup>25</sup> Human Rights Watch interview with civil society member and ICTY staff, Belgrade, March 29, 2007.

<sup>26</sup> "Scholarships Granted for Internships at the ICTY and Serbia's War Crimes Chamber and Prosecutor's Office," Youth Initiative for Human Rights press release, May 4, 2007, <http://www.yi.org.yu/english/PressReleases/2007/Html/SCHOLARSHIPS%20GRANTED%20FOR%20INTERNSHIPS%20AT%20THE%20ICTY.php> (accessed June 18, 2007).

<sup>27</sup> Human Rights Watch interview with civil society member and ICTY staff member, Belgrade, March 29, 2007.

number was an improvement over previous years), despite the fact that some of them were fairly notorious cases, in particular the Scorpions case and the Ovcara case.<sup>28</sup> The limited reach of the office may be due in part to the fact that the office is understaffed. It may also relate to the court's prioritization of educating the media about war crimes issues rather than emphasizing community-related activities, plus the fact that the media has paid limited attention to the chamber's proceedings.

## Televised Proceedings

In order for the court to maximize its impact, the proceedings should be made as accessible as possible to the general public. Film footage would be one of the best ways to inform the public about War Crimes Chamber activity. The December 2006 OSCE/Belgrade Center for Human Rights public opinion survey indicates that 71 percent of people list electronic media—mainly television—as their primary source of information about war crimes trials.<sup>29</sup> However, strict restrictions prohibiting cameras in court have so far made it impossible to film proceedings. Under the current law, the Supreme Court president and all parties have to agree to the presence of cameras before they are allowed in court. However, judges and prosecutors have been reluctant to appear on camera,<sup>30</sup> and obtaining the parties' permission has so far proved to be an insurmountable obstacle to filming proceedings. None of the proceedings have been filmed by the media to date.

To address this problem, a working group including the district court president drafted new legislation to make it easier to allow cameras in court. It is not clear whether proceedings would be broadcast live, delayed, or otherwise edited, but filming would be permitted at the trial judges' discretion. The law is still at the Ministry of Justice and is in line for consideration behind numerous urgent matters at the National Assembly, so it may not be adopted for a long time.

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<sup>28</sup> Strategic Marketing Research, "Public Opinion in Serbia," p. 15.

<sup>29</sup> *Ibid.*, p. 21. Only 39 percent listed print media as a source of information on war crimes trials.

<sup>30</sup> Human Rights Watch interview with War Crimes Chamber official, Belgrade, May 30, 2007.

## **Lack of Political and Public Support**

The war crimes prosecutor and his staff have been subject to various forms of abuse and interference since the office opened. In its early days, the then-minister of justice attempted to exploit the chamber's existence and influence the work of the prosecutor's office by pressuring the prosecutor to charge suspects wanted by the ICTY in such a way as to avoid having to transfer suspects to The Hague.<sup>31</sup> Members of the Serbian Radical Party, a hard-line nationalist party whose leader currently faces war crimes charges in The Hague, have spoken against the war crimes prosecutor in parliament. The prosecutor has been the subject of physical and verbal attacks by members of the public and reportedly receives threatening calls on his cell phone. Deputy prosecutors have had their cars vandalized and have been subject to threats and threatening phone calls as well. Judges involved in war crimes cases have also been subject to threats and attacks. Hostility towards court staff has been expressed in the media.

Although the prosecutor's office believes it has the full support of Serbia's President Boris Tadic as well as support from Prime Minister Vojislav Kostunica, that support is not always expressed publicly.<sup>32</sup> Some believe that Kostunica is reluctant to express public support for the War Crimes Chamber for political reasons since his party has a nationalist profile.<sup>33</sup> However, public support for the prosecutor from Kostunica would be extremely helpful at times, particularly when the War Crimes Prosecutor's Office is prosecuting members of the police. Political support is essential both for changing attitudes about the court and for the ultimate success of these prosecutions.<sup>34</sup>

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<sup>31</sup> Human Rights Watch telephone interview with Ivan Jovanovic, May 14, 2007.

<sup>32</sup> Human Rights Watch interview with War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

<sup>33</sup> Ibid.

<sup>34</sup> The results of the December 2006 public opinion poll indicate that the public expects politicians to make public unpleasant truths on war crimes more than any other source, including journalists and witnesses. Strategic Marketing Research, "Public Opinion in Serbia," p. 22.



## External Cooperation

### Cooperation with Bosnia and Croatia

One of the greatest challenges for the Serbian prosecutions has been overcoming obstacles inherent in investigating crime scenes in other countries. The fact that the crimes occurred years ago is also problematic. Additional complications exist as a result of differences between the Bosnian, Croatian, and Serbian justice systems. For example, a system using investigative judges no longer exists in Bosnia but does in Croatia and Serbia. (Under a system that has investigative judges, the judiciary takes a more active role in investigations and gathers evidence against the suspect before deciding whether to bring the case to trial.) Thus, even determining the appropriate people in each state with whom to conclude cooperation agreements is not straightforward. Constitutional and legislative bans on the extradition of nationals exist in all three countries.<sup>35</sup> Nonetheless, within the limitations of the laws prohibiting extradition, a great deal of progress has been made in this area in the past few years.

As a result of good will on all sides, cooperation has improved dramatically between Serbia, Bosnia, and Croatia.<sup>36</sup> The OSCE and the U.S. government convened a number of regional conferences to facilitate cooperation. The Humanitarian Law Center also arranged meetings between the different prosecutors. Regional agreements for cooperation in criminal matters now exist between Bosnia, Croatia, Serbia, and Montenegro, and bilateral agreements are in place between the prosecutors of Serbia, Croatia, and Bosnia.<sup>37</sup> A Memorandum of Understanding with Croatia allows Serbia and Croatia to share evidence in cases where the suspect cannot be extradited, to help ensure that prosecutions take place nationally and the accused will not escape justice.<sup>38</sup> A Memorandum of Understanding also exists

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<sup>35</sup> Croatia maintains a constitutional ban on such extraditions, while in Bosnia and Serbia it is prohibited under their respective criminal procedure codes.

