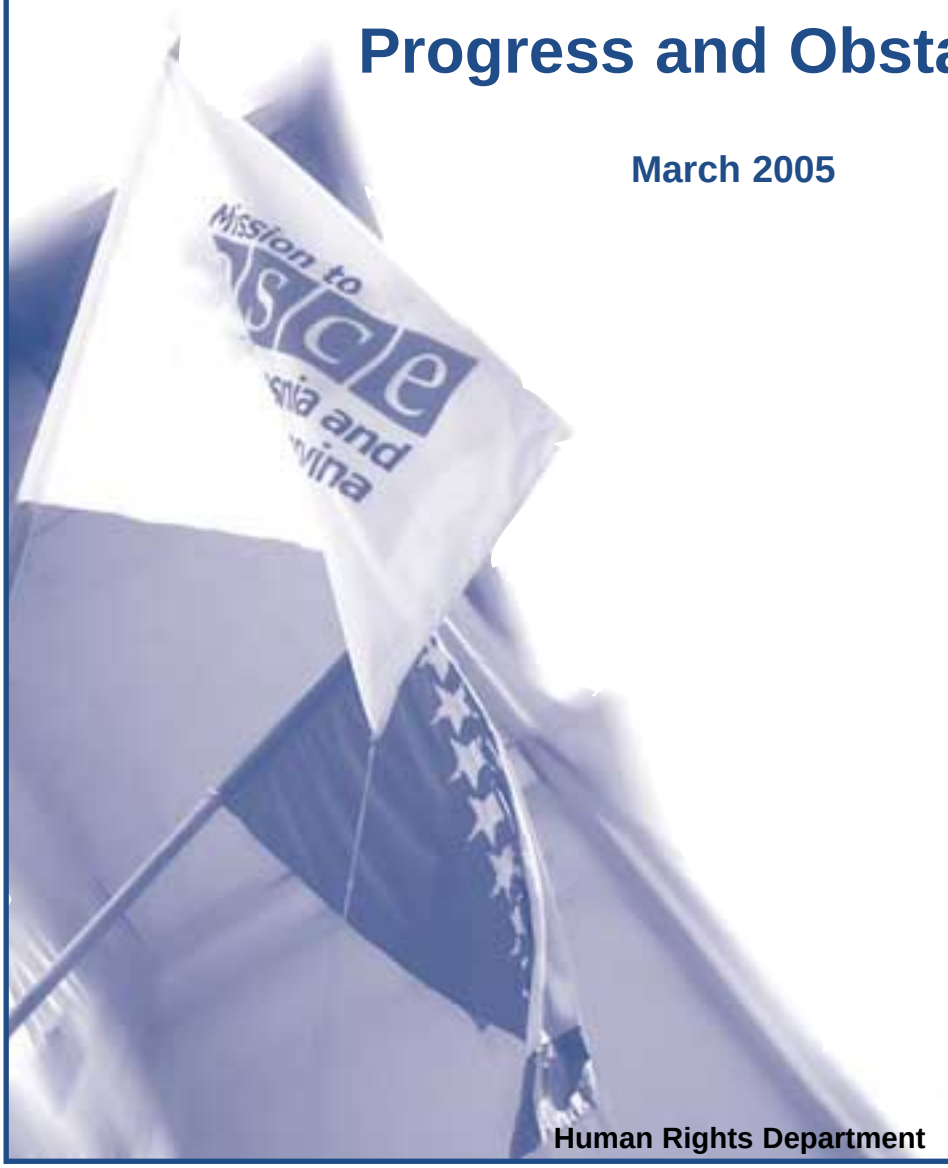
War Crimes Trials
Before the Domestic Courts of Bosnia and Herzegovina

Progress and Obstacles

March 2005



Human Rights Department

OSCE
Mission to Bosnia and Herzegovina

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Progress and Obstacles

With the establishment of the War Crimes Chamber of the State Court of Bosnia and Herzegovina (BiH) in January 2005, it is imperative to draw attention to the efforts of the BiH authorities in relation to war crimes cases proceeding before the cantonal and district courts. Although the precise number to be tried by the new state-level Chamber, which will include both national and international judges and prosecutors, has yet to be determined, it has been confirmed by the BiH Prosecutor's Office that the Chamber will only hear the most serious, *"highly sensitive"* cases, as it will have *"neither the resources nor the time to try all war crimes cases"*. Due to the quantity of remaining cases to be tried, the majority will continue to be dealt with by the domestic courts under the jurisdiction of the Entities – district courts in the Republika Srpska (RS) and cantonal courts in the Federation of Bosnia and Herzegovina (FBiH) - and the Basic Court of Brčko District.

Through this Report, the Mission to Bosnia and Herzegovina (MBiH) of the Organization for Security and Co-operation in Europe (OSCE) aims to draw attention to the number, nature and importance of war crimes proceedings before the domestic courts of BiH, providing the most detailed analysis to date of their progress and the obstacles they continue to face.

Since June 1996, the OSCE has monitored, or obtained information about, 114 war crimes cases at various stages of proceedings, involving a total of 184 defendants. In 2004, there was a significant increase in the number of cases proceeding before the cantonal courts in the FBiH, with little corresponding activity in the district courts in the RS. Of the verdicts pronounced in 2004 by the FBiH cantonal courts in relation to 24 defendants, 15 were acquitted, while the nine defendants found guilty received sentences ranging from 18 months to 15 years of imprisonment. In January 2005 there have been two further guilty verdicts before the FBiH cantonal courts resulting in sentences of seven years and four years and six months imprisonment. At the time of writing, there were 14 on-going cases involving a total of 34 defendants.

Despite widespread criticism of the domestic authorities' handling of war crimes cases, this Report highlights how some courts and prosecutors, particularly in the FBiH, have made conscientious efforts to bring those responsible for war crimes to justice. However, almost a decade after the end of the conflict, the steps taken by the authorities to investigate and bring to justice those responsible for atrocities committed during the war and to compensate the victims or their families remain insufficient. The on-going failure to address this impunity undermines the rule of law and negatively impacts public confidence in the police and legal system, especially among the returnee community. This is particularly the case in the RS.

This Report analyses the numerous obstacles to effective prosecution, including the political indifference of biased or uncommitted authorities, the fear of judges and prosecutors for their personal security, difficulties with locating and securing the attendance of witnesses and defendants, as well as inadequate commitments, structures and procedures for trans-border co-operation. In the processing of war crimes cases, the courts and prosecutors have also had to face the problems caused by reluctant, fearful or forgetful witnesses, inadequate witness protection mechanisms, large case loads, inadequate legal resources and poor dissemination of law reports and legal texts, insufficient training on humanitarian law and necessary skills, such as cross-examination, indictment drafting and witness selection. Resources at cantonal and district courts are already over-stretched and any supplementary needs to ensure these cases can proceed effectively have not been prioritised. The new criminal procedure codes introduced in 2003

and the procedural and jurisdictional uncertainty that has developed with the establishment of the state-level War Crimes Chamber have contributed to the challenges facing the entity courts.

Moreover, monitoring has revealed the courts' reluctance to conduct effective prosecutions against defendants who held positions of power during the war and remain influential. Narrow interpretations of the facts and a lack of willingness to conscientiously explore the full circumstances have resulted in a number of notable not guilty verdicts. Although 2004 saw several guilty verdicts and the imposition of lengthy prison sentences, a significant majority of these convicted defendants were low-ranking military personnel. OSCE monitoring also indicates that cases are processed less effectively and robustly where the defendants are members of the majority local community and where the prosecution witnesses are from the minority.

Additionally, domestic war crimes proceedings in the countries of the former Yugoslavia have a regional dimension since victims, witnesses, perpetrators and crime sites are often located on the territory of different countries. Although some regional co-operation exists, OSCE has found that the procedures and practices have been inefficient and insufficiently defined. The existing level of commitment and the mechanisms of co-operation among the countries in the region, and, indeed, between the Entities within BiH, have not adequately met the needs of war crimes investigations and trials and will need to be enhanced in 2005.

The welcome establishment of the mixed international/national War Crimes Chamber will create much needed momentum in 2005 for war crimes prosecutions and may have a positive impact on the work of the cantonal and district courts. However, while funding and attention are directed at the state-level Chamber to deal with the higher level cases, it remains essential for the BiH authorities and the international community to also ensure that courts, judicial and prosecutorial services, and defence lawyers at the entity-level are properly resourced and capable of effectively handling war crimes cases. The ultimate success of the domestic process of prosecuting war crimes will not only depend on the achievements of the new War Crimes Chamber, but also on the ability of the cantonal and district courts to fulfil their respective role in processing the majority of these cases.

Structure of the Report

This Report is structured to give an essential historical and statistical background to the prosecution of war crimes in BiH, while also providing a detailed analysis of important thematic issues impacting the effective and fair administration of justice in this field. To assist the BiH authorities, institutions, practitioners, and the international community, recommendations are also provided, including requirements for increased resources, guidance and clarification of law and procedures, and the requirements for further professional training. Where recommendations are presented, they constitute the recommendations of the Human Rights Department of the OSCE Mission to BiH.

Chapter One provides an overview of the aims and scope of the Report, the OSCE's Trial Monitoring Programme and methodology, and the other sources of information including the structured survey of

all prosecutors' offices at cantonal and district level conducted by OSCE, in May and June 2004, in relation to war crimes prosecutions.

Chapter Two provides the essential background, including the establishment of the ICTY, a summary of early prosecutions of war crimes in BiH and the introduction of the 'Rules of the Road' through the 1996 Rome Agreement that enabled the oversight of the ICTY of prosecutions undertaken by the authorities in BiH.

Chapter Three presents a detailed statistical overview of cases proceeding before the domestic courts of BiH. This includes the number and categorization of war crimes cases referred back to the authorities of BiH by the ICTY 'Rules of the Road' Unit, and the progress made by the authorities in bringing cases to trial. This chapter gives particular attention to the cases that proceeded to first instance verdict in 2004 and the range of sentences of imprisonment imposed upon the defendants who were found guilty.

Chapter Four provides an overview of the criminal justice system in BiH as relevant to war crimes prosecutions. This includes a brief overview of the major changes and reforms to the criminal justice system in BiH, both procedural and structural, affecting the courts, the judiciary and prosecutors' offices, culminating in the establishment of the mixed international and national War Crimes Chamber of the BiH Court in January 2005.

Chapter Five presents the OSCE's findings, analysis and recommendations in relation to the difficulties and obstacles encountered by the cantonal and district courts in processing war crimes prosecutions. This chapter contains ten sections on a range of issues, such as the problems locating and arresting suspects, jurisdiction, witness protection, procedural and evidentiary issues, trans-border legal co-operation, independence and impartiality, victim's rights, and the training, resource and capacity needs of courts, prosecutors and lawyers.

Chapter Six provides an analysis of the 'Rules of the Road' procedure. It assesses the problems encountered in relation to their interpretation and application by the domestic authorities of BiH. Finally, in light of the recent closure of the ICTY 'Rules of the Road' Unit on 1 October 2004 and the transfer of its responsibilities to the BiH Prosecutor's Office, the OSCE outlines the outstanding issues that need to be resolved.

Chapter Seven summarises the OSCE's conclusions in relation to progress made by the BiH authorities and the remaining and outstanding obstacles to the fair and effective prosecution of war crimes.

The Appendix contains summaries of 35 war crimes trials that have proceeded before the domestic courts of BiH. This includes summaries of all cases that proceeded to first instance verdict in 2004 and in early 2005, summaries of all cases that are still on-going and summaries of a selection of significant cases that were concluded before 2004.

March 2005

Acronyms

ABA-CEELI	American Bar Association - Central European and Eurasian Law Initiative
BiH	Bosnia and Herzegovina
BoR	The BiH Prosecutor's Office Book of Rules on the Review of War Crimes Cases
CC	Criminal Code
CCIAT	Criminal Code Implementation Assessment Team
CDSS	Criminal Defence Support Section of the BiH Court
CPC	Criminal Procedure Code
CoE	Council of Europe
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
EU	European Union
EUPM	European Union Police Mission
FBiH	Federation of Bosnia and Herzegovina
GFAP	General Framework Agreement for Peace in BiH
HJPC	High Judicial and Prosecutorial Council
HRC	Human Rights Chamber of Bosnia and Herzegovina
HVO	Croatian Defence Council
ICTY	International Criminal Tribunal for the former Yugoslavia
IJC	Independent Judicial Commission
JNA	Yugoslav People's Army
JPTC	Judicial and Prosecutorial Training Centre
LIG	Local Implementation Groups
MBiH	Mission to Bosnia and Herzegovina
MoJ	Ministry of Justice
OG	Official Gazette
OHR	Office of the High Representative
OSCE	Organization for Security and Co-operation in Europe
OTP	Office of the Prosecutor of the ICTY
PIC	Peace Implementation Council
RoR	Rules of the Road
RS	Republika Srpska
SFRY	Socialist Federal Republic of Yugoslavia
SIPA	State Investigation and Protection Agency
UNHCR	United Nations High Commission for Refugees
UNMIBH	United Nations Mission in Bosnia and Herzegovina
VRS	Republika Srpska Army

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1.1. Aims and Scope of the Report

The continuing work of the International Criminal Tribunal for the Former Yugoslavia (ICTY) has ensured that some of those responsible for the most serious crimes committed during the 1991-95 armed conflict are being held accountable. However, the ICTY is already beginning to reduce its caseload with a view to closure in 2008. In any event, it has never purported to be able to comprehensively address the vast scale of the crimes committed on the territory of the former Yugoslavia.

Through this Report, the Mission to Bosnia and Herzegovina (MBiH) of the Organization for Security and Co-operation in Europe (OSCE) provides the most detailed analysis to date of the progress made by the domestic authorities in relation to the criminal prosecution of war crimes cases. With the establishment of the mixed international/national War Crimes Chamber of the State Court of Bosnia and Herzegovina in January 2005, it remains as important as ever to draw attention to the efforts made by the authorities in relation to cases proceeding before the cantonal and district courts, especially given that the majority are still likely to remain within those jurisdictions. These cases have tended to fall out of the public eye and have not, hitherto, been the focus of detailed research or analysis.

The aim of this Report is to draw attention to the number, nature and importance of war crimes prosecutions proceeding before the domestic courts of Bosnia and Herzegovina (BiH). While positive developments are discussed, the Report also examines the obstacles to effective prosecution, draws conclusions and highlights recommendations to the national authorities and international agencies on how to ameliorate the situation of courts, prosecutors, victims, and witnesses.

1.2. Methodology

Since 1996, the OSCE, as well as other international organisations, has been monitoring the prosecution of war crimes before the domestic courts of BiH. Until 2003, this monitoring took place on a relatively *ad hoc* basis. However, as other international organisations have reduced their own trial monitoring capacity or even exited BiH altogether[1], the OSCE has become the most active organisation in this field. Since November 2003, the OSCE has developed an increasingly structured trial monitoring capacity dedicated to observing and reporting upon trial proceedings in all types of criminal cases, of which war crimes form an important category. The OSCE now employs a specialist team of 24 full-time national trial monitors, who cover 38 designated courts across the country. Monitors use a standardised hearing report format, detailing their observations and analysis. They are subject to a strict policy of non-intervention, enforced under the principle that in order for any justice system to establish full independence, courts must remain free from interference from external actors and remedies in individual cases must be provided from within the justice system.

Since June 1996, the OSCE has monitored, or obtained information about, 114 war crimes cases at various stages of proceedings, involving a total of 184 defendants. This process provides a broad range of information for the purposes of this Report. Of these 114 cases, 41 have reached final and binding verdicts, so the conclusions that can be drawn are incomplete to the extent that procedural or legal errors may be rectified in the appellate courts. In this Report, cases are only mentioned by name where there has been a

[1] For example, the United Nations Mission in BiH mandate ended on 31 December 2002.

final and binding verdict or where the commentary simply seeks to objectively highlight significant events in the course of the proceedings.

It should be noted that, as of November 2003, the OSCE has not been monitoring the investigative phase of criminal proceedings, namely the part preceding the issuance of an indictment involving both the police and the prosecutor. Information on the investigative phase of proceedings has been collected in some cases prior to 2003. However, the comprehensive collection of all such information remains beyond the capacity of any one international organisation in BiH.

Some information also derives from the monitoring activities of the OSCE in conjunction with other international organisations, including the Office of the High Representative (OHR), the United Nations Mission in Bosnia and Herzegovina (UNMIBH), the European Union Police Mission (EUPM), Human Rights Watch, Helsinki Committee for Human Rights and Amnesty International.

As a supplementary source of information, and one that also sheds light on the investigative phase of proceedings, between May and June 2004, the OSCE conducted a structured survey of all prosecutors' offices at cantonal and district level (Prosecutors' Survey). The purpose of the exercise was to elucidate the corporate views of each office on the problems with initiating and proceeding with war crimes cases. Where noteworthy, the views of individual prosecutors are mentioned. The Survey contained ten sections comprising questions on discrete areas such as jurisdiction, witnesses, criminal procedure, evidence, trans-border co-operation and requirements for training – areas which receive detailed treatment below.

Although most of the information derives from trial monitoring and the Prosecutors' Survey, since the establishment of its Mission to BiH in 1995, the OSCE has collected a large body of other data from a number of other sources, including other international organisations, the ICTY, other Mission activities in rule of law/human rights work, such as recent participation in the Implementation Task Force for the Establishment of the BiH War Crimes Chamber, and an extensive archive of media reports.

2. Essential Background

2.1. The 1992-1995 Conflict and Post-Dayton Bosnia and Herzegovina

The war in BiH was brought to an end by the signing of the General Framework Agreement for Peace in BiH (GFAP - also known as the Dayton Peace Agreement) on 14 December 1995. It is estimated that between 150,000 and 250,000 lives were lost during the conflict,[2] accompanied by widespread destruction and the mass uprooting and displacement of people. Approximately one million citizens became refugees and another one million were internally displaced.[3] Thirty-five per cent of pre-war residential dwellings were destroyed and the technical and social infrastructure was significantly damaged.

The GFAP set out the post-war constitutional structure of BiH, whereby the State of Bosnia and Herzegovina consists of two Entities: Republika Srpska (RS) which covers 49 per cent and the Federation of Bosnia and Herzegovina (FBiH) which covers 51 per cent of the territory.[4] The FBiH is composed of ten cantons, each with a strong degree of autonomy from the Entity and with its own ministries of justice and interior, although these exist also at entity-level. The RS comprises five administrative units called districts and has centralised ministries of justice and interior based in Banja Luka. On 5 March 1999, the constitutional status of Brčko was finally settled. The District is self-governing and includes a unified and multi-ethnic police force operating under a single command structure and a separate judiciary.

2.2. Prosecution of War Crimes at the International Criminal Tribunal for the Former Yugoslavia

The international effort to try those accused of war crimes began well before the end of the hostilities. On 25 May 1993, the United Nations Security Council unanimously concluded, such was the extent of the atrocities which had been committed on the territory of the former Yugoslavia, that an international criminal tribunal should be established to prosecute serious violations of international law which had occurred since 1 January 1991.[5] Domestic courts could also prosecute such offences, however, they were placed under an obligation to defer to the competence of the ICTY.[6] The jurisdiction of the ICTY was further recognised in Article IX of the GFAP, with its Annex IV, in which Article II(8) provides that:

> "All competent authorities in Bosnia and Herzegovina shall cooperate and provide unrestricted access to . . . the International Tribunal for the Former Yugoslavia (and in particular shall comply with orders issued pursuant to Article 29 of the Statute of the Tribunal)."

[2] Most estimates of the numbers of persons killed during the conflict in Bosnia and Herzegovina run from 200,000 to 250,000. The Sarajevo based Research and Documentation Centre estimates that the final figure is unlikely to be higher than 150,000.

[3] "Profile of Internal Displacement: Bosnia and Herzegovina," Norwegian Refugee Council Global IDP Database, 28 January 2004.

[4] See http://www.ohr.int/dpa/default.

[5] See UN Security Council Resolution 827 (1993), adopted under Chapter VII of the UN Charter, and Art.1 and 8 of the ICTY Statute annexed thereto. Available at http://www.un.org/icty/legaldoc/index.htm.

[6] Id. Art. 9, embodying the principle of primacy.

2.3. Early Prosecutions of War Crimes in Bosnia and Herzegovina

Domestic courts in BiH, civilian and military, did indeed proceed to try war crimes cases during and immediately after the conflict. However, that loss of skilled members of the legal profession and the judiciary, as well as the physical destruction and lack of proper equipment or facilities significantly hampered the ability of the courts to administer justice properly or efficiently. This situation was further exacerbated after the conflict by the complexities of the legal framework in a two-entity state, with separate legal systems, police forces and ministries of justice. Outdated and inadequate procedural laws contributed to the inefficiency of the system. The loss of many pre-war judges resulted in the judiciary and prosecutors' offices, in different parts of the country, being dominated by the majority ethnicity. New, inexperienced judges and prosecutors were appointed on ethnic and political grounds. The prosecution of war crimes, in particular, ineffectual investigations, excessive and systematic delays in the resolution of trials and dubious decisions, compounded by a lack of public faith in the judicial system, brought into serious question the applicability of the rule of law.

In this volatile and politicised context, certain police officers and prosecutors began investigating and prosecuting cases of alleged war crimes. There were a number of well-founded allegations of arbitrary arrests and unfair trials. Between 1993 and 1995, for example, 47 war crimes suspects were tried and convicted *in absentia* by the military court in the Municipality of Orašje.[7] In some of these cases, the death sentence was imposed,[8] commuted to 20 years imprisonment after capital punishment was abolished in 1998.[9] After referral to the ICTY in 2001 (see Section 3.4 below), 42 of these cases were categorised as either "B" (evidence insufficient to justify arrest or indictment) or "C" (unable to determine sufficiency of evidence). In 1993, at the District Military Court in Sarajevo, Sretko Damjanović was found guilty of genocide and crimes against the civilian population and sentenced to death, subsequently commuted to 20 years imprisonment. In 1997, the Human Rights Chamber of BiH (HRC)[10] ruled that the District Military Court in that case *"lacked a sufficient appearance of independence"* and could not therefore *"be regarded as a 'court' for the purposes of Article 2(1) of the Convention"*.[11] His conviction was quashed in July 2002. The trial of Ibrahim Đedović at the Sarajevo Cantonal Court was strongly condemned in 1997 and 1998 by OHR, OSCE and other international organizations on the basis that, in numerous respects, he did not receive a fair trial.[12] His conviction was subsequently overturned on 27 March 2000 after a second trial. In the *Golubović* case (see case summary in the Appendix) at the Mostar Cantonal Court, the proceedings lasted for more than seven years with long periods of delay and numerous interruptions in the investigative and trial proceedings. Although the prosecutor officially requested the commencement of investigative proceedings in April 1994, the criminal trial did not commence or proceed in a meaningful way until February 2000.

