SERBIA

ENDING IMPUNITY FOR CRIMES UNDER INTERNATIONAL LAW

AMNESTY INTERNATIONAL

Amnesty International Publications

First published in 2014 by
Amnesty International Publications
International Secretariat
Peter Benenson House
1 Easton Street
London WC1X 0DW
United Kingdom
www.amnesty.org

Index: EUR 70/012/2014
Original Language: English
Printed by Amnesty International, International Secretariat, United Kingdom

[ISBN:]
[ISSN:]

Cover photo: Courtesy of International Commission on Missing Persons

Amnesty International is a global movement of more than 3 million supporters, members and activists in more than 150 countries and territories who campaign to end grave abuses of human rights.

Our vision is for every person to enjoy all the rights enshrined in the Universal Declaration of Human Rights and other international human rights standards.

We are independent of any government, political ideology, economic interest or religion and are funded mainly by our membership and public donations.

AMNESTY
INTERNATIONAL

CONTENTS

1. INTRODUCTION

Over two decades have passed since the Socialist Federal Republic of Yugoslavia (SFRY) began to tear itself apart in a series of wars which lead to the deaths of an estimated 140,000 people, the enforced disappearances of 34,884[1], the rape of thousands of women and the forced displacement of an estimated four million people.

Despite the passage of time – or now, perhaps because of it – the vast majority of those suspected of criminal responsibility for crimes under international law[2] committed during the 1990s armed conflicts have not been brought to justice. In addition, the majority of their victims have been denied access to reparation for the violations they have suffered.

After the end of the international armed conflicts in Bosnia and Herzegovina and Croatia in 1995, the Serbian authorities (then the Federal Republic of Yugoslavia, FRY) initiated few investigations and prosecutions of crimes under international law.[3] Meanwhile, trials continued against suspects indicted by the International Criminal Tribunal for the former Yugoslavia (ICTY), including members of the government and military officials indicted in connection with the armed conflict in Kosovo.

Up until 2003 the Serbian authorities largely failed to meet their international obligations to investigate and prosecute crimes under international law. Indeed, not only were they reluctant to open investigations, but continued to foster a climate of impunity, including through a failure to cooperate with the ICTY.[4]

The Special War Crimes Court (SWCC) in Belgrade was established in July 2003, with financial support from the US government and technical assistance from the Organization for Security and Cooperation in Europe (OSCE). Legislation enabling the creation of the court also established the Office of the War Crimes Prosecutor (OWCP), and a War Crimes Investigation Service (WCIS) within the Ministry of Interior.

Since the establishment of these institutions, some significant progress has been made in the prosecution of war crimes perpetrated by FRY and Serbian forces in BiH, Croatia and Kosovo, yet the number of completed prosecutions remains low, and the rate at which indictments are brought is too slow.

Further, since their inception, neither the court nor the OWCP have received political support from successive governments, nor have government leaders demonstrated the political will to address their international obligations to investigate and prosecute Serbia's legacy of crimes under international law. On entering office in 2012, the present Minister of Justice, Nikola Selaković

asserted that, "Big fish will not escape justice".[5] Yet some of the big fish in the world of alleged war crimes suspects continue to enjoy impunity, and in some cases, remain in public office.[6] Amnesty International now calls on the government to take urgent steps to end this impunity, and deliver justice to the victims.

Serbia stands on the brink of joining the European Union (EU). On 21 January 2014, negotiations opened on Serbia's future membership of the EU, which it aspires to join by 2020. Amnesty International takes no position whether Serbia, or any other country, should or should not join the European Union or any other international institution. The organization however considers the process of enlargement as a critical moment to monitor and improve the human rights situation in the country and to address one of the most egregious and continuing violations: impunity for crimes under international law.

The process leading to the eventual accession of Serbia to the EU provides a unique opportunity for Serbia to address persistent obstacles to the effective and timely investigation and prosecution of crimes under international law, and for the European Commission (EC) to encourage the Serbian authorities to take the necessary measures towards ending impunity for such crimes. The next few years are crucial. By the time Serbia reaches its goal of EU membership, more evidence will have been lost or destroyed, witnesses' memories will have further faded, and many victims may have died, still awaiting justice.

This report aims to provide an analysis of the shortcomings within Serbia's prosecutorial and judicial system, which prevent those bodies from comprehensively addressing impunity for crimes under international law, which took place during the armed conflicts of the 1990s. It also addresses Serbia's failure to ensure the rights of victims and their relatives, including the right to reparation. The report provides recommendations to the EC and the Serbian government on measures that Amnesty International considers should be taken to address these shortcomings, within the context of accession negotiations on Chapters 23 and 24 of the *Acquis communautaire*, which cover the judicial system and fundamental human rights, and justice, freedom and security, respectively. [7]

The report is based on research by Amnesty International conducted in Serbia and Kosovo over the past decade, focussing primarily on developments since 2012, and including interviews with some of the main actors in the prosecutorial and judicial system, and with victims and their relatives.

Amnesty International does not attempt in this report to provide an overview of the extent of the impunity enjoyed by Yugoslav and Serbian forces for crimes under international law which took place during the armed conflicts in Croatia (1991-1995), Bosnia and Herzegovina (1992-

1995) and Kosovo (1999), as well as war-related violations against civilians inside the then republics of Serbia and Montenegro. These have been extensively documented by both international non-governmental organizations (NGOs), including Amnesty International, and by many NGOs in the region.[8]

Within Serbia, the Humanitarian Law Centre (HLC) has, unflinchingly and uniquely, through research, documentation and advocacy, held successive Serbian government and prosecutorial and judicial bodies to account, and consistently advocated for the rights of the victims, including to justice and reparation. This report draws heavily on – and hopefully complements – their work; we acknowledge Amnesty International's debt to HLC in this regard.

SUMMARY

This report first examines the institutions responsible for the investigation and subsequent prosecution of war crimes at the Special War Crimes Court (SWCC) in Belgrade at Chapter 2. Chapter 3 analyses the legal framework under which indictments are brought, and finds that they fail to meet international standards. Chapter 4 illustrates, through selected cases, how shortcomings in both the legal and institutional framework may lead to impunity, including the lack of any investigation based on command responsibility, crimes against humanity or war crimes of sexual violence. In Chapters 5 and 6, Amnesty International identifies the shortcomings within the systems established for witness protection and support, and which the organization considers to fail the victims and witnesses in proceedings at the SWCC. The rights of civilians are further considered in Chapter 7, which focuses on the absence of effective mechanisms in law and in the civil courts, which deny victims access to reparation. Finally, Amnesty International calls on the government of Serbia to publicly demonstrate the political will to end impunity for crimes under international law; without that political will impunity is likely to flourish.

2. INSTITUTIONAL FRAMEWORK

While prosecutions at the International Criminal Tribunal for the former Yugoslavia (ICTY) have established the responsibility of some of the most senior political and military leaders for the violations of international humanitarian law which took place during the armed conflicts, the international court is now moving towards closure, and responsibility for the investigation and prosecution of crimes under international law falls to courts in BiH, Croatia, Kosovo and Serbia. Many proceedings at the ICTY have established an ample evidential base for the widespread and systematic violations which took place, and cases which were neither

fully investigated nor prosecuted by the ICTY may now be transferred to the relevant local jurisdictions.[9]

Ten years after the opening in March 2004 of the first prosecution at the Special War Crimes Court (SWCC) at Belgrade District Court, the OWCP has indicted and prosecuted 170 individuals, of whom 70 have so far been convicted, in 37 cases of crimes under international law, completed at the second instance. [10]

Some 32 defendants have been acquitted. As of May 2014, seven cases are at appeal and 14 proceedings, against 40 defendants, are in progress.[11] With some exceptions, prosecutions have been brought for war crimes against the civilian population, against mainly by low level members of military, police or paramilitary forces associated with the Socialist Federal Republic of Yugoslavia (SFRY), Federal Republic of Yugoslavia (FRY), in Bosnia and Herzegovina (BiH), Croatia and Kosovo. A few other prosecutions have been brought against Kosovo Albanians, who were arrested and detained in Serbia. [12]

Another 20 cases, involving 73 suspects, are at the stage of investigative proceedings (discussed below), whilst in November 2013 some 35 cases were at the pre-investigative stage.[13] Amnesty International has been unable to obtain any statistics regarding the total number of criminal complaints and pending cases, nor an estimated number of cases which remain to be registered and investigated.

Amnesty International considers that the number of prosecutions brought by the OWCP to date remains extremely low in relation to the number, scale and intensity of the crimes under international law which were committed by Serbian forces during the armed conflicts of the 1990s. With the closure of the ICTY, responsibility now passes to the Serbian government to ensure that its institutions are equipped with the resources and personnel needed to effectively address the legacy of the wars of the 1990s before it is too late.

Both the court and the OWCP have suffered from a lack of political support since their inception. Although the SWCC was established by a law adopted by the Serbian assembly, there has been a clear lack political will by successive governments to support the court, either politically or financially.[14] Although the OSCE Mission to Serbia has continued to provide practical support, including training to the institutions, the court is no longer internationally funded, but is funded solely by the government of Serbia, which has yet to provide the additional resources required to enable it to discharge its international obligations.

Consequently the Office of the War Crimes Prosecutor (OWCP) lacks sufficient personnel and resources to address its current workload, let alone the backlog of uninvestigated crimes under international law.

Amnesty International therefore considers that immediate measures, including the development of a prosecution strategy, should be taken to increase the capacity of the Office of the War Crimes Prosecutor, and of the War Crimes Investigation Service, not only in the light of the potential number of outstanding cases, but the additional responsibilities placed on the prosecutor's office following changes in the Criminal Procedure Code (CPC) introduced in 2012.

Amnesty International, along with Serbian NGOs, considers that the major factor in determining the low number of cases, and the slow rate of prosecutions, is the longevity of investigations conducted by the OWCP, and the consequent delay in bringing indictments, even after they have been publicly announced. In some cases, further delays are caused by the continued additions to and amendments to indictments, as investigations catch up with proceedings already in progress.

In 2012, for example, proceedings took place in only 13 cases, with first instance judgements handed down in seven; thirty-seven defendants were convicted and eight acquitted.[15] In 2013, only three proceedings were concluded at the first instance, resulting in the conviction of seven men in one case, and the acquittal of one defendant in another; one defendant was convicted after entering a guilty plea; at the second instance, one defendant was convicted following appeal and retrial.[16] So far in 2014, first instance judgements have been handed down in two cases.[17]

Amnesty International believes that the OWCP does not presently have sufficient staff, resources and capacity to effectively investigate so many potentially complex and difficult cases at any one time. Further, there is the massive backlog of hundreds if not thousands of uninvestigated – and possibly not even registered - war crimes committed during the 1990s. At the current rate of progress it will take more than a generation to bring those already under investigation for crimes under international law to justice.