<sup>36</sup> Human Rights Watch telephone interview with counsel at prosecutor's office of Bosnia and Herzegovina, May 23, 2007.

<sup>37</sup> The Serbian Republic Public Prosecutor's Office and the War Crimes Prosecutor's Office concluded a memorandum of agreement in order to establish and promote cooperation in combating all forms of serious crimes with the Croatian Attorney General's office on February 5, 2005. An identical memorandum was concluded with the Prosecutor's Office of Bosnia and Herzegovina on April 1, 2005. Serbia, Montenegro, Croatia, and Bosnia have all acceded to the European Convention on Mutual Legal Assistance in Criminal Matters as well as to other European conventions on the provision of international criminal law assistance and extradition.

<sup>38</sup> Human Rights Watch telephone interview with Ivan Jovanovic, May 14, 2007.

between Bosnia and Serbia that allows prosecutor's offices to share information and evidence during the early phase of an investigation before a case is referred to an investigative judge.<sup>39</sup> The major benefit of these memoranda is that they allow for information sharing on an informal basis without going through lengthy legal processes often required for intergovernmental cooperation.<sup>40</sup>

Serbia and Croatia successfully cooperated in the investigation of the Ovcar case in Croatia. A joint investigation is currently underway in Zvornik, Bosnia. As a result of meetings between the War Crimes Prosecutor's Office and the cantonal prosecutor's office in Tuzla, Bosnia, the Bosnian prosecutor's office was able to assist in providing witnesses for the Zvornik case, cooperation that led to an investigation into the killing of 700 Bosnians at the Technical School Centre in Zvornik being initiated. Other joint investigations are underway and there is now regular contact and cooperation between the Bosnian and Serbian war crimes prosecutor's offices.<sup>41</sup> Staff from the Bosnian prosecutor's office has found no impediments to information sharing from Serbia.<sup>42</sup> These joint investigations are crucial for the successful prosecution of these crimes.

This successful cooperation has come as something of a surprise to foreign observers, due to the sensitive nature of the crimes.<sup>43</sup> It has also resulted in positive spillover effects, such as the fact that the agreements between the prosecutors to cooperate cover all forms of serious crimes, not just war crimes. Additional cooperation is apparent in police matters relating to human trafficking and organized crimes, and between justice ministers.

Although there has been significant progress in cooperation with Croatia and Bosnia, a number of issues still exist. First, there will be limits on cooperation until the constitutional or legislative bans on extradition of nationals in all three countries are

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<sup>39</sup> Human Rights Watch interview with Natasa Kandic, New York, June 11, 2007. See also the website of the Prosecutor's Office of Bosnia and Herzegovina, <http://www.tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=5&jezik=e> (accessed June 18, 2007).

<sup>40</sup> Human Rights Watch email correspondence with Sonja Prostran, May 24, 2007; Human Rights Watch telephone interview with counsel at Prosecutor's Office of Bosnia and Herzegovina, May 23, 2007.

<sup>41</sup> Human Rights Watch telephone interview with counsel at Prosecutor's Office of Bosnia and Herzegovina, May 23, 2007.

<sup>42</sup> Human Rights Watch telephone interview with staff at Prosecutor's Office of Bosnia and Herzegovina, May 24, 2007.

<sup>43</sup> Human Rights Watch interview with Ivan Jovanovic, Belgrade, March 30, 2007.

lifted. As mentioned above, each of the three states has a prohibition on the extradition of its nationals. Yet prosecutors in Croatia and Bosnia pursue investigations of war crimes that took place in their territorial jurisdiction even if the suspect is no longer present in their territory. Should the case then be taken up in the country where the suspect resides, the result can be that some crime scenes are investigated twice—once by each country. This is not entirely avoidable. Efforts to avoid duplication in investigations are increasing, but it will take time for each country to feel comfortable yielding the investigation to another state.<sup>44</sup> In the case of Bosnia, the law does not permit the transfer of proceedings where the underlying offense carries a maximum penalty of less than 10 years' imprisonment.<sup>45</sup> The Bosnian prosecutor is under a great deal of pressure from victims' groups to try cases in the country where the crimes occurred. Bosnian victims remain reluctant to travel to Belgrade to testify out of fear for their security and because they are distrustful of the court. Since the crimes were committed in Bosnia, transferring cases to Belgrade was described as "a hard political sell" and "not realistic."<sup>46</sup> This is all the more true after the Scorpion decision (discussed above), which may be a major setback for more comprehensive cooperation agreements and for efforts to get victims to testify in Belgrade. If, however, other cases are prosecuted more successfully in Belgrade and if witnesses are made aware of Serbia's witness protection measures, witnesses' resistance to testifying may diminish over time. People may also realize that without transfers to Serbia, those cases may not get prosecuted unless the extradition laws are changed.

Another potential obstacle to cooperation arose very recently when the High Judicial and Prosecutorial Council of Bosnia and Herzegovina invalidated the cooperation agreement between the Tuzla prosecutor's office and the War Crimes Chamber in Serbia because it was not approved by the High Judicial and Prosecutorial Council before going into effect.<sup>47</sup> The High Judicial and Prosecutorial Council is an

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<sup>44</sup> Human Rights Watch telephone interview with Ivan Jovanovic, May 14, 2007.

<sup>45</sup> See Human Rights Watch, *Narrowing the Impunity Gap: Trials before Bosnia's War Crimes Chamber*, vol. 19, no. 1(D), February 2007, <http://hrw.org/reports/2007/ijo207/>, pp. 18-19.

<sup>46</sup> Human Rights Watch interview with U.S. government official, Belgrade, March 30, 2007; Human Rights Watch telephone interview with staff member of Prosecutor's Office of Bosnia and Herzegovina, May 24, 2007.