[7] Some cases proceeded before the High Court Bosanski Brod, also located in Orašje.

[8] Sentences of 15-20 years were imposed in most cases.

[9] Art. 393(1) of the FBiH Criminal Code, published in FBiH OG 43/98 (20 November. 1998).

[10] Art. II(1) Constitution of BiH and GFAP, Annex 6.

[11] HRC Decision No. CH/96/30 (5 September 1997).

[12] Đedović was arrested on suspicion of having committed war crimes against civilians and prisoners of war. He was convicted by the Sarajevo Cantonal Court on 6 October 1998. After a second trial in 2000, he was found not guilty. Đedović had spent three years in custody and alleged that his arrest and prosecution were politically motivated. Đedović served as Deputy Minister of Defence and Police in the "autonomous province of western Bosnia", proclaimed by Fikret Abdić in September 1993 in Velika Kladuša. An armed conflict took place between forces loyal to Mr. Abdić and the Fifth Corps of the BiH Army.

2.4. The Need for International Oversight - The Rome Agreement and 'The Rules of the Road'

The possibility of arbitrary arrests and unfair trials was a key concern to the international community in the immediate post-conflict phase in BiH. Atrocities and the mass displacement of civilians resulted in the establishment of majority rule in areas in which these had occurred. In such an environment, it was difficult for individuals to travel through BiH without fear of arbitrary arrest or detention. Providing for freedom of movement, especially to refugees and displaced persons, was crucial to the success of holding free and fair municipal elections in September 1996, especially as candidates and voters were being encouraged to stand and vote in their pre-conflict constituencies.

For these reasons, the 'Rules of the Road' (RoR) procedure, annexed to the Rome Agreement, was introduced to enable the ICTY to oversee prosecutions undertaken by the relevant authorities.[13] The Rome Agreement was a tripartite political agreement, signed on 18 February 1996, between President Izetbegović of BiH, President Tuđman of Croatia and President Milošević of the Federal Republic of Yugoslavia. Under this agreement, the relevant authority had to submit each case to the ICTY for approval to proceed to arrest and indictment. The 'Rules of the Road' Unit was established at the Office of the Prosecutor (OTP) of the ICTY in order to advise whether or not:

> "the evidence is sufficient by international standards to justify either the arrest or indictment of a suspect, or the continued detention of a prisoner".

Category "A" is granted against a particular suspect for a specific charge in order to indicate that:

> "the evidence is sufficient by international standards to provide reasonable grounds for the belief that (accused's name) may have committed the (specified) . . . serious violation of international humanitarian law".

There are seven other categories ("B" through "H"), out of which "B" and "C" are the most significant in number and nature. "B" category indicated that *"the evidence is insufficient"* while in "C" category cases, the ICTY was *"unable to determine the sufficiency of the evidence"* and therefore instructed the BiH authorities to gather certain specific evidence after which the case should be submitted for re-categorisation.

Given the scheduled closure of the ICTY,[14] on 27 August 2004 the Tribunal's Prosecutor informed the BiH Presidency in writing on 27 August 2004 that, as of 1 October 2004, the Office of the Prosecutor of the ICTY would no longer be in a position to review war crimes cases and that the BiH Prosecutor should take over responsibility for RoR reviews. The BiH Presidency accepted in writing the revocation of the agreed measures of the Rome Agreement. Accordingly, the review of war crimes cases has been taken over by the BiH Prosecutor's Office (see Sections 5.2 and 6).

[13] Rome Agreement, signed on 18 February 1996, between Presidents Izetbegović, Tuđjman and Milošević. Available at www.ohr.int/ohr-dept/hr-rol/thedept/war-crime-tr/.

[14] UN Security Council Resolution 1503 (2003).

3. Statistical Overview of Cases Proceeding Before the Domestic Courts of BiH

3.1. Overview

Since 1996, the ICTY RoR Unit received criminal files against a total of 5,789 persons suspected of war crimes.[15] By 29 September 2004, the Unit reviewed and provided categories against a total of 3,489 persons, referring them back to the domestic authorities. Of the cases referred back to the domestic authorities in accordance with the RoRs, 846 cases received "A" categorisation,[16] 2,346 received "B" categorisation and 675 received "C" categorisation.[17]

According to information available to the OSCE, from 1996 to the end of January 2005. Fifty-four category "A" cases (individual or group), against 94 defendants, have reached trial stage. This represents approximately 11 per cent of those referred back to BiH by the ICTY with category "A" status. The OSCE is aware of at least 44 cases against 73 accused (18 Bosniacs, 38 Croats, 17 Serbs) which are being actively investigated or are in the pre-trial phase. Of the trial cases, only two have proceeded in the RS (and two others were dismissed at some stage of the proceedings). The rest have been conducted in the FBiH. Forty-one cases,[18] involving 50 defendants (27 Bosniacs, six Croats and 17 Serbs), have reached a final and binding verdict. Of these, there have been guilty verdicts, involving 30 defendants (14 Bosniacs, three Croats and 13 Serbs). Sentences of imprisonment have ranged from six months to 20 years. In addition to the cases with final verdicts, 17 more cases, involving 39 defendants (23 Bosniacs, nine Croats, seven Serbs), have reached a verdict at first instance and are currently in appeal procedure or being retried.

In 2004, there was a significant increase in the number of cases proceeding before the cantonal courts in the FBiH with little corresponding activity in the district courts in the RS. Fifteen war crimes trials, involving a total of 24 defendants (seven Bosniacs, ten Croats, seven Serbs) have reached first instance verdicts, all before the cantonal courts in the FBiH. Fifteen defendants were acquitted (seven in the *Konjic 7*, four in the *Mostar 4* group case and four in individual cases). The sentences imposed for the other nine defendants who were found guilty have ranged from 18 months to 15 years of imprisonment. Fourteen cases, involving 34 defendants, are on-going and are also being monitored by the OSCE.

[15] Statistics received by the OSCE from the ICTY on 10 November 2004.

[16] A further eleven cases were given a "G" categorization, meaning that the ICTY OTP determined that the evidence for the specified serious violation of international humanitarian law was insufficient, yet it was sufficient for a different violation of international humanitarian law.

[17] As files were received from the BiH authorities at ICTY by incident and not by suspect, some suspects were given more than one standard marking. According to ICTY figures, there were 3,965 standard markings in relation to 3,489 suspects.

[18] The figures may exclude convictions for war crimes which took place before the RoR procedures were adopted. In some cases, these have been subsequently sent to ICTY, but have not been included in the figures unless proceedings have since been activated. Courts have not, of their own motion, overturned any war-time convictions for want of a RoR categorisation. See, for example, 47 cases of war-time convictions imposed *in absentia* before a military court in Orašje which all remain on file with Orašje Cantonal Court and the Cantonal Prosecutor's Office despite the following subsequent categorizations by RoR: 5 category "A", the remainder category "B" and "C." None of the defendants have ever appeared before a court in BiH, either before or since the ICTY categorized the cases.

Examples of notable verdicts and sentences imposed in 2004 (see case summaries in the Appendix) include:

- the case of *Ratko Gašović*, who was found guilty of war crimes against civilians (in relation to rape, forced labour and inhumane treatment) and sentenced to ten years of imprisonment at the Sarajevo Cantonal Court on 9 February. The Supreme Court FBiH reduced the sentence to eight years imprisonment on 6 October 2004;

- *Ivan Baković*, who was found guilty in relation to the murder of nine civilians and sentenced to 15 years imprisonment at the Livno Cantonal Court on 7 April;

- *Vlastimir Pušara*, who was found guilty of four counts of war crimes against civilians and was sentenced to ten years imprisonment at the Sarajevo Cantonal Court on 29 June; The Supreme Court of the FBiH reduced the sentence to seven years imprisonment on 8 December 2004;

- *Mario Matić*, who was found guilty of war crimes against the civilian population and sentenced to six years imprisonment at the Mostar Cantonal Court on 6 July;

- *Dragan Bunoza* who was found guilty of war crimes against the civilian population and sentenced to 9 years imprisonment at the Mostar Cantonal Court on 12 July;

- and *Zoran Knežević* who was found guilty of war crimes against civilians and sentenced to ten years imprisonment at the Sarajevo Cantonal Court on 9 December.

In the *Konjic 7* case, on 29 June 2004, all seven defendants were found not guilty by the Mostar Cantonal Court in relation to the illegal detention, maltreatment and murder of two Serb civilians after a number of prosecution witnesses retracted their original statements.

In what is only the second war crimes case to proceed to trial before a court in the RS (the last being in 1997)[19], the Banja Luka District Court is trying the *Matanović* case, involving 11 defendants (police officers) in relation to allegations of illegal detention.[20] One case, involving the Iraqi-born Abduladhim Makhtouf, has recently commenced at state-level before the BiH Court. The first trial hearing took place on 20 December 2004.

[19] Ferid Halilović, convicted on 23 October 1997 by the Court of First Instance in Modriča in RS and sentenced to 15 years imprisonment (see case summary in the Appendix to this Report).

[20] Not in relation to murder as has been stated in other reports.

In early 2005, there have already been two further guilty verdicts before the cantonal courts in the FBiH for war crimes against civilians. In the case of *Veselin Čančar* at Sarajevo cantonal court, the defendant was sentenced to four years and six months imprisonment on 12 January. In the case of *Salem Pinjić* at Mostar Cantonal Court the defendant was sentenced to seven years imprisonment on 17 January.

The institution of 'plea agreements', also referred to as 'plea bargains', was introduced into the BiH legal system in the new criminal procedure codes (see Section 4.3 below) that came into force in 2003.[21] In July 2004, one war crimes case, *Milorad Rodić* (see case summary in the Appendix), was concluded in the FBiH following a plea agreement and resulted in a sentence of five years imprisonment for war crimes against the civilian population.

Statistics for the year 2003 show significantly less activity. Two defendants were found not guilty and one defendant was found guilty. Two other cases, *Enes Šakrak* and *Mustafa Hota*, were resolved through plea agreements in October and December 2003, resulting in sentences of imprisonment of ten and nine years, respectively, for war crimes against civilians. Two other cases were dismissed due to the mental incapacity of the defendants.

Despite the increase in cases proceeding to trial, almost a decade after the end of the conflict, a large number of cases investigated by BiH police and prosecutors have still failed to generate active and effective prosecutions before the country's courts. This is particularly the case in the RS.

[21] Art. 231 BiH CPC (BiH OG 3/03), Art. 246 FBiH CPC (FBiH OG 35/03 and Art. 238-239 RS CPC (RS OG 50/03).

4. Overview of the Criminal Justice System in Bosnia and Herzegovina as Relevant to War Crimes Prosecutions

4.1. The Courts, Judiciary and Prosecutors' Offices

The structure of the criminal justice system in BiH has been the subject of recent reform. Between 2002 and 2003, under projects led by the OHR and the Independent Judicial Commission (IJC)[22], the courts and prosecutors' offices were restructured to rationalise the number of courts and centralise the prosecutors at cantonal and district level with satellite offices in outlying areas (see Section 5.8 below).[23] Alongside these reforms, the reappointment process of all judges and prosecutors commenced (see Section 5.6 below), aiming to promote the independence and competence of the judicial and prosecutorial services which had been compromised by political interference and appointments based on ethnicity and patronage. The selection was conducted by the High Judicial and Prosecutorial Councils (HJPCs), composed of national and international appointees. The HJPCs aimed to establish an appropriate balance of judges of different ethnicities. In this process, the tenure of all incumbent judges and prosecutors was brought to an end and all posts were advertised. Incumbents, as well as external applicants, were eligible to apply. In March 2003, the Entity HJPCs opened 874 judicial and prosecutorial posts in the FBiH cantonal and municipal courts and the RS district and basic courts for reappointment.[24] The reappointment of individual judges and prosecutors began in April 2003 and continued throughout the remainder of 2003, with the majority of reappointments occurring in late 2003.[25] By the end of 2004, the now merged HJPC had appointed 96 per cent of judges and prosecutors.

Up to the end of 2004, with the exception of one case, the prosecution of war crimes was proceeding at the entity rather than the state-level.[26] The FBiH court structure consists of ten cantonal courts and 28 municipal courts, while the RS court structure consists of five district courts and 19 basic courts. The cantonal courts (FBiH), district courts (RS) and the Basic Court of Brčko District, until recently, had exclusive jurisdiction to hear first instance war crimes trials in BiH. From these courts, there is an appeal to the Supreme Court in the respective entity and to the Brčko Appellate Court. This exclusive jurisdiction was removed on 24 January 2003, when the High Representative imposed a new criminal code establishing state-level criminal jurisdiction over certain crimes, predominantly crimes against the state and crimes of an international/trans-border nature, including war crimes. The new law came into effect on 1 March 2003.

[22] See Independent Judicial Commission, Final Report, November 2004.

[23] See website http://www.hjpc.ba for more information.

[24] HJPC Periodic Report No. 2, 1 January - 31 March 2003. Available at http://www.hjpc.ba/ARCHIVE/reports/1/?cid=512,1,1

[25] HJPC Periodic Report No. 5, 1 October. - 31 December 2003. Available at http://www.hjpc.ba/ARCHIVE/reports/1/?cid=999,1,1.

[26] As of the time of writing of this Report, the single war crimes trial initiated at state-level, was started on 20 December 2004 (see case summary of *Maktouf* in the Appendix to this Report).

4.2. The Establishment of the War Crimes Chamber of Bosnia and Herzegovina

The establishment of the new mixed international and national War Crimes Chamber (a chamber within the state-level BiH Court) is an integral part of the new arrangement whereby jurisdiction over war crimes is shared between the BiH Court and the entity courts. The new Chamber was first formally proposed at the Peace Implementation Council (PIC) Steering Board meeting on 12 June 2003[27] and was the subject of subsequent discussion between the ICTY and OHR throughout 2003 and 2004. The Chamber was formally established on 6 January 2005[28] and is scheduled to start the processing of cases in the course of 2005.

In accordance with the ICTY's completion strategy, lower and intermediate ranking cases will be deferred to the new War Crimes Chamber, which may also assert jurisdiction over the most sensitive cases at entity-level. It is anticipated that it will hear three types of cases: those deferred by the ICTY in accordance with Rule 11 *bis*[29] of the ICTY Rules of Procedure and Evidence (approximately 15 accused), those deferred by the ICTY OTP for which indictments have not yet been issued (approximately 45 suspects) and those RoR cases which, due to the sensitivity, should be tried at the state-level.

According to OHR's Project Implementation Plan Registry Progress Report, dated 20 October 2004, the War Crimes Chamber is to be an institution of BiH operating under the laws of the State of BiH. In its first phase, however, it will have a temporary international component in its judiciary and court management. For the first phase of the Project, trial and appeal panels will be composed of two international judges and one national judge. These will subsequently evolve into panels configured with a majority of national judges. The Chamber is envisaged to operate with exclusively national judges at the end of a five-year period. Likewise, the Special Department in the Office of the Prosecutor of BiH will start with seven international prosecutors, but will evolve into a department with a majority of national prosecutors. In the final stage, it will be exclusively composed of national prosecutors. An independent Registry will be responsible for providing support and administration services to the War Crimes Chamber, as well as the Specialized War Crimes Department in the Office of the Prosecutor of BiH. It will also progressively evolve into a purely domestic structure.

The precise number of cases to be tried by the new state-level War Crimes Chamber has yet to be determined. According to the BiH Prosecutor's Office, the War Crimes Chamber will only hear the most serious *"highly sensitive"* cases (see Section 5.2 below) as it will have *"neither the resources nor the time to try all war crimes cases"*.[30] It is clear, therefore, that due to the volume of remaining cases to be tried, a large number will continue to be dealt with by the domestic courts under the jurisdiction of the Entities – district courts in the Republika Srpska and cantonal courts in the Federation of BiH – and the Basic Court of the Brčko District.

[27] PIC Steering Board Declaration, 12 June 2003. The PIC was formed after a Peace Implementation Conference in London in December 1995. Its principal purpose is to review progress and define the goals of peace implementation for the coming period.

[28] The laws required for the establishment of the War Crimes Chamber and transfer of cases from ICTY to BiH came into force on 6 January 2005. BiH OG 61/04 (Law on Amendments to the Law on the Court of BiH; Law on Amendments to the Law of the Prosecutor's Office of BiH; Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by ICTY in Proceedings before the Courts in BiH; Law on Amendments to the Law on Protection of Witnesses under Threat and Vulnerable Witnesses; and Law on Amendments to the BiH Criminal Code).

[29] Indictment confirmed, irrespective of whether or not the accused is in the custody of the ICTY.

[30] See "Orientation Criteria for Sensitive Rules of the Road Cases", Office of the BiH Prosecutor, 12 October 2004 (See Section. 5.2 below).

4.3. International Standards

Article II(2) of the Constitution of BiH provides that the rights and freedoms set forth in the European Convention on Human Rights (ECHR) shall apply directly in BiH and *"shall have priority over all other law"*. BiH is also obliged to *"ensure the highest level of internationally recognised human rights and fundamental freedoms"*.[31] The GFAP also established the HRC, a judicial body competent to receive and adjudicate applications alleging violations of human rights. The HRC's mandate ended on 31 December 2003 and, accordingly, the Constitutional Court of BiH has become the principal court to adjudicate on such applications.[32] Moreover, BiH ratified the ECHR on 12 July 2002, enabling cases from BiH to be taken to the European Court of Human Rights in Strasbourg.

The Geneva Conventions of 1949 were ratified by Yugoslavia on 21 April 1950, with the 1977 Protocols on 11 June 1979[33] (collectively, the Geneva Conventions). BiH became a party to these conventions upon the act of succession on 31 December 1992 and, consequently, became bound by all the major provisions of international humanitarian law,[34] whether or not they had achieved the status of customary international law.

BiH has been slow to sign, ratify and implement bilateral treaties relating to trans-national co-operation, mainly those under the Council of Europe (CoE) auspices. This was predominantly because of the unusual post-Dayton constitutional arrangements. Until the Law on Ministries and Other Bodies of Administration of Bosnia and Herzegovina came into effect in March 2003,[35] there was no BiH state-level Ministry of Justice (MoJ) or Ministry of Security which could oversee and regulate treaty implementation at entity and state-level. Following BiH's accession to the CoE on 24 April 2002, it is bound to ratify and implement various treaties relating to legal and penal matters and implement the numerous recommendations of the CoE in the penal and criminal law field, including those pertaining to victim and witness protection.[36] On 5 February 2002, BiH ratified the UN Convention on Trans-national Organised Crime which also contains obligations relating to trans-national legal and investigative co-operation.[37]

The international legal obligations deriving from the jurisdiction of the ICTY and the Rome Agreement are already referred to above.

[31] GFAP, Art. II (1) and Annex 6, Art. II thereto.

[32] Agreement pursuant to GFAP, Annex 6, Art. XIV.

[33] With reservations. Available at http://www.icrc.org.

[34] This is the body of law which regulates conduct in armed conflict and which was formerly known as the Law of Armed Conflict.

[35] BiH OG 5/03.

[36] See CoE Information Document SG/Inf (2004)10, "Bosnia and Herzegovina: Compliance with obligations and commitments and implementation of the post-accession co-operation programme" Sixth Report, 10 March 2004, para. 69-82 ("Rule of Law"). See also "Programme of activities for realization of priorities in 2004 from the report of the European Commission to the Council of Ministers on the preparedness of BiH for negotiations with SAA with EU", BiH Directorate for European Integration, 27 May 2004. Available at http://www.dei.gov.ba/en/prioriteti.asp.

[37] BiH OG International Treaties 3/02 (entry into force of the convention on 27 March 2002).

4.4. Applicable Domestic Law

Although in the post-war period, new criminal codes have been adopted in the FBiH, RS and at BiH state-level, the law applicable across the territory of BiH for acts committed during the conflict has been the 1977 Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY).[38] The relevant provisions of that code, principally Articles 141-153, criminalise those acts prohibited under the Geneva Conventions.[39] However, an amendment to the BiH Criminal Code allows for such prosecutions under the provisions of the new BiH Criminal Code (see Section 5.3 below).

In 2003, two new criminal procedural codes came into effect in the FBiH and the RS. Some war crimes proceedings are being conducted in accordance with these new codes[40], but, depending on the date of the confirmation of the indictment, some have been, or still are, conducted in accordance with the procedural codes previously in force. The difference between the criminal procedure codes of 2003 and those that preceded them are significant. The pre-2003 codes were typical of the investigative system of criminal justice and largely mirrored the system in place in the former Yugoslavia. In this system, the investigative judge was responsible for the entirety of the criminal investigation. The trial judge was the main participant at the trial. The role of the prosecutor and defence attorney was, accordingly, secondary in nature. The new criminal procedure codes, which are almost identical in the RS and the FBiH, constitute a radical move towards features characteristic of the adversarial system of criminal justice. The role of the investigative judge has been abolished and replaced by a system in which the investigative phase is conducted by the police and the prosecutor. At trial, the proceedings are adversarial in nature, meaning that it rests upon the prosecutor and defence attorney to present their cases, introduce evidence, cross-examine witnesses and actively make motions. The trial judge is no longer the dominant inquisitor of witnesses. Combined with the introduction of new procedures such as plea bargaining, these changes represent a radically reformed criminal justice system. These criminal procedure reforms were extensively monitored by the OSCE throughout 2004. On 17 December 2004, the OSCE Mission released its *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of BiH*. This provides the first detailed overview of the new codes' implementation.[41]

[38] In accordance with the principle that the applicable law is that which was in effect at the time when the offence was committed unless the subsequent law is more favourable for the accused.

