

# The Future of War Crimes Prosecutions in the Former Yugoslavia: Accountability or Junk Justice?

*Katie Zoglin\**

## ABSTRACT

As a result of pressure from the UN Security Council, the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) announced a completion strategy: the ICTY is to finish investigations by 2004, trials by 2008, and appeals by 2010. The remaining war crimes cases will be turned over to the former Yugoslavia for domestic prosecutions. Insufficient attention is being paid to the impact of the ICTY's pledge to return cases to the former Yugoslavia. While this concept sounds good and appeals to international donors, an examination of the situation casts doubt on its wisdom. This article summarizes the status of the domestic criminal justice systems and war crimes prosecutions in the former Yugoslavia and concludes that domestic legal systems are currently unable to handle even routine criminal matters, much less war crimes prosecutions. While it is preferable for domestic systems to handle their own war crimes prosecutions, the author argues that it makes little sense to return such prosecutions to the former Yugoslavia at this time because those systems do not currently have the capacity or political will to support them.

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\* *Katie Zoglin* graduated from Harvard College, 1980; Harvard Law School, 1985. She served as a Rule of Law Liaison and Gender Issues Legal Specialist in Serbia in 2002–2003 for ABA/CEELI. She has taught international human rights at Stanford Law School and UC Berkeley.

The author wishes to thank Judge Patricia Wald, Prof. Naomi Roht-Arriaza, Michael Dickstein, Prof. Laurel Fletcher, and Bogdan Ivanisevic for their time and helpful comments. The views expressed in this article are solely those of the author.

## I. INTRODUCTION

As a result of pressure from the UN Security Council, the Chief Prosecutor for the International Criminal Tribunal for the Former Yugoslavia (ICTY) has announced a completion strategy: the ICTY is to finish investigations by 2004, trials by 2008, and appeals by 2010. The remaining war crimes cases will be turned over to the former Yugoslavia for domestic prosecutions.<sup>1</sup> Unfortunately, insufficient attention is being paid to the impact of this pledge to return cases to the former Yugoslavia. While the concept may sound good on paper and appeal to international donors who have already contributed significant amounts of money to the ICTY, an examination of the situation in the former Yugoslavia casts doubt on the wisdom of the transfer at this time. Currently, domestic legal systems are unable to handle run-of-the-mill criminal matters, much less emotionally charged war crimes prosecutions. The lack of political will is even more problematic.

## II. BACKGROUND: THE ESTABLISHMENT OF THE ICTY

Accountability for war crimes is a relatively recent development, with impunity historically being the rule rather than the exception. Governments are often unable or unwilling to deal with widespread abuses during an actual conflict or a transitional phase given political and other constraints.<sup>2</sup> Typically, judicial review of atrocities takes place in a belated manner, if it occurs at all. It understandably can be difficult for a nation to try its own citizens, particularly in divided societies where one region's hero is another region's war criminal and when the impact of the war remains evident. Furthermore, the international community has often turned a blind eye to widespread violations of human rights and humanitarian law.

Given these realities, the creation of the ICTY marked a departure from the usual response to war crimes. In 1993, while the war in the Balkans was raging and the press was reporting atrocities taking place there, the UN Security Council authorized the establishment of the ICTY.<sup>3</sup> Justifying its

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1. For the purpose of this article "the former Yugoslavia" will be used to refer to Croatia, Bosnia and Herzegovina (BiH), Serbia and Montenegro, and Kosovo.
  2. See generally Jose Zalaquett, *Balancing Ethical Imperatives and Political Constraints: The Dilemma of New Democracies Confronting Past Human Rights Violations*, 43 HASTINGS L.J. 1425 (1992); Carlos S. Nino, *The Duty to Punish Past Abuses of Human Rights Put into Context: The Case of Argentina*, 100 YALE L.J. 2619 (1991).
  3. S.C. Res. 808, U.N. SCOR, 48th Sess., 3175th mtg., U.N. Doc. S/RES/808 (1993); S.C. Res. 827, U.N. SCOR, 48th Sess., 3217th mtg., U.N. Doc. S/RES/827 (1993).

action under Chapter VII of the UN Charter (believing that the war posed a threat to international peace and security), the UN Security Council charged the ICTY with prosecuting serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1991.<sup>4</sup>

After a slow and troubled start, the ICTY is now more active and productive than ever. As of October 2004, fifty-two defendants have been tried, twenty-four have served or are serving sentences, five have been acquitted, fifty-three accused are in custody in the Detention Unit, and seven trials are ongoing.<sup>5</sup> The ICTY is prosecuting top-level officials who, as a political matter, would not be tried in domestic courts in the former Yugoslavia. Several important defendants have pled guilty to charges, thus undermining the ability of some communities to deny wrongdoing and to claim that the ICTY is biased. To be sure, the ICTY is far from a perfect institution. It has experienced many problems, such as inadequate funding and support, lack of public outreach in the former Yugoslavia, insufficient support and security measures for witnesses, public skepticism, and mixed cooperation from local governments.<sup>6</sup>

### III. DOMESTIC WAR CRIMES PROSECUTIONS IN THE FORMER YUGOSLAVIA

Conceptually, the completion strategy is laudable. As a general matter, it is preferable for a country to handle its own war crimes prosecutions rather than for international institutions or foreign governments to step in and conduct them. The exercise of this type of responsibility can help mark the end of impunity from a previous regime and a step toward accountability and the rule of law. At the same time, however, domestic courts are not always able to conduct war crimes prosecutions due to the strength of the military or police forces responsible for the violations, lack of political will,

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4. S.C. Res. 808, *supra* note 3, ¶ 1. While many welcomed this development, others were frustrated by the international community's reluctance to intervene earlier and more aggressively; many thought the International Criminal Tribunal for the Former Yugoslavia (ICTY) would be ineffectual and represent a token gesture. See David Tolbert, *The International Criminal Tribunal for the Former Yugoslavia: Unforeseen Successes and Foreseeable Shortcomings*, 26 FLETCHER F. OF WORLD AFF. 7, 9 (2002).
  5. ICTY, Key Figures of ICTY Cases, available at [www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm).
  6. See, e.g., Tolbert, *supra* note 4, at 13–16; Gabrielle Kirk McDonald, *Reflections on the Contributions of the International Criminal Tribunal for the Former Yugoslavia*, 24 HASTINGS INT'L & COMP. L. REV. 155 (2001); Patricia M. Wald, *Dealing with Witnesses in War Crime Trials: Lessons from the Yugoslav Tribunal*, 5 YALE HUM. RTS. & DEV. L.J. 217, 224, 230, 238–39 (2002) (for discussion of the pros and cons of witness protective measures, including the public's perceptions of the credibility of the Tribunal).

weak legal systems, and other variables.<sup>7</sup> The ICTY's completion strategy must, therefore, take into account the domestic legal and political situations in the former Yugoslavia.

### A. Overview of Region-Wide Challenges to the Legal Systems

After years of socialism and war, Bosnia and Herzegovina (BiH), Croatia, Serbia and Montenegro, and Kosovo cannot boast adequate legal systems.<sup>8</sup> These regions are plagued by struggling economies, organized crime, and corruption. Judges and prosecutors have left their jobs due to low wages and other factors. As a result, there are many inexperienced individuals in these positions.<sup>9</sup> Cases are processed slowly and are subject to excessive delays.<sup>10</sup>

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7. See, e.g., Neil J. Kritz, *Coming to Terms with Atrocities: A Review of Accountability Mechanisms for Mass Violations of Human Rights*, 59-AUT LAW & CONTEMP. PROBS. 127 (1996); José E. Alvarez, *Crimes of States/Crimes of Hate: Lessons from Rwanda*, 24 YALE J. INT'L L. 365 (1999).
  8. While all have enacted improvements to their legal institutions and laws, the challenges remain significant.
  9. For example, in Croatia, from 1991 to 1994, 475 new judges left the bench; from 1995 to 1997, more than 100 additional judges left the bench. More than 200 new judges have been appointed since November 2001. Two thirds of those on the bench in Croatia have less than seven years of experience. A former prosecutor estimates that an even greater percentage of prosecutors have left their jobs. See Commission Staff Working Paper: Croatia, Stabilisation & Association Report 2003, Commission of the European Communities, COM(03)139 final at 6–8 [hereinafter European Commission Staff Working Paper: Croatia]; Interview with Natasa Durovic, Legal Advisor, Croatian Law Centre, in Zagreb, Croatia (14 Mar. 2003); *Status Report No. 12*, OSCE Mission to Croatia 11 (3 Jul. 2003), available at [www.osce.org/documents/mc/2003/07/450\\_en.pdf](http://www.osce.org/documents/mc/2003/07/450_en.pdf) [hereinafter *OSCE Croatia Status Report No. 12*]. In Serbia, approximately one third of the prosecutorial staff left their positions at the end of 2002. More than 100 new judges were appointed during the first half of 2003.
  10. See *Twenty-Second Report by the Office of the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations* (20 Feb.–7 May 2002), Office of the High Representative (OHR) (2002), available at [www.ohr.int/other-doc/hr-reports/default.asp?content\\_id=8069](http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=8069) [hereinafter *22nd Report by OHR*]; *Twenty-Third Report by the Office of the High Representative for Implementation of the Peace Agreement to the Secretary-General of the United Nations* (8 May–11 Oct. 2002), OHR (2002), available at [www.ohr.int/other-doc/hr-reports/default.asp?content\\_id=28227](http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=28227) [hereinafter *23rd Report by OHR*]; Peter Bach et al., *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina*, Report to OHR (May 2002) [hereinafter *Consultants' Report to OHR*] (on file with author); INTERNATIONAL CRISIS GROUP, *COURTING DISASTER: THE MISRULE OF LAW IN BOSNIA & HERZEGOVINA* (2002), available at [www.icg.org/library/documents/report\\_archive/A400592\\_25032002.pdf](http://www.icg.org/library/documents/report_archive/A400592_25032002.pdf) [hereinafter *COURTING DISASTER*]; *Report on Human Rights Situation in the Federation of Bosnia and Herzegovina for 2001, Judicial Authorities*, Ombudsman Institution of the Federation of Bosnia and Herzegovina, available at [www.bihfedomb.org/eng/reports/2001/rpt2001main.htm](http://www.bihfedomb.org/eng/reports/2001/rpt2001main.htm) [hereinafter *Ombudsman Report on Human Rights*]; U.S. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002, BOSNIA AND HERZEGOVINA* 14–15 (2003), available at

All actors in the criminal justice system—judges, prosecutors, defense attorneys, and police—lack skills, training, resources, and the infrastructure to do their jobs effectively.<sup>11</sup> Moreover, minority groups are poorly represented in the judiciary and law enforcement.<sup>12</sup> Unfortunately political

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www.state.gov/documents/organization/19590.doc [hereinafter BiH COUNTRY REPORT 2002]; CENTRAL EUROPEAN AND EURASIAN LAW INITIATIVE (CEELI), AMERICAN BAR ASSOCIATION, JUDICIAL REFORM INDEX FOR SERBIA 28 (2002), available at [www.dec.org/pdf\\_docs/PNACP777.pdf](http://www.dec.org/pdf_docs/PNACP777.pdf) [hereinafter ABA/CEELI INDEX FOR SERBIA]; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002, FEDERAL REPUBLIC OF YUGOSLAVIA 7 (2003), available at [www.state.gov/g/drl/rls/hrrpt/2002/18401pf.htm](http://www.state.gov/g/drl/rls/hrrpt/2002/18401pf.htm) [hereinafter FRY COUNTRY REPORT 2002].

11. For BiH, see COURTING DISASTER, *supra* note 10, at 44–48. For Croatia, see European Commission Staff Working Paper: Croatia, *supra* note 9, at 6–8, 14 (“The functioning of the judiciary remained a serious problem.”); CEELI, AMERICAN BAR ASSOCIATION, JUDICIAL REFORM INDEX FOR CROATIA 2, 6, 13–14, 24–26 (2002), available at [www.dec.org/pdf\\_docs/PNACP774.pdf](http://www.dec.org/pdf_docs/PNACP774.pdf) (no comprehensive training program for judges in Croatia exists) [hereinafter ABA/CEELI INDEX FOR CROATIA]; OSCE Croatia Status Report No. 12, *supra* note 9, at 11, 20; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2001, CROATIA (2002), available at [www.state.gov/g/drl/rls/hrrpt/2002/18359.htm](http://www.state.gov/g/drl/rls/hrrpt/2002/18359.htm) [hereinafter CROATIA COUNTRY REPORT 2001]; *Assessment of Issues Covered by the OSCE Mission to the Republic of Croatia's Mandate Since 12 November 2001*, OSCE Mission to Croatia 4 (12 May 2002) available at [www.osce.org/documents/mc/2002/05/1056\\_en.pdf](http://www.osce.org/documents/mc/2002/05/1056_en.pdf) [hereinafter OSCE Croatia Status Report No. 10]. In Serbia, almost one third of the prosecutors who responded to an OSCE survey said they had not attended an educational seminar in the previous two years. Many lawyers appointed to represent indigent criminal defendants in Serbia have little or no experience in criminal law. See ABA/CEELI INDEX FOR SERBIA, *supra* note 10, at 6–7, 8, 10, 15–16, 26–29; *Report on Judicial Reform in Serbia*, Rule of Law and Hum. Rts. Dept., OSCE Mission to Serbia and Montenegro 44 (5 Mar. 2003), available at [www.osce.org/documents/fry/2003/03/13\\_en.pdf](http://www.osce.org/documents/fry/2003/03/13_en.pdf); HELSINKI COMMITTEE FOR HUMAN RIGHTS IN SERBIA, HUMAN RIGHTS IN THE SHADOW OF NATIONALISM—SERBIA 2002, at 150 (2003), available at [www.helsinki.org.yu/report\\_contents.php?lang=en&idpub=150](http://www.helsinki.org.yu/report_contents.php?lang=en&idpub=150) [hereinafter SHADOW OF NATIONALISM]; FRY COUNTRY REPORT 2002, *supra* note 10. In Kosovo, some judges have a poor knowledge of the law, do not always follow the law, do not conduct proper investigations, and need additional training. Due to limited opportunities to practice law and enter the legal profession in Kosovo during the 1990s, many criminal defense attorneys lack experience, training, and substantive or procedural skills. The number of trained police has increased but more are needed; additional training in investigative techniques and collecting evidence is particularly important. INTERNATIONAL CRISIS GROUP, FINDING THE BALANCE: THE SCALES OF JUSTICE IN KOSOVO 6–8, 11 (2002), available at [www.icg.org/library/documents/report\\_archive/A400772\\_12092002.pdf](http://www.icg.org/library/documents/report_archive/A400772_12092002.pdf) [hereinafter FINDING THE BALANCE]; *Kosovo's War Crimes Trials: A Review*, Dept. of Human Rights and Rule of Law, OSCE Mission in Kosovo (Sept. 2002), available at [www.osce.org/documents/mik/2002/09/857\\_en.pdf](http://www.osce.org/documents/mik/2002/09/857_en.pdf) [hereinafter *Kosovo's War Crimes Trials*]; U.S. DEP'T OF STATE, COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2001, FEDERAL REPUBLIC OF YUGOSLAVIA (2002), available at [www.state.gov/g/drl/rls/hrrpt/2001/eur/8369.htm](http://www.state.gov/g/drl/rls/hrrpt/2001/eur/8369.htm) [hereinafter FRY COUNTRY REPORT 2001]; BELGRADE CENTRE FOR HUMAN RIGHTS, HUMAN RIGHTS IN YUGOSLAVIA 2002, at 461–62 (2003).
12. BiH COUNTRY REPORT 2002, *supra* note 10, at 10, 40; INTERNATIONAL CRISIS GROUP, POLICING THE POLICE IN BOSNIA: A FURTHER REFORM AGENDA 40 (2002) (in BiH, minority groups are poorly represented in the police forces), available at [www.icg.org/library/documents/report\\_archive/A400644\\_10052002.pdf](http://www.icg.org/library/documents/report_archive/A400644_10052002.pdf) [hereinafter POLICING THE POLICE IN BOSNIA]. See *Report No. 11*, OSCE Mission to Croatia 6 (18 Nov. 2002), available at [www.osce.org/documents/mc/2002/11/1057\\_en.pdf](http://www.osce.org/documents/mc/2002/11/1057_en.pdf) [hereinafter OSCE Croatia Status Report No. 11] (in Croatia, relatively few Serbs sit as judges).