<sup>47</sup> Human Rights Watch telephone interview with counsel at Prosecutor's Office of Bosnia and Herzegovina, May 23, 2007; Human Rights Watch interview with Natasa Kandic, New York, June 11, 2007.

independent body established to oversee judicial and prosecutorial matters. Prior to the decision, the chamber and the local prosecutor's office had been successfully investigating the Zvornik case together. It is unclear how this will affect future cooperation.

Finally, the three countries do not have the same standards or methods for collecting and preserving evidence. Thus, in some cases evidence that is shared from one country is not usable in another. Developing a standard protocol for gathering, preserving, and transferring information that takes into consideration the different country practices would be helpful to facilitate evidence sharing.<sup>48</sup> Continuing close collaboration between prosecutors and police forces is needed going forward.

### **Cooperation with International and National Institutions in Kosovo**

Less progress has been made in cooperation with the international and national institutions in Kosovo. Judicial cooperation with Kosovo on war crimes is sensitive and complex. Serbia considers Kosovo to be an integral part of its territory. Its forces withdrew from the territory in 1999 only after a NATO bombing campaign. Serbia strongly opposes the current United Nations (UN) proposal to grant the province conditional independence.

When the United Nations Interim Administration Mission in Kosovo (UNMIK) arrived in Kosovo after the armed conflict and the NATO bombing campaign, it faced a collapsed justice system and a need to quickly establish a functioning judiciary.<sup>49</sup> After initial efforts to appoint local judges raised concerns relating to bias and professionalism, UNMIK passed a regulation allowing majority panels of international judges "if it determines that this is necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice."<sup>50</sup> Since enactment of the regulation, all war crimes cases have been brought

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<sup>48</sup> Human Rights Watch telephone interview with staff member of Prosecutor's Office of Bosnia and Herzegovina, May 24, 2007.

<sup>49</sup> For more information about the criminal justice system in Kosovo, see Human Rights Watch, *Not on the Agenda: The Continuing Failure to Address Accountability in Kosovo Post-March 2004*, vol. 18, no. 4(D), May 2006, <http://hrw.org/reports/2006/kosovo0506/>.

<sup>50</sup> See UNMIK Regulation No. 2000/64, "On the Assignment of International Judges and Prosecutors and/or Change of Venue," December 15, 2000, <http://www.unmikonline.org/regulations/2000/reg64-00.htm> (accessed June 18, 2007).

by international prosecutors and held in front of courts with a majority panel of international judges.<sup>51</sup> Despite investigating dozens of cases, not many war crimes cases have been brought in Kosovo, and hardly any of these involved victims from minority communities,<sup>52</sup> notwithstanding that Serb, Roma, Ashkali, and other non-Albanian communities were also victims during the armed conflict in Kosovo.<sup>53</sup> The vast majority of the cases—involving Serb defendants—were first tried by panels of national judges, and were characterized by serious errors. On appeal and retrial before majority international panels, almost all of the cases have resulted either in acquittals or a conviction for lesser charges.<sup>54</sup>

Cooperation between the Kosovo Department of Justice and the Serbian War Crimes Prosecutor's Office has been hindered by a number of complications. First, there is a basic dispute over jurisdiction. The UN Security Council resolution establishing UNMIK granted it authority to establish a transitional administration with substantial autonomy.<sup>55</sup> Both Serbia and UNMIK claim to have concurrent jurisdiction over crimes in Kosovo.

As a practical matter, UNMIK will not seek transfer of Serbs to Kosovo for trial. Because of security concerns for witnesses in these trials, UNMIK acknowledges that it is safer to hold trials in Belgrade and to minimize exposure of witnesses locally. UNMIK does, however, object to Kosovo Albanians being tried in Belgrade for crimes committed in Kosovo. Because UNMIK considers itself to have exclusive jurisdiction over these cases, it generally declines to cooperate with the Serbian war crimes prosecutor in these investigations.

An exception may be made when the interests of the defense require it. The Anton Lekaj case is an example. Lekaj is a Kosovo Albanian apprehended in Montenegro and charged with crimes committed against Roma in Kosovo. In that case, the

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<sup>51</sup> OSCE Mission in Kosovo, Legal Systems Monitoring Section (LSMS), "Kosovo's War Crimes Trials: A Review," September 2002, <http://www.osce.org/item/1038.html> (accessed June 18, 2007), p. 11.

<sup>52</sup> Human Rights Watch, *Not on the Agenda*, p. 21.

<sup>53</sup> Human Rights Watch, *Under Orders: War Crimes in Kosovo* (New York: Human Rights Watch, 2001), <http://www.hrw.org/reports/2001/kosovo/>.

<sup>54</sup> Human Rights Watch, *Not on the Agenda*, p. 19.

<sup>55</sup> United Nations Security Council, Resolution 1244 (1999), S/RES/1244 (1999).

defense sought to hear witnesses in Kosovo. UNMIK made an exception to its own policy of not assisting in these trials because in this case they felt the rights of the defense would be jeopardized if they did not cooperate. They therefore drafted a policy enabling UNMIK to cooperate in limited circumstances to protect the rights of the accused.<sup>56</sup>

However, when the Serbian War Crimes Chamber panel came to Kosovo to interview defense witnesses, they also insisted upon interviewing the victims' parents. Because no notice was provided, and because this was contrary to UNMIK's reason for agreeing to cooperate, UNMIK made the decision not to allow the witnesses to be heard in Kosovo.<sup>57</sup> Despite this experience, UNMIK recently agreed to facilitate the hearing of a defense witness in another case.<sup>58</sup>

Another issue hindering cooperation is of a more technical legal nature: because of the uncertainty of Kosovo's status, it is difficult to develop agreements regarding cooperation. No legal framework exists to provide guidelines for cooperation in these circumstances. The only agreement between the two justice systems relates to Kosovo Albanians incarcerated in Serbia being transferred to serve sentences in Kosovo. Even the issue of jurisdiction, which is governed by interpretation of a UN Security Council resolution, is not one that can be resolved in a court.