[39] The SFRY Criminal Code was adopted by BiH in 1992 and by the then self-proclaimed Republika Srpska in 1993.

[40] FBiH Criminal Procedure Code (FBiH OG 35/03) and RS Criminal Procedural Code (RS OG 50/03).

[41] Among the issues presented in this report produced by the OSCE Mission to BiH are: findings related to the implementation of plea bargaining and the new adversarial main trial procedures; findings on the efficiency of the new procedures; findings related to the protections afforded to defendants during criminal proceedings, including the right to a defence lawyer; and other issues relating to the effective, fair, and consistent implementation of the new codes in the courts of BiH. The report includes specific recommendations for action by the domestic authorities. Available at http://www.oscebih.org.

5. Difficulties in Processing War Crimes Prosecutions in Bosnia and Herzegovina

5.1. Locating and Arresting Suspects

The conflict in Bosnia and Herzegovina not only resulted in the mass displacement of people within BiH but also precipitated the departure of many from the country altogether. The addresses of individuals, whether within BiH or outside, are often not known to the authorities. Furthermore, individuals who became aware that they were being sought by the authorities have frequently taken evasive measures. As for the large number of suspects living in the other entity or abroad, their apprehension further depends on the co-operation of the authorities in those jurisdictions. Similar to the high profile cases at the ICTY, the courts in BiH also face the challenge of locating war crimes suspects and securing their appearance at court.

In the Prosecutors' Survey, many commented that *"it is very difficult to trace defendants"* and that *"co-operation between entity police is not on a high level which has a considerable impact upon the ability to discover the defendants"*.

The tracing of suspects is undertaken through the ministries of interior, but, according to prosecutors' offices, mainly in the FBiH, this is impeded by poor inter-entity co-operation and the lack of an effective state-level body to process, co-ordinate and disseminate data. The solutions to these problems envisaged by prosecutors' offices include the use of state powers to gather information and issue arrest warrants, the strict use of disciplinary measures against authorities and officials who fail to co-operate and the EUPM's rigorous monitoring of such requests.

Many prosecutors cite problems with the use of summonses (without custody orders attached). This is the usual method for securing court attendance before resorting to other methods (e.g., arrest warrant). They recognise that their usefulness in relation to such serious crimes is questionable given the fact that an individual who may not have been previously aware of his status as a category "A" suspect will fail to acknowledge the summons and then abscond. Although the effectiveness of a summons in such sensitive cases is questionable, it is a practice which many courts seem reluctant to deviate from. Courts will first seek to exhaust such methods before resorting to an arrest warrant.

Nine years after the conflict and with the coming into force of the Law on Legal Assistance and Official Co-operation in Criminal Matters between the RS, the FBiH and the Brčko District in May 2002 (Law on Legal Assistance),[42] it would be reasonable to expect the situation has improved. Almost all prosecutors' offices are aware of this law and its obligatory nature. It provides that: *"warrants, decisions and judgments of Courts in criminal matters issued on or after 20 May 1998 are valid within the whole territory of BiH and can be executed without any additional confirmation or acknowledgement"*[43] and makes it mandatory that courts and police of the Entities and Brčko District provide legal assistance and co-operation to each other on criminal matters.[44] Requests can be made directly and by telephone unless the rights of the individual would be directly affected in which case the copy warrant must be provided[45] and should be

[42] BiH OG 13/02 (imposed by HR Decision of 23 May 2002).

[43] Id., Art. 3.

[44] Id., Art. 4.

[45] Id., Art. 5(3).

processed *"without delay"*. The Law even stipulates that, in cases of *"hot pursuit"*, the local police can exercise their powers on each others' territory.[46] In the event of dispute or non-compliance, the issue should be overseen by the BiH Court.[47] Confidence in inter-entity co-operation on this issue is low particularly in the FBiH. Prosecutors' offices state that, even if they issue an arrest warrant, they cannot rely on the other entity to carry them out. One prosecutors' office likened the situation to being as difficult *"as between two sovereign states"*. Another stated that they could not rely upon the RS police or prosecutors for any requests relating to war crimes due to fear of information leaks. Yet another commented that *"the ministries of interior at entity-level do not work with one another"*.

The OSCE has found that the procedure for the issuance and circulation of arrest warrants is also deficient both within and between the Entities. In the FBiH, cantonal ministries of interior often fail to circulate the warrants to each other. There is no method of continuous circulation or centralisation of "wanted" lists. When this problem was investigated by the OSCE in late 2003, there was no regulatory or operational procedure for the issuance and enforcement of arrest warrants in the FBiH. Few requests have been made by the FBiH to the RS. Follow-up of arrest warrants is reported to be *ad hoc* and discretionary and war crimes suspects have not been prioritised.

In two cases (*Milan Ninković* – currently being investigated by the Zenica Prosecutor's Office and *Tomo Mihajlović* – currently pending before the Zenica Cantonal Court), a request was made by the authorities in FBiH in accordance with this law for a summons or warrant to be carried out in the RS, although subsequently the relevant individuals surrendered themselves to the court in question. Thus the willingness of the RS authorities to comply with their obligations was not properly tested. However, in the case of *Mihajlović*, a request was made of the RS regarding evidence gathering but it took over four months for a partial answer to be received. In another case in the FBiH, an attempt to serve the RS resident accused resulted in the returned envelope being marked "in prison". This action on the part of a postal worker led to the accused's production before the court from an RS prison under the Law on Legal Assistance. The prosecutor asserted that this information would not otherwise have come to the attention of the FBiH authorities. The absence of information and intelligence sharing between the two Entities regarding arrest warrants and convictions, therefore, has continued to be a significant problem.

On 14 November 2004, eight Serb war crimes suspects were arrested by the RS police and handed over to the authorities in the FBiH in accordance with warrants issued by the Sarajevo Cantonal Court.[48] It remains to be seen whether this recent development is indicative of improved co-operation between the RS and FBiH and whether the problems highlighted above will be alleviated by the strengthening of powers at state-level.

[46] Id., Art. 8.

[47] Id., Art. 9.

[48] A judge of the Sarajevo Cantonal Court, Sretko Crnjak, confirmed that eight persons (Goran Vasić, Veselin Cancar, Momir Glisić, Svetko Novaković, Jovan Skobo, Zeljko Mitrović, Dragoje Radanović and Momir Skakavac), arrested on 14 November 2004 by the RS Special Police on suspicion of committing war crimes, were handed over to the Sarajevo Cantonal Court. The arrest operation was carried out in Lukavica, Pale and Foča in the RS in accordance with warrants issued by the Sarajevo Cantonal Court. See SRNA News Agency, 14 November. 2004.

Recommendations:

- The ministries of interior should establish and supervise centralised and standardised methods for issuance, circulation and activation of arrest warrants within and between Entities, mentored and monitored by EUPM.

- The ministries of interior should impose sanctions upon law enforcement officers for failures to execute arrest warrants.

5.2. Jurisdiction

According to the November 2001 statement of the OHR,

> "[t]he fact that the ICTY, under the 'Rules of the Road' procedure, does not specify where cases which are returned by the ICTY to BiH should be heard, has often led to the politicisation of trials, undue pressure on the judiciary or accusations that an outcome is not just".[(49)]

This statement acknowledges the fact that some war crimes are not investigated and tried in the court with appropriate territorial jurisdiction. This can lead to the impression that the process is ethnically biased with each ethnic group investigating and trying the alleged crimes of the others. Laws in BiH have always adopted the general principle of *forum delicti commissi*, meaning that *"the court covering a defined territory shall have territorial jurisdiction over any criminal offence committed within the court's territory"*.[(50)] Immediately after the war, however, many cases were investigated outside a court's territorial jurisdiction simply because the witnesses were reporting the case in a location to which they had been displaced or en route to their departure from BiH. When the cases were returned from the ICTY RoR Unit, they were often referred to the court which submitted the case. The courts and prosecutors have assumed this constitutes jurisdiction to proceed regardless of domestic rules on jurisdiction.

The application of the rules on territorial jurisdiction has been problematic. Because BiH was so ethnically divided in the aftermath of the conflict, the respective authorities had little faith that cases returned to the courts with appropriate territorial jurisdiction would proceed to trial effectively or at all and that the defendants would simply be allowed to disappear. In some cases, the defendants themselves were still working in the local police in those areas. For example, in the case of *Novo Rajak*, the suspect was a serving police officer in Foča until he absconded prior to service of the summons. This indicates that he must have been alerted to the impending summons. He was later arrested and brought before the relevant court.[(51)]

Defence lawyers have been active on the issue of jurisdiction. In a recently initiated case in Zenica Cantonal Court (in the FBiH), the defence lawyer challenged the jurisdiction of the court as the alleged offences occurred on the territory of Doboj District Court (in the RS). The issue was the subject of an application to the BiH Court which referred it to the competent court, namely the FBiH Supreme Court. The defendant has since dropped the application and the case is proceeding at the Zenica Cantonal Court.

[(49)] See OHR Press Release, "High Representative develops strategy for 'Rules of the Road' Court Proceedings," 8 November 2001. Available at http://www.ohr.int.

[(50)] Art. 26 FBiH CPC (2003) and Art. 25, RS CPC (2003). These articles replace the equivalent provisions in the previous CPCs.

[(51)] Proceedings were transferred to Sarajevo Cantonal Court from Goražde Cantonal Court. Another suspect, Boban Simšić, also a police officer in Foča, absconded at the same time and remained at large until his recent surrender in January 2005.

The applicable Criminal Procedure Code states that the court cannot declare it has no jurisdiction once an indictment has been confirmed, nor may this be challenged by the parties at this stage.[52] In the case of *Boškailo* in Trebinje District Court (located in the RS), the indictment was in force before the defence challenged the jurisdiction on the basis of territoriality. Hence, it was too late for the courts to deal with the issue of jurisdiction. The alleged crime had occurred in Čapljina Municipality in the FBiH and would ordinarily, therefore, be subject to the jurisdiction of the Mostar Cantonal Court.

The problem does not seem to be a lack of awareness on the part of the courts of the rules relating to territorial jurisdiction. In the case of *Franjo Radić*, for example, Zenica Cantonal Court transferred the case to Travnik Cantonal Court (also located in the FBiH) for want of jurisdiction in its area. The problem relates more to a continuing reluctance to transfer cases across entity borders. The case of *Duško Tadić* was investigated by Goražde Cantonal Prosecutors in the FBiH despite the fact that offences were committed in the district of Srpsko Sarajevo District Court (now Sarajevo East, located in the RS).[53] The defence raised the objection in April 2003, but the court failed to decide the issue. The defence later argued that the court had improperly failed to decide the matter within the prescribed deadline.[54] The matter was finally rejected a second time in November 2003 when the court stated that the motion was out of time and did not go to the merits of the case. The issue of jurisdiction has, therefore, at times been not been resolved by the domestic courts.

During the Prosecutors' Survey, this problem was honestly acknowledged. Eight prosecutors' offices considered that they do not have jurisdiction to investigate and prosecute war crimes which occurred outside the current territorial jurisdiction of the court. Two of these believe, however, that they would have jurisdiction if the cases were transferred to them by the BiH Prosecutor. Two prosecutors' offices in FBiH indicated that they now apply the principle of territorial jurisdiction more strictly and would not hesitate to transfer cases to RS authorities. The OSCE is aware of a number of cases that were transferred from FBiH to Brčko District in late 2004. Two prosecutors also believe that jurisdiction could be granted to them by the ICTY. This answer highlights the misconception that the ICTY is referring cases to prosecutors based on jurisdiction criteria, rather than simply forwarding the cases back to the submitting authority. Four prosecutors, on the other hand, believe that they do have jurisdiction outside the territorial jurisdiction of the court whilst five prosecutors' offices admitted that, despite no legal grounds allowing them to exercise such jurisdiction, they were still doing so. And one prosecutor's office highlighted the challenge of relying on territorial jurisdiction if the competent prosecutor does not take any action on a case.

The question arises as to what unfairness is caused by the failure to respect these basic rules on jurisdiction. Clearly, the rules are in place to establish certainty, predictability and clarity. They additionally establish a sense of fairness and the appearance of justice. However, prior to the reform efforts to establish an independent and competent judicial and prosecutorial service between 2002 and 2004, it remained unrealistic to expect cases to be conducted by those authorities who shared the same ethnicity as

[52] Art. 36, FBiH CPC and Art. 34 RS CPC (2003).

[53] This case was ultimately transferred for trial in Sarajevo Cantonal Court due to an insufficient number of judges being available in Goražde Cantonal Court.

[54] Art. 151 FBiH CPC (1998).

the alleged perpetrators. Furthermore, the lack of interaction and co-operation between the Entities in the immediate post-conflict phase was comparable to that of two post-conflict sovereign states. The principle of universal jurisdiction, established in international law, is propounded on the basis that it combats impunity for crimes against humanity and grave breaches of the Geneva Conventions. In a politically motivated and a previously unreformed judicial environment, these prosecutions proceeded on a similar basis by apprehending suspects outside the entity or canton where the dominant ethnic group was unlikely to sanction a trial against its kin.

Further difficulties also arise in relation to the BiH Court's new jurisdiction for war crimes. In accordance with the system established since 1 March 2003 under the new BiH Criminal Code (CC) and Criminal Procedure Code (CPC), jurisdiction over war crimes rests solely with the BiH Court. As such, all new allegations of war crimes arising since 1 March 2003 should be reported to the BiH Prosecutor by the entity prosecutors under Article 215(3) of the BiH CPC,[55] even though the BiH Court can later delegate authority to prosecute back to the relevant entity prosecutor with territorial jurisdiction.[56] There is no strict legal obligation on entity prosecutors to continue working to complete these 'new' cases once reported but the BiH Prosecutor's Office retains a general power to give necessary instructions to the prosecutor's offices in the FBiH, RS and Brčko District.[57]

With regards to existing war crimes cases ('old' cases), a number of transitional provisions apply. Where the indictment has not been confirmed by 1 March 2003 (i.e., the case is still in the pre-indictment phase), there is an obligation on the entity prosecutor to report the case to the BiH Prosecutor's Office.[58] The BiH Court then has the power to select the case for prosecution at state-level although, until such decision is taken, the same entity prosecutor is obliged to continue working on the case to complete it.[59] Where the indictment was confirmed before 1 March 2003 (i.e., the case is now in the post-indictment phase), the entity court is competent to proceed with the case without reference to the BiH Court.[60]

Apart from cases already in procedure and cases reported after 1 March 2003, the BiH Prosecutor's Office will receive for prosecution cases transferred from the ICTY (Rule 11 *bis* cases and partially investigated cases) and will now, with the closure of the ICTY RoR Unit in September 2004, be responsible for reviewing a large number of cases as part of its new function. Faced with such a large number of cases, the BiH Prosecutor's Office has developed the *"Book of Rules on the Review of the War Crimes Cases"* (BoR),[61] regulating the case review procedure in order to determine whether or not the prosecution shall continue and whether the case shall be processed at state-level before the War Crimes Chamber or returned to the entity prosecutors' offices and courts.

[55] Art. 230 FBiH CPC and Art. 215 RS CPC.

[56] Art. 27 BiH CPC (BiH OG 3/03).

[57] Id., Art. 37.

[58] Law on the Prosecutor of BiH, Art. 18, as amended (BiH OG 3/03).

[59] Art. 449(2) BiH CPC.

[60] Id., Art. 449 (1).

[61] Adopted by the Collegium of Prosecutors, 28 December 2004.

The BoR foresees two types of case review. The first review, in essence similar to the former ICTY RoR review, shall examine if sufficient evidence has been provided to establish grounded suspicion that the suspect committed serious violations of international humanitarian law. The second review shall establish the sensitivity of the case and determine if it should be tried before the War Crimes Chamber or the entity courts. In addition, the review shall determine if the prosecutor's office submitting the case has territorial jurisdiction to further act in the case.

Subject to the first ('permission to prosecute') and second ('sensitivity') review are all the cases that were not categorised by the ICTY RoR Unit, as well as the cases that were categorised but did not receive a category "A" marking by the Unit.

Cases marked as category "A" by the ICTY RoR Unit should only be reviewed for sensitivity. The sensitivity criteria, intended to serve as guidance for the BiH Prosecutor's Office in the determination of the appropriate venue for trial, has been elaborated upon by the BiH Prosecutors Office in the document *"Orientation Criteria for Sensitive Rules of the Road Cases"*, adopted by the Collegium of Prosecutors on 12 October 2004 as an Annex to the BoR. *"Highly sensitive"*[62] cases must be tried by the BiH Court, while *"sensitive cases may, contingent upon the discretion of the Chief Prosecutor, be remitted for trial to the cantonal and district courts"*. It is anticipated that "highly sensitive" cases will form only a small proportion of the total number of outstanding domestic cases.

Although the BoR attempts to provide guidance to all prosecutors in determining which cases should be sent to the BiH Prosecutor's Office for review, it appears that some confusion still exist amongst judges and prosecutors. For example, on 13 December 2004, in the ongoing case of *Matić* and *Kresić* before the Mostar Cantonal Court, the trial judge adjourned the main trial indefinitely and announced that the case had to be transferred to the BiH Court, which would decide on jurisdiction. According to the judge, since the War Crimes Chamber had been set up within the BiH Court, all cases of war crimes which are currently being processed, and the cases for which the indictment was raised had to be verified by the BiH Court for decision making as to whether the case would continue before entity courts or before the BiH Court. This confusion is caused by the fact that the BoR cites Article 449 of the BiH CPC, suggesting that even cases that, according to Article 449(1) of the BiH CPC, do not fall under the jurisdiction of the BiH Court, should be sent for review. This on-going confusion was apparent again on 5 January 2005 when the Mostar Cantonal Prosecutor stated to the media that the *Mostar 4* case shall be sent to the BiH Prosecutor's Office for review,[63] although this case, according to Article 449 of the BiH CPC should be completed by the cantonal court and under the 'old' CPC. It remains unclear whether the BiH Prosecutor's Office intentionally included cases falling under this category to be reviewed. The current wording of the BoR could lead to the conclusion that even cases processed under the 'old' CPC in the main trial phase should be adjourned and sent for review, as the *Matic* case illustrates. If so, this raises practical and legal problems which should be fully clarified; otherwise, it will continue to have a negative impact, causing adjournments and unnecessary delays which could jeopardize the course of on-going trials.

[62] Defined on the basis of the nature of the crime, the position the perpetrator occupied at the time of the crime or is presently occupying and other circumstances such as possible intimidation of witnesses.

[63] "Bosnian Federation court quashes release of four suspected war criminals," Independent TV Hayat, Sarajevo, in Bosnian/Croatian/Serbian, 1800 GMT, 5 January 2005.

Moreover, the BiH Prosecutor's Office, to date, has not had sufficient staff to monitor or respond to referrals from the Entities. Recent reports from the Entities indicate that hardly any responses have been received even when reasoned requests have been made for the BiH Prosecutor to take over a case. In the case of *Ninković* currently being investigated by the Zenica Prosecutor's Office, an application was made to the BiH Court on 23 June 2003 for the case to proceed at state-level. The BiH Court refused, citing: ICTY approval for conducting the case before a domestic body, which is Zenica Cantonal Court; significant number of witnesses interrogated in the criminal proceedings; material evidence that had been provided so far; as well as the Cantonal Court having merged several cases into one and that the case was in its final stage. This justification was based on the requirements of efficiency and economy and not on criteria provided for by law. At the time of writing, at least one entity-level war crimes case initiated at entity-level had been selected for prosecution at the state-level.

Confusion about this jurisdictional arrangement was clearly reflected by the results of the Prosecutors' Survey (carried out before the adoption of the aforementioned *Orientation Criteria* and *BoR*), in which 50 per cent of the prosecutors' offices considered that they would have jurisdiction to investigate a new case whilst the other 50 per cent noted that such jurisdiction belongs to the BiH Prosecutor's Office alone. While all the prosecutors' offices stated that they would inform the BiH Prosecutor's Office if a new case were to commence now, one prosecutor responded that there is no legal grounds to do so, just mere practice. Four prosecutors specified that they would inform the BiH Prosecutor by phone whilst two prosecutors would use the phone if there was an urgent matter requiring intervention. Six prosecutors expected that once notified, the BiH Prosecutor's Office would decide who shall proceed with the case (i.e., BiH Prosecutor or entity prosecutor), five prosecutors expected the BiH Court would take over the case, whilst two prosecutors expected the BiH Prosecutor's Office to order the necessary measures, and one prosecutor had no expectation. Divergent practice in relation to the new system, resulting from misinterpretation and confusion about the law, is apparent.

In conclusion, prior to 1 March 2003, the entity courts had exclusive jurisdiction over war crimes cases. All cases which reached confirmed indictment before that date have remained exclusively at that level. The Entity authorities are obliged to proceed with cases which are pending indictment unless and until they receive notification from the BiH Prosecutor. However, the establishment of the jurisdiction of the War Crimes Chamber has in some quarters been interpreted as an excuse for inactivity, with some entity authorities preferring to await the establishment of the Chamber, rather than proceeding with cases.

Recommendations:

- The BiH Court should ensure that a regular publication of all decisions and reasoned verdicts at BiH state-level be circulated to all courts and prosecutors' offices.

- The BiH Prosecutor's Office should organize regular meetings with entity prosecutors to ensure that they clearly understand their obligations under the BoR.

- The BiH Prosecutor's Office should provide further instructions clarifying the scope of cases that should be sent to the Office for review under the BoR.

5.3. Substantive Law Issues

International Humanitarian Law comprises a substantial and complex body of law. Its jurisprudence has been developed through national courts and international tribunals such as the International Military Tribunal at Nuremberg and much more recently, the ICTY. However, the BiH judiciary and prosecutors have, to date, very limited experience with this law and little specialized training or resources available to them. The correct application of this body of law at cantonal and district court level is essential to ensuring fair and effective war crimes prosecutions.

