Organization for Security and Co-operation in Europe
Mission to Croatia

22 June 2004

SUPPLEMENTARY REPORT: WAR CRIME PROCEEDINGS IN CROATIA AND FINDINGS FROM TRIAL MONITORING

EXECUTIVE SUMMARY

This report provides generalized findings from the Mission's war crime monitoring during 2002, 2003 and the first months of 2004, which have been covered in detail in separate reports, as well as a background on the legal framework governing war crime proceedings in Croatia. The report does not purport to be an exhaustive study of all issues related to the domestic prosecution of war crimes in Croatia or the issues raised by transfer of cases from the ICTY. It is rather an initial effort for purposes of identifying general areas where reform is desirable or necessary.

Taken together, the statistical and substantive observations derived from the Mission's trial monitoring demonstrate that further reforms are essential in order to enable all parts of the Croatian judiciary to adjudicate war crime trials. These findings suggest the need for targeted intervention so as to ensure fair trial for all defendants as well as even-handed administration of justice and the application of a single standard of criminal responsibility regardless of ethnic origin. Such intervention should include efforts to ensure that all relevant parts of the judiciary have adequate skills and knowledge, and are guided by impartiality.

In an initial effort at reform, the Parliament adopted legislation in late 2003 calling for the establishment of 4 courts that have extra-territorial jurisdiction to investigate and try war crime cases. As of June 2004, no cases have been referred to these courts under the new law which authorizes the President of the Supreme Court to determine which cases will be handled by these courts and at what stage of the proceedings. There are several indicators that ICTY transferred cases will be conducted in 1 of these 4 courts. Judges and prosecutors at 2 of the 4 courts have been given training through a joint initiative of the Ministry of Justice and the ICTY, which started in May 2004. Such training and other reform initiatives should, however, be extended to all judges and prosecutors assigned to county courts trying war crime cases so as to avoid the creation of a two-tier system of justice for war crime adjudication in Croatia.

The applicable Croatian criminal law includes most major crimes against international humanitarian law. However, it does not include all offences or theories of criminal responsibility, most notably command responsibility, included in the statutes of the international criminal courts, the ICTY and the ICC. While some of these gaps can be filled through application of other domestic law, it appears that others will remain unfilled. Given the imminent transfer of cases from the ICTY, clarification of the compatibility of the Croatian criminal law and practice with that of the ICTY has become paramount. A discussion of these issues has been initiated.

Similarly, transfer of cases from the ICTY to domestic jurisdictions will require an increase in inter-state cooperation in terms of witness testimony, evidence, and transferred proceedings. Croatia has bilateral agreements on legal assistance with Serbia and Montenegro and Bosnia and Herzegovina that have been utilized in several cases tried in Croatia. These procedures have functioned adequately in some cases, while not in others.

The reform efforts are still at a relatively early stage, but will take place against the background of a gradually increasing acceptance among the Croatian public of the importance of war crime prosecution regardless of ethnic origin of the perpetrators or victims, as demonstrated by the muted reaction to recent ICTY indictments.

A. Overview of war crime prosecution in Croatia

I. Scope of Prosecution

Croatia has since 1991 engaged in the large-scale prosecution of war crimes. Nearly 5000 persons have been reported and over 1700 have been indicted. Final verdicts have been entered against 800 to 900 persons, of which more than 800 were convicted, while approximately 100 were acquitted. The overwhelming majority of proceedings were against Serbs for crimes against Croats and the vast majority of convictions were obtained against *in absentia* Serb defendants. Procedures are pending against another 1400 to 1500 persons, including indictments against 450 to 500 people and judicial investigations against another 850 to 900 persons.[1]

According to the Mission's statistical report, during 2003, 37 individuals were arrested, 53 were indicted, 101 were tried, 37 were convicted, 4 were acquitted, charges were dropped against 12 individuals on trial and appeals of 83 individuals were pending at the Supreme Court. Between 1 January and 17 June 2004, 20 individuals were arrested, 3 were indicted, 102 were tried, 11 were convicted, 5 were acquitted, 1 individual on trial had charges dropped and 67 individual appeals were pending at the Supreme Court.

With a few exceptions, most prosecutions to date have targeted low-level offenders. A significant number of cases do not include allegations of causing death or physical injury.

II. Quality of Prosecution

The Chief State Prosecutor has acknowledged that a significant number of past investigations and indictments were based on insufficient evidence. As a result, he has ordered a review of approximately 1800 pending cases that are not currently on trial.[2] The Chief State Prosecutor

[1] Source: Annual Reports for 2002 and 2003 of the Chief State Prosecutor; Government Response to EU Questionnaire.

[2] The Chief State Prosecutor mandated that local prosecutors review old cases stating… *[i]t is a fact that at the time of the Homeland War and also afterwards, county state prosecutors' offices were submitting investigation requests indiscriminately in a number of cases, and based on insufficiently verified criminal charges, they were issuing dubious indictments for war crimes against a significant number of people on the basis of investigations conducted in an inferior manner, while those indictments did not concretize the illegal activity on the part of the particular defendants containing elements of war crimes."* 11 July 2002 Instructions from the Chief State Prosecutor to all County State Prosecutors. In the 2003 annual report the Chief State Prosecutor indicated that as a result of those instructions several indictments have been reviewed, which in turn resulted in abandoning the charges by the prosecution. Furthermore, the Chief State Prosecutor reiterated that several of the charges

acknowledged this deficiency in 2002 and issued instructions to County State Prosecutors to review indictments from that period and to abandon prosecution where not supported by the evidence.