Neither side feels the other is cooperative. In Belgrade, the War Crimes Prosecutor's Office has not been satisfied with the UNMIK Department of Justice. In part, the prosecutor's office is frustrated that UNMIK is not aggressively prosecuting war crimes cases involving ethnic Albanian perpetrators.<sup>59</sup> Although the Serbian war crimes prosecutor's office believes it has given UNMIK a great deal of evidence in at least one serious case (in which photographs show perpetrators and decapitated victims), UNMIK has yet to proceed with the case. According to an official in the UNMIK Department of Justice, UNMIK is investigating the case but has so far been

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<sup>56</sup> Human Rights Watch telephone interview with UNMIK Department of Justice official, May 24, 2007.

<sup>57</sup> Ibid. The War Crimes Prosecutor's Office in Belgrade disputes this and claims it provided UNMIK with notice regarding the witnesses. Human Rights Watch e-mail correspondence with the War Crimes Prosecutor's Office outreach staff, June 27, 2007.

<sup>58</sup> Human Rights Watch telephone interview with UNMIK Department of Justice official, May 24, 2007.

<sup>59</sup> Human Rights Watch, *Not on the Agenda*, p. 18.

unable to discover the victims' remains or the identity of the perpetrators.<sup>60</sup> UNMIK's investigations have also been hampered by high turnover of international police and a general lack of police experience in investigating these sorts of crimes.<sup>61</sup> According to staff in the Serbian War Crimes Prosecutor's Office, UNMIK's failure to prosecute Kosovo Albanians for war crimes against Serbs has created a backlash in Serbia against the prosecutor's office's efforts to pursue Serb police for war crimes in Kosovo.<sup>62</sup>

However, there are signs that cooperation may improve. The UNMIK Department of Justice has requested authorization from the Special Representative to the Secretary-General to transfer a case involving a Serb defendant they are investigating to the Serbian War Crimes Chamber. More significantly, the Serbian War Crimes Chamber just granted UNMIK's request for permission to investigate a potential mass grave site containing the remains of Kosovo Albanians abducted during the conflict. The grave site is in the administrative zone between Kosovo and Serbia. UNMIK views the fact that Serbia granted it permission to investigate as a very positive development.<sup>63</sup>

Although some members of Serbian civil society contend that cooperation is blocked by the prosecutor's unwillingness to recognize Kosovo as a separate entity,<sup>64</sup> the prosecutor's office claims that this is not a concern and that they are trying to work more closely with institutions in Kosovo.<sup>65</sup> The spokesman says that "whatever the outcome of Kosovo's status, there is a need for justice to be served," and asserts that they will adapt and coordinate efforts with Kosovo authorities.<sup>66</sup> The OSCE is currently making efforts to facilitate links between the prosecutor's office and the Kosovo judiciary. However, if at some point the Serbian National Assembly forbids the government from recognizing Kosovo as independent, it could create additional obstacles for the War Crimes Prosecutor's Office to arrange for cooperation with

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<sup>60</sup> Human Rights Watch telephone interview with UNMIK Department of Justice official, May 24, 2007.

<sup>61</sup> Ibid.

<sup>62</sup> Human Rights Watch interview with War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

<sup>63</sup> Human Rights Watch telephone interview with UNMIK Department of Justice official, May 24, 2007.

<sup>64</sup> Human Rights Watch interview with civil society member, Belgrade, March 29, 2007.

<sup>65</sup> Human Rights Watch interview with War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

<sup>66</sup> Ibid.

Kosovo. Serbia's new constitution adopted by the parliament reasserts that Kosovo is an integral part of Serbia.<sup>67</sup> Once Kosovo's status is resolved, in the long run it may be easier to manage the technicalities of inter-jurisdictional cooperation. Moreover, the future Kosovo government may be more willing to cooperate once status is resolved.

## ICTY Completion Strategy

In order to achieve its objective to complete trial activities by 2009, the ICTY developed a completion strategy that includes plans to transfer cases involving intermediate and lower-level accused to competent national jurisdictions.<sup>68</sup> The strategy includes increasing cooperation with national courts as part of an effort to strengthen their capacity to try these cases.

To facilitate its completion strategy, the ICTY amended its rules to allow transfers to other jurisdictions. ICTY Rule 11*bis* allows the ICTY to transfer a case after confirmation of the indictment but before commencement of trial to the state on whose territory the crimes are alleged to have occurred, the state where the accused was arrested, or a state "having jurisdiction and being willing and adequately prepared to accept such a case." In determining whether to permit a referral, the ICTY trial chamber must consider the gravity of the crimes charged and the level of responsibility of the accused. The court must also be satisfied that the accused will receive a fair trial in the state to which the case is referred.

Initially, some governments thought that the new Serbian court would be an important part of the ICTY's completion strategy and that the ICTY would transfer a number of cases to Serbia.<sup>69</sup> That has not turned out to be the case. As a practical matter very few cases will be transferred to Serbia under Rule 11*bis*. In part this is because the remaining cases against Serbian defendants are too high-profile to be

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<sup>67</sup> Constitution of the Republic of Serbia, adopted November 10, 2006, preamble, arts. 114, 182.

<sup>68</sup> See United Nations Security Council, Statement by the President of the Security Council, July 23, 2002 S/PRST/2002/21; United Nations Security Council, Resolution 1503 (2003), S/RES/1503 (2003); see also "Letter dated 29 May 2006 from the President of the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, addressed to the President of the Security Council," Annex I, U.N. Doc. S/2006/353, May 31, 2006, paras. 37, 49.