pressure and ethnic bias are also all too common.<sup>13</sup> Not surprisingly, the public distrusts and lacks confidence in these legal systems.<sup>14</sup>

These shortcomings become even more prominent in war crimes cases. As a rule, war crimes prosecutions are often complicated, involving events that may have unfolded over long periods of time and taken place more than a decade ago. As will be described below in more detail, war crimes cases have been marked by witness intimidation, ethnic bias, selective prosecution, and judiciaries that lack independence. Lack of political will represents a significant further obstacle. As a result, domestic war crimes prosecutions to date in the former Yugoslavia have fared poorly in most respects, from political commitment to procedural and substantive fairness in the proceedings.

## B. Bosnia and Herzegovina

### 1. *The Criminal Justice System: International Oversight but Poor Progress*

Under the General Framework Agreement for Peace in Bosnia and Herzegovina (Dayton Accords), two legal entities were established in BiH: the Federation of Bosnia and Herzegovina (Federation) and the Republika

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13. See *23rd Report by OHR, supra* note 10; *22nd Report by OHR, supra* note 10; Consultants' Report to the OHR, *supra* note 10; *COURTING DISASTER, supra* note 10; *Ombudsman Report on Human Rights, supra* note 10; BiH COUNTRY REPORT 2002, *supra* note 10, at 12–13; *Report of the Special Representative of the Commission on Human Rights on the Situation of Human Rights in Bosnia and Herzegovina and the Federal Republic of Yugoslavia, Jose Cutileiro*, U.N. ESCOR, Comm'n on Hum. Rts., 58th Sess., Agenda Item 9, ¶ 10, U.N. Doc. E/CN.4/2002/41 (2002) [hereinafter *Report of the Special Representative*]; *POLICING THE POLICE IN BOSNIA, supra* note 12; BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 339–41 (political pressure on courts); Interviews with criminal defense attorneys, in Pristina, Kosovo (21–22 Apr. 2003); CEELI, AMERICAN BAR ASSOCIATION, JUDICIAL REFORM INDEX FOR KOSOVO 29–30 (2002) available at [www.dec.org/pdf\\_docs/PNACP775.pdf](http://www.dec.org/pdf_docs/PNACP775.pdf) [hereinafter ABA/CEELI INDEX FOR KOSOVO]; *FINDING THE BALANCE, supra* note 11, at 6–8. In Croatia, political influence at the local level may remain an issue among judges. Officers in Croatia may be subject to political pressure and some are insensitive to ethnic issues. HUMAN RIGHTS WATCH, *WORLD REPORT 2003: EVENTS OF 2002*, at 326 (2003) available at [hrw.org/wr2k3](http://hrw.org/wr2k3) [hereinafter HRW WORLD REPORT 2003]; U.S. DEP'T OF STATE, *COUNTRY REPORTS ON HUMAN RIGHTS PRACTICES 2002, CROATIA (2003)*, available at [www.state.gov/g/drl/rls/hrrpt/2002/18359.htm](http://www.state.gov/g/drl/rls/hrrpt/2002/18359.htm) [hereinafter CROATIA COUNTRY REPORT 2002].
14. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 414–18; *COURTING DISASTER, supra* note 10, at 1. See generally *FINDING THE BALANCE, supra* note 11, at 3. See also KOSOVO VERIFICATION MISSION, OSCE, *KOSOVO/KOSOVA: AS SEEN, AS TOLD 78 (1999)*, available at [www.osce.org/documents/mik/1999/11/1620\\_en.pdf](http://www.osce.org/documents/mik/1999/11/1620_en.pdf) (The removal of most ethnic Albanian judges from the bench resulted in the Kosovo Albanians being “very sceptical [sic] about the impartiality of a judiciary system wherein one ethnic group would basically be judging the other.”).

Srpksa (RS).<sup>15</sup> The Dayton Accords created a complicated and burdensome system of government in BiH. In addition, there is a limited state government of BiH.<sup>16</sup> The Federation and RS have independent governments, courts, and law enforcement structures.<sup>17</sup>

The Office of the High Representative (OHR), the international body charged with implementing the Dayton Accords and overseeing the development of BiH's government,<sup>18</sup> is authorized to impose and rescind legislation, remove government officials from office, and implement and coordinate civilian aspects of the Dayton Accords.<sup>19</sup> It has administered a number of reforms in BiH, including efforts to end patronage and restructure the court system.<sup>20</sup> Nevertheless, progress has been disappointing, particularly given the length and extent of involvement by the international community.<sup>21</sup>

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15. General Framework Agreement for Peace in Bosnia and Herzegovina and Annexes, U.N. Doc. S/1995/999 (1995), *reprinted in* 35 I.L.M. 75 (1996). The Agreement is commonly known as the "Dayton Accords." Bosnian Muslims (or Bosniaks) and ethnic Croats comprise a majority of the population in the Federation while Serbs represent a majority in the RS. The Brcko District, a self-governing district that is the equivalent of an international protectorate, was also established.
  16. BiH has a bicameral legislature, three-member presidency, and court system. Representatives from the three major ethnic groups (Serbs, Bosniaks, and Croats) comprise the presidency for BiH. In March 2003, additional state level institutions, such as a state prosecutor and border police, were authorized. Currently the judiciary at the state level in BiH is comprised of a federal court system, which has a Human Rights Chamber and a Constitutional Court.
  17. The Federation is comprised of ten cantons. The Federation and the RS each has its own court system, with each having its own basic or municipal courts, cantonal or district courts, a supreme court, and Constitutional court. *COURTING DISASTER*, *supra* note 10, at 13.
  18. See Office of the High Representative, General Information, *available at* [www.ohr.int/ohr-info/gen-info](http://www.ohr.int/ohr-info/gen-info). The Peace Implementation Council (PIC), comprised of fifty-five countries and agencies that provide financial and other support for the peace process, oversees the work of the OHR. *Id.*
  19. *Id.*; *Priorities and Partners: Developing the Rule of Law in Bosnia and Herzegovina*, Mark Dietrich et al., United States Agency for International Development 16 (June 2003).
  20. See *Twenty-Fourth Report by the High Representative for Implementation of the Peace Agreement to the Secretary General of the United Nations (12 Oct. 2002–31 Aug. 2003)*, OHR ¶ 2 (13 Oct. 2003) *available at* [www.ohr.int/other-doc/hr-reports/default.asp?content\\_id=31003](http://www.ohr.int/other-doc/hr-reports/default.asp?content_id=31003) [hereinafter *24th Report by OHR*]. In September 2002, the High Judicial and Prosecutorial Council of BiH, the RS, and the Federation was established to appoint judges and prosecutors, to reorganize the court system, and to conduct disciplinary proceedings for judicial and prosecutorial misconduct. See *23rd Report by OHR*, *supra* note 10, ¶¶ 11–16; *22nd Report by OHR*, *supra* note 10, ¶¶ 11–12. United Nations Mission to Bosnia and Herzegovina started the process of reviewing police staff and decertifying police who may have been involved in war crimes. As of January 2003, the European Union took over the task of police reform. See *24th Report by OHR*, *supra* note 20, ¶¶ 55–9.
  21. See generally *COURTING DISASTER*, *supra* note 10.

The judiciary in BiH lacks independence, legal standards are applied in an inconsistent manner, and some judges are incompetent.<sup>22</sup> The judiciary, police, and prosecutors often do not cooperate with one another.<sup>23</sup> At times, the police and the judiciary fail to protect minority groups that are victims of discrimination.<sup>24</sup>

Moreover, police are corrupt, mistreat detainees, and lack professionalism.<sup>25</sup> Low salaries and failure to discharge those who were involved in war crimes contribute to this problem.<sup>26</sup> Some officers have even been complicit in human trafficking.<sup>27</sup> As a result, the public lacks confidence in the ability of the police to carry out their duties competently and fairly.

## 2. War Crimes Prosecutions: *Uneven Results and Inadequate Responses*

BiH may only proceed with war crimes cases with the approval of the ICTY, as specified in the Rome Agreement of 1996.<sup>28</sup> The Office of the Prosecutor (OTP) at the ICTY reviews files submitted by BiH to evaluate whether “sufficient evidence has been produced to provide reasonable grounds for believing that a person who is the subject of the request has committed a

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22. See *id.* at 6; BiH COUNTRY REPORT 2002, *supra* note 10; *Ombudsman Report on Human Rights*, *supra* note 10; *Report of the Special Representative*, *supra* note 13, ¶ 10; Consultants’ Report to the OHR, *supra* note 10, at 1–2, 8.
  23. POLICING THE POLICE IN BOSNIA, *supra* note 12, at 12–15.
  24. *Id.* at 25–27; BiH COUNTRY REPORT 2002, *supra* note 10.
  25. See POLICING THE POLICE IN BOSNIA, *supra* note 12, at 22–25, 59; BiH COUNTRY REPORT 2002, *supra* note 10, at 11, 45; *Report of the Special Representative*, *supra* note 13, ¶ 10.
  26. AMNESTY INTERNATIONAL, BOSNIA-HERZEGOVINA: SHELIVING JUSTICE—WAR CRIMES PROSECUTIONS IN PARALYSIS 21–22 (2003) available at [web.amnesty.org/library/pdf/EUR630182003ENGLISH/\\$File/EYR6301803.pdf](http://web.amnesty.org/library/pdf/EUR630182003ENGLISH/$File/EYR6301803.pdf) [hereinafter SHELIVING JUSTICE].
  27. BiH COUNTRY REPORT 2002, *supra* note 10, at 45, 48; POLICING THE POLICE IN BOSNIA, *supra* note 12, at 28–32; HUMAN RIGHTS WATCH, HOPES BETRAYED: TRAFFICKING OF WOMEN AND GIRLS TO POST-CONFLICT BOSNIA AND HERZEGOVINA FOR FORCED PROSTITUTION 26–34 (2002) available at [www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf](http://www.hrw.org/reports/2002/bosnia/Bosnia1102.pdf).
  28. Rome Agreement, 18 Feb. 1996, BiH-FRY-Croat., ¶ 5, available at [www.ohr.int/ohr-dept/hr-rl/thedept/war-crime-tr/default.asp?content\\_id=6093](http://www.ohr.int/ohr-dept/hr-rl/thedept/war-crime-tr/default.asp?content_id=6093). Under the Rome Agreement, BiH must submit potential cases to the ICTY for approval, before BiH authorities can arrest war crimes suspects not already indicted by the ICTY. *Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of 18 February 1996* were then developed to facilitate process. These procedures have become known as the *Rules of the Road Procedures*. According to the *Rules of the Road Procedures*, “[p]ersons, other than those already indicted by the International Tribunal, may be arrested and detained for serious violations of international humanitarian law only pursuant to a previously issued order, warrant, or indictment that has been reviewed and deemed consistent with international legal standards by the International Tribunal.” *Procedures and Guidelines for Parties for the Submission of Cases to the International Criminal Tribunal for the Former Yugoslavia under the Agreed Measures of 18 February 1996*, ¶ 2 (on file with author) [hereinafter *Rules of the Road Procedures*].

serious violation of international humanitarian law.”<sup>29</sup> The OTP may then choose to prosecute the case itself at the ICTY. Alternatively, the OTP may limit itself to declaring that the evidence submitted on a particular case is sufficient for prosecution before returning it to BiH.<sup>30</sup> For example, a category “A” designation by the OTP signifies that the matter has sufficient evidence under international standards to initiate or to continue criminal proceedings for serious violations of international humanitarian law.<sup>31</sup> To date, the ICTY has returned approximately 600 category “A” cases to BiH with clearance to proceed with a trial domestically.<sup>32</sup>

However, it is evident that war crimes cases in BiH are not currently handled appropriately. In fact, the ICTY and OHR have concluded that war crimes cases prosecuted in BiH’s domestic courts have “proven, thus far, to be ineffective and not in compliance with international standards.”<sup>33</sup> Amnesty International estimates that at least 10,000 people are reasonably suspected of having committed or ordered others to commit serious violations of international humanitarian law in BiH.<sup>34</sup> Nonetheless, in addition to the cases tried before the ICTY, only an estimated seventy to eighty trials had taken place or were in process in BiH as of June 2003.<sup>35</sup> Furthermore, virtually all of these trials have taken place in the Federation and have been against the ethnic minority in that region. The RS has held