BACKGROUND

The SWCC officially opened in October 2003, following the introduction in July 2003 of legislation creating a War Crimes Department at the Belgrade Higher (District) Court.[18] The law provided the prosecution and judiciary, and other relevant bodies, with "jurisdiction in proceedings for criminal offences specified in Article 2 hereof, committed on the territory of the former Socialist Federal Republic of Yugoslavia, regardless of the citizenship of the perpetrator or victim".[19]

Article 2 states that the "Law shall apply in detecting, prosecuting and trying: (1) crimes against humanity and international law set forth in Chapter XVI of the Basic Criminal Code; [and] (2) serious violations of international humanitarian law committed in the territory of the former Yugoslavia since 1 January 1991, stipulated in the Statute of the International Criminal Tribunal for the former Yugoslavia".[20]
The 2003 legislation also established the Office of the War Crimes Prosecutor (OWCP), and bodies to support the work of the court, including a Witness Assistance and Support Unit. It also established a War Crimes Investigation Service (WCIS) within the Ministry of Interior police, responsible for conducting investigations at the request of the OWCP.[21]

THE OFFICE OF THE WAR CRIMES PROSECUTOR

The OWCP, led since the Court's inception by Chief Prosecutor, Vladimir Vučković, consists of seven deputy prosecutors and support staff; there is also an administrative secretariat. Amnesty International considers that the number of staff employed within the office is woefully inadequate to the task of investigating crimes under international law which took place over the course of almost a decade and across BiH, Croatia and Kosovo. The office lacks sufficient analysts, investigators and has no dedicated forensic capacity.

The OWCP, and the Chief Prosecutor in particular, is also responsible for international cooperation, particularly with his counterparts in the region, not only in the gathering of evidence and cooperation in specific cases, but in paving the way for international agreements on the investigation and prosecution of war crimes. In addition, the OWCP is also charged with the investigation and prosecution of "the harbourers" – those responsible for concealing the whereabouts of, and providing assistance to, suspects indicted by the ICTY.[22]

Naturally, the Chief Prosecutor defends his record, asserting that they have prosecuted a comparable number of perpetrators (in cases involving almost 3,000 victims) to the 161 indicted and prosecuted by the ICTY in over 20 years. [23]

However, as the following tables show, the rate of indictments has slowed considerably in recent years. Further, many of them are amended indictments, rather than new indictments in new cases: for example, of six indictments issued by the OWCP in 2012, two were amended indictments in retrials following appeal (the Bytyqi brothers, the Zvornik 5); two others were amended indictments in ongoing proceedings, including Čuška – where investigations have been ongoing since at least 2009.[24] Only four indictments were issued in 2013, and, to date, one new indictment has been issued in 2014.[25]

Table 1: Indictments and suspects, by year[26]

Year	03	04	05	06	07	08	09	10	11	12	13	14
Indictments	0	0	4	2	4	8	5	9	3	5	4	1
Suspects	0	0	14	10	17	14	25	32	5	13	4	1
Amended indictments		2	2	1		1	1			2		
Suspects as amended	*	*	17	5		2	1			15		

Access to justice is often slow, complicated by the longevity of investigations, and time taken in the production of indictments. Justice may also be impeded by obstruction or intimidation, as most recently reported in connection with investigations into the abduction of 19 civilians at Štrpci in 1992.[27]

However, the Chief Prosecutor is only too aware of the limitations placed on the OWCP by the lack of staff and an adequate budget. He told Amnesty International: "The biggest issue is that we don't have prosecutorial assistants, but the government decided there should be no more employment in a decree adopted in 2012."[28] Although the OWCP and the court previously received financial assistance from international donors, it is now reliant on a budget set by the government to cover its core activities.

Amnesty International fears that the lack of capacity within the OWCP may lead to irreversible impunity, and deny justice to the victims of those crimes. As time passes, fewer potential witnesses will be available to the prosecution and other forms of evidence will be even more difficult to collect.

WAR CRIMES INVESTIGATION SERVICE

The relative slowness in bringing prosecutions is also due to the lack of investigative support from the WCIS, a dedicated police unit within the Ministry of Interior, established to investigate crimes under the court's jurisdiction at the request of the OWCP.[29]

With a staff of 50, responsible for the investigation of war crimes, including the location of missing persons, the WCIS includes up to 25 criminal investigators. However, the

WCIS is accused of lacking the capacity to provide the OWCP with the assistance it needs, and prosecutors have been enabled to question witnesses without relying on prior police work.

The OWCP told Amnesty International, "Under the law the police should investigate the criminal case and report to us, but they have not done this in one case over 10 years; all the evidence has been found by us. We have had to initiate all the investigations– but the police should do this".[30]

These concerns were echoed by the former head of the Criminal Justice System Unit of the OSCE Mission to Serbia, who identified the WCIS as passive, confirming that they only reacted to requests from the OWCP, rather than initiating investigations. [31]

The Head of the WCIS defended their record in an interview with Amnesty International, citing 35 open cases, their crucial role in investigations into the "Harbourers" case, [32] and their involvement in the location of missing persons, including in the process of the location of bodies of Croatians killed by Serbs found in Lake Perućać, and in interviewing witnesses in this case; the WCIS are also involved in exhumations at Raška in their capacity as members of the Commission on Missing Persons. In the Ćuška case, (concerning the murder of at least 44 Kosovo Albanians as a well as other war crimes against civilians in Ćuška village in Kosovo), the WCIS were responsible for the arrest of suspects, including serving police officers.

Although the WCIS play a role in the pre-investigative stage of proceedings, including in interviewing suspects, the extent of this role is limited. The unit itself is under-resourced and personnel under-paid in relation to their responsibilities. There is no dedicated forensic capacity for the unit; technical and IT equipment is outdated, and until recently, the WCIS lacked an electronic case information database, which was established only in 2010 (with the assistance of the OSCE and donor funding).

According to the OWCP and other observers, the unit is hampered by its position within the Ministry of Interior, whereby its officers are often required to investigate allegations against police officers senior to them in rank. Indeed the unit was initially headed by officers who were themselves alleged to be implicated in war crimes. Despite the appointment of a new head, the WCIS continues to be perceived as weak and unwilling to initiate investigations.[33] Although the OWCP in 2009 reported some co-operation in the Suva Reka investigation, in other cases access to information has reportedly been obstructed by the WCIS.

The WCIS also face geographical limitations; according to Dejan Marinković, Head of the WCIS: "We cannot go to Bosnia or Croatia to interview witnesses or perpetrators. [All] international cooperation is done through the prosecutors' office; it is not yet at the level of the police".

Their lack of international investigational capacity means that the WCIS are predominantly involved in investigations related to Kosovo, where former and serving Ministry of Interior police are reasonably suspected of widespread violations of international law during the 1998-9 armed conflict. In investigating their still-serving or former colleagues, according to the head of the Criminal Justice System Unit in the OSCE Mission to Serbia, the WCIS "[may] try to circumvent them for political or other reasons, or because of personal affiliations within the police", again particularly problematic in relation to Kosovo.[34] Amnesty International notes that in 2012, the WCIS had not, for example, been able to provide a "reliable conclusion" on the identification of the perpetrators in their investigations into the transfer of the bodies of Kosovo Albanians to Serbia, where they were buried in mass graves, including on Ministry of Interior property.[35]

Dejan Marinković was candid about the obstacles faced in investigating their colleagues, especially serving officers; he told Amnesty International: "*In 'Ć uška', and other cases where there are colleagues involved, according to the CPC we must arrest and process them – all perpetrators. If the prosecutor thinks there is enough evidence then we have to make that arrest. We have to do this whether we like it or not,* [we have to be] *accountable and according to the law. It is the same if we are collecting evidence: it is more difficult where colleagues are concerned. Then there are more aggravating circumstances with the colleagues. Evidence is destroyed, they are afraid and frightened and do not want to testify, so it is hard to get qualitative evidence*".[36]

Both the OWCP and some Serbian and international NGOs have argued for a variety of solutions including the creation of a separate war crimes directorate within the Ministry of Interior or Ministry of Justice; the functional accountability of the Head of the WCIS to the prosecutor; or for the OWCP to be given direct control of the unit.[37] The current head of the WCIS told Amnesty International that working with the OWCP would be advantageous, enabling the WCIS to have more direct involvement in cases, but saw disadvantages if the WCIS were no longer part of the Ministry of Interior police.[38] However, there appears to be no appetite to contemplate a complete transfer of the unit, and some have suggested a functional relationship leaving the WCIS within the Ministry of Interior Police, but accountable to the OWCP. Any such measures would require legislative change.

Amnesty International considers that measures should be taken to review, and if necessary, reform the current WCIS, with the aim of ensuring an impartial and professional unit, provided with adequate resources, and the organizational capacity to carry out prompt, impartial, through and effective investigations.

CHANGES IN THE CRIMINAL PROCEDURE CODE

Under amendments to the CPC which entered into force in January 2012, the SWCC and OWCP began applying provisions of the new Criminal Procedure Code, applicable to investigations and proceedings in cases of war crimes and organized crime.[39]

These amendments radically changed the conduct of proceedings from the former inquisitorial system, in which preliminary investigative hearings were led by the court, to a prosecution-led model of preparatory hearings (Articles 345-52, Art. 395). They also introduced the concept of adversarial proceedings, in which the prosecutor is required to prove the case, including through the cross examination of witnesses (Arts.2.22, 98 and 402).[40]

The role of the investigative judge was transformed into that of a "judge at preliminary proceedings", with a monitoring role at the preparatory or investigative hearing. According to the head of the SWCC, "*The preparatory hearing is to facilitate the work of the judge; to establish unquestionable facts, which do not have to be brought in evidence. Under the changes introduced in the CPC the role of the judge is passive. Our space for manoeuvre is limited under the new law. We can only request clarification if evidence is unclear or contradictory, but - under rule 15 - we can order new evidence under our official obligation to ensure all evidence is provided The prosecutor should present all the evidence* [at the preparatory hearing]*, but they are always bringing new evidence* [at a later stage] *which they say that they did not know before*."[41]

The amendments also established a period of pre-investigative proceedings (formerly pre-trial investigations), which might be conducted by the public prosecutor or delegated to the police, who are required under Article 285 CPC to "execute the [prosecutor's] orders" and report their findings to the prosecutor. [42]

While the changes in the CPC aim to improve the quality of proceedings and evidence brought before the court, the responsibility for the conduct of investigative proceedings has placed additional demands on the OWCP.[43] However, no additional resources were provided (including for witness support during investigative proceedings, see Chapter 5).