<sup>69</sup> Human Rights Watch interview with U.S. government official, Belgrade, March 30, 2007.



handled domestically.<sup>70</sup> To date only one case, that against Vladimir Kovacevic, has been transferred to the War Crimes Chamber pursuant to Rule 11*bis*. Kovacevic was provisionally released to Serbia in 2004 when the tribunal found him unfit to stand trial. On March 28, 2007, the ICTY Appeals Chamber upheld the referral bench decision that Serbia was capable of monitoring his health and instituting proceedings against him should he become fit to stand trial.<sup>71</sup> This will likely be the only case transferred to Serbia under Rule 11*bis*.

Cooperation with the ICTY has proved to be more meaningful with respect to sharing of information. The ICTY-Serbia transfer of investigative material has greatly assisted the prosecutor in Belgrade in preparing cases such as the Zvornik case. The ICTY has also provided important assistance in the Suva Reka (Kosovo) case, the first case implicating members of the Serbian Interior Ministry. Former and current ICTY staff have been engaged to facilitate contacts with ethnic Albanian witnesses for cases involving crimes in Kosovo being handed over to Serbia from the ICTY.<sup>72</sup> Without this link, it may have been hard for Serbian prosecutors to convince witnesses to cooperate, for reasons discussed above. Because of the difficulties the war crimes prosecutor has had with investigations and financial support, as discussed further below, the assistance the office receives from the ICTY is of great value.

In general, the chamber's cooperation with the ICTY has been very good. A 2006 Memorandum of Understanding between the Office of the Prosecutor for ICTY and the War Crimes Prosecutor's Office in Serbia granted Serbian war crimes prosecutors access to the ICTY's database.<sup>73</sup> This may be an enormously important resource, though language constraints may limit its impact since the prosecutor and his deputies do not speak English well.<sup>74</sup> Also, the prosecution only has one legal

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<sup>70</sup> Human Rights Watch interview with War Crimes Chamber official, Belgrade, March 30, 2007.

<sup>71</sup> *Prosecutor v. Vladimir Kovacevic*, ICTY, Case No. IT-01-42/2, Decision on Appeal against Decision on Referral under Rule 11*bis*, March 28, 2007, <http://www.un.org/icty/kovacevic-v/appeal/decision/070328.pdf> (accessed June 18, 2007). Staff of the War Crimes Prosecutor's Office said that they intend to establish whether Kovacevic is too ill to stand trial. They plan for him to be institutionalized or to stand trial but they say he will not stay free.

<sup>72</sup> Human Rights Watch interview with Ivan Jovanovic, March 30, 2007.

<sup>73</sup> "Memorandum of Understanding on Access to Documents through the Electronic Disclosure Suite between the Office of the Prosecutor of the ICTY and the Office of the War Crimes Prosecutor of the Republic of Serbia," reprinted in Center for Transitional Processes (Belgrade), *Justice in Transition*, September 2006 (Special Edition), pp. 152-53.

<sup>74</sup> Human Rights Watch interview with Ivan Jovanovic, Belgrade, March 30, 2007.

associate (a young lawyer who assists the prosecution but does not appear in court) able to review material, which slows work down.<sup>75</sup>

Although the prosecutor may undertake cases based on evidence collected at the ICTY, it is unclear to what extent ICTY evidence will be able to be used in court in non-*11bis* cases.<sup>76</sup> The revised law establishing the War Crimes Chamber explicitly allows for use of the ICTY's evidence in proceedings in cases that have been transferred after confirmation of the indictment pursuant to Rule *11bis* (for this reason, the prosecutor's office was confident of its capacity to handle *11bis* cases as they do not require additional investigation).<sup>77</sup> It is also possible that ICTY evidence will be permitted in court when it is otherwise unavailable from another source. For example, depending on its probity, unavailable witnesses, expert or forensic testimony, or material evidence might be deemed admissible. So far ICTY witness statements have been used for the limited purpose of impeaching witness testimony. Ultimately, though, admissibility will depend on the attitude of the judges making the decision, some of whom are more liberal than others.

Finally, in relation to the ICTY's completion strategy, there has been discussion in the region about the possible establishment of a regional court to handle cases after the ICTY closes.<sup>78</sup> This was the Bosnian chief prosecutor's idea, though it also has the support of the Serbian prosecutor. The notion is that the prospective court would take over from the ICTY and consist of judges from across the region. Were it to be established, it would likely be based in Sarajevo. There is, however, no indication that such a concept, while interesting, has traction elsewhere, including within the international community, and in any event does not mitigate Serbia's obligation to support the War Crimes Chamber and otherwise to meet its obligations with regard to the investigation and prosecution of war crimes.

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<sup>75</sup> There were two legal associates until recently; a second legal associate will be hired if the 2007 budget permits.

<sup>76</sup> Human Rights Watch interview with War Crimes Chamber official, Belgrade, March 30, 2007.

<sup>77</sup> Human Rights Watch interview with War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

<sup>78</sup> Human Rights Watch interviews with War Crimes Chamber staff, two members of the War Crimes Prosecutor's Office and Ivan Jovanovic, national legal advisor on war crimes, OSCE Mission to Serbia, Belgrade, March 30, 2007.

## Budget

War crimes investigation requirements differ from those of ordinary crimes. In particular, investigators must travel in order to collect evidence at crime scenes in Croatia, Bosnia, and Kosovo. The initial court budget did not contemplate the need to conduct investigations outside Serbia.<sup>79</sup> The original budget was supplemented by grants from the US government and from the Open Society Institute, which provided money for public information activities.<sup>80</sup> In 2006 the annual budget was raised to €450,000. However, the current budget amount still constrains the prosecutor's ability to conduct broader investigations in the field (though the prosecutor considers it an improvement over previous years).<sup>81</sup> It is also not enough to enable him to hire a sufficient number of legal associates.