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29. *Rules of the Road Procedures*, *supra* note 28, ¶ 7(a). The Rules of the Road program is not in the OTP budget but rather is funded by voluntary donations of member states.
  30. *Id.* App. B.
  31. *Id.*
  32. Interview with ICTY Outreach, in Sarajevo, BiH (17 Jun. 2003).
  33. *Joint Conclusions of the Working Group of the International Criminal Tribunal for the former Yugoslavia (ICTY) and the Office of the High Representative regarding domestic prosecution of war crimes in Bosnia and Herzegovina*, ICTY/OHR 1 (21 Feb. 2003) (on file with author) [hereinafter *Joint Conclusions*]. See generally AMNESTY INTERNATIONAL, FAIR TRIALS MANUAL, available at [web.amnesty.org/library/pdf/POL300021998ENGLISH/\\$file/POL3000298.pdf](http://web.amnesty.org/library/pdf/POL300021998ENGLISH/$file/POL3000298.pdf) (detailed presentation of fair trial standards under international law) [hereinafter FAIR TRIALS MANUAL].
  34. Memorandum from Amnesty International, to the High Representative of Bosnia-Herzegovina 1 (1 Aug. 2002), available at [web.amnesty.org/library/pdf/EUR630092002ENGLISH/\\$File/EUR6300902.pdf](http://web.amnesty.org/library/pdf/EUR630092002ENGLISH/$File/EUR6300902.pdf) [hereinafter Memorandum to the BIH High Representative].
  35. Interviews with representatives from OHR, UN Office of the High Commissioner for Human Rights, OSCE, and ICTY Outreach, in Sarajevo, BiH (16–17 Jun. 2003). According to the OSCE, approximately twenty-four cases were closed (nineteen sentences, five acquitted) and about fifty were in process (including pre-trial, trial, retrial, and appellate stages). See OSCE Mission to BiH, War Crime Cases Processed before Domestic Courts—statistical information (5 Jun. 2003) (on file with author). However, judges have a significant number of inactive cases. For example, an OSCE representative in Sarajevo told the author that one judge in Sarajevo reported that he had 160 inactive cases. Additionally, there may be ninety Rules of the Road cases pending in Mostar. More accurate numbers should be available in the near future given some new reporting requirements on pre-indictment war crimes cases.

one war crimes trial against Bosnian Serb suspects, which began in 2004.<sup>36</sup>

Witness intimidation represents a serious and persistent problem in these cases.<sup>37</sup> Human Rights Watch recently summarized the problems in the Federation to include: “weak case preparation and limited competence on the part of the prosecution, the absence of rules on the effective use of evidence gathered by the ICTY in national trials, lack of cooperation between states in the region, and inadequate witness protection mechanisms.”<sup>38</sup>

By contrast to the Federation, the RS has made little progress on war crimes prosecutions and has conveyed its lack of interest in, if not hostility towards, them. For example, in September 2002, the RS issued a report contending that only approximately 100 Bosniaks were killed illegally in Srebrenica, as opposed to the generally accepted figure of more than 7,000 victims.<sup>39</sup> Further, on 7 March 2003, the BiH Human Rights Chamber ordered RS authorities to disclose what happened to forty-nine of the victims who were believed to have been killed at Srebrenica in July 1995; but the RS authorities refused to comply with the six-month deadline provided by the court.<sup>40</sup> In June 2004, High Representative Paddy Ashdown dismissed fifty-nine Bosnian Serb officials. Finally, in October 2004, RS authorities acknowledged for the first time that at least 7,000 had been killed in Srebrenica by Serbian forces.<sup>41</sup> As of mid-July 2003, no prosecutions related to Srebrenica had taken place in Bosnian courts.<sup>42</sup> As

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36. HUMAN RIGHTS WATCH, *JUSTICE AT RISK: WAR CRIMES TRIALS IN CROATIA, BOSNIA AND HERZEGOVINA, AND SERBIA AND MONTENEGRO* 3, 9 (2004), available at [hrw.org/reports/2004/icty1004/icty1004.pdf](http://hrw.org/reports/2004/icty1004/icty1004.pdf) [hereinafter *JUSTICE AT RISK*].
  37. BiH COUNTRY REPORT 2002, *supra* note 10; Interview with Edina Residovic, Attorney, in Sarajevo, BiH (16 Jun. 2003). See also *JUSTICE AT RISK*, *supra* note 36, at 21 (referring to the Ilijasevic trial).
  38. *The Trial of Dominik Ilijasevic*, BALKANS JUSTICE BULL. (Human Rights Watch, New York, N.Y.), Jan. 2004, available at [www.hrw.org/background/eca/balkans0104.htm](http://www.hrw.org/background/eca/balkans0104.htm).
  39. The RS Government Bureau for Liaison with the ICTY issued the report. It contends that about 1,800 to 1,900 Muslim soldiers died in fighting or as a result of wounds and that only 100 Bosniaks were killed illegally. HRW WORLD REPORT 2003, *supra* note 13, at 319–24; Patrick Moore, *Blame and Denial*, BALKAN REPORT, Vol. 6, No. 33, 6 Sept. 2002, available at [www.rferl.org/reports/balkan-report/2002/09/33-060902.asp](http://www.rferl.org/reports/balkan-report/2002/09/33-060902.asp).
  40. In January 2004, after pressure from High Representative Paddy Ashdown, the RS established a commission charged with investigating the Srebrenica massacre.
  41. Patrick Moore, *Bosnian Serbs Admit 7,000 Killed in Srebrenica Massacre*, RFE/RL NEWSLINE, Vol. 8, No. 196, 15 Oct. 2004, available at [www.rferl.org/newsline/2004/10/151004.asp](http://www.rferl.org/newsline/2004/10/151004.asp).
  42. In August 2001, the ICTY convicted Bosnian Serb General Radislav Krstic for genocide in Srebrenica. In October 2002, former Bosnian President Biljana Plavsic plead guilty to planning, instigating, and aiding in the persecution of Bosnian Muslims and Croats in BiH. In 2003, Momir Nikolic and Dragan Obrenovic plead guilty to their roles in the massacre at Srebrenica. Press Release, Amnesty International, Bosnia-Herzegovina Redress for Srebrenica (11 Jul. 2002), available at [web.amnesty.org/library/index/](http://web.amnesty.org/library/index/)

of October 2004, only one domestic war crimes trial had started in the RS.<sup>43</sup>

The authorities in the RS have also been uncooperative with the ICTY.<sup>44</sup> In August 2001, the Prosecutor for the ICTY contacted Bosnian authorities about the possibility of BiH establishing a court with international staff to try war crimes cases.<sup>45</sup> The OHR, United Nations Mission in Bosnia and Herzegovina, and the BiH Council of Ministers supported this idea as a way to advance judicial reform and prosecutions for war crimes.<sup>46</sup> In May 2002, consultants recommended to OHR that BiH establish an International Humanitarian Law division within the court of BiH.<sup>47</sup> These experts concurred that war crimes cases had thus far not been handled appropriately and cited a range of serious problems.<sup>48</sup>

In early 2003, an OHR and ICTY Working Group (the Working Group) concluded "that an effective war crimes trial capability within BiH is an essential part of the establishment of the rule of law and fundamental to the reconciliation process, creating necessary conditions to secure a lasting peace in BiH."<sup>49</sup> The Working Group also recommended that BiH establish a war crimes chamber. This chamber would have two trial panels and one appeals panel, each staffed with two international judges and one local judge.<sup>50</sup>

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ENGEUR630112002?open&of=ENG-BIH; ICTY, *The ICTY at a Glance*, available at [www.un.org/icty/glance/index.htm](http://www.un.org/icty/glance/index.htm).

43. JUSTICE AT RISK, *supra* note 36, at 9. In November 2002, the ICTY authorized the RS to proceed with war crimes prosecutions of eighteen Bosnian Serbs. HRW WORLD REPORT 2003, *supra* note 13, at 320. Some war crimes cases reportedly were in the initial states in 2003. However, the status of those cases is unknown. Interview with ICTY Outreach, in Sarajevo, Bosnia and Herzegovina (17 Jun. 2003).
44. HRW WORLD REPORT 2003, *supra* note 13, at 320; Press Release, ICTY, Address by Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia to the United Nations Security Council (10 Oct. 2003), available at [www.un.org/icty/pressreal/2003/p791-e.htm](http://www.un.org/icty/pressreal/2003/p791-e.htm) [hereinafter Del Ponte Address to UN Security Council].
45. *Report on the Judicial Status of the International Criminal Tribunal for the Former Yugoslavia and the Prospects for Referring Certain Cases to National Courts*, Enclosure, ¶ 59, U.N. Doc. S/2002/678 (2002), available at [ods-dds-ny.un.org/doc/UNDOC/GEN/N02/434/47/IMG/N02.43337.pdf?OpenElement](http://ods-dds-ny.un.org/doc/UNDOC/GEN/N02/434/47/IMG/N02.43337.pdf?OpenElement).
46. Consultants' Report to the OHR, *supra* note 10, at 6.
47. The International Humanitarian Law division would have a trial and appeals chamber. *Id.* at 2.
48. *Id.* at 8.
49. Press Release, OHR/ICTY, OHR-ICTY Working Group on Development of BiH Capacity for War-Crimes Trial Successfully Completed (21 Feb. 2003), available at [www.ohr.int/print/?content\\_id=29301](http://www.ohr.int/print/?content_id=29301) and [www.un.org/icty/pressreal/2003/p723-e.htm](http://www.un.org/icty/pressreal/2003/p723-e.htm) [hereinafter OHR-ICTY Working Group on BiH War Crimes].
50. *Joint Conclusions*, *supra* note 33, at 2. In addition, the OHR also envisions developing a witness protection program, building a state detention facility, and establishing a registrar's office. As of mid-2003, the estimated cost for the five year program for the war crimes court, staffing, costs, and state detention facility was 28 million Euros. *Id.* at 4 (also estimating that a state detention facility would cost an additional 11 million Euros).

The state level prosecutor's office would have a specialized war crimes department, initially to be headed by an international prosecutor. The Working Group further suggested that two international staff monitor local law enforcement in their investigations and apprehension of war crimes perpetrators, given weaknesses in those areas.<sup>51</sup>

The Working Group recommended that the war crimes chamber have jurisdiction over a narrow categories of cases so that it would handle less than one hundred cases in total.<sup>52</sup> The remaining cases would be "tried in a second phase of the project in [the Federation and RS] Chambers for war crimes which, [would] be established in light of the experience in the operation of the State Court Chamber and with the same procedures."<sup>53</sup> Implementation of this second phase is not being addressed at this time. In June 2003, the Peace Implementation Council (PIC) endorsed the establishment of a war crimes chamber, which is to begin its work in early 2005.<sup>54</sup> Criteria is currently being developed to determine which cases are the most serious and will be handled by the War Crimes Chamber.

### 3. Predictable Problems

While it is laudable that war crimes will be addressed in Bosnian courts in a more professional manner, the plans under consideration have critical

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51. OHR-ICTY Working Group on BiH War Crimes, *supra* note 49.

52. The Working Group recommended that the BiH war crimes chamber limit itself to handling cases: (1) deferred to BiH for which indictments had already been issued by the OTP and confirmed by judge at the ICTY, (2) where the ICTY deferred but indictments had not yet been issued, and (3) considered to be "sensitive" Rules of the Road matters. According to best estimates, there are approximately fifteen defendants that would fall under the first category of cases, about forty-five defendants in the second category, and approximately twenty to thirty of these "more sensitive" cases in the third category. *Joint Conclusions, supra* note 33, at 2; Interview with official from OHR, in Sarajevo, BiH (16 Jun. 2003).

53. *Joint Conclusions, supra* note 33, at 2.

54. See Statement, OHR, Declaration by the PIC Steering Board (12 Jun. 2003) available at [www.ohr.int/pic/default.asp?content\\_id=30074](http://www.ohr.int/pic/default.asp?content_id=30074); *Tenth Annual Report of the International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991*, U.N. GAOR, 58th Sess., ¶ 6, U.N. Doc. A/58/297-S/2003/829 (2003), available at [www.un.org/icty/rappannu-e/2003/AR03e.htm](http://www.un.org/icty/rappannu-e/2003/AR03e.htm) [hereinafter *10th Annual Report of the ICTY*]. As a result of a donors' conference in late October 2003, the international community pledged 16.1 million Euros to start up a war crimes chamber in BiH. Statement, OHR, Communiqué by the PIC Steering Board, ¶ 15 (11 Dec. 2003), available at [www.ohr.int/pic/default.asp?content\\_id=31261](http://www.ohr.int/pic/default.asp?content_id=31261). These contributions will be used towards the start up costs of 17.2 million Euros estimated to be needed for the first two years of its operation. Press Release, ICTY/OHR, Donors Raise 15.6 million Euros for War Crimes Chamber of BiH Court (30 Oct. 2003), available at [www.un.org/icty/pressreal/2003/p797-e.htm](http://www.un.org/icty/pressreal/2003/p797-e.htm).

shortcomings. The proposed war crimes court will handle only a small fraction of cases out of the thousands of war crimes cases that could and should be prosecuted. The plan also fails to include any war crimes chambers at the local level. Furthermore, there is nothing in the current proposal for the vast majority of war crimes cases, which by default could and should be conducted in local or entity courts—not even provisions for monitoring, training, or advisors. As such, war crimes cases will likely continue (or not, as is the case in the RS) with the same unsatisfactory results and failure to meet international standards.<sup>55</sup>

First, these lower profile cases are often important at the local and individual level. Victims may be more concerned with seeing the individuals who killed their loved ones brought to justice than with prosecuting those who planned the strategies to inflict widespread abuses and to commit war crimes. The continued failure to deal appropriately with these lower profile cases may have a far reaching and negative impact on BiH's ability to establish the rule of law.

Second, there are only two staff members in the Rules of the Road Unit at the ICTY's OTP; both are based in the Hague. If one of the goals of the international community is to train the local populations to run their own institutions, at least one Rules of the Road representative should be based in BiH. That way, the OTP, local prosecutors, and local law enforcement officials could directly discuss why certain cases have been returned to BiH based on insufficient evidence and what additional evidence might make a difference. This interaction and follow-up could play an important training role.

Third, a number of critical gaps in the proposed criminal judicial and legislative scheme exist. Specifically, there are no provisions to address regional cooperation among BiH, Croatia, and Serbia and Montenegro.<sup>56</sup> This issue is critical given that witnesses and defendants frequently cross borders to avoid arrest or testifying in court. These countries cannot extradite those who are wanted in another jurisdiction under their current laws. The same is true with access to documents from another country and even within BiH. One lawyer explained that even the Federation's access to documentation in the RS can be problematic and depends on the goodwill of RS officials.<sup>57</sup>

Fourth, an effective witness protection program (although admittedly

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55. See generally SHELIVING JUSTICE, *supra* note 26, at 4–6.

56. See *id.* at 10–14; JUSTICE AT RISK, *supra* note 36, at 18; Memorandum to the BiH High Representative, *supra* note 34, at 9 (describes inter-entity and international cooperation being of “crucial importance”); Interview with Edina Residovic, *supra* note 35.