FAILURE TO DEVELOP A PROSECUTION STRATEGY AND CASE SELECTION CRITERIA

Amnesty International considers that in order to maximise the resources available to the prosecutor, and ensure access to justice for the victims of crimes under international law, there is an urgent need to develop a comprehensive strategy for prosecution of war crimes, and clear criteria for the selection of cases. In the absence of such a strategy, investigations and prosecutions may be prompted by international pressure (as in the Bytyqi brothers case) or by investigative work by Serbian NGOs (as in the Bogujevci case), rather than by a clear investigative or prosecutorial strategy.

The lack of an overall strategy, coupled with the lack of clear case selection and prioritization criteria, creates a situation in which cases selected for prosecution are random and unrelated, often targeting low level perpetrators accused of crimes of lesser gravity, while some of the gravest violations of international humanitarian law are not addressed. In some of these cases, responsibility at the highest level had been established by the ICTY, but no individual perpetrators or their immediate superior officers have been indicted.[44] Further, there have been insufficient investigations and prosecutions of commanders and superiors.

Amnesty International does not consider that cases of crimes under international law should be selected on the normal court practice of "first come, first served", or when the cases were registered. The prosecution of crimes under international law is significantly different, and presents several important and distinctive challenges.

The first is the massive backlog of cases across the region, which demand effective regional cooperation, including on prosecution strategies and priorities. Further, the majority of these alleged criminal acts are complex, and can rarely be reduced to single incidents, but may have been committed as part of a larger criminal enterprise, which needs to be explored and investigated. They may also often involve multiple violations: one incident may involve acts of torture, rape and/or murder, by many perpetrators, whose roles in the perpetration and responsibility for the crime may be different. Any relevant documentation related to war crimes may have been destroyed or lost. These and other challenges need to be taken into consideration by the OWCP. For these practical reasons, in the interests of justice, and to avoid accusation of political or other bias in motivating prosecutions - or its perception - the OWCP needs to establish clear criteria on the selection and prioritization of cases. All existing investigations and pre investigatory cases, should be identified and a prosecution strategy should be developed. In addition to the benefits outlined above, the organization believes that a strategy would also mitigate

against the issuing of partial indictments.

Several examples of good practice in the development of case selection and prioritization criteria exist, put in place both by the international criminal tribunals as well as by other countries of the former Yugoslavia. The OWCP should consider such examples of good practice in order to develop case selection and prioritization criteria, and a transparent prosecution strategy. [45]

BATAJNICA: THE COVER-UP

Amnesty International has long urged the investigation and prosecution of those responsible for the concealment of the bodies of ethnic Albanians killed in Kosovo by Serb forces, including those responsible for the transfer of their mortal remains to Serbia proper for destruction or reburial, including on Ministry of Interior police land at Batajnica in Belgrade and Petrovo selo, and in Lake Perućac. [46]

Whilst the most senior military and police officials responsible for this cover-up operation were amongst those convicted by the International Criminal Tribunal for the former Yugolsavia (ICTY) in 2009, other military and police commanders, allegedly responsible for coordinating and implementing the operation, have not been brought to justice, despite the ample evidence provided in proceedings at the ICTY.[47]

The remains of almost 900 ethnic Albanians disappeared by Serb forces, have been exhumed at sites in Serbia, including 744 bodies at Batajnica, 70 at Petrovo Selo and 84 in Lake Perućac.[48] The bodies of others are believed to have been burned in industrial furnaces in Surdulica and Trepča (north Mitrovica). As of May 2014, exhumations continue at a mass grave in Rudnica quarry near Raška in Serbia, where the bodies of two Kosovo Albanians were found in December 2013. By early June 2014, some 34 bodies had reportedly been exhumed. The mass grave is thought to hold the mortal remains of an estimated 250 Kosovo Albanians. Amnesty International considers this case should have long ago been established as a priority for investigation and prosecution, as recommended by the UN Human Rights Committee in 2004 and 2011.[49]

In May 2013, two police officers, one allegedly a serving special police unit (gendarmerie) officer, were arrested on suspicion of committing war crimes against at least 65 Albanian civilians, and of the "deportation and transportation of the bodies of those killed in the village of Ljubenić to the police [training] centre in Batajnica [in Belgrade]".[50] Amnesty International hopes that this is part of a wider indictment, as hinted at by the OWCP in their 2013 report. However, in July 2012, the government reported that the investigation had been a priority for the OWCP since its inception, but that a report submitted to the OWCP by the WCIS had not provided a "reliable conclusion" on the identification of the perpetrators. [51]

3. THE LEGAL FRAMEWORK

Under the 2003 law establishing the SWCC and the OWCP, the applicable law was defined in Article 2, as "crimes against humanity and international law set forth in Chapter XVI of the Basic Criminal Code; [and] serious violations of international

humanitarian law [...] stipulated in the Statute of the International Criminal Tribunal for the former Yugoslavia".

Amendments to the Law on Organisation and Competence of Government Authorities In War Crimes Proceedings introduced in 2005, and reflecting changes in the Criminal Code, added to the court's existing jurisdiction, and at Article 2(1) specified that amended law "shall apply to the detection, prosecution and trying of: "criminal offences referred to in Articles 370 through 384 and Art. 385 and 386 of the Criminal Code". These articles include: Genocide (Art.370); Crimes against Humanity (Art 371); War Crimes against the Civilian Population (Art 372), and Art 384: Failure to Prevent Crimes against Humanity and other Values Protected under International Law (Art 384), and brought the law more into compliance with international standards. [52]

Despite these amendments, prosecutions continue to be conducted under the 1976 SFRY Basic Criminal Code, on the basis that this was the law in force at the time when the criminal offences took place, and are limited to Article 142 of the 1976 Basic Criminal Code - "War crimes against the civilian population", and Article 144: Crimes against Prisoners of War".

In this section, Amnesty International explains why the failure to apply the provisions of the 2005 Criminal Code is problematic with respect to ensuring that prosecutions are conducted in accordance with international law and standards.

This chapter identifies some of the gaps in the legal framework, derived either from the failure of the OWCP to apply international law, (including as set out in the 2005 Criminal Code) where crimes set out in international law are not included in the 1976 legal framework.

As a matter of customary international law Serbia is obliged to recognize in all circumstances the supremacy of both conventional international law and customary international law with regard to its national law.[53] This obligation applies to all national law, including the Constitution of the Republic of Serbia and legislation[54] and is also reflected in the Vienna Convention on the Law of Treaties (VCLT), to which Serbia is a party since 2001.[55] Amnesty International therefore does not agree with the view recently expressed by Serbia before the Committee on Enforced Disappearances that ratified international treaties 'must be in accordance with the Constitution'. On the contrary, it is the Constitution that must be in compliance with international law.[56] Therefore, Serbia should undertake all legislative changes necessary to comply with its obligations under

international law.

INADEQUATE LEGAL FRAMEWORK TO INVESTIGATE AND PROSECUTE CRIMES UNDER INTERNATIONAL LAW

In a number of areas related to the investigation and prosecution of crimes under international law, like those committed during the armed conflicts in the territory of the former Yugoslavia, Serbian law does not seem to be in full accordance with international law.

This is not merely a theoretical debate about applicable law. In the next main section of this report, Amnesty International demonstrates how these gaps, in relation to the non-application of or absence of offences, may result in impunity for certain offences, or in prosecutions that fail to reflect the true gravity of the offence. This failure calls the commitment of the prosecutor and courts to ensure accountability for the worst crimes into question.

INCORRECT INTERPRETATION AND APPLICATION OF THE LEGALITY PRINCIPLE (*NULLUM CRIMEN SINE LEGE*) AND THE ABSENCE OF INVESTIGATIONS FOR CRIMES AGAINST HUMANITY

Serbian authorities have recently explained that crimes against humanity, defined as acts "committed as part of a widespread or systematic attack directed against any civilian population", [57] committed in the territory of the former Yugoslavia during the 1990s armed conflicts have not been investigated or prosecuted in Serbia because crimes against humanity were not defined in Serbian law until 2005. In a report submitted to the Committee on Enforced Disappearances, Serbia explained the following:

"As the law [the 1976 Criminal Law of the SFRY] does not contain specific provisions referring to the criminal offence "Crime against humanity", so far the Court [Higher Court in Belgrade] has never had cases in which a criminal offence was qualified as a crime against humanity".[58]

This position presents an incorrect interpretation and misapplication of the legality principle (*nullum crime sine lege*), which, in turn, leads to the impunity of those responsible for such crimes. Serbia is obliged to investigate and, if there is sufficient admissible evidence, prosecute those suspected of criminal responsibility for crimes under international law – including crimes against humanity - irrespective of the date of their commission, as set out in several treaties to which Serbia is a party. As it has been explained by a leading scholar, "At the time the crime was committed, a written or unwritten norm must have existed upon which to base criminality under international law. The principle of legality (*nullum crimen sine lege*) is part of customary international

law."[59]

For example, the International Covenant on Civil and Political Rights (ICCPR) provides in Article 15: "1.No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of the lighter penalty, the offender shall benefit thereby".2. Nothing in this article shall prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by the community of nations."[60]

Article 15(1) was designed "to prevent a person from escaping punishment for an international crime by pleading that the offense was not punishable under the national law of the state in question" and through Article 15(2) "[a] person may be held guilty of an act or omission that was not punishable by the applicable national law at the time the offense was committed so long as this was punishable under international treaty law or customary international law in force at the time the offense was committed".[61]

The European Convention on Human Rights (ECHR) contains a similar provision in Article 7: "No one shall be held guilty of any criminal offence on account of any act or omission which did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed.