III. Applicable Law and Treaties

1. Criminal Code - not all ICTY Statute crimes included

The Criminal Code (CC) as adopted in April 1993 contains the applicable substantive standards for prosecution of crimes against international humanitarian law committed during the 1991 to 1995 conflict.

The offences in Articles 119 to 132 of the CC include most parts of the major crimes against international humanitarian law.[3] *Genocide* and *war crimes* in various forms are specifically prescribed by the CC, whereas c*rimes against humanity* were not included in the CC. Also, the CC does not include an offence of subsequent assistance to a perpetrator of a war crime.[4] An explicit element of most domestic crimes is that the prohibited acts are committed "in violation of the rules of international law."[5] [6]

The punishment for *genocide*, *war crimes against the civilian population* and *war crimes against prisoners of war*, which are the most frequently indicted offences carry a punishment between 5 and 20 years imprisonment.

The 1993 CC does not include provisions defining criminal responsibility for failure of commanders to prevent war crimes (command responsibility). However, as stated by the Supreme Court in *Republic of Croatia v. Milan Strunjas*[7], criminal charges against commanders for failing to prevent subordinates from committing war crimes could possibly be based on general domestic theories of criminal liability for failure to act in conjunction with Articles 86 and 87 of Protocol 1 to the 1949 Geneva Conventions. The CC does not

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brought in the early to mid 1990s mainly against Serbs were of poor quality but nevertheless resulted in indictments. The Chief State Prosecutor also stated that those indictments frequently resulted in *in absentia* convictions of Serbs.

[3] Genocide - Article 119; War crimes: - War crimes against civilian population - Article 120; War crimes against the sick and wounded - Article 121; War crimes against prisoners of war - Article 122; Organizing group and inciting genocide and war crimes - Article 123 ; Unlawful killing and wounding of the enemy - Article 124 ; Unlawful taking of the belongings of those killed or wounded on the battlefield - Article 125; Forbidden means of combat- Article 126; Injury of an intermediary - Article 127; Brutal treatment of the wounded, sick or prisoners of war - Article 128; Unjustified delay of the repatriation of prisoners of war- Article 129; Destruction of cultural and historical monuments - Article 130; Inciting War of aggression - Article 131; Misuse of international symbols - Article 132

[4] In the "Paulin Dvor case"[RH v Nikola Ivankovic and Enes Viteskovic Osijek County Court] the transfer of dead bodies several hundred kilometres from where they were initially buried after the killings has never been prosecuted by Croatian authorities. The explanation given by the prosecutor was that the Criminal Code does not allow prosecuting the act of concealing a war crime.

[5] Since 8 October 1991, Croatia has been a party to the 1949 Geneva Conventions and Protocols (NN International Agreements 1/92 dated 14 November 1992 *Decision on Publication multilateral International Agreements to which the Republic of Croatia is Party to based on Notification on Succession*) and the 1948 Genocide Convention (NN International Agreements 12/93 *Decision on Publication multilateral International Agreements to which the Republic of Croatia is Party to based on Notification on Succession* from 30 September 1991).

[6] International agreements ratified by the Parliament are directly incorporated into the Croatian legal system and are superior to other laws. Article 140, Constitution of the Republic of Croatia.

[7] RH v. Milan Strunjas [Karlovac County Court]. Supreme Court I-Kz 588/02-9 from 17.10.2002.

however criminalize the second aspect of command responsibility, namely the failure of commanders to punish subordinates for committing war crimes.

According to Article 95 CC, there is no statute of limitations for war crimes under Articles 119 to 123 CC or for other criminal offences that under international law are not subject to the statute of limitations.

In July 2003 the Parliament adopted amendments to the *Criminal Code* including, *inter alia*, the new criminal offences of *crimes against humanity*, *subsequent assistance to a perpetrator of war crimes* and a provision explicitly prescribing criminal responsibility for commanders for war crimes, "command responsibility". The amendments were subsequently invalidated by the Constitutional Court on the basis of a technical flaw in their adoption.[8] As a result, the Government again proposed to Parliament amendments to the CC in April 2004, including c*rimes against humanity*, *command responsibility*, and *preparation of criminal acts against values protected by international law*.[9] These amendments passed first reading in Parliament

[8] The Constitutional Court determined that Parliament adopted the amendments without the requisite number of votes for the quorum required for laws effecting human rights. The amendments did not receive the support of the then political opposition HDZ.

[9] *Crimes against humanity*:

"A person who, violating the rules of international law within the context of a broad or systematic attack aimed against civilian population, knowing about that attack, issues an order to kill another person; to impose living conditions upon certain civilian population for the purpose of complete or partial extinction, which living conditions could lead to the annihilation of that population; to conduct trafficking against a person, primarily woman or a child or to enslave a person for sexual exploitation in such a manner as to perform particular or all powers stemming from the ownership right over that person; to forcibly remove other persons from the area in which they legally reside, by way of expulsions or other forcible measures; to illegally confine a person or deprive of freedom in other manner to torture a person who was deprived of freedom or who is under surveillance in such a manner as to intentionally inflict severe physical or mental pain or suffering against him/her; to force to prostitution, to rape a person or perform some other form of sexual violence against that person or to keep a woman, who forcibly got pregnant, intentionally imprisoned in order to influence the ethnic composition of a particular population; to prosecute another person in such a manner as to intentionally, and to a large extent, deprive that person of his/her fundamental rights, because he/she belongs to a certain group or community; to deprive other persons of their reproductive ability without their consent and what is not justified by medical reasons, to arrest other persons, keep them imprisoned or kidnap them, on behalf of, or with permission, support or consent of the state or a political organization, without afterwards admitting that those persons were deprived of freedom or to deny the information about the destiny of those persons or the place in which they are kept, or that, within the framework of an institutionalized regime of systematic oppression and domination of one racial group over another racial group or groups, and with the intention of maintaining such a regime, a person commits an inhuman act described in this Article or an act similar to one of those acts (the crime of apartheid), or a person who commits some of the above mentioned acts, shall be punished with a prison sentence of at least five years or a long term imprisonment."