(The increased budget includes €50,000 for the Mladic Task Force, an inter-agency body headed by the war crimes prosecutor, Vladimir Vukcevic, that is charged with implementing the "Mladic Action Plan" for the capture and transfer of the indicted war crimes suspect Ratko Mladic. Serbia launched the Action Plan in July 2006 to demonstrate its commitment to cooperating with the ICTY in an effort to restart stalled European Union association talks.)

## Weaknesses in Investigation Capacities

### Investigative Judge System

Serbs have a saying: "Justice is slow but achievable."<sup>82</sup> The current court structure in some ways reinforces this notion by acting as an impediment to efficient prosecutions. The police are initially responsible for carrying out investigations. The prosecutor provides them with direction and applies the law to the facts. The prosecutor provides the investigative judge with a witness list and a basic narrative of the crime highlighting key events. The investigative judge, of which the War Crimes Chamber has only two, then completes his own investigation after which he

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<sup>79</sup> Human Rights Watch interviews with War Crimes Prosecutor's Office staff and with Ivan Jovanovic, Belgrade, March 30, 2007.

<sup>80</sup> Human Rights Watch email correspondence with Sonja Prostran, May 24, 2007.

<sup>81</sup> Human Rights Watch interview with War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

<sup>82</sup> Human Rights Watch interview with U.S. government official, Belgrade, March 30, 2007.

issues a report that becomes the basis of an indictment. Because one of the two investigative judges in the War Crimes Chamber must repeat the investigation done by the police, it slows down the progress of cases. This requirement has in effect resulted in a bottleneck of investigations within the War Crimes Chamber. This may change: an amended criminal law, which applies to all criminal cases and is now scheduled to go into effect on January 1, 2009, will limit the use of investigative judges in favor of a more active role for the prosecutor. The investigative judge will primarily be used when necessary to protect the rights of the accused. However, a loophole in the new law allows the prosecutor to use an investigative judge broadly whenever he deems it necessary. Thus it is possible the new law will not result in any changes in practice.<sup>83</sup> Ideally, however, the new law will result in a more efficient movement of cases from the investigation stage to trial.

Ultimately the intent of the new law is to make cases more efficient. Prosecutors will be responsible from the beginning of the case to its end. However, prosecutors will need training in order to adapt to a more active role in investigations.

## War Crimes Detection Unit

The weak link in the War Crimes Chamber has been its investigative unit, the War Crimes Detection Unit. The law establishing the chamber included a provision creating a specialized war crimes investigative service, a police unit within the Interior Ministry assigned to assist the prosecutor's office with war crimes investigations.<sup>84</sup>

The war crimes investigative unit currently consists of 22 persons, approximately 10 of whom are investigators (the remainder includes analysts and documentation specialists).<sup>85</sup> The unit is responsible for investigating war crimes, searching for missing persons, and cooperating with the ICTY.<sup>86</sup> Members of this unit do not

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<sup>83</sup> Human Rights Watch interviews with War Crimes Chamber official and with U.S. government official, Belgrade, March 30, 2007.

<sup>84</sup> Law on the Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, *Sluzbeni glasnik Republike Srbije*, No. 67/2003, art. 8.

<sup>85</sup> Human Rights Watch email correspondence with Ivan Jovanovic, May 16, 2007.

<sup>86</sup> *Ibid.*

receive additional compensation for this assignment.<sup>87</sup> Nor do they have separate premises. It is a very unpopular assignment; usually young, inexperienced police are given it.<sup>88</sup> Because the Interior Ministry is implicated in many of the crimes under investigation, it is difficult to find senior police able to investigate these matters impartially.

Investigators in the War Crimes Detection Unit were initially openly unwilling to do more than the minimum they were ordered to do directly by the prosecutor. At OSCE War Crimes Coordination meetings in 2005, two former heads of the War Crimes Detection Unit admitted that they did not act on their own initiative in these cases. Rather their policy was to wait for specific instructions from the prosecutor.<sup>89</sup> Even then they were slow to respond. Because the police have been so inactive, prosecutors have had to rely more heavily on ICTY or NGO investigations to further their cases.

One reason the War Crimes Detection Unit is weak is its lack of leadership. Senior police qualified to lead the unit are often themselves implicated in crimes or have relationships with others implicated in crimes. From 2004 until November 2005 the unit was headed by Gvozden Gagic, who held a senior position in Kosovo during the conflict. When Gagic retired, he was replaced by his superior Slobodan Borisavljevic, who was previously chief of staff for the Serbian deputy interior minister and Serbian Interior Ministry Public Security Department chief Vlastimir Djordjevic, who was recently arrested in Montenegro and is now in the custody of the ICTY. After the Humanitarian Law Center charged that Borisavljevic was himself implicated in war crimes and should not only be removed from office but brought to trial,<sup>90</sup> a new head of the War Crimes Detection Unit was named: Aleksander Kostic, a young lawyer who has been with the unit from the beginning. Observers believe that his appointment has resulted in an improvement to the unit.<sup>91</sup> The prosecutor has said that the

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<sup>87</sup> Human Rights Watch telephone interview with Ivan Jovanovic, May 14, 2007.

<sup>88</sup> Human Rights Watch interview with Ivan Jovanovic, Belgrade, March 30, 2007.

<sup>89</sup> Ibid.; Human Rights Watch telephone interview with Jovanovic, May 14, 2007.

<sup>90</sup> "HLC Demands that Slobodan Borisavljevic be Removed from Ministry of Interior and Filed Criminal Charges against him," Humanitarian Law Center press release, January 23, 2006.

<sup>91</sup> Human Rights Watch interviews with U.S. government official and War Crimes Prosecutor's Office staff, Belgrade, March 30, 2007.

cooperation and reliability of the police has been improving. However, whether the unit is able to overcome the obstacles inherent in what may amount to internal investigations of high-level Interior Ministry personnel, particularly for crimes in Kosovo, remains to be seen.