57. Interview with Edina Residovic, *supra* note 35.

expensive) is widely recognized as key and will require significant attention.<sup>58</sup> BiH's Chief State Prosecutor has accurately noted that if there are no witness protection measures, there will be no war crimes cases prosecuted.<sup>59</sup> In the fall of 2004, legislation was enacted to strengthen witness protective measures; it is too soon to know the impact of these amendments.<sup>60</sup>

Finally, the lack of involvement of and consultation with local authorities from the outset is problematic.<sup>61</sup> While the fact that the OHR is now seeking local approval of the plan is a positive development, the OHR needs to bring locals to the table from the beginning of the process to help plan significant institutions, particularly given that one of its missions is capacity-building. As a practical matter, the OHR will need the cooperation of and funding from locals to pay for judges and prosecutors assigned to the new war crimes chamber. Another pragmatic reason for local participation is to ensure that local government officials take ownership of and responsibility for the new war crimes chamber given that it will be completely staffed by locals within five years.

## C. Croatia

### 1. A Troubled Judiciary

The judiciary represents one of the primary obstacles to the rule of law in Croatia. Problems of excessive trial delays, inefficiencies, and unqualified staff continue to hamper reform. Criminal and civil cases experience significant delays at the trial and appellate levels.<sup>62</sup> In 2002, the European Court of Human Rights issued several rulings concluding that Croatia's judiciary system had violated the rights of its citizens due to lengthy proceedings and excessive delays.<sup>63</sup> As of February 2003, there was a

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58. See *SHELVING JUSTICE*, *supra* note 26, at 18–20.

59. Interview with OSCE Legal Officer, Rule of Law Unit, in Zagreb, Croatia (14 Mar. 2003).

60. Gordana Katana, *Bosnia: War Crimes Trials Process Stalled*, TRIBUNAL UPDATE, No. 376, 8 Oct. 2004, available at [www.iwpr.net/index.pl?archive/tri/tri\\_376\\_4\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_376_4_eng.txt).

61. The OHR's failure to include the full participation of locals is not a new issue. See *SHELVING JUSTICE*, *supra* note 26, at 22.

62. *OSCE Croatia Status Report No. 12*, *supra* note 9, at 12; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 1, 10; *OSCE Croatia Status Report No. 10*, *supra* note 11, at 4–5, 8; CROATIA COUNTRY REPORT 2002, *supra* note 13.

63. See *OSCE Croatia Status Report No. 10*, *supra* note 11, at 4–5. As of April 2002, the European Court of Human Rights (ECtHR) had received 362 complaints against Croatia; 250 of them had been submitted during the first four months of 2002. *Id.* In March 2002, the Croatian Parliament adopted an amendment that addressed some of the concerns identified by the ECtHR, but these problems have persisted. In 2003, the

backlog of 1.3 to 1.5 million cases in a country that has a population of approximately 4.5 million people.<sup>64</sup> Part of the problem is that trial judges do not always follow the law that requires them to issue written verdicts within six months of their decisions; consequently, suspects have been detained past the six-month limit.<sup>65</sup> Furthermore, the judiciary continues to be inefficient and lack qualified staff,<sup>66</sup> hindered by a judicial appointment process criticized as non-transparent.<sup>67</sup> Citizens understandably have little confidence in the legal system.

## 2. Flawed War Crimes Proceedings Continue

The challenges in ordinary criminal cases are magnified by the ethnic, political, and emotional dimensions of war crimes cases.<sup>68</sup> Although Croatia has been increasing its efforts to prosecute those suspected of war crimes that occurred during the “Homeland War,” the cases are marred by witness intimidation, politicization, and the lack of an independent and trained judiciary.<sup>69</sup>

Neither ethnic Croats nor ethnic Serbs have received fair trials. The vast majority of defendants have been ethnic Serbs and they typically receive harsher sentences than do the few ethnic Croats who have been prosecuted.<sup>70</sup>

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ECtHR issued another decision finding Croatia in violation of the right to a fair trial within a reasonable time. *Status Report No. 13*, OSCE Mission to Croatia, at 10, n.25 (Dec. 2003), available at [www.osce.org/documents/mc/2003/12/1976\\_en.pdf](http://www.osce.org/documents/mc/2003/12/1976_en.pdf) [hereinafter *OSCE Croatia Status Report No. 13*].

64. *OSCE Croatia Status Report No. 12*, *supra* note 9, at 13; CROATIA COUNTRY REPORT 2002, *supra* note 13.
65. CROATIA COUNTRY REPORT 2002, *supra* note 13.
66. Commission Staff Working Paper: Croatia, *supra* note 9, at 6–8 (“The functioning of the judiciary remained a serious problem.”); *OSCE Croatia Status Report No. 13*, *supra* note 63, at 10; *OSCE Croatia Status Report No. 12*, *supra* note 9, at 11–13; *OSCE Croatia Status Report No. 10*, *supra* note 11, at 4; CROATIA COUNTRY REPORT 2001, *supra* note 11; ABA/CEELI INDEX FOR CROATIA, *supra* note 11, at 11, 13–14, 24–26.
67. Interview with Natasa Durovic, *supra* note 9.
68. See *OSCE Croatia Status Report No. 13*, *supra* note 63, at 13–14.
69. *OSCE Croatia Status Report No. 12*, *supra* note 9, at 14; JUSTICE AT RISK, *supra* note 36, at 23; *Supplementary Report, War Crime Proceedings in Croatia and Findings from Trial Monitoring*, OSCE Mission to Croatia 7–8, 10–15 (22 Jun. 2004), available at [www.osce.org/documents/mc/2004/06/3165\\_en.pdf](http://www.osce.org/documents/mc/2004/06/3165_en.pdf) [hereinafter *Supplementary Report*]; ABA/CEELI INDEX FOR CROATIA, *supra* note 11, at 3.
70. In Croatia from 1998 to 2000, there were fifty-two war crimes indictments. In 2001, there were 112 new indictments. Of the 1,850 war crimes cases under review as of late 2001, 1,467 continued to be pending as of mid-2003. The OSCE reports that ninety-nine percent of those cases still pending are against Serb suspects. See *OSCE Croatia Status Report No. 12*, *supra* note 9, at 14; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 10; *OSCE Croatia Status Report No. 10*, *supra* note 11, at 7; *Supplementary Report*, *supra* note 69, at 2.

The Organization for Security and Co-operation in Europe (OSCE) observes: “At all stages of procedure from arrest to conviction, the application of a double standard against Serb defendants and in favour of Croat defendants continues as a general rule.”<sup>71</sup> In support of this statement, the OSCE cites acquittals or minimal sentences in cases in which ethnic Croats have been the defendants.<sup>72</sup> Moreover, ethnic Serbs have been arrested based on weak evidence, experienced lengthy pretrial detentions, and remained in jail based on questionable convictions in unfair and politically motivated trials.<sup>73</sup> Generally, courts continue to conduct mass trials, to proceed with *in absentia* trials, and to convict defendants based on questionable evidence.<sup>74</sup>

The handful of war crimes cases against ethnic Croats have been problematic as well.<sup>75</sup> Two of these war crimes trials have received a great deal of media attention: the Lora and Gospić cases. The Lora case represents the more troublesome of the two. In Lora, seven military police officers were arrested for crimes that they allegedly committed in 1992 against ethnic Serb prisoners in the Lora military prison. Witness intimidation represented a major obstacle in the case, as it does in many war crimes cases. In this case alone, the public prosecutor, a former military police officer who was a key prosecution witness, a former prisoner, and the father of another

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71. *OSCE Croatia Status Report No. 13*, *supra* note 63, at 13. See also *OSCE Croatia Status Report No. 10*, *supra* note 11, at 8; *Supplementary Report*, *supra* note 69, at 2.

72. OSCE identifies the Virovitica, Bjelovar, Pakracka Poljana and Varivode cases as examples. *OSCE Croatia Status Report No. 10*, *supra* note 11, at 8, n.17.

73. The US State Department estimates that at the end of 2001, there were approximately sixty-nine people in prison based on highly questionable circumstances; one year later the number was down to about twenty-one individuals. *CROATIA COUNTRY REPORT 2002*, *supra* note 13; *OSCE Croatia Status Report No. 10*, *supra* note 11, at 7, n.14; *CROATIA COUNTRY REPORT 2001*, *supra* note 11.

74. *CROATIA COUNTRY REPORT 2002*, *supra* note 13; *OSCE Croatia Status Report No. 13*, *supra* note 63, at 13–14; *OSCE Croatia Status Report No. 12*, *supra* note 9, at 15; *Supplementary Report*, *supra* note 69, at 10–15. For example, twelve Serbs were convicted of war crimes on 14 May 2002 in the Osijek County Court. *OSCE Croatia Status Report No. 10*, *supra* note 11, at 8, n.16. For fair trial requirements, see International Covenant on Civil and Political Rights, *adopted* 19 Dec. 1966, G.A. Res. 2200 (XXI), U.N. GAOR, 21st Sess., Supp. No. 16, art. 14(3), U.N. Doc. A/6316 (1966), 999 U.N.T.S. 171 (*entered into force* 23 Mar. 1976) (“in the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality . . . To be tried in his presence, and to defend himself in person or through legal assistance of his own choosing.”); see generally *FAIR TRIALS MANUAL*, *supra* note 33.

75. European Commission Staff Working Paper: Croatia, *supra* note 9, at 12; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 1, 10–11; HRW *REPORT 2003*, *supra* note 13, at 326; *CROATIA COUNTRY REPORT 2002*, *supra* note 13. See also *JUSTICE AT RISK*, *supra* note 36, at 23. The then President of the Supreme Court reportedly asserted that Croats could never commit war crimes. He now sits on the Constitutional Court. Interview with Natasa Durovic, *supra* note 9.

witness all received threats.<sup>76</sup> Witnesses living in Serbia and Bosnia failed to appear at trial due to safety concerns. Others changed their pre-trial testimony due to threats.<sup>77</sup> The judge openly displayed bias in favor of the Croat defendants. He determined that war crimes charges were inappropriate given that the victims were Croatian citizens and Split was not occupied by enemy forces. All defendants in the Lora case were acquitted in highly flawed proceedings.<sup>78</sup>

The Gospić trial concerned the execution of ethnic Serb civilians in the western part of Croatia, known as Gospić.<sup>79</sup> The Gospić proceedings were marked by the murder of, intimidation of, and threats to witnesses. In August 2000, Milan Levar, a former police officer and an ethnic Croat, was murdered after he cooperated with ICTY investigators. No suspects have been arrested for his death.<sup>80</sup> The presiding judge received death threats.<sup>81</sup> The Court concluded that the defendants organized and carried out the execution of approximately fifty ethnic Serb civilians. Public demonstrations

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76. Press Release, Amnesty International, Croatia: Victims and Witnesses in War Crimes Trials Must be Adequately Protected (20 Jun. 2002), available at [web.amnesty.org/library/Index/ENGUR640022002?open&of=ENG-HRV](http://web.amnesty.org/library/Index/ENGEUR640022002?open&of=ENG-HRV) [hereinafter Croatia Victims and Witnesses].
  77. See OSCE Mission to Croatia, *Croatia and Yugoslavia Co-operate to Facilitate Testimony in War Crimes Trials*, NEWS IN BRIEF (24 Sept. 2002), available at [www.osce.org/croatia/news\\_in\\_brief/archive/240902.pdf](http://www.osce.org/croatia/news_in_brief/archive/240902.pdf) [hereinafter *Croatia and Yugoslavia Cooperate*]; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 8; CROATIA COUNTRY REPORT 2002, *supra* note 13.
  78. *World in Brief: Military Officers Cleared of Charges*, WASHINGTON POST, 23 Nov. 2002, at A20. They were indicted for the torture of dozens of prisoners and the murder of two prisoners; approximately seventy of the prisoners allegedly were disappeared. On 10 June 2002, the trial began in Split County Court. Observers noted that Judge Slavko Lozina, the presiding judge, showed bias in favor of the Croat defendants. On 22 July 2002, the trial court released the defendants. The Supreme Court reversed the trial court's decision to release the defendants. Two of the defendants remained at large when the trial resumed; at least one was tried in absentia. *Croatia and Yugoslavia Cooperate*, *supra* note 77. In November 2002, Judge Lozina acquitted the accused. As of March 2003, no written verdict had been issued. The Prosecutor's Office has stated that it would appeal but it is unable to do so until a written decision is issued. The Supreme Court and the Ministry of Justice initiated an investigation into the numerous irregularities that took place during the trial but there were no results as of December 2002. CROATIA COUNTRY REPORT 2002, *supra* note 13; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 10; HRW WORLD REPORT 2003, *supra* note 13, at 326.
  79. The trial proceedings were held in Rijeka. Seventeen witnesses from Serbia and Montenegro were allowed to provide their testimony before a judge in Belgrade when they expressed concerns for their safety. *Croatia and Yugoslavia Cooperate*, *supra* note 77.
  80. INTERNATIONAL CRISIS GROUP, CROATIA: FACING UP TO WAR CRIMES 6 (2001) available at [www.icg.org/library/documents/report\\_archive/A400468\\_16102001.pdf](http://www.icg.org/library/documents/report_archive/A400468_16102001.pdf) [hereinafter FACING UP TO WAR CRIMES]; CROATIA COUNTRY REPORT 2002, *supra* note 13.
  81. JUSTICE AT RISK, *supra* note 36, at 11; *OSCE Croatia Status Report No. 11*, *supra* note 12, at 11.

took place when General Mirko Norac was arrested and when he and his co-defendants were convicted.<sup>82</sup>

The Lora and Gospić cases highlight the emotional nature of war crimes trials, as well as witness intimidation and security concerns.<sup>83</sup> In war crimes trials, judges, prosecutors, defense attorneys, and witnesses receive threats.<sup>84</sup> Witnesses often change or “forget” their testimony as the result of threats or refuse to appear in court.<sup>85</sup> One witness in the Gospić case reportedly told the court words to the effect of: “If you were in my place, you would not remember anything either.”<sup>86</sup>

For a number of years, political will and public support for war crimes cases have been lacking in Croatia. Croatian authorities have sent inconsistent messages to the public regarding war crimes, and the European Commission has described Croatia’s attitude toward the ICTY as “lukewarm.”<sup>87</sup> They have not turned over indicted war criminal General Gotovina, who remains at large and is regarded by many Croats as a hero.<sup>88</sup> The government is cooperating to a certain degree with the ICTY but it is still not providing all requested information.<sup>89</sup> Croatia only appears to increase its