*Command responsibility***:**

Paragraph 1 "For the criminal acts from Article 156-167 shall be punished committer, military commander or any other person who acts as a military commander or authorized civil person who in the civil organization has an actual power of ordering or supervising and if they knew that their subordinates were committing or preparing to commit criminal acts from Art. 156-167 and did not prevent their subordinates. In this case Article 25 Paragraph 3 will not be taken into consideration."

Paragraph 2. "Persons that are mentioned above, those who had to know that their subordinates committed one or more criminal acts from Article 156-167 therefore by failing to prevent their subordinates or failing in conducting the supervision did not stop them from committing the criminal acts, shall be punished by the imprisonment from 1 to 8 years."

Paragraph 3. "Persons mentioned in Paragraph 1 of this Article who do not inform the authorized authorities with the aim to conduct the investigation or crime prosecution against the direct perpetrator shall be punished by the imprisonment from 1 to 5 years."

Preparing of the criminal acts against values protected by the international law:

in early June. Most Croatian legal commentators indicate that any newly adopted provisions would not apply to ongoing proceedings stemming from the 1991 to 1995 conflict.[10]

2. Criminal Procedure Code / ICC Law – jurisdiction and composition of tribunals

The Law on Criminal Procedure (LCrP) and the Law on Courts provides all 21 county courts in Croatia with jurisdiction to try war crime cases as part of their major crime jurisdiction.[11] However, since most proceedings are conducted in the territory where the crimes were committed, not all courts conduct war crime trials in fact. In limited instances, proceedings have been moved to another court through change-of-venue provisions at the request of the court or the prosecutor.[12] During 2003, twelve county courts conducted war crime procedures, with the Osijek (7 trials), Zadar (6 trials), Sibenik (5 trials) and Vukovar (4 trials) County Courts conducting the highest number of proceedings.

As of November 2003 the *Law on the Implementation of the Statute of the International Criminal Court and Criminal Prosecution for Acts Against War and Humanitarian International Law* (ICC Law)[13] established extra-territorial jurisdiction of the county courts in Rijeka, Split, Osijek and Zagreb in addition to courts otherwise competent pursuant to the Law on Criminal Procedure. The ICC Law allows the Chief State Prosecutor to initiate new proceedings in one of these four courts or to move an ongoing case to one of the four courts if the President of the Supreme Court gives his consent. The ICC Law does not specify what criteria would warrant initiation or transfer of cases to the 4 courts. At present, this aspect of the law remains unimplemented. It is widely discussed, however, that any cases transferred from the ICTY, particularly pursuant to Rule 11 *bis* of the ICTY Rules of Procedure and Evidence, would be initiated in one of the four courts.

The LCrP prescribes that war crimes, as the most severe crimes, are tried by panels consisting of two professional judges and 3 lay judges. The ICC Law as *lex specialis* prescribes that as of its effective date, war crime trials as well as re-trials following reversal on appeal should be conducted before a panel of three professional judges.[14] At present, trials are being conducted under both systems. The Mission has observed that ongoing trials continue to be conducted by 2 professional and 3 lay judges while new trials or trials that re-commence

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"Whoever removes obstacles, plans or is in agreement with others, or acts in a manner by which conditions for direct commitment of the criminal acts from articles 156-160, 169 -172 and 179, 181 of this Law, are met, shall be punished by the imprisonment punishment from 1 to 5 years."

[10] Acts committed during the 1991 to 1995 conflict can only be prosecuted under the substantive law in force at the time. Even if new war crime provisions are adopted by Parliament, they cannot be applied to conduct during the Homeland War to the extent that they are more severe than the pre-existing law. But see Article 7.2 of the European Convention on Human Rights that provides as an exception to the general prohibition against the retroactive application of criminal law "the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."

[11] Some crimes that fall under "war crimes", for example the *Brutal Treatment of Wounded, Sick and Prisoners of War*, fall under the jurisdiction of Municipal Courts. To the Mission's knowledge those crimes have not been prosecuted widely in Croatia.

[12] While aware of a number of changes of venue granted at the request of the prosecutor or court, *e.g.*, "*Gospic group*", the Mission is unaware of any changes of venue done at the request of the defendant. Change of venue to date has virtually exclusively been granted in cases involving Croat defendants.

[13] NN 175/03.

[14] Article 13 Paragraph 2 ICC LAW.

following reversal from the Supreme Court are conducted before a panel of 3 professional judges. The Supreme Court is the court of appeal and sits in panels of 5 professional judges.

3. ICC Law - Crown witnesses / use of ICTY evidence

The ICC Law also contains provisions related to the use of crown witnesses as well evidence from the ICTY in domestic war crime procedures.[15]

An accomplice to the commission of a war crime can be made a "crown witness" in exchange for immunity from prosecution.[16] Furthermore, the ICC Law prescribes that evidence collected by the ICTY can be used in domestic proceedings under the condition that the evidence has been established in a manner foreseen by the Statute and the Rules of Evidence and Procedure of the ICTY and that the evidence can be used before that Tribunal.