Suggestions as to how to improve the unit include making the prosecutor responsible for evaluating team members' job performance. Currently the interior minister determines the advancement of the police, so they do not have as much incentive to perform well for the prosecutor. Indeed, this structure may provide a counter-incentive not to be overly aggressive in investigating Interior Ministry members. Members of the unit should also receive additional compensation for their assignment in order to attract more experienced police. The unit should be separated from the rest of the Interior Ministry police. A separate directorate for war crimes would help avoid sharing resources and could streamline the bureaucracy currently necessary for approvals. Another option would be to place the unit directly under the control of the prosecutor.

## **Command Responsibility**

The Serbian law on command responsibility is somewhat controversial. Serbian criminal law until recently did not contain a provision explicitly allowing prosecution on the basis of command responsibility.<sup>92</sup> For this reason some commentators claim it is not possible under Serbian Law to prosecute leaders for failing to prevent or punish crimes.<sup>93</sup>

The recently revised criminal code does contain a provision criminalizing a commander's or superior's failure to prevent commission of war crimes. The law also prescribes a lesser punishment for failure to prevent war crimes on the basis of negligence, which is intended to be akin to situations where the commander "should

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<sup>92</sup> Criminal Code of the Republic of Serbia, *Sluzbeni glasnik Republike Srbije*, Nos. 85/2005, 88/2005, 107/2005, art. 384.

<sup>93</sup> See "Implementation of Transitional Laws in Serbia 2006," Youth Initiative for Human Rights, Report No. 19, December 8, 2006, <http://www.yi.org.yu/english/Publications/Documents/prelom%20knjige%20eng.pdf> (accessed June 19, 2007), p. 128, citing Dragoljub Todorovic, *Abolition for Commanders*, DANAS, March 13, 2006.

have known” that the crime was going to be committed.<sup>94</sup> Failure to punish may be charged as “failure to perform an official duty” or failure to report a crime.<sup>95</sup>

The war crimes prosecutor believes there is no legal impediment to prosecution on the basis of command responsibility.<sup>96</sup> Indeed, although no one has been officially charged with omission as a form of liability under Serbian law, the Zvornik indictment contains multiple references to defendants Branko Grujic and Branko Popovic’s leadership role in Zvornik. The indictment alleges that they knew of numerous illegal actions by other defendants, including torture, mutilation and killing, and failed to prevent them—classic allegations of command responsibility.<sup>97</sup> The prosecutor’s office also uses aiding and abetting where there is not direct responsibility.

Although there may be no legal impediment to charging on the basis of command responsibility, a question remains as to whether the prosecutor is interested in aggressively pursuing senior officials for war crimes. Civil society members regularly criticize the prosecutor for what they see as a lack of political will to go up the chain of command.<sup>98</sup> The Humanitarian Law Center in particular believes that the prosecutor has a tendency to minimize the scale of war crimes and the level of government involvement.<sup>99</sup> This was apparent in the Scorpion decision, which was criticized for not linking the murders to the state institutions involved in the

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<sup>94</sup> Criminal Code of the Republic of Serbia, art. 384.

<sup>95</sup> International observers feel Serbia’s law on command responsibility is not an obstacle to ICTY transfers. The possibility of acquittal on the basis of differences in the law on command responsibility was raised in the Kovacevic transfer decision but not resolved because he was only charged with command responsibility in the alternative. *Prosecutor v. Kovacevic*, Decision on Referral of Case Pursuant to Rule 11bis, November 17, 2006, <http://www.un.org/icty/kovacevic-v/trialc/decision-e/o61117e.pdf> (accessed June 18, 2007), paras. 43-46.

<sup>96</sup> Human Rights Watch interview with War Crimes Prosecutor’s Office staff, Belgrade, March 30, 2007. See also Sinisa Vasic “Towards Clear Answers and Determined Stands,” *Justice in Transition*, December 2006 (indicating that international law, including the Geneva Conventions and the ICTY Statute, takes precedence over domestic legislation).

<sup>97</sup> Republic of Serbia, War Crimes Prosecutor’s Office, Case No. KTRZ-no.17/04, August 12, 2005 (Belgrade) (unofficial translation).

<sup>98</sup> See, for example, International Center for Transitional Justice, “Serbia and Montenegro: Selected Developments in Transitional Justice,” October 2004, <http://www.ictj.org/images/content/1/1/117.pdf> (accessed June 19, 2007), p. 5; Humanitarian Law Center, “Transitional Justice Report: Serbia, Montenegro and Kosovo 1999-2005,” pp. 26, 32.

<sup>99</sup> “HLC on War Crimes Trials in Serbia,” Humanitarian Law Center press release, July 26, 2006, [http://www.hlc-rdc.org/english/War\\_Crimes\\_Trials\\_Before\\_National\\_Courts/Serbia/index.php?file=1462.html](http://www.hlc-rdc.org/english/War_Crimes_Trials_Before_National_Courts/Serbia/index.php?file=1462.html) (accessed June 19, 2007).

planning.<sup>100</sup> As noted above, the War Crimes Detection Unit may also be unwilling or unable to investigate high level Ministry of Interior officials. After the recent International Court of Justice decision finding Serbia in violation of the Genocide Convention for failing to prevent the genocide at Srebrenica or to punish those responsible, but (as noted above) which had held that Serbian organs did not directly take part in the genocide, there is a perceived lack of interest at the chamber in pinning responsibility on Serbian institutions.<sup>101</sup> Another problem that may limit the scope of some investigations is the reluctance of Serb witnesses to testify for fear of retaliation. In Kosovo cases, witnesses often either claim to remember nothing, or identify dead people or the ICTY indictees as responsible, rather than testify against Serb police.<sup>102</sup> The two former members of the Police Special Purpose Units accused in the Bitici case in Kosovo so far are therefore very low-level.