In the Prosecutors' Survey, 13 out of 16 prosecutors acknowledged that the applicable criminal law in relation to war crimes committed in BiH during the conflict is the SFRY Criminal Code. More recent entity criminal codes were used only in cases where the sentence for a similar offence was more lenient for the accused. Three individual prosecutors took the view that the present BiH Criminal Code is the applicable code. Such a position would be contrary to the principle that the applicable criminal law must be the one in force at the time the crime was committed unless the recent law is more lenient for the accused. However, the complex legal arrangements in relation to transfer of jurisdiction to the entity courts and prosecutors' offices for war crimes could lead to a situation whereby the 2003 BiH Criminal Code would have to be applied.

There remains considerable lack of clarity in relation to which criminal code will be applicable in pending war crime cases and at which jurisdiction those cases would be processed. As a result of the recent amendment, Article 4a of the 2003 BiH Criminal Code provides that the principle of legality and the principle that the applicable law is the law which was in effect at the time the crime was committed unless the recent law is more lenient for the accused 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 international law. Clearly, the aim of this article is to allow for the applicability of the BiH Criminal Code which contains definitions of war crimes and criminal responsibility that where not contained in the pre-2003 criminal codes, but are recognized under international law.

This complex legal problem will have to be resolved by the BiH Court in one of its first cases. It is likely that defendants charged under the 2003 BiH Criminal Code will raise the issue of the retroactive application of the law.

Both the Prosecutors' Survey and OSCE trial monitoring have revealed a number of other discrete legal issues within international humanitarian law that have troubled judges, prosecutors and defence lawyers. Although 12 prosecutors state that they have not experienced problems with the legal qualification of a specific war crime, three prosecutors mentioned their difficulties in deciding whether to prosecute a murder as a war crime or as an ordinary murder. In the case of *Cicmanović and Others*, for example, the defendants, who at the time of the offences belonged to the Republika Srpska Army (VRS), faced charges of rape committed in 1992. The five alleged victims were of Croat ethnicity. The first hearing before the Kotor

Varoš Basic Court[64] in the RS proceeded on 8 August 2000. It took until 28 September 2004 for the court to re-qualify the offences as war crimes against the civilian population, referring the case to the BiH Court. Another prosecutor in the Survey referred to problems with the definition of pillage. The term "pillage", as referred to in the offence of war crimes against the civilian population, is not further defined or elaborated upon in the domestic criminal codes. For this offence, and any other war crime which is not defined under the codes, judges, prosecutors and lawyers will need guidance by reference to international jurisprudence and academic commentaries. Trial monitoring has revealed that this rarely happens. Problems in relation to the definition of the term "pillage" were evident in the case of *Torbica* (see case summary in the Appendix).

Another prosecutor indicated that the concept of command responsibility might be difficult to define and expressed concerns over the *"lack of legal basis to investigate cases of command responsibility"*, presumably referring to the lack of domestic legal provisions for such a concept. The SFRY Criminal Code does not contain a provision which replicates the definition of command responsibility contained in Article 7 of the ICTY Statute, although the Code does state that one who *"orders"* the criminalised act is guilty of an offence. Furthermore, Article 30 of the SFRY Criminal Code[65] states that an omission to act can constitute a crime. The question of whether an individual can be guilty of a war crime by virtue of command responsibility was considered in the case of *Mirsad Cupina and Others* at the Mostar Cantonal Court, where the court held that the prison warden failed to take action to prevent his guards from treating the prisoner in an inhumane way even though he knew about the actions being taken. In this case, the court made explicit reference to Article 30 of the SFRY Criminal Code. At the first trial of the *Mostar 4* case in 2001, the judge ruled that guilt on the basis of command responsibility could only be established where direct orders had been given and not on the basis of acts of omission. At the retrial the court did not enter into any discussion of the legal issues, but simply found that there was no evidence to establish that the first defendant was a commander.

A further issue in the *Mostar 4* case revolved around the issue of what constituted a *"war crime"*. The court found that a civilian had had a knife held against her neck by the combatant accused. The court found not only that the act had occurred, but also that it constituted inhumane treatment and that it was committed by the defendant. However, the defendant was acquitted as the judge held that such a single isolated incident perpetrated against one individual did not constitute a war crime against civilians. The judge responded that a *"grave breach"* of the Geneva Conventions requires inhumane treatment to have resulted in *"great suffering or serious bodily injury"* in order to be a crime under Article 142 of the SFRY Criminal Code.[66] He took the view that this individual incident was simply an overstepping of authority by the official without taking into account the surrounding circumstances, such as the on-going siege-like situation in Mostar, the ethnic cleansing and the fact that the victim's family property was simultaneously being looted. On 4 November 2004, the FBiH Supreme Court in the *Mostar 4* case allowed the prosecutor's appeal on various grounds and ordered a second retrial.

[64] Cicmanović has since died. The other defendants are Mirko Bozić, Ostoja Marković and Bosiljko Marković. The military prosecutor issued the indictment on 1 November 1993. The main trial was scheduled to proceed before a military court on 21 July 1994 but was adjourned due to the non-attendance of the parties. Upon the termination of the military courts, the case was transferred to Kotor Varoš Basic Court on 8 August 2000.

[65] See also Art. 30 FBiH CPC (1998).

[66] The judge referred to ICTY judgements in *Delalić et. al*. and *Furundžija*.

In the case of *Tadić* (see case summary in the Appendix), at the Sarajevo Cantonal Court, the main thrust of the defence case was that there was no armed conflict in the area of Čajniće Municipality at the time of the alleged acts. Thus these acts had no nexus with an armed conflict and could not be classified as *"war crimes"*. Although the prosecutor engaged with these representations and attempted to prove otherwise in evidence, the first instance verdict of the court panel failed to address the question at all. The defendant was acquitted and subsequently the prosecutor submitted an appeal.

In cases monitored by the OSCE, lack of humanitarian law experience has occasionally reflected itself in terms of the quality of specificity of indictments, qualification of crimes and legal arguments. In trial observation and in interviews with prosecutors, qualifying the appropriate offence has been highlighted as a problem.

As can be seen from these few examples, parties and judges in court proceedings and verdicts generally fail to cite international jurisprudential sources such as the ICTY case law or cases from other jurisdictions to rely upon or interpret international law. This can lead to inconsistency in approach and lack of depth of reasoning. Resources, such as texts, reports and commentaries in local language, available to prosecutors and judges are poor (see Section 5.9 below), and hence legal arguments are often limited or not adequately addressed in the courts' verdict.

5.4. Witnesses - Fear, Amnesia, Absence and Protection

In war crimes trials, as with any criminal case, the reliable and comprehensive testimony of witnesses is essential to a fair and effective procedure. The ICTY Trial Chamber has succinctly set out an approach to the inherent problems with witness testimony:

> "In evaluating the evidence given by witnesses, the Chamber has taken into account that the alleged events took place almost ten years before the witnesses presented their testimonies in court. The Chamber accepts that due to the long period elapsed between the alleged commission of the crimes and the trial, witnesses cannot reasonably be expected to recall the precise minutiae, such as exact dates or times, of events. The Chamber further notes that many Prosecution witnesses were transferred through a number of different detention facilities, in a sequence that may, for some, have amounted to traumatic experiences… such witnesses cannot be expected to recall each and every detail regarding the sequence or details of the events… in most instances the oral evidence of a witness will not be identical with the evidence given in a prior statement. It lies in the nature of criminal proceedings that a witness may be asked different questions at trial than he was asked in prior interviews and that he may remember additional details when specifically asked in court … the Chamber has not attached particular significance to minor inconsistencies in the testimony of a witness or irrelevant discrepancies in peripheral matters in the testimonies of different witnesses who testified to the same events. The Chamber has, however, only attached probative weight to evidence submitted by witnesses who were, as a minimum, able to recount the essence of the incident charged in sufficient detail."[67]

In the context of domestic war crimes prosecutions in BiH, there is a host of problematic issues relating to witness evidence. The mobility of witnesses since the war has made it often difficult to locate them. Many prosecutors, however, seem confident that this is less of an issue than that of securing their attendance at court especially when the witnesses are abroad. Many witnesses now live in an environment different to the one in which they originally gave evidence to the police or prosecutors. Many gave statements to judges, police and prosecutors of their own ethnicity shortly after the event or after the war. In many cases, the same people then moved abroad or to a community in BiH dominated by members of their own ethnic group. They did not foresee the time when the suspect or the suspect's family would become their neighbour once more or that they would be living in neighbouring communities with full and unchecked freedom of movement.

Many displaced persons and refugees have been able to claim and repossess the homes they lost during the war through the development and implementation of property laws. Local authorities have made substantial progress in implementing property laws. Ninty-three per cent of all property claims have now resulted in repossession (representing 201,417 repossessions).[68] Although no definitive figures exist, the United Nations High Commission for Refugees (UNHCR) reports that, as of April 2004, nearly one million people

[67] Prosecutor v. *Mladen Natetilic, aka Tuta*. and *Vinko Martinovic, aka Stela*. [2003] ICTY 3 (31 March 2003), Case No. IT-98-34-T, para. 10.

[68] As of January 2005, 119 of the 129 municipalities engaged in the property return process have been verified by the inter-agency Property Law Implementation Cell as having substantially completed Property Law Implementation; see PLIP Cell Statistics, January 2005 http://www.ohr.int/plip/. See also PLISC Bulletin, January 2005, OSCE Mission to BiH Human Rights Department (internal report).

have returned to their pre-war communities, including 439,000 returnees from minority ethnic groups.[69] The context of "return" is therefore one in which many witnesses may now find themselves.

Feedback from OSCE trial monitors indicates that, especially in cases where defendants are powerful political figures or businessmen, ordinary citizens feel intimidated to act as witnesses. This can manifest itself as a vulnerability to a real or perceived pressure not to give evidence or to "forget" the evidence given during investigations. In at least one monitored case the witness expressed concerns directly to the judge about threats and intimidation from the defendant's family. The judge's response, whilst sympathetic, was to explain that the only alternative was to arrest her and bring her to court.[70] In the recent *Konjic 7* case at the Mostar Cantonal Court, all seven defendants were found not guilty on 28 June 2004. During the trial, a number of witnesses reneged on their original statements. In another recent case, *Dragan Palameta*, at the Mostar Cantonal Court, prosecution witnesses also significantly departed from the original accounts given during the investigation. The defendant was found not guilty on 1 November 2004. The *Mostar 4* case is a serious example of a case where witnesses significantly departed from the evidence they gave during the investigation. Whilst the nature and reality of pressure and threats can only be assessed by trained specialist law enforcement officers and social workers, for the purposes of this Report, it remains clear that such a phenomenon can only hinder the fair and effective processing of war crimes cases.

The difficulties faced by witnesses in any criminal case are manifold given the level of trauma attached to being subject to public scrutiny. In the case of BiH war crimes cases, this is likely to involve the public recollection of traumatic incidents over a decade ago. Under the 'new' CPC, the witness is questioned during the investigation by the prosecutor or police and at trial is subject to examination and often gruelling cross-examination of all his/her evidence by the parties engaged in adversarial proceedings.

Unfortunately, the management of cases by courts and prosecutors in BiH leaves the system open to criticism for failing to consider the needs of witnesses. The practice of staggering trials, whereby a small number of witnesses are heard over a short period, only for the case to be adjourned and rescheduled some time later, has been very common. This is very often the result of prosecutors planning the presentation of their case poorly and not foreseeing the actions required to prevent adjournments. In addition, sanctions are rarely taken by the courts to ensure adequate case management, to prevent trials being prolonged unnecessarily and to avoid repetitious attendances at court. Some trials have had to be recommenced when adjournments have lasted too long. This has led to witnesses being required to give testimony at trial for a second time.[71] Additionally, witnesses are being called to court unnecessarily either because their evidence is not relevant or because it does not support facts which any party in the case is attempting to prove, such as indirect (second-hand or hearsay) evidence or evidence based purely on speculation (see case of *Torbica*).

[69] UNHCR Statistical Summary, 30 April 2004. See http://www.unhcr.ba/return/Summary_30042004.pdf.

[70] *Zarko Pandurević* (Sarajevo Cantonal Court).

[71] See cases of *Vlastimir Pusara* (Sarajevo Cantonal Court) and trials of *Dominik Ilijasević, Tomo Mihajlović,* and *Edin Hakanović* (Zenica Cantonal Court) in the Appendix to this Report.

Reluctant witnesses are at times threatened by the court with arrest or fine, rather than being offered assistance. Although such threats are rarely carried out, they do little to resolve the problem which a reluctant witness can create for the prosecution or defence. Nor is this method of dealing with witnesses satisfactory from the perspective of international standards relating to their treatment and protection.[72] Examples of poor treatment of witnesses include arrest; threat of arrest; harassment by a prosecutor saying *"What kind of behaviour is that? You have to remember"*; and rape victims giving evidence in front of the accused without the benefit of witness protection measures.

One likely consequence of these pressures on witnesses is the noted discrepancies between prosecution witness statements made at the investigative phase of proceedings and subsequent testimony at trial. Such discrepancies are particularly pronounced in those cases that have taken considerable time to reach trial. While some differences between investigation and trial testimony are inevitable due to the effects of time on memory, the inconsistency of the taken testimony can not be justified only by honest mistakes or witness confusion.

There have been examples of more effective measures being taken to protect witnesses including, for example, the recent prosecution of one individual for attempting to influence witnesses.[73] In the same case, evidence was taken from an expert witness regarding the traumatising impact of sexual violence and rape during armed conflict, with the court concluding that affected individuals required protection.

More comprehensive and consistent witness protection must be considered as a key element of war crimes prosecutions in BiH. Human Rights Watch has emphasised the importance of the vigorous implementation of witness protection legislation, whilst acknowledging that BiH's small size is an objective limitation.[74] However, this comment assumes that the current witness protection mechanisms within the law are sufficient. The Law on the Protection of Vulnerable Witnesses and Witnesses under Threat ("Witness Protection Law"),[75] for example, is limited mainly to in-court procedural protections for witnesses falling into its scope:

[72] Witnesses' rights may be protected under Art. 2 and Art. 8 of the ECHR (see *Doorson* para. 76, and Van Mechelen para. 55 and 60) and the interests of witnesses can justify restrictions on Art. 6 (*Van Mechelen* para. 55, *Doorson* para. 76, *Birutis* para. 29 and 32, and *Visser* para. 43.). *See, in particular*, UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power; Council of Europe Committee of Ministers Recommendation R (85) 11 to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985; Recommendation R (87) 21 to Member States on Assistance to Victims and the Prevention of Victimisation, 17 September 1987; and Recommendation R (97) 13 to Member States concerning Intimidation of Witnesses and the Rights of the Defence, 10 September 1997. For general information regarding international standards on witness protection, see Kartusch, A and Thompson, K., Trafficking in Persons, Witness Protection and the Legislative Framework of Moldova, OSCE, December 2003. Available at http://www.osce.org/documents/mm/2003/12/3191_en.pdf.

[73] Zoran Knezevic, Sarajevo Cantonal Court.

[74] Human Rights Watch, Balkans Justice Bulletin: The Trial of Dominik Ilijasević, January 2004. Available at http://hrw.org/backgrounder/eca/balkans0104.htm (hereinafter HRW Report).

[75] BiH OG 21/03, 61/04.

- a witness whose personal security or the security of his/her family is endangered through his/her participation in the proceedings, as a result of threats, intimidation or similar actions pertaining to his/her testimony;
- a witness who has been severely physically or mentally traumatised by the events of the offence;
- a witness who otherwise suffers from a mental condition rendering him/her unusually sensitive;
- and a child and a juvenile.[76]

These protections are applied on a discretionary basis by the courts and include the re-ordering of examination of witnesses, using technical means for transfer of video images from another room, removal of the accused from the room, limiting the defence ability to access documents identifying the witness.

Occasionally, the court has used the measures of a "Witness Protection Hearing" available under Article 14 of the Witness Protection Law to ensure that the witness testimony is heard with his/her identity protected and in a closed hearing without even the prosecutor and defence attorney being present.[77] A witness protection hearing takes place before a panel of judges and a minute-taker without the presence of the prosecutor or the defence. Details disclosing identity are not required. The judges on the panel are distinct from the trial judge who reads the testimony into the trial hearing at a later stage. Article 23 of the Witness Protection Law protects a defendant from being convicted on the basis of this evidence alone. Depending on the facts of the case, such a conviction could be a violation of Article 6(3)(d) of the ECHR, dealing with the right to cross-examine witnesses, which requires that the verdict should not be based *"to a decisive extent"* on such evidence.[78]

The only protection[79] envisaged at the early stages of the case, i.e., at initial contact with the prosecutor (but not the police) at the commencement of and during investigation is *"access to psychological and social assistance and profession help"*.[80] The court and prosecutor are obliged to *"enable the assistance"* and *"psychological support"* of the *"body responsible for social care"*. However, it is unclear who will pay the costs of such assistance and the nature of the strength of the obligation *"to enable"*. It is also

[76] Witness Protection Law, Art. 3. The term *"juvenile"* (*"maloljetnik"*)" remains undefined in this law but could be interpreted as under 18 years of age, as per the definition contained in the BiH, RS and FBiH Criminal Codes.

[77] Where there is a *"manifest risk to the witness or the family of the witness, and the risk is so severe that there are justified reasons to believe that the risk is unlikely to be mitigated after the testimony is given or is likely to be aggravated by the testimony, the court may conduct a witness protection hearing."*

[78] For an exposition of this right, see Holdgaard, M., *The Right to Cross-Examine Witnesses – Case Law under the European Convention on Human Rights*, Nordic Journal of International Law 71, 83-106, 2002.

[79] The CoE Recommendation R (85) 11 establishes relevant recommendations for witness protection in the pre-trial investigation as well as the court proceedings phase. See Rec R (85) 11 to Member States on the Position of the Victim in the Framework of Criminal Law and Procedure, 28 June 1985.

[80] Witness Protection Law, Art. 6.

unlikely that the social work centres in BiH have capacity to undertake this work without specialised training and resources. Although witnesses have an entitlement to *"legal aid"*[81], the provision is not specific as to the nature and purpose of this assistance. There is no provision for witness representation within the new criminal procedure codes.

The Witness Protection Law leaves a number of gaps regarding the implementation of the witness' right to physical security, privacy, information, legal assistance, sensitive treatment, and prevention of re-traumatisation as outlined in the international documents highlighted above. The Law on Witness Protection Program in BiH[82] provides for the establishment of a Witness Protection Department within the State Investigation and Protection Agency (SIPA). The Witness Protection Department will be responsible for developing and maintaining the Witness Protection Program to meet the security needs of witnesses who need sophisticated security measures during and after criminal proceedings, such as changes in identity. This program, however, is only for state-level cases and does not extend to support for witnesses in entity-level cases.

The Prosecutors' Survey confirmed that the level of confidence in the usefulness of the witness protection provisions is minimal. All prosecutors' offices cite material and financial inability to access the protections provided for in these laws. Many cite the need for a more sophisticated witness protection scheme at the entity-level (providing for the security concerns of witnesses relocation, change in identity, etc.). Some prosecutors' offices cite difficulties in getting witnesses to court, arising from lack of sense of civic duty, lack of faith in the courts and the judiciary, or a preference for "fitting in" in the community, rather than coming to court. Retaliatory measures may be limited to social censure (exclusion and stigma), but may extend to more violent actions. Importantly, many prosecutors' offices state that witnesses who are now returnees will not or are reluctant to give evidence, even if they have given statements during the investigative phase. This is not surprising, given that families may be living in the entity, canton or village in which their "ethnic group" forms a minority and where their re-integration is still at an early stage. Additionally, the suspect is likely to be a member of the majority "ethnic group", leaving the witness open to stigmatization, intimidation or attack. Little has been done to tackle this specific problem outside the general security mandates of SFOR (now EUFOR) and UNMIBH (now EUPM). Although some provision has been made in terms of special donor funds for housing for ICTY witnesses, the security of returnees who are witnesses in entity war crimes trials has never specifically been addressed.

There is very little contact between the witness and the prosecutor or a member of the court service to ensure that he/she understands his/her role, what is likely to happen to him/her and what protections are available. The extent to which such contact exists depends on how the prosecutor interprets and carries out his/her role. This *ad hoc* approach means that protection for many witnesses is not even considered. Even on the most basic level, an assessment of the "levels of threat" is not carried out by police. Trained social workers are not available at any stage to provide counseling and support to witnesses (even the injured parties), despite the legal provisions to this effect. Only two prosecutors' offices in the Survey mentioned the usefulness of NGOs who provide shelter for witnesses and this was mainly in the context of trafficked women and victims of domestic violence.

[81] Id., Art. 5(b).

[82] Law on Witness Protection Programme in BiH, BiH OG 29/04.

Human Rights Watch concluded that the situation will only change if faith in the BiH justice system improves generally and criminal sanctions of those suspected of witness intimidation are vigorously enforced.[83] Whilst this is a necessary component of the improving security for victims, it is not sufficient.

There are many other steps which could be taken to improve witness assistance, both in and out of court, such as the allocation of trained social workers to counsel and explain court procedures; arranging travel; identifying needs for social assistance to compensate for loss of earnings and payment for childcare; training police in risk assessment; arranging re-housing; referrals to specialist counselors where necessary; and providing waiting rooms for witnesses at court so they do not have to wait in the public areas.

A fully funded, comprehensive witness assistance service is required, entailing different levels of risk assessment and protection services, such as bodyguards during the trial, temporary shelter in a safe house, and, if necessary, relocation run by the police for the most serious cases. These services must run alongside effective in-court procedural protections that exist not only in law, but in practical terms. Although the ICTY has developed models of good practice and invested into such services, in BiH they are in their infancy if they exist at all, despite much accumulated evidence that witnesses believe they cannot safely testify.