4. Witness Protection Law

As of 1 January 2004 Croatia has a witness protection law.[17] The Law is *inter alia* applicable in criminal procedures conducted for criminal acts against international law. Hence witnesses required to testify in war crime procedures can be subject to various protection measures. A full witness protection scheme remains to be developed.

5. Law on General Amnesty

The Law on General Amnesty[18] is frequently applied by courts trying war crime cases when indictments or investigations fail to substantiate allegations of war crimes, resulting in re-qualification to a common crime subject to amnesty. According to this law, amnesty is granted to perpetrators of criminal acts committed during or in relation to the armed conflict, the most common charge being armed rebellion. The law exempts from amnesty perpetrators of violations of humanitarian law having the character of war crimes, specifically acts of genocide, war crimes against the civilian population, war crimes against prisoners of war, etc.

6. Bilateral Agreements on Judicial Cooperation in Criminal Matters

Relevant to its prosecution of war crimes, Croatia has ratified bilateral agreements on legal assistance in criminal matters with Bosnia and Herzegovina and Serbia and Montenegro.[19] The agreements provide for obtaining evidence in one country upon the request of the authorities of the other as well as trying individuals in one country for acts committed on the territory of the other. The Mission has observed that Croatian courts, through the relevant Ministries in Croatia and Serbia and Montenegro, requested courts in Serbia and Montenegro to obtain witness testimony for ongoing proceedings. While this procedure functioned satisfactorily in some trials, requests remained unanswered in others. One request to conduct proceedings for crimes committed in another state by a Croatian citizen was submitted by the

[15] Article 16 Paragraph 2 ICC LAW and Article 28 Paragraph 4 ICC LAW.
[16] The ICC Law essentially incorporates by reference a provision to this effect in the *Law on the Office for the Prevention of Corruption and Organised Crime* (USKOK). (NN 88/01, 12/02).
[17] NN 163/03.
[18] NN 80/96.
[19] Agreement between the Republic of Croatia and Bosnia and Herzegovina on Legal Assistance in Criminal and Civil Matters (NN International Agreements 12/96, 5/03); Agreement between the Republic of Croatia and the Federal Republic of Yugoslavia on Legal Assistance in Criminal and Civil Matters (NN International Agreements 6/98).

authorities in Bosnia and Herzegovina and granted by the Croatian authorities, resulting in the conviction of Fikret Abdic [Karlovac County Court]. The *Ovcara* case in which the war crime court in Serbia and Montenegro is currently trying its citizens for war crimes committed in Croatia will likely involve significant cooperation pursuant to the bilateral agreement. However, this procedure was not initiated at the request of Croatian authorities in the context of the agreement on international legal assistance, but stems from a transfer of the case from the ICTY.

7. Extradition

Croatia does not extradite its citizens to third countries.[20] However, Croatian Serbs have been extradited to Croatia in several war crime procedures the Mission monitored. Several individuals were extradited in the last years in particular from Hungry and Switzerland. There are approximately 500 Interpol warrants pending for Croatian war crime suspects. In the first part of 2004, Austria and Bosnia and Herzegovina have detained persons on the basis of such warrants for purposes of possible extradition.

B. Findings from trial monitoring

I. Proceedings rely primarily on witness testimony – factors compromising reliability

Most war crime trials conducted in Croatia are based on investigations and indictments stemming from the early to mid 1990s. Due to the poor quality of many of these "old" investigations (see Section II and fn. 2 above), in which often little or no material evidence was generated, war crime trials frequently rely heavily on witness testimony.

Several problems related to witness testimony present a significant challenge to successful prosecution, particularly as related to Croat defendants. These include:

- the predominant supportive atmosphere in which war crime trials against Croats are conducted – thus far almost always accompanied by demonstrations outside the courtroom (e.g., "Lora" case [Split County Court], Hrastov [Karlovac County Court], "Gospic" case [Rijeka County Court], Hubelic/Gavron [Sisak County Court]) and public official's statements. Both might, and according to some witnesses has, influenced witnesses.
- during trials against Croats, supporters of the defendant have directed comments at prosecution witnesses during their testimony (e.g., Hrastov [Karlovac County Court], "Lora" case [Split County Court], Hubelic/Gavron [Sisak County Court]); in some cases neither the judge nor the court police intervened or warned the individuals in the courtroom to refrain from making such comments and disturbances.
- during trials, local media, including television, has photographed and otherwise identified prosecution witnesses (e.g., "Lora" case [Split County Court]). Even with ICTY protected witnesses, local media have released sufficient identifying information so as to make witnesses identifiable to a local audience.
- in trials against Croats, witnesses (as well as court personnel) reported that they were threatened ("Gospic" case [Rijeka County Court], Hubelic/Gavron [Sisak County Court]. In the latter case the witness testified that he was contacted by three former high ranking

[20] Article 9, Constitution of the Republic of Croatia.

army officials prior to the hearing all of whom inquired into the content of his testimony. The witness reported that one of the former army officials threatened him and his family.