This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognized by civilized nations".[62]

The former Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, Manfred Nowak, is of the view that "As with Art. 7(2) of the ECHR, Art.15 (2) of the Covenant contains an exception to the prohibition of retroactive national criminal laws if an act or omission was, at the time when it was committed, criminal under *customary international law*".[63]

The European Court of Human Rights has explained the scope and application of the legality principle under international law in a number of cases. For example, the Court

stated in a recent case against Bosnia and Herzegovina that:

"Serious violations of international humanitarian law falling under the State Court's jurisdiction can be divided into two categories. Some crimes, notably crimes against humanity, were introduced into national law in 2003. The State Court and the Entity courts therefore have no other option but to apply the 2003 Criminal Code in such cases (see the international materials cited in paragraphs 31 and 32 above). In this regard, the Court reiterates that in Šimšić v. Bosnia and Herzegovina (dec.), no. 51552/10, 10 April 2012, the applicant complained about his 2007 conviction for crimes against humanity with regard to acts which had taken place in 1992. The Court examined that case, inter alia, under Article 7 of the Convention and declared it manifestly ill-founded. It considered the fact that crimes against humanity had not been criminal offences under national law during the 1992-95 war to be irrelevant, since they had clearly constituted criminal offences under international law at that time."[64]

And also in a case against Estonia that: "The Court reiterates that Article 7 § 2 of the Convention expressly provides that this Article shall not prejudice the trial and punishment of a person for any act or omission which, at the time it was committed, was criminal according to the general principles of law recognised by civilised nations. This is true of crimes against humanity, in respect of which the rule that they cannot be time-barred was laid down by the Charter of the Nuremberg International Tribunal."[65]

Likewise, the Special Tribunal for Lebanon – established by the UN Security Council, acting under Chapter VII of the Charter of the United Nations, in 2006 - also explained the true meaning of the legality principle under international law:

"[A]rticle 15 of the ICCPR allows at the very least that fresh national legislation (or, where admissible, a binding case) defining a crime that was already contemplated in international law may be applied to offences committed *before* its enactment without breaching the *nullum crimen* principle. This implies that individuals are expected and required to know that a certain conduct is criminalized in international law: at least from the time that the same conduct is criminalized also in a national legal order, a person may thus be punished by domestic courts even for conduct predating the adoption of national legislation".[66]

In that sense, the 'Law on the organization and competence of the government authorities in war crimes proceedings' – which mainly regulates the establishment, organization, competences and powers of the OWCP for the purposes of detection,

prosecution and trying of criminal offences which were committed in the territory of the former Socialist Federal Republic of Yugoslavia – should be applied not only to the investigation and prosecution of those suspected of criminal responsibility for war crimes, but also for genocide and crimes against humanity.

In 2009, the Committee against Torture concluded that Serbia should ensure that: "All persons, including senior police officials, military personnel, and political officials, suspected of complicity in and perpetrators of war crimes and crimes against humanity, are brought to justice in adequate penal proceedings, including after the scheduled closure of the ICTY tribunal".[67]

However, as far as Amnesty International is aware, neither investigations nor prosecutions for crimes against humanity have ever taken place by Serbian prosecutorial authorities. This is not a theoretical issue: the reluctance of the OWCP to indict under charges of crimes against humanity – defined in Article 371 of the 2005 Criminal Code of Serbia – may have practical consequences in terms of impunity, as demonstrated in a number of cases described in Chapter 4, where – in relation to Kosovo - prosecutions have been brought under Article 142 (war crimes), despite the fact that the crimes set out in the indictment took place after the end of the armed conflict.

Amnesty International recalls that, as a state party to the 1968 Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, Serbia may not apply statute of limitations to crimes against humanity "irrespective of the date of their commission".[68]

LACK OF CRIMINALIZATION OF ENFORCED DISAPPEARANCE

As a state party to the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) since 2011 Serbia is obliged to "take the necessary measures to ensure that enforced disappearance constitutes an offence under its criminal law".[69] The crime of enforced disappearance is defined in Article 2 of the Convention as "the arrest, detention, abduction or any other form of deprivation of liberty by agents of the State or by persons or groups of persons acting with the authorization, support or acquiescence of the State, followed by a refusal to acknowledge the deprivation of liberty or by concealment of the fate or whereabouts of the disappeared person, which place such a person outside the protection of the law".

In addition, there is an express obligation in Article 3 to extend the active subject of the crime not only to state agents, but also to those persons or groups of persons acting without the

authorization, support or acquiescence of the state. Therefore, Serbia has the obligation to define the conduct prohibited in Article 2 when committed by such individuals as a crime under national law.

With regard to the criminalization of enforced disappearance under national law Serbia stated to the Committee against Enforced Disappearances last January: "The criminal legislation of the Republic of Serbia does not provide an explicit definition of enforced disappearance, in terms of article 2 of the Convention.[70]

Amnesty International recalls that the obligation under Article 4 requires that states parties define enforced disappearance as a separate and autonomous crime. It is not enough to define offences that are often linked with enforced disappearances such as abduction, unlawful detention, illegal deprivation of liberty, torture or extrajudicial executions.

Amnesty International calls on Serbian authorities to promptly comply with its obligations under international law by making enforced disappearance criminal under Serbian law. Serbia should implement, in law and practice, its obligations under the Convention and related international law and standards.[71]

INADEQUATE DEFINITION OF WAR CRIMES OF SEXUAL VIOLENCE

The jurisprudence of the ICTY and the International Criminal Tribunal for Rwanda (ICTR) has established that, depending on the circumstances, rape and other forms of sexual violence may be considered as torture, war crimes, crimes against humanity or genocide. The Rome Statute of the International Criminal Court expressly provides that rape, sexual slavery, enforced prostitution, forced pregnancy, enforced sterilization, or any other form of sexual violence of comparable gravity amount to war crimes and crimes against humanity. [72]

Amnesty International considers that Article 142, which refers to "forcible prostitution or [forcible] rape", may lead to an inadequate prosecution, in requiring proof that the victim had tried to fight back, and is inconsistent with international standards. A definition of rape consistent with international standards should, for example, make reference to "force, threat of force or coercion",[73] to allow for the element of coercion, as set out by the ICC.[74]

Further, although sexual slavery,[75] and torture are qualified as crimes against humanity in Article 371 of the SFRY CC, this charge has not been brought in any indictments. Under international criminal law, sexual violence has been identified as a form of torture;

Amnesty International considers that all crimes of sexual violence should be treated with the same seriousness as torture.[76]

RESPONSIBILITY OF COMMANDERS AND OTHER SUPERIORS

The failure to investigate and prosecute commanders and civilian superiors is a concern in the fight against impunity in Serbia.[77] This is true both for those accused of giving criminal orders and, even more evidently, in connection with command responsibility.

The doctrine of command responsibility[78] is a mode of individual criminal responsibility under customary international law[79] whereby a superior, either a military commander or a civilian superior, may be liable for the acts of their subordinates – basically if he or she fails to undertake measures to prevent the commission of crimes or repress them. This is in addition and separate to other, no less important modes of responsibility, such as planning, ordering, aiding and abetting, all of which may impute the responsibility of commanders or civilian superiors. However, the lack of application of command responsibility necessarily leads to the impunity of many of those leaders who bear the greatest responsibility for crimes committed during the 1990s armed conflicts. Indeed, this has been recognized in Article 384 of the 2005 Criminal Code, "Failure to Prevent Crimes against Humanity and other Values Protected under International Law", but this article is not applied.

The Protocol Additional to the Geneva Conventions relating to the Protection of Victims of International Armed Conflicts (Protocol I) (1977), [80] to which Serbia is a state party (and to which the then former Yugoslavia was a state party at the time of the armed conflicts), defines the responsibility of commanders and other superiors regarding war crimes in the following terms:

"The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach."

The effective exercise of command is an essential tool in ensuring that crimes under international law are prevented and, if they nonetheless occur, are punished.[81] Liability of superiors for negligence may be found as early as the Nuremberg follow –up trials. [82]

Although a number of middle-ranking officers, albeit a small number, have been indicted

for war crimes by the OWCP, so far not one senior military or police official or politician has been indicted for their command responsibility – aside those cases at the ICTY.

It is claimed by some observers that an indictment based on the responsibility of commanders would violate the Constitution of the Republic Serbia,[83] because command responsibility was not 'defined' under the law in force in the former Yugoslavia at the time of the armed conflicts.[84] According to the Chief Prosecutor, the OWCP "does not make a decision on issues of command [responsibility]". This interpretation of the legality principle, as explained above, is mistaken. The Socialist Federal Republic of Yugoslavia was a state party to Protocol I well before the 1990s armed conflicts – indeed since 1978 - and, therefore, Serbia, which claims to continue the international legal personality of the former Yugoslavia, is obliged to abide by it without invoking the provisions of its internal law as justification for its failure to do this.[85]

Moreover, as the HLC have noted, "Guidelines on the Application of International Humanitarian Law in the Armed Forces of the Socialist Federal Republic of Yugoslavia, adopted in 1988 and applied during the 1990s, clearly define the command responsibility of military commanders". Article 21 of the guidelines states:

"A military commander shall be held individually responsible for violations of International Humanitarian Law if he knew or he should[86] have known that his subordinate or other units or individuals were about to commit such crimes, and, if at a time when it is still possible to prevent the commission of the crime, he does not take necessary measures to prevent these violations. A military commander shall also be held responsible if he knows that violations of international humanitarian law were committed, and he fails to initiate disciplinary or criminal proceedings against the perpetrators, or, if he is not authorized to initiate such proceedings, he fails to report them to the appropriate military commander".[87]

In sum, Serbian prosecutorial authorities are obliged to investigate and, if there is sufficient admissible evidence, prosecute those suspected of criminal responsibility for crimes under international law also pursuant to the principle of command responsibility.

4. INDICTMENTS AND PROSECUTIONS

In the preceding chapters, Amnesty International has identified some of the impediments to the effective investigation and prosecution of crimes under international law. This chapter examines how some of those factors play out in practice, in both indictments and prosecutions, and sets out further concerns about the prosecution of crimes under international law at the SWCC.

SHORTCOMINGS RESULTING FROM THE INADEQUATE LEGAL FRAMEWORK

Amnesty International considers that the absence of a legal framework consistent with international humanitarian law and standards, and the consequent lack of indictments for crimes against humanity and war crimes of sexual violence, and the very low number of prosecutions of high-ranking officials (including on grounds of command responsibility) is denying justice to the victims of crimes under international law, and resulting in impunity for the perpetrators, or in sentencing that fails to reflect the gravity of the crimes of which they are accused. As will be seen below, in a few cases the Appeal Court has returned cases for re-trial on the basis of the inappropriate qualification of crimes, although this has been largely ignored by the OWCP and the SWCC. However, there are signs that the judiciary, including at the Appeal Court, are increasingly recognising the problems caused by the absence of indictments for crimes against humanity, as well as the failure by the OWCP to indict senior officials including for their criminal, including command, responsibility.