Recommendations:

- The BiH authorities should review and amend, as necessary, the Laws on the Protection of Witnesses under Threat and Vulnerable Witnesses to ensure witnesses' rights to privacy, security, information and assistance are fully respected and protected, as established by international standards.

- The BiH authorities should ensure the provision of material assistance to courts to establish properly functioning in-court procedural protections (such as video link).

- The BiH authorities should ensure adequate funding of courts to enable witness' costs to be met.

- The BiH authorities should establish security procedures for the protection of witnesses out of court.

- The BiH authorities should establish and fund a witness assistance scheme within the entity courts and prosecutors' offices to provide independent legal advice to all witnesses and referral to social workers, as necessary.

- The Judicial and Prosecutorial Training Centres (JPTC) and police academies should provide training and guidance to police and prosecutors on the available witness protection provisions, emphasising confidentiality and sensitive handling of witnesses.

- The BiH authorities should ensure that there is an effective specialised risk assessment team within a witness protection unit in the entity police focusing on the investigation.

- The BiH authorities should establish and fund specialised units within the social work centres to give specialised psychological support to witnesses and to advise the courts as to appropriate protective measures required.

[83] HRW Report.

5.5. Procedural and Evidentiary Issues

The introduction of two new criminal procedure codes in the RS and the FBiH in 2003 is summarised above (see Section 4.3). The rules on procedure and the presentation of evidence at trial differ considerably between the 'old' and the 'new' CPCs. It should be pointed out that, while a number of war crimes cases are still being conducted in accordance with the 'old' CPCs, the majority of cases will be subject to the 'new' CPCs in accordance with transitional provisions.

Some prosecutors have indicated a degree of confusion about whether evidence gathered by the investigative judge under the 'old' CPCs can be admitted in a case tried under the 'new' CPCs. The relevant provisions of the 'new' CPCs[84] stipulate that a case, which was in the pre-indictment phase before the new code came into force, must be transferred to the prosecutor (presumably from the investigative judge previously in charge of the investigation). There are no further instructions that the prosecutor begin such a case afresh (i.e., by gathering the same evidence but this time in strict accordance with the 'new' CPC). For this reason, it must be inferred that the 13 prosecutors' offices[85] who stated that they see no barriers to the admission of evidence gathered under the 'old' CPCs to trials proceeding under the 'new' CPC, so long as the evidence was originally gathered lawfully, are correct in their interpretation.

Greater difficulties have arisen regarding the statement of the accused when given during the investigative phase of the 'old' CPC, namely whether it admissible as evidence at trial under the 'new' CPC. The 'new' CPC does not envisage the examination of the defendant at the main trial unless he/she volunteers to give evidence/make a statement. In the recent case of the *Konjic 7*, the charges were primarily based on confessions made in the investigative phase. The trial court refused to take testimony from the investigative judge as to the quality and legality of the investigation in which the confessions were made, and stated that it would only accept these statements if the defendants themselves were called to testify by their own defence team. The court cited the principle of *"direct presentation of evidence"* (as enshrined in the 'new' CPC) as the grounds for this refusal. The defendants did not give evidence and were subsequently acquitted at first instance.

The issue raised in this case is one which has not been clarified since the introduction of the 'new' CPC. Certain provisions of the CPC seem to directly anticipate that the statement would be admissible. Others, however, do not.[86] In the *Konjic 7* case, the judge took the narrow view and decided not to allow the evidence although he was at liberty to evaluate the evidence as he saw fit (given the free evaluation of evidence principle enshrined in the CPC). This raises the question as to the objective of questioning a suspect at the investigation stage if such statements are not admissible unless they later choose to give evidence (which they are not obliged to do).

To date, there are too few cases to draw any firm conclusions regarding the impact of the 'new' CPC on the preparation of cases and admissibility of evidence on the processing of war crimes cases. However, it is an area which requires close monitoring.

[84] Art. 452 FBiH CPC and Art. 442 RS CPC.

[85] Two prosecutors' offices were of a different view.

[86] Cf. Art.77-78 with Art. 273 BiH CPC.

A significant challenge to the criminal justice system seems to be the ability to process a case without undue delay. The obligation upon BiH to protect the right to trial within a reasonable time is part of the wider obligation to protect the right to a fair trial (Article 6 of the ECHR). As previously noted above, "staggered hearings" appear to be a hallmark of many criminal cases and have been noted in a significant number of war crimes trials.[87] The consequence of this type of case management has already been raised in relation to its impact on witnesses. Additionally, the human, as well as the constitutional and statutory, rights of the defendants must be considered, especially of those who are detained for the full duration of the proceedings.

In general, the way that cases are prepared in BiH means that eye witness testimony is the main pivot upon which the prosecution case rests. In the 'new' procedural code, the prosecutors are responsible for presenting the evidence and it is therefore crucial that they focus on the impact of the staggered hearings on the quality of the evidence and the flow of the case. Additionally, it is crucial that the judicial panel give directions on the management of the case in a way which does not exacerbate delays. Currently prosecutors regularly request, and are granted, adjournments for the attendance of witnesses at a late stage, or fail to plan ahead for the time it may take for a witness to be summonsed from abroad. Additional problems noted in the overall case-planning include medical experts attending hearings without their records[88] and requests for medical reports being made at a late stage. Trans-border co-operation requests can also impact on delays.[89]

The result of such delays, poor planning and administration of the case is that if adjourned for more than 30 days, the case must restart and all evidence must again be presented.[90] This provision has been broadly criticised by judges for contributing to delays in procedure, rather than detracting from them. However, in practice, the judges may simply read the evidence out from start to finish without requiring the attendance of the witnesses to repeat their live testimony. It is unlikely that this is in the spirit of the current or previous procedures, which were presumably designed to prevent delays for the benefit of the accused, rather than to be sidestepped for the convenience of the court or the prosecutor.

In many cases monitored by the OSCE, the case against the defendants has rested wholly or substantially on identification. Often witnesses are asked if they know the accused and are required to point him or her out in court in a form of unregulated identification procedure. This has certainly created a perception amongst observers that the procedures can be unfair, given that the accused is quite obviously sitting in the court room and given the suggestibility of witnesses in this regard. Despite the requirement for an "identification parade" in the 'new' CPC, the method of implementation has not been further elucidated. At one trial, the men present in court were asked to stand with the accused and in another the case was adjourned due to insufficient men being available to carry out the procedure. However, the procedure is actually not currently subject to any guidelines guaranteeing fairness to the accused.

[87] See, for example, *Jovo Torbica*, *Vlastimir Pusara* (Sarajevo Cantonal Court) and *Zvonko Trlin* (Mostar Cantonal Court).

[88] *Ostoja Sando* (Sarajevo Cantonal Court).

[89] *Dominik Ilijasević* (Zenica Cantonal Court – ongoing case).

[90] Art. 300(3) FBiH CPC 1998 (replaced by Art. 266(3) CPC (2003)).

The question of the admission of evidence gathered by the ICTY in the course of their proceedings remains problematic. In the case of *Ilijašević* at the Zenica Cantonal Court, the court rejected relevant videotaped interviews made by the ICTY with one of the witnesses appearing in the case. The court stated that *"the evidence was not obtained pursuant to the provisions of the CPC in the FBiH"*.[91] The CPC in question was the 'old' CPC dating back to 1998. Human Rights Watch also identified this problem in their monitoring, observing that:

> "[b]y admitting statements given to the ICTY, courts would avoid time-consuming and costly examination of hundreds of witnesses who have already testified in judicial proceedings about the same events, as well as allowing them to benefit from the investigative expertise and resources of the ICTY".[92]

Under the 'new' CPCs, the same problem is anticipated by the prosecutors. In the Prosecutors' Survey, the prosecutors gave extremely mixed responses on the question. Five prosecutors consider that evidence gathered by the ICTY is, or would be, admissible before the domestic courts and two more prosecutors consider that ICTY evidence is, or would be, admissible if it was gathered according to the CPC. Two prosecutors stated that the evidence is not admissible and another prosecutor is of the view that the admission will depend on the way the evidence was gathered (without specifying if he is referring to respect of the CPC rules or other standards). One prosecutor took the view that witness statements would not be admissible, whereas other written material would be admissible. Another prosecutor explained that the problem lies with the way the prosecutor came into possession of the evidence, rather than the evidence itself.

The issue of admissibility of evidence gathered by the ICTY has recently been addressed by the Law on the Transfer of Cases from the ICTY to the Prosecutor's Office of BiH and the Admissibility of Evidence Collected by the ICTY in Proceedings before the Courts in BIH.[93] The general principle of this new law is that evidence collected in accordance with the Statute and the ICTY Rules of Procedure and Evidence may be used in proceedings before the courts in BiH. The law provides that such evidence will be admissible before all the courts in BiH. Nevertheless, the law does not address situations where courts have already rejected the ICTY evidence, as in *Ilijašević* case, which remains ongoing at the time of writing of this Report.

The institution of the plea agreement or 'plea bargaining' was introduced in the 'new' procedure codes[94] and had been used in three cases of war crimes at the time of writing. This method of concluding a case was subject to much controversy following its introduction in the ICTY Rules of Procedure and Evidence.[95] It exposes the court to accusations of lacking transparency and the appearance of justice. On the other hand, plea agreements accelerate the justice process: they enable guilty pleas to be entered and defendants to give evidence against others which could not otherwise have been achieved at trial. In BiH,

[91] Hearing minutes, 8 September 2003.

[92] HRW Report.

[93] Entered into force on 6 January 2005.

[94] Plea Bargains: Art. 231 BiH CPC, Art. 246 FBiH CPC and Art. 238-239 RS CPC.

[95] Rule 62, available at http://www.un.irg/icty/legaldoc/index.htm. See also University of Texas Conference Papers, *International War Crimes Trials*: Making a Difference?, November, 2003, 24-28.

the limited number of cases makes it difficult to draw any conclusions as to fairness from the perspective of defendants or victims at this stage. In the three cases so far resolved in this way, the sentences imposed appear not to have significantly departed from sentencing practice for war crimes cases in BiH (see case summaries in the Appendix – *Sakrak, Hota, Rodić* - Sarajevo Cantonal Court). However, the fact that the agreement is not a matter for a public hearing means the victims and witnesses may be left with the feeling that justice was not done due to the "deal" reached with the defence.

Recommendations:

- The Criminal Code Implementation Assessment Team (CCIAT), under the auspices of the BiH MoJ, should consider the necessity for guidance, commentary or legal amendment on the problems raised in the 'new' CPCs regarding admissibility of defendants' statements, expert and witness testimony.

- The BiH authorities should provide guidance on the use of evidence gathered by the ICTY in previously ICTY-categorised and on-going entity-level cases.

- The BiH authorities should provide guidance on good practice to the courts or draft court rules regarding the carrying out of identification procedures.

5.6. Independence, Impartiality and Competence of the Judiciary and Prosecutorial Services

In relation to the issue of independence of the judiciary, expert consultants submitted a report to the OHR on the future of domestic prosecution of war crimes noting that:

> "there appears to be little confidence that such (war crimes) cases can be tried impartially, independently, and free of political, criminal or other influence or without ethnic bias. There is little faith that mono-ethnic courts could deliver impartial judgments. Many witnesses are reported to be afraid to testify and some of the officials involved are concerned for their own safety because of real or imagined threats from those who oppose such prosecutions. Trial monitoring to date by staff of the Office of the High Representative (OHR) and other international organizations shows an uneven approach and uneven results".[96]

Problems in the domain of war crimes trials, ranging from procedural and legal irregularities to trials collapsing after witnesses changed their testimonies, have fueled the public perception that justice is not being served in relation to war crimes proceedings. This has been exacerbated by the nature and tenor of media reporting on case outcomes.

[96] Office of the High Representative, "The Future of Domestic War Crimes in Bosnia and Herzegovina", OHR, May 2002. On file with the OSCE.

At the Zenica Cantonal Court, in a case concerning 15 alleged war criminals of Croat ethnicity, the investigative judge was subject to a complaint on the basis that he had served as a military judge in the BiH Army. Two of the defendants challenged the composition of the court, as there were no judges of Croat ethnicity on the bench. The defendants also opposed the venue of the hearings and requested that the case be transferred to what they perceived to be a more ethnically neutral court. The case caused increased political tensions. There were demonstrations when the defendants' objections relating to the perceived impartiality of the court were dismissed. Activists even formed an organization for the purpose of defending Croat interests and supporting the suspects in the case. On 25 September 2001, the FBiH Supreme Court rejected the petition for disqualification of the judge. An application to the Human Rights Chamber was rejected as inadmissible.

The perception that war crimes prosecutions are manipulated to deter return has been reinforced by a perceived discriminatory approach by the authorities. The "selective" exercise of prosecutorial authority can have a detrimental effect on the decision of people considering returning to areas from where they were displaced. In the case of *Jovo Torbica* (see case summary in the Appendix), the defendant was indicted for relatively minor violations of the laws of war, namely the pillage of livestock during the conflict. He was 69 years old, of Serb ethnicity and spent eight months in pre-trial custody before being acquitted by the Sarajevo Cantonal Court. The willingness of the prosecuting authorities to pursue such cases can fuel suspicions among minority ethnic or returnee groups that there is no equal standing before the law and that they are being targeted for prosecution while members of the ethnic majority are not prosecuted for similar offences.[97]

Many of the early concerns regarding judicial and prosecutorial independence stemmed from the failure of the national authorities and international community to solve the problem created by appointments to office made during and after the war. According to IJC statistics prior to the HJPC reappointment process, 90 per cent of judges had been appointed since 1992. Many judges had been appointed as a result of a process that was not merit based, objective or transparent, but was dominated by ethnic or political considerations. The level of public confidence in judges and prosecutors was also extremely low.[98] Judges and prosecutors were also very poorly paid until May 2000, when the High Representative imposed a new judicial service law which significantly raised their salaries.[99]

[97] See also OSCE Mission to Croatia, "Background Report: Domestic War Crimes Trials, 2003", and OSCE Mission to Croatia, "Background Information on War Crimes Procedures in Croatia and Findings from Trial Monitors", 22 June 2004. Available at http://www.osce.org/documents/mc/2004/06/3165_en.pdf

[98] One RS lawyer stated: *"In Banja Luka, there are 50 judges but only about 5 or 6 of them are capable of resolving cases – the rest are just circulating them."* USAID, Priorities and Partners: Developing the Rule of Law in BiH, June 2003. Available at http://www.usaid.ba/rol_report_english_june2003.doc.

[99] Until May 2000, a crucial problem, both in the RS and the FBiH, was the low level of judges' salaries, as well as the fact they were often paid late. In the RS, the monthly salary range had been between DM 300-500. In the FBiH, salaries varied from canton to canton. In some cantons, they were as low as DM 600-700. Salary payments were often three or four month late and sometimes only 60-70 percent of the total salary. Moreover, the salaries and other material funding of the courts were not distributed in a transparent way, but depended on the ability of the court president to get funding allocated to his court. Judges salaries now range from 1,500 to 4,000 KM per month, based on seniority and other factors laid out in the Law on Court of Bosnia and Herzegovina (BiH OG 29/00, 16/02).

The principal goal of the reappointment process (see also Section 4.1 above) was to allow for a truly comprehensive, systematic approach to verifying the quality and competency of judges and prosecutors in all courts in BiH. In terms of reshaping the judiciary, the reappointment process was described as being the most effective method of ridding the legal system of bad judges and prosecutors, because it shifted the burden to the applicant to establish competency while affording the HJPCs a range of competitive choices from sitting judges and serving prosecutors to outside applicants. It was also seen as the only way to undo past and existing institutional practices which had resulted in preferential treatment for Bosniacs and Croats in the FBiH and Serbs in the RS.[100] Unfortunately, the HJPCs have faced difficulties in filling a number of posts due to the challenge of finding candidates of the minority ethnicity to work in certain locations.[101] In their periodic report of December 2003, the HJPCs stated that:

> "[t]he constitutional requirements for the proportional ethnic representation in the courts continued to cause problems in the appointment process and some appointments, particularly to courts and prosecutors' offices in the Republika Srpska were delayed due to lack of suitable candidates of some ethnicities".[102]

The reappointment process has, however, resulted in some improvement of the ethnic balance in the judiciary and prosecutors' offices which may have a positive impact in terms of future war crimes proceedings. The ethnic balance at courts where war crimes proceedings have been gathering pace indicate an even greater multi-ethnic balance.

Ethnicity chart of the composition of the judiciary and prosecutors at the entity-level

	Bosniaks		Croats		Serbs		Others	
	Pre-R	*Post-R*	*Pre-R*	*Post-R*	*Pre-R*	*Post-R*	*Pre-R*	*Post-R*
RS Judiciary	**1.9%**	**21.9%**	**3.8%**	**7.3%**	**91.5%**	**65.1%**	**2.6%**	**2.8%**
RS Prosecutors	**3.2%**	**23.8%**	**1.6%**	**7.9%**	**95.1%**	**66.6%**	**0.0%**	**1.5%**
FBiH Judiciary	**65.7%**	**57.2%**	**23.1%**	**21.8%**	**8.8%**	**19.4%**	**2.2%**	**1.5%**
FBiH Prosecutors	**65.4%**	**54.1%**	**21.2%**	**22.6%**	**10.9%**	**19.8%**	**2.4%**	**3.4%**

Pre-R: pre-reappointment process

Post-R: post-reappointment process

[100] IJC, "An Alternative Strategy to Verify the Competence of the Judiciary: A Reappointment Process," 18 December 2001.

[101] According to the HJPC, as of December 2004, less than 30 vacancies had still not been filled.

[102] HJPC Periodic Report No. 5, 1 October – 31 December 2003. Available at http://www.hjpc.ba.

Ethnicity chart of the composition of the judiciary in some Cantonal Courts trying war crimes cases

	Bosniaks		Croats		Serbs		Others	
	Pre-R	*Post-R*	*Pre-R*	*Post-R*	*Pre-R*	*Post-R*	*Pre-R*	*Post-R*
CC Mostar	**42.1%**	**40.0%**	**36.8%**	**40.0%**	**21.0%**	**13.3%**	**0.0%**	**0.0%**
CC Livno	**20.0%**	**50.0%**	**80.0%**	**50.0%**	**0.0%**	**0.0%**	**0.0%**	**0.0%**
CC Sarajevo	**75.0%**	**55.1%**	**11.1%**	**10.3%**	**11.1%**	**31.0%**	**2.7%**	**3.4%**
CC Zenica	**69.5%**	**64.7%**	**21.7%**	**17.6%**	**8.6%**	**17.6%**	**0.0%**	**0.0%**

CC: Cantonal Court

Pre-R: pre-reappointment process

Post-R: post-reappointment process

Although public allegations of ethnic bias appear to have decreased over the years, there continue to be problems encountered by prosecutors post-reappointment regarding co-operation from their colleagues in the other Entity (as noted in Section 5.1 above). Problems, such as security for judges and prosecutors, and questions about their competence prevail.

The OHR imposed the Law on Legal Assistance in 2002,[103] enabling direct requests to be made between entity law enforcement agencies, prosecutors and judges. The Prosecutors' Survey, however, demonstrated that, despite the reappointment process, the level of cynicism about working with the RS authorities is still high amongst FBiH prosecutors, presumably based on the continuing lack of effort made by the RS prosecutors to investigate and prosecute war crimes cases, in particular against Serb suspects.

In the early days after the conflict, it was evident that judges and prosecutors lived in fear from their own communities or from those being prosecuted.[104] This was to be expected in the immediate aftermath of the war. This, however, is a problem still observed and expressed by the prosecutors in the Prosecutors' Survey. One prosecutor in the FBiH cited the recent example of the death by hand grenade of an RS judge in her home.[105] Other prosecutors expressed their regret at the absence of security for them and their families. It can be concluded that they will either not process their dormant cases at all, or will be less than vigorous in the investigation, especially where the suspect is already notorious for violent behaviour. A prosecutor has expressed concern that his family had returned to live in the community from which they were displaced during the war and in which the suspect in one of his cases now lives.

[103] See Section 5.1 above.

[104] In the *Golubović* case, hearings did not take place for two years due to fears for security after the war (see case summary in the Appendix to this Report).

[105] The death of the judge has not been determined to have been a murder. It has, however, been sufficient to intimidate members of the judiciary and prosecutorial services. *See* "Bosnia: Judge killed in Banja Luka explosion," SRNA News Agency, Banja Luka, 9 May 2004.

The OSCE continues to have concerns about the ability of certain judges and prosecutors in relation to their handling of war crimes cases. Problems identified by the OSCE include a lack of specificity in indictments, over-reliance on eye witness testimony, poor witness selection such as bringing irrelevant witnesses to court and poor preparation, and not checking the witnesses' accounts with those given in investigation. In the trial itself, the OSCE has noted that in some cases, prosecutors fail to adequately examine or cross-examine, especially when witnesses fail to give evidence consistent with their previous statements. In many cases, the trial testimony is markedly less precise on identification issues and on what precisely was seen by the witness, compared to what was said in the investigation stage. Such inconsistencies may result from flaws at the investigation stage. In its report on the case of *Dominik Ilijasević* at the Zenica Cantonal Court, Human Rights Watch comments that:

> "[i]nvestigative judges in Bosnia have often carried out flawed investigations into war crimes. The trial of Dominik Ilijsević, as well as another war crime trial unfolding before the Zenica Cantonal Court, monitored by Human Rights Watch (the trial of Bosnian Serb Tomo Mihajlović) reveal that investigative judges in those cases have sometimes inserted phrases not uttered by interviewed witnesses into the official records of their interrogation. The reasons may have varied from incompetence to attempts to construct "stronger" evidence against those accused who belong to a different ethnic group than the judges."[(106)]

This should be anticipated and checked by the prosecutor before commencing the case. Under the 'new' CPC provisions, prosecutors are in charge of the investigation and preparation of the case against the accused. In some cases the contradictory evidence given by the witness at the trial cannot be predicted. It is, however, evident that in many cases the prosecutors have not taken the time to check whether the witnesses agree with their previous statements and call them as witnesses, thus *"undermining the credibility of the witness and hence the prosecution's case"*.[(107)] An additional problem is the difficulty for the prosecutor in understanding and addressing the real motivation for the change in evidence, i.e., whether it was that the original statements were incompetently drawn up or the witnesses are now reluctant to give evidence at trial because of fear, intimidation or the desire for a *"quiet life."* A sufficient number of cases have now occurred for the prosecutors to have diagnosed this problem and to be taking the necessary steps to reduce such occurrences, e.g., by building a relationship with the witnesses, considering the application of witness protection measures, etc. In the Prosecutors' Survey, 14 prosecutors consider it necessary to build a relationship with the prosecution witnesses. Most prosecutors mentioned that they were aware that the 'new' CPC permits them to have contact with their witnesses prior to the trial. Four prosecutors specified that such a relationship was beneficial to build trust and confidence between the witness and the prosecutor, while two others felt that it would allow them to prepare the witness to the idea of being cross-examined. However, it was not clear how many prosecutors are acting on this possibility. At least one answered that he does not have contact with the witnesses prior to the trial.