- in trials against Croats (but also in some trials against Serbs) many witnesses claimed no recollection of events to which they previously testified or changed the statement previously given to an investigative judge ("Paulin Dvor" [Osijek County Court]; "Lora case"). The former Minister of Justice publicly referred to this phenomenon as an "epidemic of memory loss."
- witnesses have often left the country and reside abroad and are unwilling or afraid to return to Croatia to provide testimony, including Serb refugees. Taking their testimony requires international legal assistance which has not functioned efficiently in most cases monitored (e.g., Gagula [Bjelovar County Court]). It always incurs significant delay in the proceeding, in most cases the prosecution did not attend the hearing of the witnesses before foreign courts (e.g., "Paulin Dvor" case [Osijek County Court]) and in some cases the statement was first requested but later not used in the trial.

II. Prosecution - issues of concern:

1. Inadequate specification of indictments

In several cases monitored, local prosecutors issued indictments that failed to adequately specify facts essential to establishing the elements of the criminal offence charged, including the identity of the perpetrator, the alleged acts of each accused (particularly in group indictments) and including joint action, the location where the act was committed, the dates when the act was committed and the identity of the victims. Such lack of specification can partially be explained with poor investigations conducted by investigating judges. Unspecified indictments that inadequately individualized guilt were of particular concern where there was more than one perpetrator or a large group of defendants.

a) In the case of Mirko Svonja and others [Bjelovar County Court], the prosecutor indicted 55 Serbs in 1991 for having committed war crimes against the civilian population. All accused left Croatia during or after the conflict. The indictment specifies alleged conduct of 4 defendants and refers to incriminating statements pertaining to those 4 that several witnesses gave to the investigative judge. The indictment fails to document the acts allegedly committed by the remaining 51 accused and only refers to a list that indicates that the 55 accused were at one point members of a paramilitary group believed to have participated in the alleged acts. The list does not indicate whether the individuals were still members of the group on the day when the act was committed or that the individuals were present on that day. The Mission followed 5 arrests in the last years based on arrest warrants from those charges. All 5 accused were released within a very short period of days due to lack of evidence.

b) In the "Lora" case [Split County Court], the prosecution filed an indictment that was overly broad with regard to the alleged act, the time of the offence as well as with regard to the perpetrator. The indictment held under count 4 that "*in the period between 19 and 29 August 1992 Miloslav Katalina was illegally brought to the Lora prison where <u>they</u> humiliated him, beat him and exposed him to electrical shocks which resulted in several injuries and significant psychological trauma*". The indictment failed to specify which accused did what at what time. The indictment does not refer to a common plan between the accused which would allow holding each accused liable for actions committed by another accused.

2. Overcharging

The Mission has observed that prosecutors have on several occasions issued indictments charging an offence that is not supported by the conduct alleged.

a) In the "Luc group" case [Osijek County Court], 10 Serbs were indicted for having committed genocide in the period between August 1991 and May 1995. The indictment did not adequately document the defendants' intent to "destroy a group in whole or in part" and therewith to commit genocide. The prosecution did not provide any evidence of an organized and systematic operation of which each defendant was part and wanted to be part.[21] The Osijek County Court convicted 8 of the 10 defendants *in absentia* and issued sentences ranging between 5 and 8 years. Charges against 2 defendants were re-qualified and amnesty applied.

b) The Mission has observed that prosecutors dropped charges in several cases in which Serbs were indicted for war crimes against the civilian population or genocide. In those cases the evidence presented at trial was insufficient which prompted the prosecutors to abandon the charges. During 2003, in more than one-quarter of all concluded trials the prosecution dropped charges due to lack of evidence, demonstrating that a considerable proportion of war crime charges against Serbs were unsubstantiated. In some cases the abandoning of the war crime charges was accompanied with the motion to re-qualify the act as *armed rebellion*. In those cases proceedings were concluded by verdict rejecting the charges as the amnesty law applied.

3. Passive prosecutors

In many cases monitored during 2002 and 2003 local prosecutors assumed a passive role during trial. Although the Law on Criminal Procedure prescribes that the presiding judge directs the proceedings, many prosecutors relied entirely on the court instead of actively participating in the questioning of witnesses and expert witnesses.

With regard to international legal assistance, local prosecutors did not, as a rule, attend hearings before foreign courts when witnesses were requested to testify. For example, the prosecutor in the "Paulin Dvor" case [Osijek County Court] did not attend the hearing of a witness suggested by the prosecution in Sabac and Subotica in Serbia and Montenegro, explaining that he lacked resources to cover travel costs. Also, in the case of Zorana Banic [Zadar County Court] and the "Lora" case [Split County Court], the prosecution did not travel to Serbia and Montenegro and Bosnia and Herzegovina to attend hearings. In contrast, the prosecutor in the "Gospic group" case [Rijeka County Court] attended hearings in Germany and Serbia and Montenegro.

4. Inconsistent witness statements

The Mission has observed that in all trials against Croats and in some cases against Serb indictees, several witnesses changed their testimony compared to that given before the investigating judge or in previous *in absentia* proceedings. Several witnesses explained the discrepancy by stating that they were traumatized at the time of their previous testimony and

[21] The ICTY Trial Chamber observed that it is very difficult in practice to prove genocidal intent if the crimes committed are not widespread and if the crime charged is not backed by an organization or a system. *Prosecutor vs. Jelisic* December 1999, Paragraph 101.

now recalled what happened (e.g., Hrastov [Karlovac County Court], "Paulin Dvor" case [Osijek County Court]). Others explained the difference in their testimony by alleging their original testimony had been coerced by local authorities ("Lora" case [Split County Court]), that they had been threatened in the course of the procedure, and that they believed their testimony before the investigating judge was not official ("Paulin Dvor" case [Osijek County Court]). In its verdict in the "Virovitica group" case [Bjelovar County Court], the court stated that it did not credit a statement by one witness during the trial as it contradicted his prior statement given in the investigative procedure and it was obviously given in order to "help" the defendants.