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82. Two were acquitted (one before trial and one after trial). In March 2003, the court sentenced three defendants to ten to fifteen years of imprisonment. Hundreds of veterans protested the convictions. Major General Mirko Norac was sentenced to twelve years, Tihomir Oreskorvic to fifteen years, and a soldier to ten years. *Mass protests in Croatia after Gospić killers sentenced*, B92 DAILY NEWS BULLETIN, 24 Mar. 2003, available at [www.b92.net/english/news/index.php?dd=24&mm=3&yyyy=2003](http://www.b92.net/english/news/index.php?dd=24&mm=3&yyyy=2003); Drago Hedl, *Regional Report: Rijeka Court Convicts Croat Suspects*, TRIBUNAL UPDATE, No. 305 (Institute for War & Peace Reporting) 17–21 Mar. 2003, available at [www.iwpr.net/index.pl?archive/tri/tri\\_305\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_305_3_eng.txt); OSCE Croatia Status Report No. 10, *supra* note 11, at 7.
83. See JUSTICE AT RISK, *supra* note 36, at 23; CROATIA COUNTRY REPORT 2002, *supra* note 13, for other examples.
84. JUSTICE AT RISK, *supra* note 36, at 11, 17, 23; OSCE Croatia Status Report No. 11, *supra* note 12, at 11.
85. JUSTICE AT RISK, *supra* note 36, at 23; OSCE Croatia Status Report No. 11, *supra* note 12, at 11; OSCE Croatia Status Report No. 10, *supra* note 11, at 8; *Supplementary Report*, *supra* note 69, at 7–8; Croatia Victims and Witnesses, *supra* note 76.
86. Interview with Natasa Durovic, *supra* note 9.
87. HUMAN RIGHTS WATCH, CROATIA: BENCHMARKS FOR MEETING E.U. REQUIREMENTS ON REFUGEE RETURNS AND WAR CRIMES ACCOUNTABILITY, available at [http://hrw.org/English/docs/200401/08/croati6915\\_txt.htm](http://hrw.org/English/docs/200401/08/croati6915_txt.htm) [hereinafter CROATIA: BENCHMARKS FOR MEETING E.U. REQUIREMENTS]. President Stjepan Mesic noted the importance of individual criminal accountability, but a conflicting message was communicated when high government officials attended the funeral of General Bobetko, who had been indicted by the ICTY for allegedly having committed war crimes. Drago Hedl, *Regional Report: Controversy Follows Bobetko to the Grave*, TRIBUNAL UPDATE, No. 311 (Institute for War & Peace Reporting) 8 May 2003, available at [www.iwpr.net/index.pl?archive/tri/tri\\_311\\_5\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_311_5_eng.txt).
88. Del Ponte Address to the UN Security Council, *supra* note 44; OSCE Status Report No. 13, *supra* note 63, ¶¶ 12–13.
89. Interview with representative from ICTY OTP, in Zagreb, Croatia (Mar. 2003); European Commission Staff Working Paper: Croatia, *supra* note 9, at 11; 10th Annual Report of the ICTY, *supra* note 54, ¶¶ 240–41.

reform efforts when the European Union and the United States exert pressure.<sup>90</sup> While public attitudes may be slowly changing, the political leadership needs to encourage public discussion about the war.<sup>91</sup>

### 3. Landmark Trials by a "Victor": But Judicial Reform Must be Realized

The Nuremberg trials have often been described as a form of "victor's justice." There, the "winning side" did not try "its own" for war crimes.<sup>92</sup> Seen in this context, it is a positive sign that Croatia has gone forward with war crimes trials against ethnic Croats. Those who fought for Croatia during the "war of self defense" are viewed as heroes. Croatia sees itself in a unique position: it is the first time a "victor" has prosecuted war crimes against "its own," a landmark achievement.

At the same time, few cases have been conducted in a fair manner or have met international standards. While certainly there are individual judges who have acted professionally, unfortunately, many others have not. The lack of witness protective measures further undermines Croatia's ability to try war crimes in a just manner.<sup>93</sup>

Croatia recently adopted legislation to allow war crimes cases to be transferred to courts in its four largest cities (Zagreb, Split, Rijeka, and Osijek) under certain circumstances.<sup>94</sup> As of September 2004, no such referrals had been made. However, these courts have not demonstrated an ability to dispense justice. The fundamental weaknesses in the criminal justice system must be addressed, not only for war crimes trials, but for the long term goal of establishing the rule of law in Croatia. Although efforts are being made to deal with the shortcomings, it is unclear whether results will be forthcoming in the immediate future.

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90. See generally, Sanja Romic, *Gotovina Blocks Croatia's March to Brussels*, BALKAN CRISIS REPORT, No. 523 (Institute for War & Peace Reporting, London) 29 Oct. 2004, available at [www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200410\\_523\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200410_523_2_eng.txt).
91. According to a poll in March 2003, approximately two thirds responded that the government should cooperate with war crimes cases and only 14 percent opposed working with the ICTY. Patrick Moore, *Croatian Polls Show Support for War Crimes Trials*, RFE/RL NEWSLINE, Vol. 7, No. 59, 27 Mar. 2003, available at [www.rferl.org/newsline/2003/03/270303.asp](http://www.rferl.org/newsline/2003/03/270303.asp). But see *Croatia: Facing Up to War Crimes*, *supra* note 80, at 7 (regarding more "ambiguous" public attitudes).
92. See generally, MARTHA MINOW, BETWEEN VENGEANCE AND FORGIVENESS 30 (1998).
93. See JUSTICE AT RISK, *supra* note 36, at 19–20, 23; CROATIA: BENCHMARKS FOR MEETING E.U. REQUIREMENTS, *supra* note 87.
94. *Supplementary Report*, *supra* note 69, at 5. The Law on the Implementation of the Statute of the International Criminal Court and Criminal Prosecution for Acts Against War and Humanitarian International Law was adopted in October 2003. The OSCE indicates: "[i]t remains unclear whether these new provisions will result in an improvement in the processing of war crimes cases." *OSCE Croatia Status Report No. 13*, *supra* note 63, at 13.

## D. Serbia<sup>95</sup>

### 1. Before and After the Assassination of Prime Minister Djindjić

As in other regions of the former Yugoslavia, Serbia's criminal justice system has a long way to go before it can handle typical trials in a fair and transparent manner, much less war crimes cases. Serbia continues to suffer from the legacies of the Milošević regime, which fanned nationalism and forged ties between organized crime and the government.<sup>96</sup> Because the post-Milošević administrations never purged themselves of his associates and appointees, many corrupt government officials, judges, and police remain in power.<sup>97</sup> As a result, the public holds the judiciary in particularly low esteem.<sup>98</sup> In fact, according to one survey, the public regards the lack of an independent judiciary as the most significant human rights problem in the country.<sup>99</sup> While the Minister of Justice has publicly attacked the judiciary on a number of occasions, no judges have been tried or formally censured.

On 12 March 2003, Prime Minister Djindjić was assassinated.<sup>100</sup> A state of emergency was declared, and the government detained more than 10,000 people in "Operation Sabre." It pushed through legislation on organized crime and the organization of the public prosecutor's office. The government dismissed a number of judges and forced the President of the

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95. On 4 February 2003, the Federal Republic of Yugoslavia, which was comprised of the republics of Serbia and Montenegro, officially changed its name to the State Union of Serbia and Montenegro [hereinafter Serbia and Montenegro]. As a result of a new constitutional charter, the Republics of Serbia and Montenegro now have increased authority and the federal government may exercise power in only a few areas, including foreign relations. The vast majority of government institutions in the republics of Serbia and Montenegro are separate. As of the time this article was written, Kosovo, which is part of Serbia, was under United Nations control pursuant to UN Security Council Resolution 1244. See *infra* note 130 and accompanying text. This article focuses on Serbia and Kosovo and not Montenegro.
96. See generally HELSINKI COMMITTEE FOR HUMAN RIGHTS IN SERBIA, THE PREMIER ZORAN DJINDJIĆ ASSASSINATION AND IMPACT OF THE STATE OF EMERGENCY (2003), available at [www.helsinki.org.yu/focus\\_text.php?lang=en&idteks=956](http://www.helsinki.org.yu/focus_text.php?lang=en&idteks=956) [hereinafter DJINDJIĆ ASSASSINATION]; MEDIA & WAR (Nena Skopljanac Brunner et al., eds., 2000) (role of the media in Croatia and Yugoslavia during the war); INTERNATIONAL CRISIS GROUP, SERBIA AFTER DJINDJIĆ 1–7 (2003), available at [www.icg.org/library/documents/report\\_archive/A400921\\_18032003.pdf](http://www.icg.org/library/documents/report_archive/A400921_18032003.pdf).
97. FRY COUNTRY REPORT 2002, *supra* note 10, at 21.
98. ABA/CEELI INDEX FOR SERBIA, *supra* note 10, at 10. See generally BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 396.
99. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 414–18.
100. At the time this article was written, the trials of some of those allegedly involved in the assassination had begun. It appears that Serbian Interior Ministry's Special Operations Unit, also known as the Red Berets, and an organized crime gang known as the Zemun Clan were involved in the assassination. See DJINDJIĆ ASSASSINATION, *supra* note 96, at 7, 9.

Supreme Court and the Chief Public Prosecutor to resign; key court presidents were replaced with political appointees.<sup>101</sup> The government took measures that were over-broad and violated international norms.<sup>102</sup> Overt pressure on and politicization of the judiciary has increased. Government officials frequently pronounce their own determination of guilt in the media before a trial has started, notwithstanding the presumption of innocence.<sup>103</sup> At the same time, the government has taken steps to restrict the press.<sup>104</sup>

## 2. Limited War Crimes Trials: Lack of Political Will

Serbia's lack of will to investigate violations of humanitarian law is illustrated by the fact that few serious trials have taken place to date.<sup>105</sup> One human rights activist estimates that there may be thousands of war crimes

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101. See generally *id.* at 7–11. See also *Statement to the U.S. Commission on Security and Cooperation in Europe*, Human Rights Watch (4 Jun. 2003), available at [www.hrw.org/backgrounder/eca/serbiatestimony060403.htm](http://www.hrw.org/backgrounder/eca/serbiatestimony060403.htm) [hereinafter *HRW Statement to U.S. Commission*].
  102. Some of the steps initially taken, such as the dismissal of the judges, were done in contravention of the law. Laws were enacted without public discussion and some measures have subsequently been ruled unconstitutional. The public initially supported the government actions against the unpopular judiciary and the much needed crackdown on organized crime. The law on the public prosecutor changed the mechanism of appointing prosecutors, so now the government has an increased role in selecting and dismissing all prosecutors, rather than the more independent High Council of Justice. See *State of Emergency and Judiciary*, OSCE Mission to Serbia and Montenegro (2003) (on file with author); *DJINDJIC ASSASSINATION*, *supra* note 96, at 7–17 (for summary of measures taken during a state of emergency); Letter to Serbian Prime Minister Zoran Zivkovic from Human Rights Watch (25 Mar. 2003), available at [www.hrw.org/press/2003/03/serbia032503.ltr.htm](http://www.hrw.org/press/2003/03/serbia032503.ltr.htm).
  103. *SHADOW OF NATIONALISM*, *supra* note 11, at 152; *Overview of Human Rights Situation for period February–April 2003*, Human Rights Field Operation in Serbia and Montenegro (& Kosovo), UN High Commissioner for Human Rights 5 (on file with author).
  104. INTERNATIONAL CRISIS GROUP, *SERBIAN REFORM STALLS AGAIN* 9–12 (2003), available at [www.icg.org/library/documents/report\\_archive/A401049\\_17072003.pdf](http://www.icg.org/library/documents/report_archive/A401049_17072003.pdf) [hereinafter *SERBIAN REFORM STALLS AGAIN*].
  105. For example, the Belgrade Centre for Human Rights states that the evidence presented at the Ranisavljevic war crimes trial “showed that senior state officials had been informed about planned abduction but had done nothing.” High ranking people were implicated but there has been no indication that any actions will be brought against them. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 312–13; Interview with Sonja Biserko, Helsinki Committee for Human Rights, in Belgrade, Serbia and Montenegro (21 Aug. 2003); Interview with representative from Humanitarian Law Center, in Belgrade, Serbia and Montenegro (4 Sept. 2003); *War Crimes Before Domestic Courts: OSCE Monitoring and empowering of the domestic courts to deal with War Crimes*, Rule of Law and Human Rights Department, OSCE Mission to Serbia and Montenegro 47–48 (Oct. 2003) available at [www.osce.org/documents/fry/2003/11/156\\_en.pdf](http://www.osce.org/documents/fry/2003/11/156_en.pdf) [hereinafter *War Crimes Before Domestic Courts*]. In March 2004, the war crimes trial against eight suspects charged with having killed approximately 200 Croats near Vukovar in 1991 are scheduled to begin.

cases that should be tried in Serbia. Mass graves containing hundreds of bodies have been identified in several locations, including at two police training ranges.<sup>106</sup> As of June 2004, no criminal indictments relating to these mass graves had been issued; instead, police and prosecutors have accused one another for this failure.<sup>107</sup> The new war crimes prosecutor claims that investigations are ongoing.<sup>108</sup>

Only nine war crimes cases have started or been held in Serbia or Montenegro.<sup>109</sup> The fairness of these trials has been mixed.<sup>110</sup> Prosecutors have been criticized for failing to produce sufficient evidence, such as neglecting to identify appropriate witnesses.<sup>111</sup> In one case, the prosecution argued in favor of a reduced sentence for the defendant. Prosecutors, witnesses, and at least one judge have received threats. For example, a case was transferred to Belgrade from southern Serbia and to a different prosecutor because of threats.<sup>112</sup> After that change of venue, a former member of the Special Anti-Terrorist Unit of the Serbian police initially claimed he was ill and did not appear at trial. He subsequently did testify and explained that he was afraid to take the stand after his former commander warned him that there would be “drastic consequences” if he testified.<sup>113</sup> The defendant was ultimately convicted.