The OSCE monitoring of war crimes trials continues to reveal reluctance on behalf of the courts to effectively try defendants who held positions of power during the war and continue to be influential. Narrow interpretations of the facts, and an unwillingness to conscientiously explore the full circumstances; have resulted in a number of notable not guilty verdicts. Some court verdicts are also worded in such a

[(106)] HRW Report.

[(107)] HRW Report.

way as to give the impression of having no sympathy for the victims and/or their families. Although 2004 has seen a number of guilty verdicts and the imposition of substantial prison sentences, a significant majority of these convicted defendants were of low ranking military personnel. OSCE monitoring also indicates that cases are processed less effectively and robustly where the defendants are members of the majority local community and where the prosecution witnesses are from the minority.

Despite the above mentioned concerns, it is clear that, in some courts, the judges and prosecutors are making conscientious efforts to process war crimes cases effectively and fairly. The frequency with which the appeal system is used and the fact that decisions are often partly or fully overturned is also evidence that the domestic legal system contains checks and balances. In late 2003 and in 2004, the legal system has gradually begun to work with new laws, restructured prosecutors' offices, and newly appointed judges and prosecutors. It is, perhaps, too early to fully assess the impact of these reforms upon the processing of war crimes cases.

Recommendations:

- The authorities should enhance security measures for judges, prosecutors and lawyers to enable them to work without fear of reprisals, harassment, intimidation and concern for their own or their families' security.

- The HJPCs and Disciplinary Prosecutor should adopt a rigorous approach to the enforcement of ethical and competence standards among judges and prosecutors.

- The JPTCs should incorporate into the training curricula for judges and prosecutors, comprehensive training on standards regarding impartiality and independence.

5.7. Trans-border Legal Co-operation

Following the conflict, many Croats and Serbs from BiH took up residence and obtained the citizenship of Croatia or Serbia and Montenegro or retained dual nationality of one of these countries and BiH. These included both witnesses and suspects in war crimes cases. In addition, relevant wartime documentary records and material may not be readily available to local prosecutors and courts and instead be located in another jurisdiction. The successful processing of war crimes cases in BiH is therefore dependent upon the co-operation of the other countries of the former Yugoslavia (especially Serbia and Montenegro and Croatia), as well as effective co-operation with other countries where witnesses and suspects are now resident such as France, Germany, Norway and the United States.

Nationals of all three countries in the region cannot be extradited to any of the others owing to a prohibition on extradition of nationals. In the case of *Dominik Ilijasević* at the Zenica Cantonal Court, the delay in the processing of requests for evidence from the Croatian authorities drew the trial to a halt. A request was made for the examination of a witness on 19 May 2003. The Croatian authorities did not respond until 3 September 2003, stating that the witness did not live at the given address and that the court

could not locate him, even though he had previously been investigated by the authorities there. In the case of *Smajlović* at the Tuzla Cantonal Court, the trial was delayed awaiting witnesses from the United States and Switzerland. Some efforts were made to obtain the evidence through the United States authorities, but eventually the witness arrived to give evidence at court. In other cases, witnesses now residing in Canada and Norway have had their statements from the investigation stage read in court. In one case in 2001, the BiH authorities were reluctant to hand over the case for trial in Croatia despite the arrest of the accused. They were reported as saying that the Croatian authorities could not be trusted to process the trial impartially.[108] The accused had obtained Croatian citizenship and could not, therefore, be extradited to BiH. He was released and remains at large.

Efforts to solidify and streamline procedures relating to legal co-operation have been slow. For example, an agreement between the FBiH and Croatia on Legal Assistance in Civil and Criminal Matters was reached in 1996.[109] The scope of the agreement was extended to the territory of the RS on 17 June 2002 by an amendment to the original agreement. Yet this amendment appears not to have been published in either the RS or BiH Official Gazette.[110] As a result, it is not surprising that the Prosecutors' Survey revealed that the RS prosecutors were unfamiliar with this legal assistance agreement with Croatia. Hence Human Rights Watch has recommended the enhancement of the existing judicial co-operation agreements and/or drafting of new agreements with other states of the former Yugoslavia to prevent delay or political prevarication.

It should be highlighted, however, that the current agreement with Croatia does not meet the standards required by the BiH authorities according to the CoE Conventions which they currently are obliged to ratify in the post-CoE accession phase.[111] These conventions incorporate personal and material guarantees for witnesses required to travel across borders, procedures as to extradition and the transfer of legal proceedings to the other state in cases where extradition is not possible. Such measures are essential and need to be implemented in domestic law and streamlined as soon as possible to ensure effective, swift and impartial co-operation even in the most politicised of cases. Without the ratification of these conventions and the procedures being streamlined in domestic law, the other countries in the region can use procedural delay as a cover for political reluctance to deal with a case which may be sensitive on their soil.

As the countries of the former Yugoslavia, including BiH, do not permit the extradition of their own nationals, in order for a case to proceed, it must be transferred to the other state's jurisdiction for prosecution. This heightens the need for effective, swift co-operation and trust between the authorities that a case will be dealt with independently and competently regardless of the country and the ethnicity of the suspect and victims. Avoiding confusion between co-operation on investigative matters which are outside of the judicial domain and legal co-operation on matters within the judicial domain is crucial. The adoption

[108] See HRW Report.

[109] OG RBiH International Treaties 1/96

[110] Art. 7 Addendum. The agreement is in effect despite the lack of publication in the official gazettes due to the provision that the agreement is to be "self-executing."

[111] European Convention on Extradition, ETS No. 24, 13 December 1957, European Convention on the Compensation of Victims of Violent Crimes, ETS No.116, 24 November 1983, European Convention on Mutual Assistance in Criminal Matters, ETS No. 030, 20 June 1959, and European Convention on the Transfer of Sentenced Persons, ETS 112, 21 March 1983.

of the 'new' criminal procedure codes in BiH means that the country's procedures are no longer synchronised with the rest of the region. The relevant actors are therefore different (e.g., prosecutor in BiH and investigative judges in Croatia and Serbia and Montenegro). However, this should not be a barrier to effective co-operation as long as the international obligations are properly implemented and the correct channels of communication are established between the countries.

When interviewing prosecutors about their approach to trans-border legal co-operation in the Prosecutors' Survey, the OSCE received uneven responses. When a defendant is resident abroad, seven prosecutors stated that they would use diplomatic channels, through the BiH Ministry of Foreign Affairs, to request the extradition of the defendant, while six prosecutors would refer the situation to the BiH Prosecutor for him to act pursuant to the International Legal Aid provisions under the BiH CPC. Five prosecutors acknowledged that they could consider transferring the proceedings to the country where the defendant is resident. Others said they would ask for the help of Interpol or would rely on the Agreement on Rendering Legal Assistance between Croatia and BiH. Another prosecutors' office mentioned that in the past, he/she would issue a summons to the defendant, but no longer does so.

When a witness is resident abroad, the prosecutors' responses were also varied. Four prosecutors would act pursuant to the International Legal Aid provisions under the BiH CPC, four prosecutors would use diplomatic channels to contact the witness, while three prosecutors would contact the witness directly. Two stated they would rely on the Agreement on rendering Legal Assistance between Croatia and BiH which is limited only to requests from/to Croatia. Two prosecutors would request the assistance of the authorities in the country where the witness is resident. Two prosecutors would summon the witness without any special procedure. Finally, one prosecutor would summon the witness through the BiH Embassy in the country of residence of the witness and another said he would apply to the BiH Ministry of Justice to examine the witness.

In relation to the option of requesting that evidence be gathered abroad, 13 prosecutors stated they would consider making a request for a rogatory commission, whereas three prosecutors said they would not make such a request. Two prosecutors specified that the current law would not allow for such statements to be valid in front of domestic courts. Many countries allow for such procedures to be adopted so long as the rights encapsulated within their own procedural codes are not violated.

All prosecutors' offices would consider requesting a witness travel from abroad. Twelve specified that they should cover the travel costs of the witnesses, but half of them mentioned the problems of insufficient court budget to cover such costs. One prosecutors' office mentioned, however, that witnesses do not tend to ask for the reimbursement of their travel costs. The question arises whether witnesses are actually aware that they are entitled to be reimbursed. Seven prosecutors mentioned that they would, if appropriate, offer material and/or personal guarantees to the witness, and five of the prosecutors explained that the CPC provides for some guarantees.

This diversity in responses does little to inspire confidence in the ability of the BiH prosecuting authorities to deal with these cases in an efficient and consistent fashion. The correct procedures for requesting legal assistance from other states, in the absence of a bilateral agreement to the contrary, is to direct the requests through the entity ministry of justice which should communicate this to the BiH Ministry of Justice. The appropriate diplomatic channels can then be used.[112] Where extradition requests are to be made, they are dealt with at state-level by the BiH Court.[113]

In the Prosecutors' Survey, only four prosecutors mentioned the existence of inter-state agreements on co-operation (three of these specified the aforementioned agreement with Croatia). Two referred to unspecified treaties on co-operation, one prosecutor knew of the establishment of a centre for evidence (unspecified) and another prosecutor explained that certain countries do inform them informally when they are aware that witnesses reside on their territory.

Projects to promote and improve trans-border legal co-operation, such as the CoE's Programme Against Corruption and Organised Crime in South-Eastern Europe (PACO),[114] have particularly focused on the region. On 29 and 30 November 2004, OSCE hosted an expert-level meeting in Palić, Serbia and Montenegro, on co-operation between prosecutors' offices and courts from BiH, Croatia and Serbia and Montenegro. Particular attention was given to facilitating access to, and hearing of, witnesses as a key area in procuring evidence. An NGO project to enhance regional co-operation is also planned to start in 2005.[115]

On 21 January 2005, the State Prosecutor of Croatia and the State Prosecutor of BiH signed an agreement on co-operation on all forms of serious crime, including war crimes. The agreement aims to facilitate direct contacts between prosecutors in pre-trial proceedings, streamlining the exchange of reports and legal documents, information and data which may help in the investigation and prevention of crimes. On 5 February 2005, the Public Prosecutor and War Crimes Prosecutor of Serbia and the State Prosecutor of Croatia signed a similar agreement.

In sum, although some co-operation has existed between countries in the region, the procedures and practices to date have been inefficient and insufficiently defined. The level of commitment and the mechanisms of co-operation among the countries in the region, and, indeed, between the Entities within BiH, have not adequately met the needs of war crimes investigations and trials and will need to be enhanced in 2005. With Croatia's proposed accession to the European Union (EU), the establishment of new institutions for the adjudication of war crimes, namely specialised war crimes chambers in BiH, Croatia and Serbia and Montenegro, and the recent bilateral agreements, some improvement may be expected. It is

[112] Art. 429 FBiH CPC (2003), Art. 419 RS CPC (2003).

[113] Art. 428–431 BiH CPC (2003).

[114] See http://www.coe.int/T/E/Legal_affairs/Legal_co-operation/Combating_economic_crime/Programme_PACO/PACONetworking(2002).asp. See also PACO Training Manual available at http://www.coe.int/T/E/Legal5Faffairs/Legal5Fco2Doperation/Combating5Feconomic5Fcrime/Programme5FPACO/P-030-d4-CoopMan21June.pdf.

[115] On January 2005, the Sarajevo-based Centre for Research and Documentation, the Zagreb-based Dokumenta and the Belgrade Humanitarian Law Centre announced they have joined efforts in a regional project to collect testimonies, documents and information relating to the conflict. The three centres will form a compatible database, provide support for domestic war crimes prosecutors, as well as support for witnesses. http://see.oneworld.net/article/view/101154/1/OneWorldSoutheastEurope.

hoped that, the arrest of Vlado Cosić, an individual suspected for war crimes against civilians, in Croatia in May 2004 on an international arrest warrant, is evidence of improved co-operation.[116]

Recommendations:

- The BiH authorities should enhance their co-operation with the authorities in Croatia and Serbia and Montenegro in relation to war crimes investigations and prosecutions in the area of exchange of information, evidence, other documentation, and ensure adequate witness protection measures in relation to testimonies from witnesses abroad.

- The BiH authorities should ratify all relevant conventions regarding trans-border co-operation, especially on mutual assistance, transfer of proceedings, and extradition.

- The BiH authorities should reach bilateral agreements containing the required protections and procedures.

- The BiH authorities should incorporate the required standards and procedures into domestic law and disseminate information and guidance to practitioners at entity-level on how to activate these procedures.

- The ministries of justice should disseminate guidance to entity prosecutors' offices on how to locate witnesses and suspects abroad and which bodies can provide assistance.

- The BiH authorities should ensure that efficient and impartial responses to requests for legal co-operation and assistance from other states on war crimes cases are given.

- The BiH authorities should ensure the courts receive adequate funding to enable them to pay witnesses costs.

- The international community should intensify initiatives to facilitate inter-state dialogue and agreements on legal and judicial co-operation.

5.8. Impact of Legal and Structural Reforms

The restructuring of courts in 2002 and 2003 involved the closure of numerous municipal and basic courts and the further rationalization of the court system in BiH. The project applied three criteria in determining which courts to consolidate; namely, case-load, population and geographical location; and worked on the assumption that the courts operated with costly inefficiency.[117] Alongside the court restructuring, the prosecutors' offices were restructured, abolishing the municipal and basic prosecutors' offices and focusing them at district and cantonal level with only a few sub-offices. At the same time, the HJPC reappointment of judges and prosecutors proceeded and the number of prosecutors increased while the office of the

[116] "Bosnian Croat suspected of Ahmići war crime arrested in Croatia", BBC Monitoring Report, 11 May 2004.

[117] IJC, "Restructuring of the Court Systems: Report and Proposal," 21 October 2002. See also IJC, Final Report.

investigative judge was phased out under the new procedural codes. The aim of this exercise was to:

> "centralise and strengthen the positions and conditions of the working prosecutors, to limit the possibilities of intimidation and influence, to rationalise expenditure, to increase effectiveness and to strengthen professionalism by facilitating specialization".[118]

The prosecutors' offices are now organized largely by the chief prosecutor at cantonal and district level. The degrees of specialization on particular cases are, therefore, dependent on local level decision-making. Specialisation, according to the Prosecutors' Survey, means that one or two prosecutors are responsible for the war crimes cases, which does not mean that those prosecutors received special training or support to prosecute war crimes cases. All prosecutors have had to become familiarised with their role since mid–2003. Many are completely inexperienced with war crimes cases and need extra support. Six prosecutors' offices stated that they have a designated war crimes unit with between two and six prosecutors and an average number of cases per prosecutor varying from six to 100 (often these involve multiple accused). The rest of the offices have one or two prosecutors working on war crimes amongst other crimes.

During the HJPC reappointment process, a number of cases experienced significant delays as a result of judges or prosecutors losing their jobs midway through a trial or investigation.[119] At the Zenica Cantonal Court, all the major war crimes trials drew to a halt. In the case of *Dominik Ilijasević*, two judges and the prosecutor were not reappointed which led to indefinite adjournment necessitating the recommencement of the trial on 30 June 2004. In the case of *Hakanović*, a member of the panel was not reappointed which meant that the trial was adjourned to find a replacement for more than 30 days and therefore had to recommence. In the case of *Mihajlović* ("Kuka"), nearing the end of a lengthy trial with numerous witnesses having given live testimony, the case was adjourned for the translation of documents received via the ICTY Liaison Office which had originated from German investigations. In the meantime, the presiding judge and one of the panellists were not reappointed, thereby requiring the proceedings to commence afresh.

While it was a necessity to improve the quality of the judicial and prosecutorial services and to help increase public confidence in the justice system, the HJPC reappointment process has had a negative immediate effect upon the processing of some war crimes cases. Even where the cases have not been suspended, the newly reorganised and reappointed prosecutors have had a challenge to catch up with a large caseload carried over from the investigative judges. According to six prosecutors' offices, the restructuring of the courts and prosecutors' offices had a negative impact on the processing of war crimes cases. The reasons given include that they are overloaded with work, are not familiar with this type of case, and that trials might have to restart. On the other hand, five prosecutors' offices stated in the Prosecutors' Survey that the reform was positive for the processing of war crimes cases on the grounds that the prosecutors are now more efficient, the judiciary is independent and the cases are concentrated in one office. Three prosecutors' offices stated that the reforms had had no impact or no significant impact, whilst two more thought that the reforms are too recent to comment on their effect.

Recommendations:

- The BiH authorities should undertake an evaluation of prosecutors' offices to establish whether staffing numbers, specialisations and organisations are sufficient to enable them to process the outstanding war crimes cases efficiently and competently. As determined extra resources and funding should be provided.

[118] Work Plan for HJPCs of BiH and IJC for September 2002 - December 2003.

[119] See, for example, cases of *Samir Bejtic, Vlastimir Pusara, Zvonko Trlin* and *Drago Palamet* in Appendix to this Report.

5.9. Victims' Rights

There is no provision for representation of victims in the 'new' criminal procedure codes and nor is there any state compensation scheme for damages resulting from criminal offences. The prosecutor's formal duties are limited to providing the necessary information to the victims about their rights to claims for compensation within the criminal procedure and collecting information relevant to a compensation claim.

Claims for damages can, however, be made within the criminal procedure[120] and these extend to damages for loss of earnings and expected income, for psychological and physical pain, and for damage to property as defined under the Law on Obligations.[121] Under the 'old' procedure, the courts were obliged to make all the necessary enquiries of the victims or their next of kin in order to make an assessment of damages. Under the 'new' CPCs, this is the role of the prosecutor. Under both procedures, however, it has been the responsibility of the injured parties themselves to make the application for the damages. Although the courts have the power to adjudicate on the level of damages and make such awards within the criminal proceedings, in practice, they rely upon provisions within the CPCs which permit them to refer the victim to the civil procedure if the assessment of damages will slow down the criminal proceedings. It is then up to the victim to commence the proceedings within the civil court jurisdiction.

A criminal conviction is clearly a solid basis for civil liability. However, civil actions in BiH are still lengthy, complicated and expensive for victims and their survivors, especially as they are unlikely to receive adequate legal aid. The enforcement of civil judgments has also been problematic. The 'new' civil procedure codes which came into force in 2003 have attempted to deal with these challenges, but insufficient time has passed to know if these have been effective.

There is no state scheme for compensation unless the victim/victim's family has a human rights claim and is awarded damages by other legal institutions such as the HRC in relation to a failure to effectively investigate a disappearance or death of a relative (see the HRC cases of *Palić, Unković* and the *Srebrenica Cases*)[122]. The recently signed European Convention on Compensation of Victims of Violent Crimes imposes obligations on BiH to establish a state funded compensation scheme although it is yet to be implemented.

In the Prosecutors' Survey, 11 prosecutors' offices considered that it is not their role to request compensation for victims while five stated that they understood that their role is to collect evidence which will be used for the determination of compensation. One prosecutor made the interesting point that there would be more room for action by the prosecutor in cases where plea agreements are struck. As the rules regarding plea agreements are fluid, there remains some flexibility as to what can be agreed upon by the parties. As an offer of payment of compensation by the defendant to the victim(s) is indicative of remorse, it could have a mitigating effect upon the sentence.

[120] Art.96-107 FBiH CPC (1998) and Art. 207-218 FBiH CPC (2003); RS Art. 103-114 CPC (SFRY 1993) Art. 103-114 CPC (2003).

[121] Art. 155 and 193-197 Law on Obligations, SFRY OG 29/78 (adopted by the Republic of BiH 1992 and the self-proclaimed RS in 1993).

[122] *See Palić*, HRC Decision No. CH 99/3196 (9 Dec 2000). *See Unković*, HRC Decision No. CH 99/2150 (10 October 2001). In this case, the father of Mrs. Golubović (see also *Golubović* case summary in the Appendix to this Report) submitted an application to the HRC alleging that the failure of the authorities to properly investigate and pursue the fate of his daughter, son in law and two grandchildren in a timely manner constituted inhumane and degrading treatment and was a violation of his rights protected by Article 3 of the ECHR. The HRC initially found a violation under Article 3. However, this decision was overturned by the Plenary Session of the HRC under its review procedure wherein the HRC highlighted the fact that *"albeit after repeated delays and obstructions, the authorities did pursue the criminal investigation, did discover the fate of the victims and did successfully prosecute and punish the men who committed the crime."* See *Srebrenica Cases* (49 applications), HRC Decisions Nos. CH/01/8365 to CH/02/9596. (7 March 2003).

Victims or their relatives are poorly served in the BiH criminal justice system despite international obligations to the contrary.[123] They are unrepresented by counsel and no one is under any obligation to inform them about the process or progress of a case. Most victims have to give testimony in court with limited protection. They receive no compensation unless they take action themselves and even then they need to penetrate an inefficient civil legal system.

Recommendations:

- The BiH authorities should fully implement international standards and conventions regarding victims' rights.
- The BiH authorities should evaluate existing legal and systemic provisions for representation, advice and compensation for victims of crimes.
- The BiH authorities should establish a representation and advice scheme for victims of crime.
- Upon the conviction of defendants in war crimes trials, the courts, should, wherever possible, award compensation to victims.
- The BiH authorities should improve the accessibility and efficiency of civil procedure and enforcement of civil judgements, to enable the victims of war crimes to obtain compensation.