FAILURE TO INDICT SENIOR OFFICIALS

While the highest ranking officials have been tried and convicted at the ICTY,[88] in the decade since the creation of the OWCP, few senior military or police officers, and no politician or government official has been indicted. Only a few middle-ranking officers from the Yugoslav National Army (JNA) or Yugoslav Army (VJ) or police have been indicted, and generally for the commission of crimes. Few have been indicted specifically in relation to their criminal responsibility as commanders, and none have been indicted for their command responsibility. The majority of prosecutions have been brought against ordinary soldiers, reservists or paramilitaries and police officers. They have not been brought against those who were in positions of command, whether they issued the orders, or, through their actions or omissions, were responsible for, or failed to prevent subordinates under their command committing crimes under international law. [89]

Consequently there is a massive justice gap between the prosecutions at the ICTY of the most senior political and military and leaders and the low ranking soldiers, paramilitaries and police officers prosecuted at the SWCC, resulting in impunity for senior military and police officers and officials reasonably suspected of criminal responsibility (on whatever grounds or mode of criminal responsibility).

LOVAS: FAILURE TO INDICT COMMANDING OFFICERS

In June 2012, the SWCC convicted 14 Croatian Serbs, mainly from the local Territorial Defence Force, and including paramilitaries, for war crimes against the civilian population in the village of Lovas, in eastern Croatia, and sentenced them to a total of 128 years' imprisonment. They were found responsible for inhuman treatment, torture, violation of bodily integrity (beating, wounding or causing serious bodily harm) and murder, including the killing of 40 and the wounding of 11 Croat civilians in October 1991.

The indictment did not include Yugoslav National Army (JNA) officers, alleged to have given the orders to kill the captured civilians. Marijana Toma, from the Belgrade-based Humanitarian Law Centre, told Balkan Insight that "[t]he Serbian prosecution appeared to see an interest in not having the JNA officials prosecuted".[90] Mirko Kovačić, a relative of one of the victims stated. "The Army is in some way protected and nobody dares touch it".[91]

Only one officer from the JNA Second Proletarian Guard Mechanized Brigade (who the court considered to be in overall command of the operation) was indicted and prosecuted. In her concluding remarks the judge reportedly stated, with respect to the JNA, "We have heard in this courtroom the full names of some other actors involved in the critical events, some of them even appeared before us as witnesses, so the prosecutor should fulfil the promise he gave in his closing argument and look into their criminal responsibility as well, if we are to ensure fairness both to the victims and the accused."[92]

However, in sentencing the convicted men, the court took into account the command role of five of the defendants (including Miodrag Dimitrijević, a JNA lieutenant) as an aggravating circumstance, and accordingly imposed higher sentences. [93]

Similar criticisms were made by the Trial Chamber in the Beli Manastir case, also relating to Croatia, which reportedly stated in its judgment, "that in addition to those accused, their superiors should also be held responsible because they were aware of the crimes committed and who the perpetrators were, but they failed to prosecute any of them".[94]

ĆUŠKA: RESPONSIBILITY OF COMMANDERS

The final amended indictment against those responsible for war crimes against civilians which took place in Ćuška, in Kosovo in May 1999, however, did recognise the specific criminal responsibility of Toplica Miladinović, as commander of the 177th Military Technical Detachment of the VJ. It states:

"On 13 May 1999 in Peć, Toplica Miladinović was present at the local headquarters of the Yugoslav Army. In his capacity as commander of the 177th MTD reserve force, he ordered his subordinates – including the late Nebojša Minić, at the time immediate commander of the 1st Platoon operating within the 177th MTD – to conduct a search operation in villages Ćuška, Pavljan and Zahač on 14 May 1999, allegedly aimed at the identification and liquidation of armed KLA members, and the subsequent seizure of their weapons.

Albeit aware that, by acting upon his order, the unit under the immediate command of the late Nebojša Minić would be committing a criminal offence; […] As a consequence of the above-described circumstances and the particular order issued by the accused, Miladinović, the late Nebojša Minić and his unit submitted the local civilian population to a campaign of terror and intimidation that included unlawful and intentional destruction of civilian property; burning of family homes and storage facilities, cattle and vehicles; extensive seizure of civilian possessions –cash, jewellery, vehicles and other valuables; as well as individual and mass killings of civilians, all of which were aimed at the permanent expulsion of the local population from their households. By issuing the specific attack order, the accused, Toplica Miladinović, acquiesced to such consequences".[95]

On 11 February 2014, Toplica Miladinović and eight other defendants were convicted at the first instance; on the basis of his responsibility, as a commanding officer, Miladinović and two others were handed down the maximum sentence of 20 year's imprisonment. The written verdict was not available at the time of writing.[96]

Amnesty International notes that a recent indictment against a Commander of the Logistics Battalion of the 549th Motorised Brigade of Yugoslav Army also appears to recognize the responsibility of a military officer for issuing orders. [97]

ZVORNIK II: COMMAND RESPONSIBILITY?

In one instance, it appears that the OWCP has edged closer towards acceptance of the doctrine of command responsibility. In the Zvornik II indictment, the OWCP specifically refers to the elements of command responsibility, stating that Branko Popović, "in his capacity as Commanding officer in the Zvornik Territorial Defence, was therefore under [an] obligation to prevent any unlawful activity by those involved in this operation, by members of the Territorial Defence, and in particular to prevent the unjustified killings committed by those involved, as was [his] duty under the rules in article 3, s. 1 ss. 1 paras. a), b) and c) of the 4th Geneva Convention, and Article 4, s. 2, ss. a), c), and e) of Protocol II".[98]

In 2010, in her judgement in the case, presiding judge Tatjana Vuković, described the actions of Branko Popović, as "aiding and abetting by omission", and concluded that he was criminally responsible for his subordinates, "in that he deliberately failed to issue an adequate order to the persons guarding hostages and take appropriate measures to protect the life and physical integrity of hostages; as a result of which omission, the hostages were murdered or physically injured". Branko Popović, was convicted and sentenced to 15 years' imprisonment. The Court of Appeal confirmed the conviction in 2012. [99]

Although this may not have affected the final verdict, Amnesty International believes that, in order to comply with international law, consideration could have been given to also indict Branko Popović under Article 384 of the 2005 Criminal Code, for "Failure to Prevent Crimes against Humanity and other Values Protected under International Law".

RELUCTANCE TO INVESTIGATE AND PROSECUTE

While there are signs that the judiciary have indicated a willingness that they would look well on indictments against senior officials, including for some form of command responsibility, the OWCP is reluctant to do so. In only one of the cases described above have commanding officers been indicted for their specific command responsibility. Some commentators have argued that the failure to bring such indictments is a matter of lack of political will; others suggest a lack of capacity.

According to Ivan Jovanović, "I believe no one has told the prosecutor not to go to that level. Most of the former colonels or other high ranking officers from that time don't have that much influence now, so it is perhaps self-censorship? Life is easier, less resistance, not provoking people who can make life difficult, avoid the media and pressure on the families. It's not just political; it's also a legal mentality. Some elements of international law are just not acceptable [here]".[100]

However, the Chief Prosecutor countered that the main reason for the low numbers of prosecutions against senior military or police officers is the difficulty in finding witnesses prepared to testify against them: "*Where senior police officers* [were indicted in the Suva Reka case], *there were big obstructions against the witnesses. Unfortunately a high ranking officer was acquitted because of the pressure put on the witnesses*".[101]

This was confirmed by Ivan Jovanović,"The willingness of witnesses to come forward is key to the prosecution of senior officials. Those who were given orders, or witnessed the order, need to provide that evidence. There were no witnesses in the Suva Reka case to

testify against the deputy gendarmerie commander, or the commander of the rapid reaction group. There were no witnesses, so no evidence".[102]

AN INDICTMENT FOR BATAJNICA?

On 21 May 2013, two men – one a serving member of Serbia's gendarmerie (special police unit) – were arrested on suspicion of committing war crimes against the civilian population. They were among five individuals charged with participation in the murder of at least 65 Kosovo Albanian civilians in Ljubenić village in Kosovo, during April and May 1999. They are also charged with the deportation and transfer of the victims' remains from Ljubenić to a Ministry of Interior training ground in Batajnica, Serbia, where they were buried in a mass grave. Reportedly the OWCP's case is based on evidence provided by participants in the alleged violation.[103] However, when on 22 November, the Prosecutor announced that an indictment had been raised in the Ljubenić case, no reference was made to the transfer of remains to Batajnica. At the time of writing, the indictment has not been made public: it remains to be seen whether any senior officials responsible for the cover-up operation will be indicted. [104]

As already noted in Chapter 3, despite the fact that Serbia has signed and ratified the Convention of the Protection from Enforced Disappearances, enforced disappearances have not been criminalized in Serbian law. Without an adequate definition Amnesty International considers that it is not enough to define offences linked with enforced disappearances, such as abduction[105] or unlawful detention, (or as in this case, deportation and transfer of mortal remains), but urges Serbia to make enforced disappearances criminal under Serbian law, in accordance with its obligations under the CPED.

Under Article 7 (1) (i) of the Rome Statute, enforced disappearances are defined as crimes against humanity, "when committed as part of a widespread or systematic attack, directed against any civilian population". In proceedings at the ICTY, former Assistant Minister of the Interior and Chief of the Public Security Department (RJB), responsible for all RJB units in Kosovo was indicted, in relation to the enforced disappearance of ethnic Albanians, for individual and joint responsibility for his participation in "the joint criminal enterprise... [including that] ...[t]ogether with [Vlajko] Stojiljković and others, he took a lead role in the planning, instigating, ordering and implementation of the programme of concealment by members of the RJB and subordinated units of the crime of murder, in coordination with persons in the RDB [state security] and in the VJ."[106] In February 2011, the Trial Chamber found, amongst other matters, that Vlastimir Đorđević had played a leading role in efforts by the Ministry of Interior to conceal the murders, both as a member of a joint criminal enterprise, and in aiding and abetting the crimes. He was convicted on three counts of crimes against humanity, and on two counts of violations of the laws and customs of war.[107] Amnesty International considers that all those suspected of participation in the deportation and transfer of the bodies of Kosovo Albanians to Serbia should also be indicted for crimes under international law - for war crimes and/or crimes against humanity.

WAR CRIMES OR CRIMES AGAINST HUMANITY?