The Mission is not aware of any instance in which a prosecutor initiated criminal charges against witnesses for giving a false statement before a judge as prescribed as an *ex officio* criminal offence in the Criminal Code.

The high frequency of inconsistent witness statements *inter alia* explained by threats made during the procedure underscores the need for a fully operational witness protection program.

III. Courts - issues of concern:

1. Composition of the panel

In some cases the Mission observed violations of the Law on Criminal Procedure mainly in relation to the composition of the court or the absence of persons whose presence at the trial is mandatory. For example, in the "Lora" case [Split County Court] the lawyer representing the defendant who was tried *in absentia* left the courtroom during a hearing when evidence was presented. In the case of Zorana Banic [Zadar County Court], a lay judge left the courtroom for approximately 10 minutes while the president of the panel continued with the hearing.

2. Establishing facts/drawing conclusions from the facts

The Mission's statistical reports indicate a high rate of reversal of trial court verdicts (both convictions and acquittals) by the Supreme Court. In 2002 almost all appeals were granted and the verdict reversed, in 2003 more than half of the appeals were granted and the verdict reversed, and in the first 5 to 6 months of 2004 more than two-thirds of all appeals resulted in reversal of trial verdicts and remand for new trial. The primary reason for reversal was the failure of the trial court to correctly establish the facts.

a) In the case of Mihajlo Hrastov [Karlovac County Court], Croat, the Court acquitted Hrastov finding that he killed 13 unarmed Serbs who had surrendered in self defence. In its decision quashing the acquittal and remanding for re-trial, the Supreme Court found that the trial court failed to establish the facts correctly.[22] In particular, the trial court had not explained why it credited the statement of a witness who had changed his testimony during the trial and had testified that one of the victims attacked the defendant. In addition, the Supreme Court held that the act, in the form the trial court determined that it occurred, was in contradiction to physical evidence of blood traces that indicated that the victims were shot while trying to run away and not while attacking the defendant. The Supreme Court

[22] Supreme Court I Kz - 948/02-8 from 09.03.2004.

highlighted that the previous acquittal of the defendant in 1993 (for the same act) had been overturned by the Supreme Court for the same reason.

b) In the case of Savo Gagula [Bjelovar County Court], Serb, the trial court did not explain why it credited the statements of witnesses incriminating the Serb defendant although other witnesses gave statements that contradicted this testimony. The description of the alleged act, in the form the trial court established it, contradicted statements of another witness and/or material evidence and the court did not explain why it did not credit the other evidence. Also, the court did not explain why it followed the statement of a witness given during trial although it differed significantly from what the witness had stated during the investigative procedure. The Supreme Court quashed the trial court conviction and remanded the case for re-trial.[23]

c) In the case of Tihomir Drajic [Bjelovar County Court], Serb, the court found the defendant guilty for having committed war crimes against civilians. The Supreme Court quashed the verdict and found that the trial court had failed to determine facts that allowed the conclusion of the defendant's guilt and his will to act as a co-perpetrator.[24] In addition, the trial court had failed to specify the individual acts in which the defendant engaged that constituted the criminal conduct sufficient for guilt.

d) In the case of Svetozar Karan [Gospic County Court], Serb, the Supreme Court held that the trial court had failed to establish facts that allowed concluding that Karan was responsible for wounding the victims and that he acted with criminal intent.[25] In addition, the Supreme Court found that the trial court disregarded the principle of *in dubio pro reo* and established Karan's guilt by relying on a witness that testified that he could not confirm Karan maltreated the victims but he could also not exclude it. In addition, the Supreme Court determined that the trial court had failed to explain why it followed the statement of a witness despite the fact that another witness stated the contrary.

e) In other cases the trial courts failed to draw the correct legal conclusions from the established facts. For example, the Supreme Court found that the Karlovac County Court convicted Miljan Strunjas, a Serb, for conduct that had not been indicted, i.e., outside the scope of the indictment.[26] While the indictment accused Strunjas of having *ordered* subordinates to commit the offences contained in the indictment, the court in its explanation of the verdict referred to Strunjas' *failure to prevent his subordinates from committing* the offences and consequently convicted the defendant for an "omission" as opposed to an "action" as alleged in the indictment.

3. Sentencing

During 2003, the average sentence ordered by trial courts in 37 guilty verdicts was slightly less than 9 years imprisonment. In total only 3 defendants, all tried *in absentia*, received the maximum punishment of 20 years.

[23] Supreme Court I Kz - 642/01-9 from 05.09.2002.
[24] Supreme Court I Kz - 466/02-6 from 22.01.2004.
[25] Supreme Court I Kz - 862/03-8 from 29.01.2004.
[26] Supreme Court I Kz - 588/02-9 from 17.10.2002.

Despite a minimum punishment of 5 years for war crimes[27], during 2002 county courts issued sentences below the prescribed minimum of 5 years imprisonment in more than one-quarter of all war crime cases. In those cases, trial courts made generous use of mitigating circumstances that would appear inconsistent with the ICTY practice.[28] In 2003, only 5 per cent of convicted persons received less than the prescribed minimum sentence, whereas in the first 5 to 6 months of 2004, more than half of the persons convicted (6 of 11) received less than minimum sentences.