## Supreme Court

The Supreme Court has slowed completion of cases by regularly overturning lower court judgments. The Supreme Court reversed the first three war crimes judgments on appeal and returned the cases to the lower court for retrial. The first two cases were war crimes cases brought in ordinary courts before the War Crimes Chamber was established.<sup>103</sup> The third reversal, for the first trial at the War Crimes Chamber, was in the Ovcara case (in which retrial is ongoing).<sup>104</sup> A fourth case, against Albanian Anton Lekaj for the murder of four Roma in Kosovo, was recently affirmed (see above).<sup>105</sup> So far, after retrial the higher court has tended to affirm the lower court decision, though it is not clear that the retrial was conducted any differently than the original trial.

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<sup>100</sup> See Tracy Wilkinson, "Serbs sentenced in 1995 murders" *Los Angeles Times*, April 11, 2007 (quoting Sonja Biserko, head of the Helsinki Committee for Human Rights in Serbia, as saying the trial "showed yes, there were crimes, but by individuals and not institutions."); Nicholas Wood, "4 Serbs Guilty in Execution of 6 Bosnians," *New York Times*, April 11, 2007.

<sup>101</sup> Human Rights Watch interview with U.S. government official, Belgrade, March 30, 2007.

<sup>102</sup> Human Rights Watch interview with Ivan Jovanovic, March 30, 2007.

<sup>103</sup> See Humanitarian Law Center, "War Crimes Trials in Serbia," January 11, 2007, [http://www.b92.net/eng/insight/reports.php?yyyy=2008&mm=01&nav\\_id=39011](http://www.b92.net/eng/insight/reports.php?yyyy=2008&mm=01&nav_id=39011) (accessed June 19, 2007).

<sup>104</sup> Dusan Stojanovic, "Serbia's supreme court orders retrial in 1991 killing of 200 Croat POWs," Associated Press, December 14, 2006.

<sup>105</sup> "Supreme Court upholds 13-year prison sentence for Kosovo Albanian," Associated Press, April 5, 2007.



While the Supreme Court is bound to ensure that the lower courts have not erred and rendered unsound convictions, doubts about whether the decisions of the Supreme Court were based on such error have been widespread. In particular, the Humanitarian Law Centre and the OSCE have critiqued decisions of the Supreme Court as not being legally sound. This was particularly true of the Supreme Court's overturning the verdict in the original Ovcara trial, which was regarded by observers to have been an extremely well-run trial.<sup>106</sup>

Other reasons that have been offered as possible explanations for the Supreme Court's actions relate to the history and structure of the Supreme Court. The Supreme Court was described by one official as "very rigid," "from old times" and "unaware of the current environment."<sup>107</sup> Four of the five Supreme Court judges who hear these appeals were appointed before the end of the Milosevic regime in 2000. The judges may also have ideological biases that make them reluctant to pass judgments on these cases. The judges were also not consulted during the process of creating the War Crimes Chamber and were reportedly offended by that since the judges are usually consulted on legislation relating to the judiciary. This, and the fact that they were not initially involved in training and education on these issues, may be factors influencing their decisions.<sup>108</sup> Finally, the new constitution requires judges to be reelected by a new parliament.<sup>109</sup> It is therefore possible that by reversing cases they are seeking to appease those opposed to prosecutions and not jeopardize their jobs.

Apart from the inefficiencies, the reversals are frustrating for the War Crimes Chamber and demoralizing for the victims who have come to Serbia to participate in proceedings. The recent Supreme Court reversal of the Ovcara convictions provoked victims' families' indignation and may have undone some of the initial good will generated by the trial. The families have boycotted the retrial in protest of the

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<sup>106</sup> See, for example, "The Supreme Court of the Republic of Serbia illegally overturned the first instance ruling in the Ovcara case," Humanitarian Law Center press release, December 15, 2006, [http://www.hlc-rdc.org/english/War\\_Crimes\\_Trials\\_Before\\_National\\_Courts/Serbia/index.php?file=1569.html](http://www.hlc-rdc.org/english/War_Crimes_Trials_Before_National_Courts/Serbia/index.php?file=1569.html) (accessed June 19, 2007); Humanitarian Law Center, *Transitional Justice Newsletter*, no. 22, January 11, 2007, <http://www.hlc-rdc.org/storage/docs/2499f9cc5cae85d689b7afea714aff03.pdf> (accessed June 19, 2007); OSCE, "Analysis of the Serbian Supreme Court's Ruling Annulling the First Instance Judgment in the Ovcara case," document on file with Human Rights Watch.

<sup>107</sup> Human Rights Watch interview with War Crimes Chamber official, Belgrade, March 30, 2007.

<sup>108</sup> Human Rights Watch email correspondence with Sonja Prostran, May 24, 2007.

<sup>109</sup> Constitution of the Republic of Serbia, arts. 105, 147.

Supreme Court's decision.<sup>110</sup> The decisions are also not helpful in assuaging concerns of Bosnian victims about Serbia's ability to try these cases.

## Conclusion

The Serbian War Crimes Chamber is a critical forum for ensuring full accountability for the crimes committed during the Balkans conflicts in the 1990s. In addition to bringing to justice perpetrators in Serbia who might otherwise go unpunished, the trials are a means of educating the public about these crimes. Transparency and accountability are essential to help ensure these crimes do not occur in the future.

In order for the court to reach its potential, however, it must be fully funded and able to function independently.

This requires political will from the Serbian government. It remains to be seen how supportive the new coalition government will be of the War Crimes Chamber, but in the best case scenario it will increase government support for war crimes prosecutions, including publicly supporting the prosecutor's work, fully funding the War Crimes Chamber, and considering in a timely fashion the law on allowing cameras into courtrooms.

European Union stakeholders in the discussions with Serbia about a Stabilization and Association Agreement and possible future EU candidate status must keep this issue, along with the need for Serbia to cooperate fully with the ICTY, on the agenda to guard against the possibility of an impunity gap for the atrocities committed in the region.

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<sup>110</sup> Drago Hedl, "A new Ovcar trial opens without the victims," *International Justice Tribune*, No. 64, March 19, 2007, p. 3.