In a significant number of cases relating to Kosovo, the OWCP has issued indictments and prosecuted defendants under Article 142 (war crimes against civilians), even though the alleged offences took place after the conclusion of the internationalized armed conflict in June 1999, under the Military Technical (Kumanovo) Agreement concluded between NATO and the FRY on 9 June and UN Resolution 1244/99, adopted on 10 June.[108] In view of the

concerns raised by, and at, the Appeal Court about the applicability of war crimes charges outside of the period of armed conflict, Amnesty International believes that consideration should have been given as to whether the alleged offences could be qualified as war crimes or whether it would have been appropriate to have also or instead indicted the suspects for crimes against humanity. Although the Appeal Court's rulings on this issue have been mixed, there is a danger that the failure to correctly qualify the crimes may potentially lead to impunity.

Of course, in raising the temporal issue, Amnesty International does not mean to imply that prosecutions for crimes against humanity may only be brought after the end of an armed conflict; prosecutions for crimes against humanity may be brought at any time where violations of international humanitarian law take place as part of a widespread or systematic attack against the civilian population, as set out in Article 371, 2005 CC.

GNJILANE GROUP

Members of the "Gnjilane group" of former members of the Kosovo Liberation Army (KLA), were indicted in and tried under Article 142 (1) for "war crimes against the civilian population". However, the alleged crimes – which included abduction, torture and rape - took place from 17 June 1999 and continued into September 1999, well after the conclusion of the internationalized armed conflict. The prosecutor justified the indictment under Article 142 (1) on the basis that the armed conflict "continued as an internal conflict well after 20 June 1999".[109]

During appeal proceedings, the defence for Agush Memishi challenged the classification of the alleged crime on the basis that, during the period in question – 17-23 June 1999, there was no military conflict.[110] Nevertheless, in this case, the Appeal Court rejected this appeal, and maintained that the detention and torture of the injured parties, C1 and C2, took place during the time of the armed conflict.[111] Amnesty International considers that the abductions which took place after the end of the armed conflict in June 1999, were part of a widespread, as well as a systematic attack on a civilian population and may constitute crimes against humanity, and must be investigated as such.[112]

MARC KASHNJETI

However, in another case, the Appeal Court did raise the issue. In 19 November 2012, Marc Kashnjeti – a member of the KLA was convicted and sentenced for the abduction, on 14 June 1999, of Božidar Đurović and Ljubomir Zdravković – and their subsequent ill-treatment. He had been indicted under Article 142, for war crimes against the civilian population.

On 8 March 2013, the Appeal Court upheld the defence appeal and quashed the judgment, sending the case back for retrial, on grounds that the judgement contained some serious errors, including that the court, "concluded that the judgment contained an unclear and insufficiently explained claim for the existence of an armed conflict at the time of the incident in question, which happened on June 14th, 1999, particularly because the signing of the Kumanovo Agreement on June 9th, 1999 created the presumption of a ceasefire on the territory of Kosovo". The Appeal Court also questioned the quality of evidence relating to the identity of the defendant. Nevertheless Marc Kashnjeti was convicted of war crimes in a retrial in June 2013. [113]

BYTYQI BROTHERS

The temporal issue arose yet again in the Appeal Court's ruling in January 2013, following the second acquittal of the defendants in the Bytyqi Brothers case. The court found that the accused could not be convicted under Article 144 (War Crimes against Prisoners of War), as it could not be established that the three Albanian-American brothers, and former KLA combatants, were prisoners of war. In particular, the court noted that they had entered Serbia proper after the cessation of the armed conflict on 9 June 1999. [114]

LACK OF INDICTMENTS AND PROSECUTIONS FOR CRIMES OF SEXUAL VIOLENCE

Despite the many credible reports of rape and crimes of sexual violence, allegedly perpetrated by Serbian forces (or forces under their command) during the wars of the 1990s, the SWCC has failed to guarantee access to justice to survivors of rape and other crimes of sexual violence. For example, despite the conviction of senior officials at the ICTY for their command responsibility for sexual assaults in Kosovo, none of the direct perpetrators have been brought to justice or indicted by the OWCP.[115]

To Amnesty International's knowledge, only five prosecutions relating to war crimes of sexual violence have taken place at the SWCC: in each case, defendants were indicted for war crimes against the civilian population, under Article 142 (1).[116]

Two of those indictments were laid against Kosovo Albanians. In September 2006, former KLA member Anton Lekaj was convicted and sentenced by the SWCC to 13 years' imprisonment. Charges against him included the rape of a Romani girl at the Hotel Pashtrik in Gjakove/Ð akovica on 12 June 1999, and the rape of a Romani man on the night of 13-14 June; these and other charges related to events following the abduction by the KLA of the Roma girl and members of her wedding party on 12 June 1999.[117]

In January 2011, members of the "Gjilane group", were convicted of war crimes by the first instance court. The indictment included allegations of the repeated rape, inhumane treatment and violations of bodily integrity (torture) of Kosovo Serb women, who had been unlawfully deprived of their liberty on 17 June 1999 and held in a cellar with other women, where they were raped and tortured. [118] Two women, who managed to escape on 23 June 1999, appeared in proceedings as protected witnesses C1 and C2; further evidence was provided by witness C1's brother, a psychiatrist and medical documentation.[119]

As has already been noted above, in both cases the events took place after 9 June 1999. Consideration could have also been given to an indictment under Article 371, Crimes against Humanity.

Charges of crimes against humanity might also have been brought where there is evidence that a specific incident was part of a widespread or systematic attack against the civilian population, as in the following case. On 22 February 2013, Zoran Alić and six other paramilitaries known as "Sima's Chetniks"were convicted under Article 142 for war crimes including torture, rape and sexual slavery and the murder of 23 Roma people, including minors and a pregnant woman, in the village of Skočić in Zvornik municipality, BiH, and sentenced to periods of between twenty and two years' imprisonment.[120]

Crimes of sexual violence set out in the indictment included that a grandfather and his grandson were ordered to take their clothes off and engage in oral sex with each other, after which an unidentified soldier cut off the older man's penis. A 13 year old girl was raped and then killed, along with almost all of her family. Protected witnesses "Alpha", "Beta", and "Gamma", who were then 13, 15 and 19 years of age, were raped, and then taken to a village where they were detained in houses where the unit lived, between July 1992 and December 1992 and early 1993. They were forced to cook, wash clothes and uniforms and clean the houses. There they were raped on a number of occasions, and sexually humiliated, particularly by making them dance naked on the table and look at each other while they were being raped.[121]

In June 2011, three members of a Serbian volunteer unit were indicted for war crimes against civilians in Bijelina, BiH in 1992, in a case transferred by BiH to Serbia under the Law on International Legal Aid in Criminal Matters. Charges included murder, rape and "particularly offensive and humiliating treatment that destroyed the victims' personal dignity". The accused took turns to rape two women, Nizama Avdić, the daughter of Ramo Avdić, and Hajreta Avdić, his daughter in law, who had given birth a few days

before; the accused then shot Ramo Avdić. They then forced the two women to walk naked and barefoot through the town; outside the town the accused again took turns to rape the women, "whom they also subjected to oral and anal sexual intercourse".[122] The women's testimonies were corroborated by an expert witness after a review of their medical records finding their injuries consistent with a violent sexual attack.[123] In June 2012, Dragan Jović, charged with murder of Ramo Avdić, was sentenced to 15 years; Zoran Djurdjević and Alen Ristić were sentenced to 13 and 12 years respectively.

Rape was amongst the charges laid against two former members of the Jackals, convicted and sentenced for war crimes against the civilian population in Ćuška, Pavlan, Ljubenić and Zahač. In December 2013, after the testimony of one of the women, who was 13 years old at the time, the indictment was changed, so that only one perpetrator was accused of rape; he was subsequently acquitted.[124]

INADEQUATE INDICTMENTS

"Indictments are the same across the region; the prosecutors have not learned that they lack the detail needed. The new CPC will force prosecutors to be more detailed in their indictments, in order for them to be confirmed; the arguments need to be more substantive, based on the witness statements and other evidence collected in the investigation. Moreover, the prosecutor and judges very often fail to provide legal reasoning and fail to understand international law", Ivan Jovanović, OSCE. [125]

Amnesty International is concerned that indictments issued by the OWCP often lack clarity and precision in accounting for the alleged crimes, and often fail to adequately qualify the offences. Further, few indictments take into account the jurisprudence of the ICTY or the ICC in their qualification of the crimes, and are often inconsistent with international law.

For example, in his oral reasoning after acquitting the defendants in the Bytyqi Brothers retrial in May 2012, the presiding judge reportedly stated: "Owing to contradictions and incoherence in the indictment, it was not possible to ascertain when and where the victims were murdered, nor who murdered them; the only thing that was established is that their mortal remains were found in 2001 in a mass grave located in Petrovo Selo". According to the HLC, "The unprofessional performance by the [prosecutor] in this case is also reflected in the fact that the [prosecutor] amended the indictment three times after the Higher Court and Court of Appeal had found it to be imprecise and contradictory".[126] The prosecutor appealed the second acquittal.[127]

Indictments rarely clearly identify separate elements of the alleged offences, or - as is the practice at the ICTY – list offences as separate counts within the indictment. For

example, in the Skočić case, involving war crimes of sexual violence, (described in the previous section) at least 15 separate counts can be identified from the indictment narrative, including, for example: torture and rape (para 2.d); torture and rape (forced oral sex, para 2c); and sexual slavery and torture, (villages of Malesic and Setici, paras 1-2).

Amnesty International considers that inadequate qualification of the crimes set down in an indictment may lead to insufficient consideration of each element of the alleged offences, resulting in reduced sentencing, which often fails to reflect the cumulative gravity and severity of the crimes.

With respect to the jurisprudence of the ICTY, concerns have been raised in connection to the case of Scorpions 1, in which the accused were indicted for the killing of five men, which took place in the context of the genocide at Srebrenica. Despite video evidence which clearly showed the connection, Srebrenica was not mentioned in the indictment or the verdict, nor provided as the context of the crime. According to the HLC, "The indictments and qualification of crimes are nothing like the ICTY, [further] the judgement did not even reflect the Srebrenica judgement, [and] there is nothing on genocide". At the ICTY, defendants were convicted for genocide, conspiracy to commit genocide, crimes against humanity and war crimes.[128]

In almost all proceedings to date, almost all first instance decisions have been appealed, either by the defence or prosecution, and a retrial has been ordered following an appeal, or in some cases, a second retrial. While defendants can always be expected to exercise their right to appeal, according to a member of the judiciary, while appeals may be made on the basis of fact, law or procedure, in the majority of cases, defence appeals are made on the basis of insufficiently established facts, the reasoning and the quality of the evidence – which is extremely crucial due to the extensive reliance on witness testimony.[129]

Amnesty International is also concerned that many proceedings are conducted on the basis of incomplete indictments, which the organization considers can only slow and often complicate access to justice, and may fail to respect the right of defendants to trial within a reasonable time. While the continued amendment of indictments,[130] may be explained by new evidence or new facts which come to light in proceedings, often proceedings have opened on the basis of incomplete indictments – which may subsequently require several successive amendments.