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106. JUSTICE AT RISK, *supra* note 36, at 15 (poor police cooperation); Interview with Sonja Biserko, *supra* note 105. More than 500 bodies believed to have been Kosovars killed in 1999 were uncovered outside of Belgrade in 2001. See *HRW Statement to U.S. Commission*, *supra* note 101.
107. Human Rights Watch reports that the police have not allowed a serious investigation and have failed to provide evidence to the prosecutors. *Id.* In November 2003, Serbia’s special war crimes prosecutor took oversight of this investigation. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 313–14.
108. AMNESTY INTERNATIONAL, EUROPE AND CENTRAL ASIA: SUMMARY OF AMNESTY INTERNATIONAL’S CONCERNS IN THE REGION (JANUARY–JUNE 2004) 72 (2004), available at [web.amnesty.org/library/pdf/EUR010052004ENGLISH/\\$File/EUR0100504.pdf](http://web.amnesty.org/library/pdf/EUR010052004ENGLISH/$File/EUR0100504.pdf).
109. *War Crimes Before Domestic Courts*, *supra* note 105, at 8–11. See generally BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 309–11.
110. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 306–14; Humanitarian Law Center, War Crimes Trials Before National Courts, available at [www.hlc.org.yu/english/War\\_Crimes\\_Trials\\_Before\\_National\\_Courts/index.php](http://www.hlc.org.yu/english/War_Crimes_Trials_Before_National_Courts/index.php); *War Crimes Before Domestic Courts*, *supra* note 105, at 42–47.
111. See *The First Phase of the Sjeverin Trial*, BALKANS JUSTICE BULLETIN (Human Rights Watch, NY) 15 Mar. 2003, available at [www.hrw.org/backgrounder/eca/serbia031503.htm](http://www.hrw.org/backgrounder/eca/serbia031503.htm).
112. In the Nikolic case, the judge, prosecutor, and a reporter received anonymous threats. The Cvjetan case was transferred from Prokuplje in southern Serbia to Belgrade and a new prosecutor was assigned the case due to threats received by the prosecutor. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 311.
113. Press Release, Human Rights Watch, Serbia and Montenegro: Protection Needed for War Crimes Witness (11 Dec. 2003), available at [www.hrw.org/press/2003/12/serbia121103.htm](http://www.hrw.org/press/2003/12/serbia121103.htm); *War Crimes Witness Claims Intimidation*, DAILY NEWS BULLETIN, 10 Dec. 2003, available at [www.b92.net/english/news/index.php?dd=10&mm=12&yyyy=2003](http://www.b92.net/english/news/index.php?dd=10&mm=12&yyyy=2003).

On another front, Serbia has failed to cooperate with investigators and prosecutors from the ICTY<sup>114</sup> and still has not harmonized its laws with the ICTY statute. For example, as of 2002, approximately twelve individuals indicted by the ICTY were believed to be living in Yugoslavia.<sup>115</sup> Additionally, while Serbia has provided some documents to the ICTY more recently, it has resisted this type of cooperation and has not always provided all documents sought.<sup>116</sup> Serbia generally acts on war crimes issues only when it receives direct and immediate pressure; the government appears most willing to arrest ICTY indictees just before deadlines for cooperation set by the United States in order to continue receiving aid.<sup>117</sup> Vojislav Kostunica, Serbia's current Prime Minister, does not support cooperation with the ICTY.<sup>118</sup> More positively, in July 2003 Serbia enacted limited war crimes legislation that establishes a separate war crimes chamber in the District Court of Belgrade. The court has jurisdiction to hear charges of war crimes and crimes against humanity that were committed anywhere in the former Socialist Federal Republic of Yugoslavia.<sup>119</sup>

While this legislation represents a step forward, it is flawed. Specifically,

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114. See *10th Annual Report of the ICTY*, *supra* note 54, ¶¶ 242–44 (regarding mixed cooperation); Del Ponte Address to the UN Security Council, *supra* note 44; INTERNATIONAL CRISIS GROUP, *SERBIA'S CHANGING POLITICAL LANDSCAPE* 12–13 (2004), available at [www.icg.org/library/documents/europe/balkans/040722\\_serbia\\_changing\\_political\\_landscape.pdf](http://www.icg.org/library/documents/europe/balkans/040722_serbia_changing_political_landscape.pdf) [hereinafter *SERBIA'S CHANGING POLITICAL LANDSCAPE*]; *SERBIAN REFORM STALLS AGAIN*, *supra* note 104, at 4; *JUSTICE AT RISK*, *supra* note 36, at 8. At times, Serbia has supported those accused of war crimes, such as in June 2003 when the Council of Ministers of Serbia and Montenegro decided to provide assistance to Hague indictees who voluntarily surrendered to the ICTY. Press Release, Humanitarian Law Center, Revoke the decision on material assistance for persons voluntarily surrendering to the Hague Tribunal (11 Jun. 2003), available at [www.hlc.org.yu/english/Facing\\_The\\_Past/Press\\_Releases/index.php?file=147.html](http://www.hlc.org.yu/english/Facing_The_Past/Press_Releases/index.php?file=147.html). Serbia enacted legislation to support the families of Hague indictees in 2004, but as of July 2004, the Constitutional Court had temporarily suspended that law. *SERBIA'S CHANGING POLITICAL LANDSCAPE*, *id.* at 2.
115. HRW WORLD REPORT 2003, *supra* note 13, at 392.
116. *HRW Statement to U.S. Commission*, *supra* note 101; *10th Annual Report of the ICTY*, *supra* note 54, ¶ 245 (lack of cooperation regarding documents and witnesses in the Milošević case).
117. For example, former Yugoslav National Army Colonel Veselin Sljivancanin was taken into custody after a standoff on 13 June 2003, just two days before the US deadline requiring cooperation with the ICTY as a condition for aid to Serbia and Montenegro.
118. See, e.g., Matt Prodger, *Serbian PM snubs Hague tribunal*, BBC NEWS (17 Sept. 2004), available at [news.bbc.co.uk/1/hi/world/europe/3667220.stm](http://news.bbc.co.uk/1/hi/world/europe/3667220.stm).
119. This court has jurisdiction over crimes that occurred in Croatia, Bosnia and Herzegovina, Kosovo, and Serbia and Montenegro. There will be a War Crimes Investigation Service within the Ministry for Internal Affairs that is to respond to requests by the Prosecutor. The District Court in Belgrade is to deal with witnesses and victim protection. Law on Organisation and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, arts. 3, 8, 9, 11 (2003) (Serb. & Mont.). English translation available at [www.osce.org/yugoslavia/documents/fry/2003/07/446\\_en.pdf](http://www.osce.org/yugoslavia/documents/fry/2003/07/446_en.pdf). Montenegro has not created a war crimes court and this statute does not apply to this republic.

it provides only for the prosecution of those who “pulled the trigger” and not of commanders or others who organized and planned the atrocities; there are no provisions for command responsibility. The law fails to address other important issues, such as sentencing, the admissibility of evidence gathered by ICTY investigators, and retroactivity.<sup>120</sup> Furthermore, it does not require the Serbian government to cooperate with other jurisdictions.

More basic are the questions of whether the war crimes chamber will have the capacity and independence to handle the cases. Particularly troublesome is the government’s interference with the independence of judges and prosecutors. Furthermore, it remains to be seen whether the political will exists to make the court a serious forum, including whether adequate resources will be provided to establish an effective witness protection program. In fact, before the war crimes court began its work, the Minister of Justice announced that he did not foresee many prosecutions under the new law.<sup>121</sup> These factors cast serious doubt on whether this legislation represents a real effort to address war crimes rather than mere window dressing for the international community.

### 3. Resistance to Examining the Past

The impact of the nationalism fomented by Milošević continues and presents an obstacle to progress in Serbia.<sup>122</sup> Many of the non-democratic

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120. Interview with representative from Humanitarian Law Center, in Belgrade, Serbia and Montenegro (4 Sept. 2003). See *A Critique of the Draft Law on the Organization and Competence of State Bodies in War Crimes Proceedings*, Humanitarian Law Center (on file with author). See also Memorandum from International Bar Association, to the OSCE (2003) (reviewing the Draft law) (on file with author).

121. Zeljko Cvijanovic, *War Crimes Bill Less Than It Seems*, BALKAN CRISIS REPORT, No. 440 (Institute for War & Peace Reporting) 30 Jun. 2003, available at [www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200306\\_440\\_1\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200306_440_1_eng.txt).

122. Recently, there have been several troublesome ultra-nationalist incidents. In January 2004, posters in the towns of Sjenica and Novi Pazar read: “Oh Sjenica, a second Srebrenica,” and “Oh, Pazar, a second Vukovar.” Between those lines was the Serbian two-headed eagle, with “Freedom or Death!” and “With Faith in God” printed. Press Release, Humanitarian Law Center, Authors of Inflammatory Poster Must Be Identified and Punished (22 Jan. 2004), available at [www.hlc.org.yu/english/Other/Hate\\_Speech/index.php?file=724.html](http://www.hlc.org.yu/english/Other/Hate_Speech/index.php?file=724.html). In January 2004 in Novi Sad in northern Serbia, “drunken mobs” were shouting “Hey Serbs let’s butcher the Croats! Hey Serbs, let’s butcher the Hungarians”; Jan Briza, *Fear Ripples Through Vojvodina Minorities*, BALKAN CRISIS REPORT, No. 477 (Institute for War & Peace Reporting), 23 Jan. 2004, available at [www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200401\\_447\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200401_447_3_eng.txt). See generally Sonja Biserko, *Editorial: Anti-European Vertical Scores Off*, HELSINKI CHARTER, No. 70–71 (Helsinki Committee for Human Rights in Serbia) Nov.–Dec. 2003, available at [www.helsinki.org.yu/charter\\_text.php?lang=en&idteksta=1151](http://www.helsinki.org.yu/charter_text.php?lang=en&idteksta=1151); SHADOW OF NATIONALISM, *supra* note 11. Infighting among the parties in the Democratic Opposition of Serbia (DOS) and the DOS’s failure to make progress have not helped this situation. *Id.* at 7–8.

attitudes and personnel from the Milošević regime remain in place; those responsible for war crimes are widely seen as being involved in organized crime and remain in government positions. A strong minority remains supportive of Milošević and his allies, as demonstrated by the December 2003 parliamentary election results in which war crime indictees Milošević and Vojislav Sešelj, who are both in custody at the ICTY, headed party lists that garnered more than one third of the votes.

There is a fundamental lack of political and popular will to confront the past in Serbia.<sup>123</sup> The media, politicians, and the public have not called for discussions of what happened under the Milošević regime. The media devotes little time to war crimes; many of the reports that do address them are general and biased.<sup>124</sup> Moreover, government officials display little interest in or commitment to accountability for war crimes. Instead, “[t]he government has portrayed cooperation with the [ICTY] as a means of receiving economic assistance from abroad, rather than a duty to victims and justice.”<sup>125</sup> Nor have Serbian authorities promoted a public dialogue about Serbia’s role in the regional wars. Perhaps one reason for this silence is that such a discussion would implicate many who remain in powerful positions. A common response is that all sides were to blame or to limit discussions to atrocities committed against ethnic Serbs.<sup>126</sup>

The international community may provide impetus for this dialogue. Serbia seems to be somewhat responsive to pressure (especially financial pressure) from the European Union and the United States, although the international community has not always taken a consistent position.<sup>127</sup> In 2003, Serbia became a member of the Council of Europe (CoE) and seeks membership in the European Union. The CoE has advised Serbia and Montenegro that it must cooperate with the ICTY. As such, continued

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123. HUMANITARIAN LAW CENTER, TRUTH AND RESPONSIBILITY (Institute for War & Peace Reporting, Human Rights Report Card, 2002), available at [www.iwpr.net/index.pl?archieue/bcr/bcr2/bcr2\\_20021110\\_1\\_hr\\_eng.txt](http://www.iwpr.net/index.pl?archieue/bcr/bcr2/bcr2_20021110_1_hr_eng.txt) [hereinafter TRUTH AND RESPONSIBILITY]; Interview with Sonja Biserko, *supra* note 105; Interview with representative from Humanitarian Law Center, in Belgrade, Serbia and Montenegro (4 Sept. 2003).
  124. TRUTH AND RESPONSIBILITY, *supra* note 123; Bogdan Ivanisevic, *Lagging Behind Reality*, HUMAN RIGHTS WATCH COMMENTARY, 11 Dec. 2003, available at [www.hrw.org/editorials/2003/serbia121103.htm](http://www.hrw.org/editorials/2003/serbia121103.htm) [hereinafter *Lagging Behind Reality*]. The original was published as an editorial in the Serbian magazine VREME, 11 Dec. 2003.
  125. *Lagging Behind Reality*, *supra* note 124.
  126. See SHADOW OF NATIONALISM, *supra* note 11, at 295; *Lagging Behind Reality*, *supra* note 124. See generally STANLEY COHEN, STATES OF DENIAL: KNOWING ABOUT ATROCITIES AND SUFFERING (2001). In August 2003, a photo exhibit that depicted Serbian atrocities during the Bosnian war was cancelled in several cities in Serbia after nationalists assaulted some of the organizers. It was later shown under guard in some other cities in Serbia.
  127. See HRW Statement to U.S. Commission, *supra* note 101. The United States has sometimes sent mixed messages. SERBIA’S CHANGING POLITICAL LANDSCAPE, *supra* note 114, at 14.

involvement by and pressure from the European Union to help Serbia address war crimes can play a valuable role.

Given local unfamiliarity with international humanitarian law, this involvement should include technical support, such as having international judges and prosecutors advise local authorities at the new war crimes court. Public education about the legal system in general, and more specifically about war crimes trials (domestically and at the ICTY), is sorely needed.<sup>128</sup> However, in the end, financial and technical assistance will bring about only limited change if Serbian authorities do not have a commitment to the rule of law and justice for victims.

## E. Kosovo

### 1. Legacy of Milošević and Post-Conflict Developments

In 1989, Serbia revoked Kosovo's status as an autonomous province. Serbian authorities subsequently began to detain, torture, and imprison ethnic Albanians. They also dismissed ethnic Albanians from their jobs as judges, prosecutors, and teachers; most schools taught in Albanian were closed.<sup>129</sup> In June 1999, after the NATO bombing campaign in Kosovo, the UN Security Council established an international civil authority in Kosovo, the UN Mission in Kosovo Interim Administrative (UNMIK).<sup>130</sup>

One of UNMIK's many challenges has been to establish a functioning criminal justice system in a climate in which ethnic tensions and violence have remained high. Although a range of reforms has been instituted, significant problems permeate the criminal justice system.<sup>131</sup> For example, there are few experienced ethnic Albanian legal professionals because they were barred from practice during most of the 1990s.<sup>132</sup> Those who have experience from before 1989 had only worked under the socialist system, in which the independence of the judiciary was not a core value.<sup>133</sup>

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128. See Tolbert, *supra* note 4, at 12–16.

129. HUMAN RIGHTS WATCH, UNDER ORDERS: WAR CRIMES IN KOSOVO 27–28 (2001) [hereinafter UNDER ORDERS].

130. S.C. Res. 1244, U.N. SCOR, 54th Sess., 4011th mtg., ¶ 10, U.N. Doc. S/RES/1244 (1999).

131. See generally Wendy S. Betts et al., *The Post-Conflict Transitional Administration of Kosovo and the Lessons-Learned in Efforts to Establish a Judiciary and Rule of Law*, 22 MICH. J. INT'L L. 371 (2000–2001).

132. FINDING THE BALANCE, *supra* note 11, at 3, 5; *Kosovo's War Crimes Trials*, *supra* note 11, at 10.

133. Interviews with criminal defense attorneys, in Pristina, Kosovo (21–22 April 2003); ABA/CEELI INDEX FOR KOSOVO, *supra* note 13, at 2; FINDING THE BALANCE, *supra* note 11, at 8.