5.10. Training and Capacity Needs

As part of the Prosecutors' Survey, OSCE asked the prosecutors' offices about their experiences and needs in terms of training and resources.

The JPTCs at entity-level were established in March 2003[124] and are in the process of completing curricula, induction and continuous training for judges and prosecutors. Specialised training in the area of war crimes has yet to be delivered by the centres. For the most part, the training on this subject area continues to be delivered on an *ad hoc* basis by NGOs such as the American Bar Association – Central European and Eurasian Law Initiative (ABA-CEELI) or the RS Helsinki Committee for Human Rights in conjunction with the ICTY. Training to date has not met the needs of the entity prosecutors or judges in a comprehensive fashion and has not focused in sufficient detail on the legal, investigative or structural barriers which they face at entity-level.

As of December 2004, a mechanism for the provision of support and assistance to entity prosecutors is in place as a result of Article 12 of the BoR of the BiH Prosecutor's Office providing that: *"The Regional Prosecution Teams of the War Crimes Department may provide necessary legal assistance and official co-operation to Cantonal/District Prosecutor's Offices and the Public Prosecutor's Office of the Brčko District on all war crimes cases and prosecution"*. It is too early to assess how extensive or effective this support will be. Entity prosecutors are encouraged to develop an on-going process to access these resources of assistance.

[123] United Nations Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, UN General Assembly Resolution 40/34 of 29 November 1985, annex 40 U.N. GAOR Supp. (No. 53) at 214, U.N. Doc. A/40/53.

[124] Law on Judicial and Prosecutorial Training Centres in RS and FBiH, OG RS 34/02, 77/02 and OG FBIH 24/02, 59/02, 21/03.

In the Prosecutors' Survey, two prosecutors stated that they have not received any training with regard to humanitarian law or investigation of war crimes cases. Fourteen representatives of other prosecutors' offices had attended the seminar organised by the Helsinki Committee with the participation of the ICTY in Bjelašnica, BiH, in March 2004. Two prosecutors stated that they had attended training on the RoR procedure several years ago and one mentioned training on the ECHR. All the prosecutors acknowledge the need for further training in relation to war crimes. Examples of topics which they suggested include command responsibility, collection of evidence, witness protection, co-operation between entity prosecutors, the relationship between the jurisdiction of the BiH Prosecutor and the entity prosecutors, methods of investigation, and the elements of the criminal acts. None of these have been dealt with at previous trainings in the context of the entity laws and institutions.

Nine prosecutors stated that they do not have access to a legal library whereas seven do, out of whom five consider their library to be poor and insufficiently stocked. The material received by the prosecutors' offices is generally limited to their entity official gazettes. When asked what they require to improve their work on war crimes cases, the prosecutors gave varied and sometimes overly general answers as to the law reports and publications that they would need to properly investigate and prosecute war crimes cases, e.g., commentaries to verdicts (three prosecutors), practice of the BiH Court once it is operational (three prosecutors), reports of the ICTY (three prosecutors), documents on the ECHR (three prosecutors), documents on international humanitarian law (three prosecutors), or anything available (one prosecutor). One prosecutor stated that he/she did not need any material, while two prosecutors did not know what to answer as they are not aware of what material is available on the subject of war crimes.

Fifteen prosecutors' offices have computer access in their office while only six have a computer equipped with a CD-rom drive. Four prosecutors' offices have Internet access and five individual prosecutors use the Internet from their homes.

To date, training defence lawyers has been left to the bar associations or international agencies such as ABA-CEELI to arrange. A Criminal Defence Support Section (CDSS)[125] is being created within the BiH Court to provide legal advice and logistical support to the defence appearing before the War Crimes Chamber. It will be composed of an administrative unit, development and training unit and legal support unit. The CDSS will aim to ensure the effective vetting of lawyers through a list of approved qualified defence counsel. To ensure the highest standard of professional ethics, a disciplinary panel will be established. An important component of the CDSS will be the development of training, provided by the International Bar Association, the Association of Defence Counsel at the ICTY and other organizations. There are also plans to establish a law library at the BiH Court with law journals, online legal database resources and law reports.

Although some defence lawyers appearing before the cantonal and district courts may benefit from the specialised training and resources provided by CDSS, there is currently no regulation of the lawyers who can be appointed by the court, *ex officio*, to deal with war crimes cases other than membership of the bar association. Unlike the War Crimes Chamber, no specific vetting approval or training are necessary in order to appear as defence counsel in war crimes trials in the entities, nor are additional logistical support,

[125] Project Implementation Plan Registry Progress Report, OHR War Crimes Chamber Project, 20 October 2004.

library facilities or other resources provided. Although the OSCE welcomes the establishment of the CDSS as a positive development, it will, as of 2005, result in a two-tier war crimes legal aid system, one at state-level and one in the Entities.

With the majority of war crimes trials continuing to proceed at entity-level, increased focus on training and meeting the capacity needs of those judges, prosecutors and lawyers having conduct of those cases is required.

Recommendations:

- International organizations, donors and the domestic authorities should focus on properly resourcing and building the capacity of the courts, judicial and prosecutorial services, and defence lawyers at entity-level to conduct war crimes trials.

- The JPTCs and the bar associations, with the support of the international community, should provide comprehensive training for prosecutors, judges and defence lawyers on international humanitarian law, ICTY jurisprudence, and on the treatment of victims and witnesses. This training should include guidance on specialised concepts such as command responsibility, classification of crimes, and procedural training and guidance on trans-border co-operation procedures, witness protection measures and compensation claims.

- Specialised training and guidance (legal research, indictment drafting, witness selection, interaction with witnesses) should be provided for prosecutors and judges.

- The BiH authorities should establish a scheme to enable the compilation and circulation of domestic law reports from all cantonal and district courts to each other, BiH Court to all other courts and ICTY texts in the local language.

- The BiH authorities should ensure that the entity courts are provided with sufficient funding to establish an adequate legal resource library, to include relevant legal texts on international jurisprudence in the local languages accessible for judges, prosecutors and lawyers, internet access in offices of judges and prosecutors and internet research training for all parties.

- The regional prosecution teams should provide an effective mechanism of support and advice to entity prosecutors in accordance with the BiH Prosecutor's Office Book of Rules on the Review of War Crimes Cases.

- Local Implementation Groups (LIGs) of judges and prosecutors should thematically address practical, procedural and legal problems faced by judges and prosecutors in war crimes cases.

6. The 'Rules of the Road' – Looking Back and to the Future

The Rome Agreement of 18 February 1996 was a political agreement signed by the leaders of the three participating parties – BiH, Croatia and the Federal Republic of Yugoslavia (now Serbia and Montenegro). It established, *inter alia*, an independent oversight mechanism, the 'Rules of the Road', for war crimes cases being investigated and prosecuted in BiH. The RoR Unit established within the ICTY in The Hague was staffed with international and BiH lawyers. The principal aim was to ensure freedom of movement for returnees throughout BiH, to prevent arbitrary arrests, detentions and harassment of ethnic groups. Over the past eight years, the Unit has been engaged in reviewing all cases submitted by the BiH authorities and allocating a category indicating whether or not the cases could proceed to arrest and indictment. The HRC of BiH and the FBiH Supreme Court have confirmed that they viewed the RoR procedures to be applicable in domestic law.

The implementation of the RoRs was credited with reducing the incidence of unjustified detentions and threats of detention against politicians and officials as well as returnees, thereby contributing to the active participation of displaced people and candidates in the early elections. ICTY statistics on the work of the RoR Unit provided to the OSCE indicate that only 24 per cent of the individuals referred to in the cases submitted by BiH authorities were categorised under classification "A", i.e., "evidence sufficient to proceed to arrest and indictment", whilst 67 per cent (2,346) were classified as "B", i.e., "evidence insufficient". These figures may indicate that, in the majority of cases, the authorities in BiH were prepared to proceed to the detention of individuals when the evidence was deficient and basic international standards were not met. This supports the contention that the RoRs were necessary and met their political objectives. It cannot, however, be excluded that under-investigated files were deliberately submitted in some cases in order to exonerate individuals.

There were, however, a number of problems relating to the application of the RoRs that are not only of historical interest but are also relevant to any future oversight mechanism adopted by the BiH Prosecutor's Office.

One of the negative factors was that RoR procedures may have considerably slowed down or even halted some domestic war crimes cases. While the RoR procedure has prevented the prosecution of cases with insufficient evidence, the slow processing of other cases and the unsystematic return of decisions on reviewed cases to the domestic authorities resulted in lost momentum on the ground. It is evident that relatively few domestic trials have proceeded to completion and suspects have remained at large whilst case files were being reviewed by the ICTY.

The status of the RoRs has not always been entirely clear. In *Hermas*,[(126)] the HRC held that the RoRs apply as domestic law in the FBiH.[(127)] The HRC seems to have arrived at this conclusion by accepting the FBiH Agent's assertion that *"the Federal Ministry of Justice in Sarajevo has delivered the text of this agreement*

[(126)] *Samy Hermas v. the Federation of Bosnia and Herzegovina*, HRC Decision No. CH/97/45.

[(127)] Id., at para. 46.

promptly on time to all courts within the Federation of Bosnia and Herzegovina in order to comply with it".[128] What is much less clear is the situation in which such dissemination has not been so thorough. The OSCE is aware of a letter written by a Mostar investigative judge in one case stating that the RoRs were only forwarded to her court on 2 October 1996 by the entity prosecutor upon her insistence. In this context, it is notable that the RoRs have never been published in any of the official gazettes in BiH. This is the standard way in which treaty obligations (assuming for these purposes that the Rome Agreement and the RoRs qualify as such) become binding within the domestic legal order. The *Hermas* decision does not apply to the situation in the RS where it is unclear how or whether the RoRs were ever disseminated at all. This lack of clarity regarding the legal status of the RoRs, and their lack of dissemination, meant that the rules and obligations created by the RoRs resulted in confusion amongst the domestic authorities and international organizations.

In 1997 and 1998, international organizations in BiH were reasonably vigilant in monitoring compliance of the entity courts with the RoRs. During this period, a significant number of cases were commenced, if not completed, outside the RoR procedure. This often led to intervention or public comment on the part of the international community.[129] Additionally, the accused often sought a remedy and, where possible, compensation domestically from the HRC or through the appellate system.[130] The outcome of some cases (*Golubović* case – Mostar Cantonal Court, *Goran Vasić* - Sarajevo Cantonal Court, *Zuhdija Rizvić* and *Almir Šabančević* – Bihać Cantonal Court) was that the case was, upon the insistence of the international community, sent to the ICTY after the arrest or commencement of proceedings for categorization and category "A" status was granted retrospectively. In some cases, individuals were not subject to an RoR categorization at all. For example, Samy Hermas, following investigation by the Vitez High Public Prosecutor of Travnik seated in Vitez, was arrested and detained without any RoR authority and released following a prisoner exchange, albeit later awarded compensation by the HRC.[131] In other cases, individuals were tried for offences not authorised by the ICTY while having received at least one category "A" categorization for another offence (e.g., *Goran Vasić* and *Veselin Čančar*- Sarajevo Cantonal Court, *Ferid Halilović* - Modriča Basic Court/Doboj District Court). Such prosecutions, being outside the RoRs framework, were naturally a cause of concern for the international community. One solution was the brokering of prisoner exchanges and early releases from prison sentences (e.g., *Veselin Čančar* – Sarajevo Cantonal Court)[132]. In the one case which has been completed in the RS (*Ferid Halilović*, Modriča Basic Court/Doboj District Court (see case summary in the Appendix), the defendant was made subject to

[128] Id., at para. 18.

[129] *See, for example*, cases of *Veselin Cancar* (Sarajevo Cantonal Court), *Golubović* (Mostar Cantonal Court), *Ferad Halilović* (Modriča Basic Court) and numerous cases in Bihać arising from the internecine warfare amongst Muslim combatants there.

[130] Case of *D.B.*, FBiH Supreme Court, 28 May 1998; *Zuhdija Rizvić, Sead Huskić, Almir Šabančević, Ahmet Sefic, Ismet Gračanin*, HRC Decision No. CH/98/1335 (8 March 2002).

[131] *Samy Hermas*, HRC Decision No. CH/97/45 (18 February 1998).

[132] Noting the case would be appealed to the FBiH Supreme Court, the High Representative stated the sentence of Veselin Čančar was *"directly contrary to the Rome Agreement . . Such defiance of the international community may make for good press coverage but it calls into question the basic standards of officials within the judicial system . . . ."* Sarajevo-based ONASA News Service, 20 January 1998. See also OSCE Press release, dated 20 January 1998: *"The OSCE is deeply concerned that yesterday's sentence of Veselin Čančar on war crimes charges in the Sarajevo Cantonal Court has resulted in a miscarriage of justice . . . The OSCE is discussing with the OHR further steps to address this most egregious violation of the Peace Agreement and the Rules of the Road."* Čančar was later convicted on appeal but subject to a prisoner exchange with the RS and released early from his sentence.

category "A" status following his arrest, trial and imprisonment for 15 years, but was "exchanged" with the FBiH and then made subject to early release.[133] This is, in fact, the first, and only, war crimes trial to be completed in the RS at the time of writing of this Report.

Confusion concerning the interpretation of the RoRs was apparent in the case of *Goran Vasić* at the Sarajevo Cantonal Court. This case was controversial from the outset. Vasić was arrested without RoR prior authorization for any offence. This caused protests along the inter-entity boundary line in what was then called Serb Sarajevo. The case was also heavily politicised as the crime alleged was the 8 January 1993 murder of Hakija Turaljić who, as Deputy Prime Minister of BiH, was travelling under the protection of French peacekeeping troops. Although retrospective category "A" status was granted for one offence of murder, the complicating factor was that Vasić was subsequently prosecuted for five further offences which had not been granted RoR authorization. Following convictions on some of the charges in a trial verdict delivered on 21 December 2001, the issue on appeal was whether the five non-RoR charges had been properly brought. After considerable delay, the FBiH Supreme Court cancelled this verdict and returned the matter for a new trial on 29 May 2003. Before delivering judgment on this issue, the FBiH Supreme Court solicited the view of the ICTY OTP. The response given was that, as the aim of the RoRs was to prevent arbitrary arrest, the actual final classification of the charges on the indictment was not relevant to achieving this aim. It follows that a person against whom a category "A" had been marked could lawfully be arrested regardless of which crimes he/she was subsequently indicted of. The subsequent judgment of the FBIH Supreme Court is surprisingly vague, but it has been understood by the prosecutors and the Sarajevo Cantonal Court as an order to resubmit the charges to the ICTY for RoR categorization on the basis that it was illegal to proceed with different charges to those authorised by the RoR Unit. The conclusion that can be drawn is that this case should have been resubmitted for reconsideration by the ICTY in relation to the other charges. The FBiH Supreme Court based this approach on their understanding that the ICTY had examined the merits of the case before it[134] and on the reasoning in the HRC decision in the case of *Buzuk*.[135] The Sarajevo Cantonal Court resubmitted the charges in April 2004 to the ICTY and it remains to be seen how the BiH Prosecutor's Office will deal with this case under its BoR.

Due to the lack of synchronization of the RoRs with domestic laws, there has been uncertainty as to what action the local authorities are permitted to take in category "B" cases (insufficient evidence) in terms of detaining and questioning the individual suspect. Entity prosecutors have been obliged to resubmit category "B" and category "C" cases to the ICTY RoR Unit before proceeding to arrest an individual. However, in the BiH CPCs, there are powers to "deprive of liberty" and to "apprehend" as well as to issue warrants and custody orders. At least one individual, Husnija Balić, was detained by Trebinje District Prosecutor on 31 July 2003 despite his case having been given category "B" status.[136] His detention was justified on the basis that he had been "deprived of liberty" for questioning (*"lišenje slobode"* – Article 196(1) of the RS CPC) rather than "apprehended" (*"dovođenje"* – Article 182 of the RS CPC). It is unclear whether the individual was free to leave detention at any time. Confusion over a semantic and language difference, therefore, allowed the purpose of the RoRs (freedom of movement) to be defied. In this case, Balić was a Bosniac traveling through the town of Foča in the RS. He was stopped by police and

[133] Letter from Sarajevo Penal-Corrective Institution, 19 May 2001. On file with OSCE.

[134] *Goran Vasić* Appeal decision FBIH Supreme Court, 29 May 2003, Kž-106/02.

[135] HRC Decision No. CH/01/7488 (decision on admissibility and merits, 5 July 2002).

[136] See *Dnevni Avaz*, 1 August 2003.

transported a considerable distance to Trebinje where he was detained for questioning even though his case was classified as category "B".

When interviewed on the point of what actions were permissible in non - category "A" war crimes cases, three prosecutors' offices were of the view that they had the power to question/apprehend/detain/or arrest a suspect. However, five prosecutors' offices stated that they did not have such power. Six prosecutors believed that they could question the suspect if he voluntarily came forward following a summons, and seven prosecutors expressed the view that they could not arrest the suspect. One prosecutor stated that the law allowed him/her to apprehend the suspect. This divergence in views is evidence of a clear dislocation between the international agreement and the practitioners' understanding of how this translates into domestic procedures. The fact that almost one-third of the prosecutors' offices were of the view that arrests can take place for non - category "A" cases was cause for concern.

According to the Prosecutors' Survey, prosecutors reported waiting as much as two years for a response from the ICTY on submitted cases. Half of the prosecutors' offices interviewed in the Survey considered that the RoR procedure had been necessary after the war to prevent arbitrary arrests. However, half were of the view that the procedure considerably slowed down the processing of cases as the ICTY RoR Unit could take several years before returning a categorization on the case submitted. This delay could have detrimental effects on the availability of evidence, especially witness testimony. Two prosecutors' offices expressed their dissatisfaction with the procedure which, according to them, impinged on the independence of the prosecutor.

With the closure of the ICTY RoR Unit on 1 October 2004, the RoR process was transferred to the BiH Prosecutor's Office. Under Article 6(2) of the BoR cases, entity prosecutors should submit all cases not categorised by the RoR Unit and all cases which received an ICTY categorization other than "A" to the BiH Prosecutor for review on the evidence. According to ICTY OTP statistics,[137] approximately 2,300 individuals have not yet been categorised by the RoR Unit. These outstanding cases have been notified to the BiH Prosecutor's Office. The original files remain with the domestic authorities in BiH. In addition, there remain further files that were never sent to the ICTY RoR Unit. The BiH Prosecutor's Office will now have the responsibility to assess whether the evidence presented is sufficient to detain the suspect or raise an indictment. It remains to be seen, however, whether the BiH Prosecutor's Office will have the necessary resources to review this large volume of case files in a timely and effective fashion. In relation to cases which were given a marking of "B" and "C" by the ICTY RoR Unit, subject to further evidence being gathered, they could be upgraded to cases where evidence is sufficient to proceed with detention of the suspect or raising of the indictment. However, the dilemma related to the existence of legal basis for the BiH Prosecutor to presuppose the functions of the "Rules of the Road" Unit, still remains. This dilemma particularly arises in the absence of legal provisions in the BiH CPC regulating this issue and since there is no hierarchical relationship between the State Prosecutor and the entity prosecutors.

[137] Statistics obtained by OSCE from the ICTY on 10 November 2004.

7. CONCLUSION

The volatile social and political atmosphere in which war crimes trials take place poses the ultimate challenge and test for the "reformed" BiH legal system. Despite ongoing and widespread criticism of the domestic authorities' handling of war crimes cases, the OSCE, in this Report, has highlighted how some courts and prosecutors, particularly in the FBiH, have made conscientious efforts to bring those responsible for war crimes to justice.

However, even with the increase in cases proceeding to trial in FBiH in 2004, almost a decade after the end of the conflict, the steps taken by the authorities to investigate and bring to justice those responsible for atrocities committed during the conflict and to compensate the victims or their families remain insufficient. The on-going failure of the authorities to address this impunity seriously undermines the rule of law and negatively impacts public confidence in the police and legal system, especially among the returnee community. This is particularly the case in the RS.

Numerous obstacles to effective prosecution remain. These include the political indifference of biased or uncommitted authorities, the fear of judges and prosecutors for their personal security, difficulties locating and securing the attendance of witnesses and defendants, and inadequate commitments, structures and procedures for trans-border co-operation caused by political intransigence in BiH and the region. In the processing of war crimes cases, the courts and prosecutors have also had to face the problems caused by reluctant, fearful or forgetful witnesses, inadequate witness protection mechanisms, large case loads, inadequate legal resources and poor dissemination of law reports and legal texts, insufficient training on humanitarian law and on necessary skills, such as cross-examination, indictment drafting and witness selection. Resources at cantonal and district courts are already over-stretched and any supplementary needs to ensure these cases can proceed have not been prioritised. The radically changed procedure codes and the procedural uncertainty that has developed with the establishment of the War Crimes Chamber within the BiH Court have contributed to the challenges the entity courts face.

It remains to be seen whether, in the light of the recent reforms, mid- and lower-level war crimes prosecutions before the domestic courts can be conducted more effectively than has been hitherto the case. Accountability for serious crimes committed during the conflict remains the ultimate responsibility of the authorities of BiH. The establishment of the mixed international and national BiH War Crimes Chamber may have a positive impact upon the work of the cantonal and district courts. However, while resources are directed at the state-level War Crimes Chamber to deal with a relatively small number of cases, it remains essential for the BiH authorities and the international community also to address the question of properly resourcing and building the capacity of the courts, judicial and prosecutorial services, and defence lawyers at entity-level to conduct war crimes prosecutions. Improving the level of commitment and the mechanisms of co-operation among the countries in the region, and, indeed, between the Entities within BiH, to adequately meet the needs of war crimes investigations and trials should also be a priority in 2005. The ultimate success of the process of prosecuting war crimes will be not only dependent upon the effectiveness of the new War Crimes Chamber, but also on the ability of the cantonal and district courts to fulfil their role in handling the majority of war crimes cases.