5. WITNESS SUPPORT

"Witness support is in many ways as important, if not more important, than witness protection".... "If we start from the premise that these communities are small, that many of the victims and witnesses – no matter what protection measures are in place – will eventually be known by the accused and defence teams, this further increases the importance of witness support." Refik Hodžić, International Centre for Transitional Justice. [131]

Amnesty International considers that participation of victims as witnesses in criminal proceedings is crucial to addressing impunity, not only in their contribution to bringing perpetrators to justice, but also in affording victim-witnesses access to justice. Many of the 2,300 witnesses who have provided testimony at the SWCC are also the victims of crimes under international law.[132] It is therefore of utmost importance to ensure their rights through effective witness support, and witness protection (which is separately addressed in the next chapter).[133]

Support is particularly crucial at the SWCC, where successful prosecutions rely almost exclusively on witness testimony. If victims are unable or unwilling to provide their testimonies, perpetrators may be acquitted and the victims denied the right to an effective remedy.[134] Article 6 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power outlines the need for judicial authorities to respond to the needs of witnesses and victims, including through, "Providing proper assistance to victims throughout the legal process".[135]

In the absence of other forms of evidence, the OWCP must ensure that the trial panel is presented with credible witness testimonies.[136] Gathering such evidence can be extremely challenging. Not only have almost two decades passed since the end of the armed conflicts in BiH and Croatia, and over a decade since the Kosovo conflict, but many witnesses and victims continue to experience some form of trauma, which may affect their memory of events or relevant factual information.

Without effective and adequate witness support, before, during and after proceedings, potential witnesses may not come forward; those who attend court may be unable to provide adequate testimonies. In the absence of adequate support in re-telling the violations they experienced, they may suffer secondary re-victimisation or re-traumatization during or after proceedings. When placed under pressure by the defence they may feel stress, frustration or experience an emotional breakdown, and be unable to provide evidence.

International standards provide that all states are under an obligation to treat the victims of gross violations of international law with humanity and with respect for their dignity and human rights, and to ensure that every care is taken to avoid the re-traumatization of victims, including during proceedings.[137]

In this chapter, Amnesty International examines the support services provided to witnesses in proceedings at the SWCC, notes the absence of specific mechanisms and procedures for the support of victims of war crimes of sexual violence; and makes a series of recommendations to ensure that all witnesses receive appropriate assistance and support.

THE WITNESS ASSISTANCE AND SUPPORT UNIT

Whilst prosecutors, judges and other court staff have an obligation to ensure that witnesses are treated with dignity and respect, the role of ensuring this is entrusted to the Witness Assistance and Support Unit (WSU) at the SWCC. Amnesty International believes that support provided by the WSU is inadequate: the unit is under-resourced, lacks the necessary infrastructure and crucially fails to provide support before and after proceedings, providing support only when the victim reaches the court building.

The WSU was established under the law establishing the court.[138] Three WSU staff - a lawyer and two social scientists - were recruited from within existing court staff. They had no previous experience, and no job descriptions. They were subsequently trained by OSCE, and in visits to other courts.[139]

Located within the office of the President of the Court, the WSU is required to provide assistance to each witness appearing before the court. Funding for each witness, including for travel and accommodation costs, is allocated from the budget of the presiding judge. If funds are not available, often at the beginning of a financial year, a witness' appearance may be delayed.

Witnesses receive a subpoena from the court, following a request from the OWCP to the Ministry of Justice, (which may be forwarded to the Ministry of Foreign Affairs if the witness comes from outside Serbia). Information about the availability of support services is attached to the court summons, together with contact details for the WSU. Alternatively, in the case of witnesses originating from BiH or Kosovo, provisions may be made for them to testify via a video-link from the relevant court. Witnesses resident in EU member states may also appear by video-link under provisions of the EU Convention on Mutual Assistance in Criminal Proceedings.

"Our role starts with the subpoena, to when they have finished testifying, these are our limits. We only meet them about an hour before, and we have to be very careful, there is no time for deeper actions. We do not have information about them in advance; we do not know the details of their statement or their current circumstance." Head of Witness Support Unit.[140]

The WSU contacts the witness prior to their court appearance only to make arrangements for transport and accommodation. Unlike protected witnesses (see chapter 6), no advance assessment is made of their medical or psychological condition, and its potential impact on their ability to testify. The witness is required to make their own way to accommodation provided in Belgrade, and to the court; they will only be met by the WSU when they enter the court building. Witnesses are asked to attend the court around an hour before proceedings begin, so they can enter the building without meeting defendants' families or supporters. They are then familiarized with the court, and the order of proceedings, and are taken to one of two rooms set aside for the WSU, one of which is a "waiting room", which they may have to share with other witnesses.

"We try to give them emotional stability – we don't always know whether they are witnesses or "delicate witnesses". We go through the physical layout of the court, walk them into the room, show them where the defendants will be and tell them about the order of the process. We tell them they can ask to have a break, or ask for a glass of water".[141]

Some witnesses may then receive additional protection, as set out in the CPC (see witness protection). For example, the room for witnesses adjoining each court room is provided with a one-way glass through which the witness may view proceedings, whilst their identity is protected from defendants, defence lawyers and the public gallery during their testimony.

According to the WSU, judges and prosecutors, witnesses are often subject to "disagreeable behaviour", including insults and taunts from defendants and defence lawyers, with the aim of undermining the prosecution and obstructing proceedings. The presiding judge has a number of measures at her disposal to regulate the conduct of the court, and is required to notify the prosecutor of any attempt to harass witnesses.

Witnesses are also vulnerable within the court building, which lacks a separate entrance for witnesses. Nor is there a dedicated witness entrance into the courtroom, which has to be accessed via corridors and a shared lift. If the witness wants to go to the toilet,

they have to be escorted by the WSU. If the witness needs to smoke, or wants some fresh air, they have to leave the building by the main exit, where they may encounter relatives or friends of the accused. According to the prosecutor, one witness was hit with a bottle in a nearby cafe and never returned to the court.

While an SWCC judge told Amnesty International, "*We try our best to take care of them afterwards; when they leave we remain in contact to check if there are issues or problems or pressure has been applied on them.. not just those under special protection measures*," this is an informal provision, not required by the court.[142]

THE IMPACT OF CHANGES IN THE CRIMINAL PROCEDURE CODE ON WITNESS SUPPORT

"The OWCP has started calling us, and saying they have an investigative witness coming, or even someone already in the office, and they ask us if we can help; they say can you be with the witness until the process starts – we don't know if they are just witnesses or victims. The prosecution does not have these services, or rooms; it all happens in the hallways", Head of Witness Support Unit.[143]

The changes in the CPC, described in Chapter 2, transferred responsibility for the investigative stage of proceedings from the judiciary to the OWCP, without making additional provision for the support of witnesses called to investigative proceedings. The WSU remains within the judicial department, and as yet there is no formal mechanism to provide support for witnesses in investigative proceedings, except on the unsatisfactory *ad hoc* basis described above.

Witness protection should be available to the OWCP without any further delay, either through the creation of a separate unit, or preferably through the creation of a unified witness support unit, providing continuity of support to witnesses, through all stages of proceedings.[144] Given that under the previous CPC, during both pre-investigative and investigative stages, witnesses were contacted by, or visited by prosecutors, several times without any support, a unified WSU could ensure that support is provided from the very beginning of the process, and help ensure the early identification of any particular psychological and other support required, in advance of their appearance at court.

The President of the Court considers that the extension of witness support, "….would provide a higher quality of protection and support for the first investigations, and maybe people would then not change their testimonies".[145] The OWCP also sees the importance and benefits, for both the witness, and for the broader aim of securing justice.

"Witness support should be in the prosecutor's office; the deputy prosecutors work with

the witnesses, and encourage them and work with them, including women who have been raped. It is her decision whether to testify, and the deputy prosecutor has to spend time with her, at her place, to encourage her to testify.[146]

SUPPORT FOR WITNESSES-VICTIMS OF WAR CRIMES OF SEXUAL VIOLENCE

"*There are some cases where the judge says the witness is not persuasive enough: it happened in a rape case. The witness said that the rape happened in a room. Then the lawyers read out her previous evidence, in which she said she was raped on a table, and the lawyers said that these statements contradict each other, even though the table was in that room*". Chief Prosecutor, OWCP.[147]

The European Court of Human Rights has held that the victims of war crimes of sexual violence have heightened interests in privacy because of the stigma attached to their injuries.[148] While measures for the protection of witnesses are applied, including in cases, where there is a possibility of traumatization, the current CPC fails to provide any specific measures to support (or protect) victims of sexual violence, including during their testimony. [149]

For example, there is no provision – as established in other domestic jurisdictions and at the International Criminal Court (ICC) – deeming inadmissible any evidence of "the prior or subsequent sexual conduct of a victim or witness".[150] The defence may use such information to cast doubts on the credibility of a witness, (as in the case cited above), in order to undermine the prosecutor's case, regardless of whether this results in secondary victimization of the witness.

Witnesses have also faced harassment by defendants: for example, in the Skočić case, when a protected witness, and victim of war crimes of sexual violence, asked to be allowed to enter the court room, she was reportedly subjected to "inappropriate conduct of the indictees, who used vulgar language and asked questions which were aimed at showing disdain and causing additional trauma to the victims. The presiding judge warned them he would not tolerate such behaviour".[151]

The HLC has raised serious concerns about the capacity of the WSU to provide appropriate protection, based on the Skočić case,[152] reporting that the three victim-witnesses were not provided with adequate accommodation, assistance with understanding court procedures, or any psychological support. According to HLC observers, they were extremely stressed during their testimonies, which had to be interrupted to provide them with medical assistance.