A variety of other problems exist. Specifically, judges and prosecutors are subject to intimidation and threats.<sup>134</sup> The task of the judiciary is further impeded by poor facilities and inadequate interpretation and translation services.<sup>135</sup> Furthermore, criminal defense attorneys reportedly fail to represent their clients adequately and are not proactive.<sup>136</sup>

The police and UNMIK have been criticized on several levels as well. Police lack investigative skills and have lost evidence in some instances,<sup>137</sup> while UNMIK forensic capacity is mixed.<sup>138</sup> The frequent rotation of police officers makes it difficult to conduct complicated investigations.<sup>139</sup> Some see UNMIK as inefficient, lacking transparency, and not being serious about nation-building.<sup>140</sup> In fact, UNMIK has attempted to interfere with the independence of the judiciary at times.<sup>141</sup> Thus, citizens remain distrustful of the police and are reluctant to help them, particularly in ethnically-related cases.<sup>142</sup>

## 2. War Crimes Cases: Importance of Internationals and Witness Protection

War crimes trials in Kosovo have a troubled record to date.<sup>143</sup> In 2000 and 2001, some war crimes cases were tried, often with local judges and sometimes with international judges on the panels.<sup>144</sup> The purpose of

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134. See generally, FINDING THE BALANCE, *supra* note 11, at 3.

135. ABA/CEELI INDEX FOR KOSOVO, *supra* note 13, at 21, 35, 37–38; FRY COUNTRY REPORT 2002, *supra* note 10; FINDING THE BALANCE, *supra* note 11, at 6, 11; Interview with international judge, in Pristina, Kosovo (22 Apr. 2003).

136. Kosovo, *Review of the Criminal Justice System (March 2002–April 2003): Protection of Witnesses in the Criminal Justice System*, Department of Human Rights and Rule of Law, OSCE Mission in Kosovo 45–50 (20 May 2003), available at [www.osce.org/documents/mik/2003/05/859\\_en.pdf](http://www.osce.org/documents/mik/2003/05/859_en.pdf) [hereinafter *Kosovo: Review of the Criminal Justice System*]; FRY COUNTRY REPORT 2002, *supra* note 10.

137. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 458–59, 462; FINDING THE BALANCE, *supra* note 11, at 11.

138. FINDING THE BALANCE, *supra* note 11, at 11.

139. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 458; FINDING THE BALANCE, *supra* note 11, at 25.

140. Interview with Tome Gashi, defense attorney, in Pristina, Kosovo (22 Apr. 2003); interviews with Professors Ismet Salihu and Ejup Sahiti, in Pristina, Kosovo (21 Apr. 2003).

141. Kosovo: *Review of the Criminal Justice System*, *supra* note 136, at 29.

142. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 458.

143. UNMIK Pillar I (which includes the Department of Justice and international and Kosovar police forces) is responsible for prosecuting war crimes cases. See generally *Pillar 1 (Police and Justice) Presentation Paper*, United Nations Interim Administration Mission in Kosovo (June 2004), available at [www.unmikonline.org/justice/documents/Pillar1\\_Report\\_June04.pdf](http://www.unmikonline.org/justice/documents/Pillar1_Report_June04.pdf).

144. UNDER ORDERS, *supra* note 129, at 483; Zoran Culafic, *Regional Report: Kosovo Acquittal Angers Serbs and Albanians*, TRIBUNAL UPDATE, No. 449 (Institute for War & Peace Reporting), 2–6 Jun. 2003, available at [www.iwpr.net/index.pl?archive/tri/tri\\_316\\_4\\_eng.txt](http://www.iwpr.net/index.pl?archive/tri/tri_316_4_eng.txt). In February

involving internationals was to reduce ethnic bias and pressure, as well as to respond to security concerns.<sup>145</sup> Until mid-June 2002, there were insufficient numbers of international judges and prosecutors necessary to change the outcome of cases. As a result, UNMIK increased their representation.<sup>146</sup> It is too early to evaluate the full impact of this change; however, it appears to help address some problems.

At the same time, the presence of international judges has created challenges. For example, Kosovar judges initially did not always welcome their international colleagues.<sup>147</sup> Some Kosovar judges did not want to serve on panels with internationals because they did not want to be held responsible for politically unpopular decisions.<sup>148</sup> Furthermore, the opportunity for the international judges to interact with and to mentor the Kosovar judges is limited because the chambers of the international judges are generally located in a separate building.<sup>149</sup> Moreover, the United Nations provides little or no training for the new international judges or prosecutors, many of whom are unfamiliar with international humanitarian law and stay in Kosovo for only six months.<sup>150</sup>

A further problem is that Kosovar prosecutors and defense attorneys lack adequate skills. The prosecutors have been criticized for poorly

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2000, the Special Representative of the Secretary-General in Kosovo enacted Regulation No. 2000/6, allowing for the appointment of international judges in Kosovo. *On the Appointment and Removal From Office of International Judges and International Prosecutors*, UNMIK Reg. 2000/6, U.N. Doc. UNMIK/REG/2000/6 (2000); see generally MICHAEL E. HARTMANN, INTERNATIONAL JUDGES AND PROSECUTORS IN KOSOVO: A NEW MODEL FOR POST-CONFLICT PEACEKEEPING 7–8 (U.S. Inst. of Peace, Special Report 112, 2003), available at [www.usip.org/pubs/specialreports/sr112.pdf](http://www.usip.org/pubs/specialreports/sr112.pdf). It is the UN that hires the international judges and prosecutors. In December of that year, a further regulation permitted the prosecutor, defense counsel, or the accused to request a majority of international judges to serve on a panel when it was “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.” *On the Assignment of International Judges and Prosecutors and/or Change of Venue*, UNMIK Reg. No. 2000/64, ¶ 1.1, U.N. Doc. UNMIK/REG/2000/64 (2000); see also FINDING THE BALANCE, *supra* note 11, at 6. The OSCE monitored the seventeen war crimes trials held as of June 2002 for crimes allegedly committed during the time of May 1998 and June 1999. See *Kosovo’s War Crimes Trials*, *supra* note 11.

145. HARTMANN, *supra* note 144, at 6–7.

146. See *id.* at 8–13. Generally, three to five judges hear a case and each is entitled to one vote. While initially a relatively small number of international judges were appointed so that they comprised a minority of judges sitting on a case, continued bias required further regulations to permit majority international panels. As of June 2002, there were fourteen international judges and twelve international prosecutors in Kosovo. *Id.*; BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 460; *Kosovo’s War Crimes Trials*, *supra* note 11, at 10–11; FINDING THE BALANCE, *supra* note 11, at 5, 8.

147. FINDING THE BALANCE, *supra* note 11, at 9.

148. See generally, FRY COUNTRY REPORT 2002, *supra* note 10.

149. FINDING THE BALANCE, *supra* note 11, at 9.

150. Interview with international judge, *supra* note 135.

evaluating cases, including the admissibility of evidence, charges to be filed, and the elements of crimes.<sup>151</sup> Many judgments have been reversed, usually due to the prosecution's failure to establish sufficient facts to support the charges.<sup>152</sup> Kosovar prosecutors may experience pressure, either overt or perceived, to overcharge ethnic Serb defendants.<sup>153</sup> On a positive note, the quality of the indictments has improved with the increased presence of international prosecutors.<sup>154</sup>

On the other side, defense lawyers have not represented their clients adequately. For example, they fail to object to evidence that is prejudicial to their clients, to prepare for court hearings, and to object to confessions obtained through torture or duress.<sup>155</sup> Further, UNMIK's lengthy process for reimbursing appointed counsel may serve as a disincentive for many attorneys to represent clients zealously. These problems are compounded for those who reside outside of large towns and for ethnic Serbs, who have limited access to lawyers.<sup>156</sup>

Oftentimes, eyewitness testimony represents the only evidence presented in these trials, without any corroborating physical evidence (such as documents or forensic evidence). As a result, verdicts often hinge on determinations of witness credibility. The lack of corroborating testimony and physical evidence has been problematic, given that many witnesses testify along ethnic lines due to intimidation or bias. Witnesses often change their testimony due to ethnic bias, intimidation, and pressure.<sup>157</sup> Essentially, ethnic Albanians may be more willing to testify against ethnic Serbs than to testify against ethnic Albanians. Verdicts remain particularly vulnerable to actual and perceived ethnic bias when the majority of judges sitting on the panels are Kosovars.<sup>158</sup>

To date, most prosecutions in Kosovo have been against ethnic Serbs, although there are now some cases against ethnic Albanians. Both the ethnic Albanian media and the public have reacted negatively to this development. There were public demonstrations when former Kosovo Liberation Army members were arrested in January and August 2002.<sup>159</sup> The

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151. *Kosovo's War Crimes Trials*, *supra* note 11, at 34, 37; Interview with criminal defense attorney, *supra* note 123.

152. *Kosovo's War Crimes Trials*, *supra* note 11, at 48.

153. Discussion with Michael Hartmann, international prosecutor in Kosovo in Belgrade, Serbia & Montenegro (Dec. 2002).

154. *Kosovo's War Crimes Trials*, *supra* note 11, at 37.

155. *Kosovo: Review of the Criminal Justice System*, *supra* note 136, at 45–50.

156. FRY COUNTRY REPORT 2001, *supra* note 11.

157. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 462.

158. *Kosovo's War Crimes Trials*, *supra* note 11, at 10–11; FINDING THE BALANCE, *supra* note 11, at 5–6.

159. FINDING THE BALANCE, *supra* note 11, at 21.

media has not always played a constructive role and has been criticized for its lack of professionalism.<sup>160</sup>

In addition, the courts' written verdicts often neglect to set forth the facts of the cases, to apply the facts to relevant law, to analyze individual responsibility, to apply international standards, or to articulate the bases of critical credibility determinations.<sup>161</sup>

Further, seemingly mundane issues have created significant problems. For example, there are very few verbatim records of court proceedings.<sup>162</sup> Moreover, many interpreters lack professional training, experience in court, and familiarity with legal and local terminology.<sup>163</sup> A precise record and translation rather than general summaries may be critical, particularly in cases relying almost exclusively on witness testimony, in which witness credibility and specific testimony decide the result.

Given that witness intimidation and safety are of paramount concern in Kosovo, an effective witness program needs to be in place. Potential witnesses are often unwilling to cooperate with the police because they believe they will not be protected.<sup>164</sup> Witnesses from Serbia likewise are

160. *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, U.N. SCOR, ¶ 11, U.N. Doc. S/2002/1126 (2002) [hereinafter *Report of the Secretary-General*].

161. See *Kosovo's War Crimes Trials*, *supra* note 11, at 43–52. The courts do not always follow the jurisprudence of the ICTY and ICTR, particularly on the issue of witness credibility. For example, the Kosovo courts apparently conclude that if a witness provides inconsistent statements, the witness therefore is untruthful and unreliable, without taking into account the possibility that a witness may forget some details over time, that forgetfulness is not automatically untruthfulness, the frailties of human perception, cultural factors, and the impact of trauma. *Id.* at 38–41; compare *Prosecutor v. Akayesu* (Case No. ICTR 96-4-T), Judgement of Trial Chamber I, 2 Sept. 1998, ¶¶ 140–46.

162. Generally, the practice has been to have witnesses provide testimony and then the judge summarizes the testimony. *Kosovo's War Crimes Trials*, *supra* note 11, at 42; Interview with international judge, *supra* note 135. The new criminal code requires summaries plus either audio, video, or stenographic recordings at the main trial “unless there are reasonable grounds for not so doing.” *Provisional Criminal Procedure Code of Kosovo (CPC)*, UNMIK Reg. 2003/26, Art. 348., U.N. Doc. UNMIK/REG/2003/26 (6 Jul. 2003), available at [www.unmikonline.org/regulations/2003/RE2003-26.pdf](http://www.unmikonline.org/regulations/2003/RE2003-26.pdf) [hereinafter *Provisional CPC*]. Hopefully the courts will always require some kind of recording at all trials. See *infra* note 167 for more on the *Provisional CPC*.

163. *Kosovo's War Crimes Trials*, *supra* note 11, at 41–42.

164. See *Kosovo: Review of the Criminal Justice System*, *supra* note 136, at 11–12, 14. See also *Report of the Secretary-General*, *supra* note 160, ¶ 27. Unfortunately, this fear was confirmed in early 2003, when computer hard drives from the Centre for Protection of Women and Children in Pristina were stolen. These computer files contained confidential and sensitive information and testimony gathered from more than 650 women who had been victims of human rights abuses such as rape by Serb troops during the NATO bombing and more recently victims of trafficking and domestic violence, and forced prostitution. Alma Lama, *Kosovar Abuse Victims in Jeopardy*, BALKAN CRISIS REPORT, No. 403 (Institute for War & Peace Reporting) 3 Feb. 2003, available at [www.iwpr.net/index.pl?archive/bcr3/bcr3\\_200302\\_403\\_2\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr3/bcr3_200302_403_2_eng.txt).

afraid to come to Kosovo to testify.<sup>165</sup> While some witness security measures are in place, the existing program lacks adequate resources. For example, witnesses are rarely relocated.<sup>166</sup>

The new criminal procedure code includes provisions that may help protect witnesses, such as permitting videotaped examinations and closed circuit television; but difficult hurdles nevertheless remain.<sup>167</sup> First, Kosovo is small and the identities of witnesses are often common knowledge. The new procedures will not help these individuals. Next, because the court system involves a number of people—the police (including the Kosovo Police Service), court staff, and interpreters—it can be difficult to keep information confidential.<sup>168</sup>

### 3. Criminal Justice in Kosovo: A Distant Reality

An independent justice system that inspires public confidence is vital to Kosovo's longer term prospects for stability and peace. While progress has been made, Kosovo's legal system is far from able to handle war crimes cases. For example, the public continues to distrust the legal institutions.<sup>169</sup> Many do not understand why parts of proceedings are not open to the public or why international judges and prosecutors are needed.<sup>170</sup> As a result, verdicts are questioned.

In contrast, those familiar with the legal system support the presence of international prosecutors and judges in light of the current security situation

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165. FINDING THE BALANCE, *supra* note 11, at 12.

166. *Id.* at 12; *Report of the Secretary-General*, *supra* note 160, ¶ 27.

167. *Provisional CPC*, *supra* note 162, art. 170. The long-overdue criminal codes were promulgated in July 2003 by the Special Representative of the Secretary-General Steiner. *See id.*; *Provisional Criminal Code of Kosovo*, UNMIK Reg. 2003/25, U.N. Doc. UNMIK/REG/2003/25 (6 Jul. 2003). These codes replaced a confusing combination of laws from the former Federal Republic of Yugoslavia, Serbia, UNMIK Regulations and Administrative Directions, and international humanitarian law. It was often unclear which law should apply. Moreover, judges and lawyers frequently did not have access to new UNMIK regulations. As such, legal professionals had difficulty assessing relevant law. The new codes were submitted in November 2001; the time it took the United Nations to review them was unduly lengthy.