1. Ferid Halilović - Modriča Basic Court and Doboj District Court

The defendant (Bosniac) was accused of having committed war crimes against Serb civilians detained in camp run by the Croatian Defence Council (HVO) in Odžak. In 1997, his case became the first trial of a RoR case to be concluded in the RS. He was found guilty by the first instance court, which established that he had participated as a camp warden in the beatings of 29 detainees, four of whom died as a result of their injuries. The verdict and sentence of 15 years imprisonment was upheld by the second instance court. The defendant was deprived of liberty on 18 October, 1996 without ICTY RoR authorisation. He remained in custody for almost seven months before the ICTY assigned a category "A" marking to the case on 9 May 1997. The defendant's chosen counsel, a lawyer from the FBiH, was not permitted to represent him in the first instance proceedings on the basis that FBiH lawyers could not appear as attorneys before RS courts. The defendant was released from prison early after he was transferred to a prison in the FBiH and received a conditional release prior to serving one third of his 15-year prison sentence.

2. *Golubović* case (Miralem Macić, Josuf Potur and Adem Landžo) - Mostar East High Court and Mostar Cantonal Court

The three Bosniac defendants were former members of the BiH Army, on active military duty during the war. They were found guilty of war crimes against civilians on 25 July 2000 and sentenced to 12, nine and 12 years respectively. The case was appealed. The convictions and sentences were upheld by the FBiH Supreme Court on 8 February 2001. It was alleged that, on 1 July 1992, the Defendants took a Serb couple from their home in Konjic together with their young sons (aged five and seven) and shot and killed them. An additional charge was laid against Macić and Landžo for the stabbing to death of a Serb security guard.

The case commenced during the conflict and proceeded during a politically charged period when attempts were being made to unify the two mono-ethnic Mostar High Courts into one multi-ethnic cantonal court pursuant to the High Representative's decision of 3 August 1998. The case is significant because it was the first war crimes case to be tried by a multi-ethnic panel at Mostar Cantonal Court.

The trial proceeded in early 2000 and on 25 July 2000 the guilty verdicts were announced. The father of Mrs. Golubović had previously submitted an application to the HRC on 10 May 1999, alleging, *inter alia*, that the failure of the authorities to properly investigate and pursue the fate of his daughter, son-in-law and two grandchildren in a timely manner constituted inhumane and degrading treatment and was a violation of his rights protected by Article 3 of the ECHR. The HRC initially found a violation under Article 3.[138] This decision was, however, overturned by the Plenary Session of the HRC under its review procedure wherein the HRC highlighted the fact that *"albeit after repeated delays and obstructions, the authorities did pursue the criminal investigation, did discover the fate of the victims and did successfully prosecute and punish the men who committed the crime"*.[139]

[138] HRC Decision No. CH 99/2150 (9 November 2001).

[139] Id., at para. 97.

3. Enes Šakrak and Mustafa Hota - Sarajevo Cantonal Court

Both defendants (Bosniacs) were accused of participating, as soldiers of Ninth Motor Brigade of the First Corp of the RBIH Army, in the murder of 30 Croats in the village of Grabovica, Jablanica Municipality, on 8-9 September 1993. They were charged with war crimes against the civilian population contrary to Article 142 SFRY Criminal Code. Sakrak murdered a pregnant woman and her four-year old daughter, whilst Hota murdered a married couple. On 15 October 2003, Sakrak concluded a plea agreement with the Sarajevo Cantonal Prosecutor's Office resulting in a ten-year sentence of imprisonment according to which he agreed to give evidence at future war crimes trials. On 1 December 2003, Hota entered into a plea agreement with the Cantonal Prosecutor resulting in a nine-year prison sentence, later confirmed by the Cantonal Court. This is the first known domestic case of plea agreements in a war crimes case following the adoption of the 'new' CPC in the FBiH.

Verdicts in 2004

4. *Mostar 4* case (Željko Džidić, Erhad Poznić, Ivan Škutor and Mate Aničić) – Mostar Cantonal Court

On 30 January 2004, the Mostar Cantonal Court acquitted all four defendants (Croats) in the *Mostar 4* war crimes retrial. As members of the HVO, the defendants had been charged with being involved in the deaths of Bosniac civilians and prisoners of war detained at the Faculty of Mechanical Engineering in Mostar between May and July 1993. The first accused was alleged to be Commander of the Military Police of the HVO's Third Brigade in Mostar. The defendants were initially acquitted at the Mostar Cantonal Court on all charges in April 2001. In June 2002, the FBiH Supreme Court ordered a retrial on the basis that additional evidence needed to be heard. The retrial started on 17 February 2003 and ended in January 2004. A number of witnesses changed the accounts they had given at the investigative stage, thereby exculpating the defendants. On 4 November 2004, the FBiH Supreme Court allowed the prosecutor's appeal on various grounds and ordered a second retrial.

5. Duško Tadić – Sarajevo Cantonal Court

On 31 March 2004, the Sarajevo Cantonal Court acquitted Duško Tadić (Serb). Tadić was accused of the illegal detention of Bosniacs in Čajniće in April 1992 and of doing so as part of an armed Serb paramilitary unit (war crimes against civilians – Article 154 of the FBIH Criminal Code). The prosecution lodged an appeal on 4 May 2004.

6. Jovo Torbica – Sarajevo Cantonal Court

On 11 March 2004, the Sarajevo Cantonal Court acquitted Jovo Torbica (Serb) on the basis that there was insufficient evidence to support the war crimes charges against him (war crimes against civilians – Article 154 of the FBIH Criminal Code). The defendant was accused of the war crime of pillage in the aftermath of an attack by the Serb armed forces (*"pripadnik oružanih snaga srpske vojske"*) on his village in the municipality of Novi Grad in June 1992. He had been accused of stealing property and cattle from the homes of Bosniacs expelled from the village of Ahatovići, Novi Grad Municipality. The prosecution lodged an appeal on 29 April 2004. The case file has been with the FBiH Supreme Court since 9 June 2004.

7. Vlastimir Pušara – Sarajevo Cantonal Court

On 29 June 2004, the Sarajevo Cantonal Court found Vlastimir Pušara (Serb) guilty of four counts of war crimes against civilians with the aim of ethnic cleansing in the Hadzici Municipality (Article 154 (1) of the FBIH Criminal Code), in his capacity as member of the Serb armed forces (*"pripadnik vojske RS"*). He was sentenced to ten years of imprisonment. The defence lodged an appeal on 2 September 2004. The FBiH Supreme Court revised the verdict on 8 December 2004 and reduced the sentence to seven years of imprisonment.

8. Ratko Gašović – Sarajevo Cantonal Court

On 9 February 2004, the Sarajevo Cantonal Court found Ratko Gašović (Serb) guilty of war crimes against civilians (Article 154 (1) of the FBIH Criminal Code) on charges of rape, forced labour and inhumane treatment). He was sentenced to ten years of imprisonment. The FBiH Supreme Court revised the verdict on 6 October 2004 and reduced the sentence to eight years of imprisonment.

9. Romeo Blažević – Mostar Cantonal Court

On 26 April 2004, the Mostar Cantonal Court found Blažević (Croat) guilty of war crimes against prisoners of war and civilians (Arts 142 and 144 SFRY Criminal Code). He was sentenced to a total of two years of imprisonment. As a soldier in the Croatian Defence Counsel (HVO) he had been accused of being involved in inhuman treatment of the BiH Army prisoners of war captured in the Vranica building in Mostar and held in the HVO police station of Siroki Brijeg. He was also accused of inhumane treatment and intimidation of a Bosniak female civilian detained in Heliodrom and other detainees. On 16 December 2004, the Supreme Court of the Federation of Bosnia and Herzegovina commuted the two-year term of imprisonment into a term of three-year imprisonment.

10. Ivan Baković– Livno Cantonal Court

On 7 April 2004, the Livno Cantonal Court found Baković (Croat) guilty of war crimes against civilians. He was sentenced to 15 years of imprisonment. It was alleged that HVO General Ivan Baković murdered nine civilians of Bosniac ethnicity in August 1993 in the village of Mokronoge, Tomislavgrad Municipality. Previously, Baković was convicted before the Zagreb County Court for murder (under the Croatian Criminal Code) in relation to the same allegations. Upon appeal, the Croatian Supreme Court overturned the verdict and referred the case back for retrial. Baković did not appear for the retrial and was subsequently arrested in Livno in 2001. The main trial at the Livno Cantonal Court commenced in October 2003. This is the first guilty verdict for war crimes against civilians in Canton 10. The defence lodged an appeal with the FBiH Supreme Court on 13 May 2004 and the FBiH Supreme Court confirmed the conviction.

11. Milorad Rodić – Sarajevo Cantonal Court

On 6 July 2004, Milorad Rodić (Serb) pleaded guilty to war crimes against the civilian population committed in July 1992 and January 1993 under Article 142 (1) of the SFRY Criminal Code. On 9 July 2004, following a plea agreement, Rodić was sentenced to five years of imprisonment. On 13 July 1992, he entered an apartment in Grbavica as a soldier of the RS Army (member of Serb military forces) and threatened the female occupants with a knife. On 13 January 1993, also in Grbavica, as member of Serb military forces he entered another apartment, threatened the occupant with a gun and then raped her.

12. Mario Matić – Mostar Cantonal Court

On 6 July 2004, the Mostar Cantonal Court found Mario Matić (Croat) guilty of war crimes committed in April 1993 against the civilian population during the conflict between Army BiH and HVO. He was sentenced to six years of imprisonment. It was alleged that Matić, as a member of HVO Military Police, treated civilians inhumanely by joining a column of unlawfully arrested Bosniac civilians and members of BiH Army being taken by HVO military police to prison "Pločara" in Gornje Zabrđe, Konjic Municipality, and murdering a captured Bosniac civilian.

13. *Konjic 7* case (Jasmin Guska, Muharem Hujdur, Sadat Sarajlić, Safet Sarajlić, Muhamed Sarajlić, Senad Begluk and Miralem Salihović) - Mostar Cantonal Court

On 29 June 2004, the Mostar Cantonal Court acquitted the defendants (Bosniac) in the *Konjic 7* case for the illegal detention, torture and murder of two Serb residents of Konjic in May 1992 during the conflict in BIH. It was alleged that in early May 1992 defendant Guska ordered other defendants to unlawfully arrest two Serb civilians, in their homes in Konjic, and their subsequent detention and torture in which he took part together with the other defendants. The indictment alleges that the other defendants, who were members of the Territorial Defence of the Republic of BiH, beat the two persons to death while the defendant Guska being their superior was aware that they were torturing them and it might result in a murder, but he did not prevent it or take actions to punish them. The defendant Guska was the Head of Konjic Police Administration and a member of the Konjic War Presidency.

14. Zvonko Trlin – Mostar Cantonal Court

On 29 June 2004, the Mostar Cantonal Court found Zvonko Trlin (Croat) guilty of war crimes against civilians for torture and inhumane treatment, inflicting grave sufferings and bodily harm to civilian detainees at the military barracks in Grabovina, Čapljina municipality. He was sentenced to 18 months of imprisonment. The Court found him not guilty of murder.

15. Dragan Bunoza – Mostar Cantonal Court

On 12 July 2004, the Mostar Cantonal Court found Dragan Bunoza (Croat) guilty of war crimes against the civilian population contrary to Article 142 of the Criminal Code SFRY. He was sentenced to nine years of imprisonment. The court established that, by the use of force, Bunoza, as a member of the Croatian Defence Counsel (HVO) during the conflict between HVO and Army of BiH, took part in the illegal detention and forced a number of Bosniac civilians from the village of Pješivac, Stolac Municipality, to leave their homes and property on 30 June 1993 and 13 July 1993, and murdered a civilian.

16. Dragan Palameta – Mostar Cantonal Court

On 29 October 2004, the Mostar Cantonal Court acquitted Dragan Palameta (Croat) of war crimes against the civilian population under Article 142 SFRY Criminal Code following a trial that lasted approximately 18 months. About 20 witnesses were heard, and the trial recommenced several times because of long adjournments between hearings partly due to serious problems with summoning the witnesses, their appearance in court and the reappointment process.

17. Ostoja Sando – Sarajevo Cantonal Court
On 22 November 2004, the Sarajevo Cantonal Court acquitted Ostoja Sando (Serb) for war crimes against wounded prisoners in November 1993 (Article 143 of the SFRY Criminal Code). It was alleged that he shot and killed wounded members of the BiH Army. The prosecution has stated that it will lodge an appeal with the FBiH Supreme Court. Sando was arrested on 18 September 2003, and the trial began in January 2004. He spent 14 months in detention.

18. Zoran Knežević - Sarajevo Cantonal Court
On 8 December 2004, the Sarajevo Cantonal Court found Zoran Knežević (Serb) guilty of war crimes against civilians (Article 142 (1) of the SFRY Criminal Code). He was sentenced to ten years of imprisonment. It was alleged that during the war in BiH, in Grbavica, Sarajevo, he raped female Bosniac civilians, thus abusing his position as member of the RS Army.

Verdicts in January 2005

19. Veselin Čančar – Sarajevo Cantonal Court
On 12 January 2005, the Sarajevo Cantonal Court found Veselin Čančar (Serb) guilty of war crimes against civilians (Article 142 (1) of the SFRY Criminal Code). He was sentenced to four years and six months of imprisonment. As a member of the Serb military forces (*"pripadnik srpskih vojnih formacija"*), it was alleged that he participated in the imprisonment at concentration camps of civilians. In 1998, the Cantonal Court Sarajevo sentenced him to 11 years of imprisonment. Upon appeal, the FBiH Supreme Court issued a decision by which the prison sentence was reduced to nine years. Upon application of the defendant, the HRC issued a decision ordering the reopening of the criminal proceedings. The main trial recommenced on 23 November 2004.

20. Salem Pinjić – Mostar Cantonal Court
On 17 January 2005, the Mostar Cantonal Court found Salem Pinjić (Bosniac) guilty of war crimes against the civilian population under Article 142 SFRY Criminal Code. He was sentenced to seven years of imprisonment. It was alleged that on 13 July 1992 Pinjic, as a member of the Army of BiH, he killed a Serb female civilian who had been detained in the village of Bradina, Konjic Municipality.

On-going Cases as of the End of 2004

21. Novo Rajak – Sarajevo Cantonal Court
The defendant (Serb) is charged with war crimes against civilians (Article 142 (1) and (2) of the SFRY Criminal Code). In April, May and June 1992, as the police officer in the Višegrad police station, together with members of Serb paramilitary forces, it is alleged that he was involved in attacks on the villages Crni Vrh and Kabernik, including having threatened, arrested, tortured and mistreated Bosniacs and participated in murder. The main trial continues with the evidentiary procedure (under the 'new' CPC).

22. Boro Krsmanović – Sarajevo Cantonal Court
The defendant (Serb) is charged with seven counts of war crimes against civilians (Article 142 (1) of the SFRY Criminal Code). The prosecution alleges that he participated in attacks on villages in the Hadžići area in 1992-1993 as a member of the Serb military forces (*"pripadnik srpskih vojnih formacija"*) during which houses were pillaged and burned and civilians were illegally arrested, detained, tortured and killed. The main trial is on-going (under the 'new' CPC).

23. Samir Bejtić – Sarajevo Cantonal Court
The defendant (Bosniac) is charged with war crimes against civilians (Article 142 (1) of the SFRY Criminal Code) and aggravated murder (Article 36 (2.1) of the RBIH Criminal Code in relation to Article 25 of the SFRY Criminal Code) . He is accused of having committed these crimes as a member of the Tenth Mountain Brigade of the BiH Army in 1992-93. The main trial continues with hearing of the witnesses (under the 'old' CPC).

24. Franjo Radić - Novi Travnik Cantonal Court (adjourned indefinitely)
The defendant (Croat) is charged with war crimes against civilians, including the 1993 murder of two civilians. The main trial was adjourned pending a decision of the court panel of the FBiH Supreme Court on the motions of the defence lawyer and prosecutor in relation to the exclusion of evidence. The case was re-opened on 21 December 2004.

25. Petar Matić and Ante Krešić – Mostar Cantonal Court
The defendants (Croat) are charged with war crimes against civilian population: the indictment consists of five counts and is raised against three defendants; however, proceedings in this case are separated as the third defendant Dragan Krešić is at flight. It is alleged that Petar Matić, as a commander of the HVO military police, together with Ante and Dragan Krešić who were members of the same unit, subjected to torture and inhumane treatment a number of Bosniac civilians detained in Koštana hospital in Stolac in July, August, September and October 1993. As a result of torture five civilians died. Kresic is also alleged to have been responsible for torturing a detained Bosniac civilian in "Dretelj" detention camp near Čapljina. The main trial recommenced on 16 November 2004 after two years. On 13 December 2004 the new judge adjourned the main trial indefinitely announcing that the case had to be referred to the BiH Court to decide whether processing of the case in subject would continue before entity court or before the State Court.

26. Fikret Boškailo – Trebinje District Court (adjourned indefinitely)
The defendant (Bosniac) is charged with war crimes for violating international law applicable in wartime and arising out of pillage of civilians' property and large scale illegal and arbitrary destruction and appropriation of property in the area of Čapljina in 1992. A hearing was scheduled to be held on 17 January 2005 but the defendant and his lawyer failed to appear before the court. The defence lawyer sent by post a letter containing medical evidence on their illness justifying their absence. So the trial was adjourned indefinitely.

27. Ćupina et. al. (Mostar 4th elementary school case) – Mostar Cantonal Court (retrial)
Thirteen defendants (Bosniacs) are charged with war crimes against prisoners of war. It is alleged that during the conflict between the Army of BiH and HVO in the territory of Mostar, where a number of HVO members were captured, the defendants, as members of the Army of BiH, inhumanly treated the prisoners of war. Three defendants are at flight. The first instance verdict in this case was pronounced on 6 July 2001. On 11 September 2003 the FBiH Supreme Court revoked the first instance verdict and returned the case before the Mostar Cantonal Court for retrial. The retrial commenced on 29 September 2004. Hearings were scheduled on 18, 19 and 20 October 2004, but were adjourned indefinitely due to the inability of the lawyer of the second accused to appear before the court until January 2005.

28. Tomo Mihajlović ("Kuka") – Zenica Cantonal Court
The defendant (Serb) is charged with war crimes against civilians as a member of reserve unit of the police in the Teslić area. The allegations include inhumane treatment, murder, torture, expulsion and rape. He was subject to an arrest warrant issued on 9 November 2000 which was never executed, despite a request for legal co-operation from FBiH authorities to the RS. However, he voluntarily surrendered on 7 March 2003 after which his detention was ordered. Until that time, the trial against him had been conducted *in absentia*. He was subsequently released from detention three months later and continued to attend court for hearings. The main trial recommenced on 27 July 2004.

29. Dominik Ilijašević ("Como") – Zenica Cantonal Court
The defendant (Croat) is charged with Article 154(1) FBIH Criminal Code war crimes against civilians in three municipalities in central Bosnia (Vareš, Kiseljak and Kreševo). He is alleged to have instigated, ordered or directly participated in murders, torture and rape of civilians. He was detained on 28 August 2000 and released on 7 February 2003. He made a successful application to the HRC against the FBiH regarding the duration of his detention. After a trial hearing in October 2003, two of the panel judges and the prosecutor were not reappointed and the case had to be restarted. The case recommenced on 30 June 2004 before a multi-ethnic panel. The trial is on-going.

30. Edin Hakanović – Zenica Cantonal Court
The defendant (Bosniac) is charged with issuing orders for attacks on the villages of Dusina and Kegelji in the Zenica Municipality in January 1993, his participation in detaining 40 civilians in one house, formation of a human shield against HVO, offending and maltreating arrested people and deportation of captured Croatian civilians in the direction of the village of Lašva. The accused has not been in detention for the duration of the proceedings. A hearing in the case took place in December 2003 before reappointment when a member of the panel was not reappointed. The main trial resumed in November 2004 and is on-going.

31. Fikret Smajlović ("Piklić") – Tuzla Cantonal Court
The defendant (Bosniac) is charged with war crimes against civilians and war crime against prisoners of war. He arrived at the Serb-run concentration camp "Batković" near Bijeljina in 1992 as a prisoner, became a guard and was allegedly involved in the torture of prisoners. He is alleged to be responsible for the deaths of at least two prisoners. The main trial is on-going. Certain witnesses failed to attend at the hearings on 14 and 22 December 2004.

32. Mato Miletić – Travnik Cantonal Court
The defendant (Croat) is charged with war crimes against the civilian population under Article 142(1) of the SFRY Criminal Code and war crimes against prisoners of war under Article 144 of the SFRY Criminal Code. It is alleged that the defendant, as a member of an HVO Unit, detained civilians in camps, abused them physically, exposed them to inhumane treatment and burned mosques and houses in Kreševo Municipality. The main trial started on 20 December 2004.

33. Ćazim Behrić – Bihać Cantonal Court
The defendant (Bosniac) is charged with war crimes against civilians under Article 142(1) of the SFRY Criminal Code. It is alleged that in 1994, as a warden of the concentration camp "Drmaljevo" in Velika Kladuša, he ordered the killing, torture, inhumane treatment, intimidation, forced labour and rape of civilians. The plea hearings in December 2004 had to be adjourned as the defendant resides in Croatia and failed to attend court.

34. Matonović case (Ranko Jakovljević and ten others) – Banja Luka District Court
The defendants (Serbs) are charged with war crimes against civilians under to Article 142 of the SFRY Criminal Code. According to the indictment, the defendants illegally kept Catholic priest Tomislav Matanović and his parents in detention at their home during the period 14 August through 19 September 1995. On 5 October 2001, the bodies of the Matanović family were found in a well in the village of Rizvanovići in Prijedor Municipality. On 17 May 2002, five of the suspects were arrested and detained. They were released on 24 July 2002 on bail. The trial is on-going.

35. Abduladhim Maktouf – BiH Court
The Iraqi-born accused is alleged to have abducted five civilians in Central Bosnia during the conflict in 1993. The main trial started on 20 December 2004.

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