The Criminal Code (CC) foresees that mitigating and aggravating circumstances shall be considered when determining the type and range of punishment *within the prescribed range*, e.g., the punishment for the offence of *war crimes against the civilian population* Article 120 CC ranges between 5 and 20 years. Only when circumstances are particularly compelling may the court issue a sentence below the specified range of punishment. Article 38 CC (1993).

Mitigating circumstances put forward by trial courts justifying punishment below the prescribed minimum included "the defendant is poor", "the defendant has underage children" ("Baranja II" case [Vukovar County Court]), "the defendant is a family man" (Slobodan Gojkovic [Vukovar County Court]), "the age of the defendant when he committed the offence" (Crevar Marko [Vukovar County Court]), "the previous clean criminal record of the defendant" (Milenko Macura [Vukovar County Court]), "the poor health of the defendant" ("Virovitica group" case [Bjelovar County Court]), "the defendant is unemployed" ("Baranja II" case [Vukovar County Court]) and "the contribution to the Homeland War ("Virovitica group" case [Bjelovar County Court], "Gospic group" case [Rijeka County Court]). Almost all courts considered such circumstances as mitigating the punishment.

4. Delays throughout the criminal procedure

Lengthy delays occurred in several cases monitored during 2002 in all stages of the procedure at county courts as well as at the Supreme Court on appeal. For example, in the Hrastov case the Karlovac County court did not commence a re-trial ordered by the Supreme Court in 1993 until May 2000, 7 years delay. Following several successful appeals in the "Sodolovci" case [Osijek County Court], two Serbs who have been tried three and four times, respectively, since 1995 were ordered to stand trial again in 2003. In the case of Nikola Cvjeticanin [Gospic County Court] the court did not commence the re-trial after the guilty verdict was quashed by the Supreme Court in June 2003 before May 2004. During that period of inactivity the defendant remained in detention. Once the re-trial started in May 2004 the defendant was acquitted after one day of hearing and subsequently released after having been in prison for more than 2 years.

Despite the legal obligation to decide upon appeals within a period of 3 months from receiving the trial record when the defendant are in detention,[29] the Supreme Court in Abdic [Karlovac County Court] and Banic [Zadar County Court] did not render a decision for a

[27] The war crimes that fall within the jurisdiction of the municipal courts because punishment of 1 to 10 years is prescribed are not reflected in these figures.
[28] The ICTY Trial Chamber has held that no prior criminal record, poor health and youth might be considered as mitigating factors in determining the appropriate sentence for an individual convicted of war crimes. However, the Chamber held that only on rare occasions would such factors play a significant part in mitigating international crimes. *Prosecutor vs. Simic* Judgement case No. IT-55-9/2-S Paragraph 97.
[29] Article 409 Paragraph 2 LCrP.

period of more than one year although both defendants remained in custody following convictions and imprisonment.

IV. Lack of impartial tribunal

The Mission's observations through trial monitoring suggest that there is a considerable lack of impartiality amongst parts of the judiciary.

1 In the case of Svetozar Karan, a Serb, the Gospic County Court not only found Karan guilty of war crimes, but also of a 500-year history of Serb crimes against Croatia and explicitly criticized the provision of Government assistance to returned Serb refugees.

2. In the Hrastov case [Karlovac County Court], a Croat, the president of the panel of judges referred to killed JNA members (Serbs) as "chetniks". When a prosecution witness who was testifying was verbally intimidated by Hrastov's supporters in the courtroom, the judge did not intervene and did not warn the individuals in the courtroom to refrain from making such comments and disturbances. The verdict of acquittal of killing 13 unarmed Serb prisoners on the grounds of self defence reached twice by the trial court seems questionable in light of the facts and evidence, a view underscored by the Supreme Court's two-time reversal and statement that the trial court's finding are in contradiction to findings of an expert.

3. In the "Lora" case [Split County Court], involving 8 Croats, the president of the panel of judges on more than one occasion addressed the defendants by their first names and shook their hands when they entered the court room. The judge suggested to a witness who was unable to express clearly what he had witnessed that he should testify that he did not remember rather than giving confusing answers. The trial judge did not utilize testimony of prosecution witnesses given to an investigating judge in Serbia and Montenegro in the context of international legal assistance, as he determined that the witnesses did not qualify to be considered "unavailable" as required by the Law on Criminal Procedure for use of such prior testimony. The judge expressed his opinion that the Serb witnesses must travel to Croatia and rejected their concerns related to personal security although they reported that they had received threats. The judge also ordered the release of the 7 defendants in the course of the proceedings without seizing their travel documents. As a result, two of the 7 accused did not appear for the remainder of the trial nor did they return to detention later ordered by the Supreme Court.

4. The common use of "participation and contribution to the homeland war" as mitigating circumstances in the (few) convictions against Croats for crimes against Serbs is also of concern. The judge presiding over the "Gospic Group" case [Rijeka County Court] involving General Mirko Norac in explaining her sentencing decision stated that she had "*to stress, in the first place, that this criminal offence was committed during the war that was imposed on us. This was a defensive and just war, the war for Croatian independence……All three defendants took active part in the defence and, together with many known and unknown defenders, defended Gospic and prevented its fall.. ……So the circumstance that was particularly considered as a special mitigating circumstance is their contribution to the Croatian War of Independence*".