168. *See generally Kosovo: Review of the Criminal Justice System*, *supra* note 136, at 12–14. In at least one case, defense counsel revealed confidential testimony to the press. *Id.* at 16.

169. BELGRADE CENTRE FOR HUMAN RIGHTS, *supra* note 11, at 462; FINDING THE BALANCE, *supra* note 11, at 2.

170. Interview with Lori Galway, ICTY Outreach, in Pristina, Kosovo (22 Apr. 2003). In addition, according to Natasa Kandic of the Humanitarian Law Center in Belgrade, the Albanian public is distrustful of the international judges and prosecutors because it sees them as setting free some Serbs who were indicted by Albanian prosecutors. Natasa Kandic, Address at the ABA/CEELI Award Ceremony during the ABA Annual Meeting (9 Aug. 2003) (on file with author) [hereinafter Kandic Address].

and continuing ethnic discrimination. Many believe that Kosovo must first deal with organized crime and related witness security before Kosovo can address many of its problems. All recognize that ultimately these responsibilities must be transferred to Kosovars.<sup>171</sup>

Fundamental reforms must continue to be realized. To achieve the long-term goal of local control of institutions, the United Nations, ICTY, and international community need to invest substantial resources and energy in training local judges, prosecutors, and defense attorneys to strengthen the criminal justice system.<sup>172</sup> Professional legal associations need to be engaged in these discussions.

#### IV. PROSPECTS FOR DOMESTIC WAR CRIMES PROSECUTIONS IN THE FORMER YUGOSLAVIA

Unfortunately, the criminal justice systems in Croatia, BiH, Serbia, and Kosovo simply do not have the capacity at this time to handle war crimes trials that are fair for suspects and victims. Furthermore, it is essential for the long-term stability and growth of the former Yugoslavia that the legal systems be strengthened, independent of war crimes prosecutions.<sup>173</sup>

Too little attention has been paid to the consequences of the ICTY's planned closure—both in identifying and preparing for the likely effects and obstacles. The international community needs to focus on capacity-building and public education in the former Yugoslavia if war crimes trials are to be fair and meaningful and for the rule of law to take root. These changes will not occur overnight. Serious implementation strategies at the domestic level, beyond setting up local war crimes courts, must accompany the ICTY's completion strategy.

This strategic approach must be multi-faceted to deal effectively with

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171. Interview with Tome Gashi and Lori Galway, ICTY Outreach and OSCE Chief of Legal Monitoring, in Pristina, Kosovo (22 Apr. 2003); interview with Teki Bokshi and Fazli Balaj, criminal defense attorneys, in Pristina, Kosovo (21 Apr. 2003).

172. HARTMANN, *supra* note 144, at 12–14.

173. While trials alone will not stabilize the Balkans, they can contribute to social reconstruction and establishing the rule of law. The purpose of this article is not to examine the advantages and disadvantages of trials in this context; those discussions are articulately presented in a number of writings. Rather, it assumes that trials will and need to occur. Social healing takes place slowly and on different levels, including at the governmental, community, and individual levels; it may never be complete for some. A few examples of writings on the role of trials in the aftermath of massive violations of human rights and humanitarian law include MINOW, *supra* note 92; IMPUNITY AND HUMAN RIGHTS IN INTERNATIONAL LAW AND PRACTICE (Naomi Roht-Arriaza, ed., 1995); Diane F. Orentlicher, *Settling Accounts: The Duty to Prosecute Human Rights Violations of a Prior Regime*, 100 YALE L.J. 2537 (1991).

the prosecution of war crimes cases in the former Yugoslavia, incorporating measures at the domestic, regional, and international levels. At the domestic level, functioning, transparent, and professional criminal justice systems that are respected by the public are essential to the future of the former Yugoslavia. Addressing the weaknesses of the local criminal justice systems would go a long way to realizing fair domestic war crimes trials. In addition, local officials must work to end corruption in the judiciary and other sectors of government.

Continuing trials under the current seriously flawed systems may undermine the very notions of accountability and justice that they seek to uphold. However well-intended the current efforts are, it will be difficult if not impossible for the domestic war crimes courts to achieve any measure of justice—real or perceived—if the public continues to lack confidence in the legal systems and if government officials do not take the issues seriously.<sup>174</sup>

The international community as well must re-double its efforts to improve the capacity of the criminal justice systems. Substantial technical and financial assistance is still needed. The gradualist approach used to date, in which incremental or piecemeal changes are introduced, has contributed to some improvements but has been inadequate. In some instances, sweeping reforms should have been instituted.

International donors (such as the United Nations, OSCE, European Union, and the United States) should consider adopting more integrated and coordinated strategies in developing their projects with local governments and institutions. While the ICTY has provided some training, it has not done so on a systematic or widespread basis, due in part to its lack of resources.<sup>175</sup> The time has come for the international community to provide more resources if it wants to effectuate the transfer strategy.

As the ICTY has learned, trials do not exist in a vacuum and must be accompanied by public discussion and education.<sup>176</sup> It was not until 1999 that the ICTY established an Outreach Program, funded through voluntary country donations. Ideally, trials help to establish an official account of what happened—one that cannot be questioned. But due to poor initial outreach and other factors, many people in the former Yugoslavia—particularly ethnic Serbs—perceive the ICTY as tainted and biased.<sup>177</sup> Moreover, they do

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174. See generally THOMAS CAROTHERS, *AIDING DEMOCRACY ABROAD: THE LEARNING CURVE* 163–67, 336–37 (1999). (“Aid providers are coming to appreciate that will to reform must exist in state institutions if change is to occur.”).

175. Tolbert, *supra* note 4, at 12–13.

176. See *id.* at 13–16; *10th Annual Report of the ICTY*, *supra* note 54, ¶ 278.

177. For public perceptions of the ICTY, see *Lagging Behind Reality*, *supra* note 124; Sanja Kutnjak Ivkovic, *Justice by the International Criminal Tribunal for the Former Yugosla-*

not understand the hybrid common law/civil law procedures in place. As a result, many have been unwilling to accept the verdicts at the ICTY.<sup>178</sup> Government leadership has done little to discourage those views. The lack of public education about and understanding of the ICTY have undermined many of the achievements it has realized to date. Because of these factors and others, the trials at the ICTY have not been particularly successful in establishing a shared truth about the war, particularly in the minds of many ethnic Serbs.

One way to help pave the way for domestic war crimes trials would be to hold all or parts of some ICTY trials in the former Yugoslavia (or elsewhere in the region) to increase public understanding of the proceedings and testimony and make them more accessible to a broader audience. This move could also aid efforts to train domestic officials. More importantly, conducting some of these trials in the region might advance the goal of reaching “one truth” for the former Yugoslavia.<sup>179</sup>

Regional cooperation represents another key component. Because important witnesses and documents often reside outside the jurisdiction of a particular court, the governments of the former Yugoslavia must reach agreements to exchange documents and create mechanisms to admit witness testimony and other evidence from outside their borders. They also need to enter into agreements so that suspects cannot avoid prosecution by crossing a border.<sup>180</sup> Furthermore, prosecutors must have the ability to relocate witnesses in certain circumstances. Effective relocation programs often entail the cooperation of other governments.

In addition, steps taken in one country may have an impact on others. For example, a more even-handed treatment of war crimes cases in Croatia might be facilitated if Serbia and the RS conducted substantive war crimes prosecutions. Likewise, the Kosovar Albanian public might be more supportive of prosecutions against ethnic Albanians in its own courts if Serbia

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via, 37 STAN. J. INT'L L. 255 (2001); Jelena Pejic, *The Yugoslav Truth and Reconciliation Commission: A Shaky Start*, 25 FORDHAM INT'L L.J. 1, 3 (2001); The Human Rights Center & Int'l Human Rights Law Clinic, University of California, Berkeley, & The Centre for Human Rights, University of Sarajevo, *Justice, Accountability and Social Reconstruction: An Interview Study of Bosnian Judges and Prosecutors*, 18 BERKELEY J. INT'L L. 102, 136–39 (2000).

178. *Lagging Behind Reality*, *supra* note 124.

179. Countries such as East Timor and Sierra Leone have decided to hold war crimes trials at home rather than abroad, creating “hybrid tribunals” that consist of both national and international judges and law. For more regarding the courts of East Timor and Sierra Leone, see generally Richard Dicker & Elise Keppler, *Beyond the Hague: The Challenges of International Justice*, in HUMAN RIGHTS WATCH, WORLD REPORT 2004: HUMAN RIGHTS AND ARMED CONFLICT 194, 201–03 (2004), available at [www.hrw.org/wr2k4/10.htm](http://www.hrw.org/wr2k4/10.htm).

180. See *War Crimes Before Domestic Courts*, *supra* note 105, at 50; SHELVEG JUSTICE, *supra* note 26, at 10–14; JUSTICE AT RISK, *supra* note 36, at 17–19.

conducted serious war crimes trials.<sup>181</sup> As one human rights activist explains: "Reconciliation between nations only starts when they acknowledge their own responsibility, thus reinstating the human dignity of the victims of political and ethnic murders."<sup>182</sup>

Other regional efforts to confront the past might contribute to a shared history of the wars. Regional arrangements could include the establishment of joint trials at the former-Yugoslavia level or a regional war crimes court with representation from the former Yugoslavia and joint investigations. These trials could be located in the region itself or in a more neutral site, such as Slovenia or Hungary. Another possibility is creating a regional truth commission with representatives from each region of the former Yugoslavia.<sup>183</sup> Admittedly, such approaches are not currently being discussed or considered in the former Yugoslavia. However, perhaps now is the time for these kinds of dialogues to begin.

In these efforts and others, the international community has the ability to play a strong role in the region. Unfortunately, it has provided inadequate leadership in response to significant problems that have long been apparent.<sup>184</sup> The international organizations administering the governments in Kosovo and BiH need to make war crimes a greater priority and focus of resources. In Croatia and Serbia and Montenegro, which are not under international control, progress on war crimes issues seems only to be made when the European Union or the United States exerts pressure. This carrot-stick approach unfortunately must continue. The European Union in particular has the potential of playing a key role in encouraging Croatia and Serbia and Montenegro to live up to their obligations to address war crimes, given the countries' desire to become member countries.

Ultimately, political will and leadership are of paramount importance. While the international community and governments in the former Yugoslavia vocally support accountability for war crimes, these sentiments are not accompanied by real action. The past several years have demonstrated that many areas in the former Yugoslavia will not try "their own" without

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181. Kadic Address, *supra* note 170.

182. Natasa Kadic, *Comment: Kosovars Must Confront Their Demons*, BALKAN CRISIS REPORT, No. 316 (Institute for War & Peace Reporting, London) 31 Jul. 2003, available at [www.iwpr.net/index.pl?archive/bcr/bcr3\\_200307\\_449\\_3\\_eng.txt](http://www.iwpr.net/index.pl?archive/bcr/bcr3_200307_449_3_eng.txt).

183. See Pejic, *supra* note 177 (discussion of reasons for a truth and reconciliation commission in Serbia and Montenegro). See generally PRISCILLA B. HAYNER, UNSPEAKABLE TRUTHS: CONFRONTING STATE TERROR AND ATROCITY (2001) (discussion of advantages and disadvantages of truth commissions); Payam Akhavan, *Justice in The Hague, Peace in the Former Yugoslavia? A Commentary on the United Nations War Crimes Tribunal*, 20 HUM. RTS. Q. 737, 770–75 (1998).

184. See HARTMANN, *supra* note 144; COURTING DISASTER, *supra* note 10.

continued international pressure. It is only recently that both the international community and domestic officials seem to be communicating actively about war crimes. Without real support at the domestic level, currently lacking, local war crimes prosecutions will achieve little and risk further undermining the credibility of the legal institutions.

## V. A RUSH TO CLOSE THE ICTY: “PENNY WISE BUT POUND FOOLISH”?

Returning cases to domestic courts makes little sense if those systems do not have the capacity to handle them and there is no political will to support them. Furthermore, if the international community is not willing to provide technical, financial, and political support to bring about much needed reforms, the criminal justice systems in the former Yugoslavia will continue to dispense “junk justice.”<sup>185</sup> It would then appear that the determination to return these cases to domestic courts merely was a way for international community to wash its hands of an expensive problem.<sup>186</sup> This short term solution may end up costing more in the long run if adequate systems are not in place before the ICTY transfers cases to the former Yugoslavia. All too often the international community loses interest in a troubled region long before the problems have been addressed adequately. Hopefully, this cynical view will not be validated.

The international and domestic communities need to formulate and to fund comprehensive strategies so that short-term fiscal concerns do not undermine long-term goals. Given the current shortcomings, it may be more useful now for the international community to focus its attention on improving fundamental domestic criminal justice systems in the former Yugoslavia rather than on establishing specialized war crimes chambers in each jurisdiction and shutting down the ICTY. The ICTY should continue its

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185. Natasa Kandic used the term “junk justice.” Kandic Address, *supra* note 170.

186. See *10th Annual Report of the ICTY*, *supra* note 54, ¶ 293 (expenditures to date). See generally Dicker, *supra* note 179, at 200 (explaining how support for the ICTY has waned and its pressure that a completion strategy be adopted so that the ICTY will shutdown in 2010 “regardless of whether this date allows the tribunals to fulfill their mandates”); *UN International Criminal Tribunals for Rwanda and the Former Yugoslavia: International Justice or Show of Justice?: Hearing Before the House International Relations Committee*, 107th Cong. 22 (2002) (statement of Pierre-Richard Prosper, Ambassador-at-Large for War Crimes Issues), available at [wwwc.house.gov/international\\_relations/107/77896](http://wwwc.house.gov/international_relations/107/77896) (explaining that the Bush Administration was “urging both tribunals to aggressively begin to focus on the end-game and conclude their work by 2007 or 2008” given the “shared responsibility of local governments to adjudicate some of these serious violations.”).

work and refrain from returning cases to the former Yugoslavia until domestic jurisdictions can provide fair trials.

Moreover, the former Yugoslavia needs to come to terms with its past and provide justice to victims of war crimes. As one lawyer who has represented both ethnic Serbs and ethnic Albanians in Kosovo explained, "If we don't deal with the past war crimes, we won't have a future; there will not be peace in the Balkans."<sup>187</sup> International, regional, and local communities must confront this challenge. The prospect of the ICTY ending its work should serve as a catalyst for much needed reforms, so that domestic legal systems dispense actual justice rather than junk justice.

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187. Interview with defense attorneys, in Pristina, Kosovo (21 Apr. 2003).