Similarly, in the "Virovitica group" case [Bjelovar County Court] the panel of judges stated in the verdict referring to mitigating circumstances "*...the conflict actually occurred because*

of the intention to realize the famous objective of the creation of a greater Serbia in the territory of the Republic of Croatia….Each of the defendants participated in the Homeland war as a volunteer and it can be concluded that each of them gave a significant contribution in the Homeland war." In addition the court established that the previously clean criminal record, poor health of all defendants and the fact that one defendant had underage children as being mitigating circumstances and convicted the 3 Croats to 1 year imprisonment for war crimes against the civilian population.

Also, several courts have found mitigating circumstances in procedures against Serbs, when the defendants helped and protected Croats during the war.

Lack of impartiality is also suggested by statistical observations collected during 2002 and 2003.

- Large discrepancies continued in the numbers of Serbs and Croats that faced prosecution.
- *In absentia* proceedings, a judicial phenomenon applied almost exclusively to Serbs, continued. The vast majority of Serbs convicted are convicted *in absentia* (90 per cent in 2003).
- A significant differential between Serbs and Croats was observed in the rate of conviction and acquittal.
- A significant number of war crime charges, including cases where arrests were made and trials completed, were unsubstantiated as demonstrated by the prosecution abandoning the charges due to lack of evidence. Such proceedings involved almost exclusively Serbs.
- During 2002 and 2003, a total of 18 per cent (16 of 89) of individuals convicted received sentences less than the legally prescribed minimum for the most serious criminal offences due to the generous use of mitigating circumstances.
- The Supreme Court reversed a very high percentage of Serb convictions (95 per cent in 2002 and 50 per cent in 2003) and upon re-trial, a majority of Serbs previously convicted were exonerated.

There is a high rate of error in war crime proceedings as indicated by the high reversal rate. While the line between error and lack of impartiality cannot always be drawn with certainty, the discrepancy observed in relation to the conviction rate of Serbs and Croats in tandem with the large discrepancies in numbers of Serbs and Croats prosecuted as well as evidence from individual cases suggests that lack of impartiality remains amongst some members of the judiciary.

V. *In absentia* procedures

Despite the exceptional character foreseen in the LCrP[30] and the instructions from the Chief State Attorney,[31] Croatian courts have in many cases chosen to pursue proceedings against

[30] In exceptional cases the Croatian LCrP foresees the possibility to conduct proceedings against an accused who is at large or otherwise not accessible to Croatian justice (Article 322 Paragraph 5 LCrP). The provision highlights the exceptional character of conducting a trial without the defendant's presence by requiring *particular important reasons*. The Vukovar County Court in November 2003 found such *particularly important reasons* in the severity of the war crime offence and in the public expectation and commenced proceedings against *in absentia* defendants.

Serbs who were not present at trial. Out of a total of 77 Serbs convicted in war crime procedures in 2002 and 2003, 71 per cent (55 individuals) were convicted *in absentia.*

International jurisprudence, the Statutes of the ICTY, the ICTR and the ICC as well as the European Court on Human Rights do not *per se* prohibit proceedings against defendants who are not present. While the Statutes of the ICTY, the ICTR and the ICC contain provisions which leave room for extensive interpretation with regard to the admissibility of trials *in absentia*, the European Court on Human Rights has developed specific basic safeguards that must be met in order to conduct *in absentia* proceedings. The most important safeguard of those developed is that domestic law provides for the right of the defendant to request a new trial once he becomes accessible to justice. The Croatian LCrP prescribes this possibility in Article 429 and the Mission has, with the exception of one case, observed that defendants were readily granted a new trial in due course when requested.[32]

Mission concerns with regard to *in absentia* convictions are fourfold. First, the continuation of this practice creates an additional burden on the courts as defendants convicted *in absentia* regularly make use of their guaranteed right for re-trial once accessible to Croatian justice.

Second, while it is a valid argument that victims wish to see alleged perpetrators tried, the right of the defendant to be present at trial outweighs this concern in particular in war crime procedures. Although the LCrP foresees mandatory representation by a lawyer, the nature and complexity of war crimes, the time that has gone by since the alleged commission and the great number of witnesses frequently involved, in light of the defendant's right to present evidence and to cross examine witnesses require the presence of the defendant.

Third, a significant number of these convictions do not stand once the accused appears for re-trial. During 2002 and 2003 six proceedings where defendants had previously been convicted *in absentia* resulted in the total exoneration of 8 defendants following the re-trial. This suggests that the quality of *in absentia* procedures resulting in convictions is questionable.

Fourth, in individual cases there is a potential danger that trials are conducted for political reasons instead of legal reasons. As stated by the most senior Croatian Professor on Criminal Procedure in the Law Faculty of Zagreb and Member of Parliament[33] in *Novi List* on 7 February 2004, several of the *in absentia* trials were conducted in order to discourage Serbs from returning to Croatia.

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[31] The Chief State Prosecutor instructed local prosecutors in 2002 that "county state prosecutors' offices will not be proposing trials *in absentia* without the approval of the State Prosecutor of the Republic of Croatia. Namely, *in absentia* trials actually proved to be a loss of time and dissipation of funds, because the trials were repeated in the presence of defendants when they had become accessible." 11 July 2002 Instructions from the Chief State Prosecutor to all County State Prosecutors.

[32] In the case of Dane Serdar, the Gospic County Court granted the request for re-trial only after more than 3 months. This delay has resulted in the initiation of disciplinary proceedings against the President of the Gospic County Court by the President of the Supreme Court for failing to act upon the request for renewal of the procedure in a timely manner.

[33] Professor Ivo Josipovic.