"The proceedings revealed serious flaws in the work of the Victim and Witness Assistance and Support Service of the Higher Court. The injured parties had the status of protected witnesses and testified under code names at main hearings which were closed to the public. These measures were necessary, but proved insufficient, because the Assistance and Support Service failed to properly do their work. The Service did not even provide appropriate conditions for the victims/protected witnesses during their stay in Belgrade. One of the victims, who came to testify from abroad, where she lived, was provided only with bed and breakfast, without lunch, despite the fact that her testimony was lengthy and she was going back home immediately upon testifying. Also, none of the victims/witnesses received adequate assistance to become familiar with the procedure for testifying. More importantly, none received psychological support. During their testimony, all three of the injured parties/witnesses were under great stress and their testimonies had to be interrupted to provide them with medical assistance. They were clearly confused, unfamiliar with the audio and video equipment and the sequence and manner of questioning".[153]

INTERNATIONAL STANDARDS: BEST PRACTICES

Amnesty International considers that the International Criminal Court (ICC) provides a model of relatively good practice in this area. A Victims and Witnesses Unit established within the Registry is required to provide, in consultation with the Office of the Prosecutor, counselling and other appropriate assistance for witnesses, victims who appear before the Court and others who are at risk on account of testimony given by such witnesses. This Unit must also plan protective measures and security arrangements for them. The Unit should include staff with expertise in trauma, including trauma related to crimes of sexual violence. [154]

The ICC Rules of Procedure and Evidence also details the functions of the Victims and Witnesses Unit, as well as specific provisions to address the needs of victims and witnesses of sexual violence.[155] These do not exist within the Serbian CPC, and should be taken as a model in the development of an effective witness support unit, including for victims of war crimes of sexual violence.

Serbia ratified the Istanbul Convention on preventing violence against women in November 2013, but has yet to implement its provisions.[156] The convention contains a series of mechanisms and protections to protect the rights of victims and witnesses, which should be adopted as good practice. [157] Serbia would also be expected to adopt and implement relevant EU standards on witness support and protection during the accession process.[158]

Amnesty International welcomes the decision by the EC to review the provision of witness support in its screening process for Chapter 23.[159]

6. WITNESS PROTECTION

Amnesty International considers that Serbia has failed to develop an adequate system of protection for witnesses appearing before the SWCC, irrespective of their ethnicity, origin, gender and status or professional affiliation.[160] Further, serious allegations of the intimidation of the witnesses in war crimes proceedings by the Witness Protection Unit (WPU), and other shortcomings have raised concerns about the functioning of the WPU, a dedicated unit within the Ministry of Interior Police Department, providing protection to witnesses in proceedings for both crimes under international law and organized crime.

The organization believes that concerns about the WPU may impede justice in that potential witnesses may be deterred from coming forward, given the authorities' failure to ensure the protection of all witnesses, and potentially result in impunity for the perpetrators.[161]

PROTECTION OF WITNESSES DURING PROCEEDINGS

Measures for the protection of witnesses during proceedings were set out in the 2006 Criminal Procedure Code (CPC), largely based on procedures established by the ICTY. [162] It also provided for the examination of "sensitive witnesses", later defined under the 2011 CPC as "especially vulnerable witness" who may be examined outside the court, or with the assistance or a psychologist, social worker or other relevant expert. [163]

Specific provisions are made so that the court may, under specific circumstances, grant an individual the status of a protected witness, establish the conditions under which a witness may become a protected witness, and in Articles 118-122, provided for a range of procedures which may be used to protect the identity of the witness. [164]

The CPC also obliges the court "to protect the witness and the injured party from insults, threats and any other attacks", and empowers the judiciary to warn or fine those who threaten or intimidate witnesses, or to initiate procedures for their prosecution in serious cases of violence or threat.[165] According to trial monitoring reports, the judiciary generally appear to take their responsibility with due seriousness in warning defendants, their lawyers or supporters, during proceedings. However, Amnesty International is not aware of any prosecutions - despite ample evidence of such insults, threats or attacks.

Article 14 of the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes provides for the protection of previously

protected witnesses in cases transferred from the ICTY.[166] The same article also enables the inclusion of the testimony of cooperative witnesses in war crimes trials, providing them with additional protection, by enabling the exclusion of the public during proceedings.[167] Cooperative witnesses may be, but are not necessarily, included into the witness protection programme.

THE WITNESS PROTECTION PROGRAMME (WPP)

The WPP provides a further layer of protection for selected witnesses, who are considered to be at risk of serious harm. Although the support and protection of witness was envisaged in the law establishing the SWCC, the WPP delivered by the Witness Protection Unit was not established until 2006, under the Law on the Protection of Participants in Criminal Proceedings, which created the concept of a protected witness.[168] The WPP provides protection to witnesses in proceedings for war crimes[169] and organized crime, which forms the bulk of their workload.

A protected witness is initially identified as being in need of protection by the prosecutor during investigations into a particular allegation, taking into account the significance of the evidence they will be able to provide, and the related risk. They may, for example, be "insider witnesses" – including suspects in criminal proceedings who have agreed to provide evidence against other suspects. Proposals to include a witness within the WPP are made by the relevant prosecutor, with the final decision made by a commission, comprising a Supreme Court judge, the prosecutor and the Head of the WPU. Decisions on the scope of the protection – for example, whether it is for just the individual witness or his/her close family – are made by the OWCP.

The WPU is charged with the protection of the witness' life and property. Available measures include a change of residence (including to another prison in the case of detainees); concealment of the witnesses identity through the issuance of personal documents in another name; or a complete change of identity. The WPU is also charged with providing the protected person with "the necessary economic, psychological, social and legal assistance". [170] The WPU is not responsible for the protection of witnesses within the court, where measures set out in Article 117 CPC, (see above), may be applied.

Unlike the WSU, the WPU is in contact with the witness well in advance of proceedings. Following their admittance into the programme, urgent measures are taken, threat assessments made and a contract drawn up specifying the protection to be provided, the most frequent being the provision of an undercover identity or relocation after trial, predominantly within the region or otherwise in EU member states.

According to the Head of the Unit, this pre-trial stage enables the relevant case officer (or "handler") to discuss the witness' concerns, including their need for emotional or psychological support, on which further decisions on the nature of their protection may be based. This may include securing the assistance of relevant professionals, including – reportedly – psychologists.[171]

During proceedings, the witness is provided with accommodation in a safe house (although the safety has been contested, see below), from which the witness is escorted to and from the court by arrangement with the OWCP. Following proceedings, the witness may be provided with a permanent change of identity and long-term protection, often outside Serbia.

By their own admission, the WPU lacks resources: "We need technology, computers, a bullet proof car..."[172]... but according to others, they also lack the professionalism, independence, integrity and impartiality required to deliver such a service. [173]

According to the OSCE, during the first years of the programme, the WPU was seen as a model for the region, and received widespread praise, including from the ICTY. However, changes in personnel, the lack of effective protocols and/or their full implementation, along with widely published allegations against both individual members of the WPU and the head of the unit, [174] have undermined their reputation, and the WPU has become subject to widespread criticism, including from the judiciary.

In November 2013, Judge Snežana Nikolić Garotić, in an unprecedented public criticism, accused the WPU of incompetence in not responding for more than two months to her request to bring a protected witness before the court, thus prolonging the length and costs of the trial. She reportedly stated that she was sending an official complaint about "the work and inadequate behaviour of the WPU to the then Minister of Interior Ivica Dačić.[175]

In the same month, Judge Snežana Nikolić Garotić, told Amnesty International: *"For most protected witnesses it is OK, it is OK for civilians. There are problems only when witnesses are police or military personnel; then there are accusations. There is no procedure in law for witnesses to file an appeal against their treatment, and there is nothing that the OWCP can do ... They need young policemen without a war background in the WP and the WCIS."*[176]

ALLEGATIONS AGAINST THE WPU

Amnesty International is aware that the substance of some of the allegations detailed

below has been publicly contested by the WPU and in some cases, by the OWCP. Such allegations of criminal acts, such as intimidation, threats and harassment, must be subject to a full and independent investigation.

In addition to allegations of criminality, which may amount to perverting the course of justice, there are also consistent allegations which point to negligence on the part of the WPP, and failures in the procedures adopted by the unit, which should also be reviewed.

These include a failure to provide a contract between the WPU and the witness, clearly setting out the rights and obligations of the witness and the obligations of the WPU to the witness, including the nature and degree of protection, financial support and accommodation (including its location) to which they are entitled.

The WPU is located within the Ministry of Internal Affairs Police Department, and is composed of police officers.[177] This sets up an immediate tension in cases where the WPU is required to protect former or serving members of the Ministry of Interior police who have agreed to provide testimony against their former colleagues. In some cases, the WPU is alleged to have failed to provide such witnesses with impartial protection, including by intimidating them into withdrawing their testimony.

Allegations relating to the unprofessional, inappropriate, and sometimes unlawful, treatment of protected witnesses within the WPP have been made most frequently – although not exclusively – in relation to witnesses in proceedings against members of the Serbian Ministry of Interior police operational in Kosovo in 1998-9. However, other allegations have been made by non-police witnesses, in relation to BiH and Kosovo.

The degree of loyalty amongst the police and animosity to their colleagues turned witnesses is illustrated in the following case. In March 2009, police officers in Leskovac organized protests following the arrest of four former members of the 37th Detachment of Special Police Units (PJP). Police reservists were seen wearing T-shirts printed with photographs of the arrested PJP members on the front and the slogan, "Heroes of the 37th Battalion", on the back. The protests, apparently supported by the Police Administration of the City of Leskovac and the Presidency of the Independent Police Union of the Republic of Serbia, called for the release of the arrested officers and public disclosure of the names of the witnesses. Police officers were reportedly heard threatening to kill the police witnesses and calling for them to be tried for treason.[178] Ivica Dačić, then Minister of Interior, issued a public statement stating his intention to, "provide all the legal aid that is possible, because it is in the [interior ministry's] best interest to prove their innocence."[179] (See below for the case of one of those witnesses).

Serious allegations relating to the intimidation or other inappropriate treatment of protected witnesses by the WPU were originally documented by the HLC. Members of the WPU were alleged to have harassed or intimidated protected witnesses, to the degree that

they have feared for their safety, and with the apparent aim of coercing them to withdraw their testimony. Some have alleged that members of their families were also threatened. This has had the effect of not only deterring those within the WPP, but others from coming forward as witnesses. [180]

The most substantive allegations have been made by former protected witnesses, who had previously served in the Ministry of Interior Police in Kosovo, and were prepared to testify against other former or serving police officers, in connection with alleged war crimes in Kosovo in 1999. These "insider" witnesses may have been able to provide critical evidence, without which some prosecutions could not have taken place.

The case of Slobodan Stojanović, a former member of the 37th Detachment of the PJP, based in Leskovac, is widely known, and has been comprehensively documented by the HLC.[181] Approached by the OWCP in 2005, as a potential witness against Radoslav Mitrović, he was admitted into the WPP in March 2009, following death threats by other police officers (see box, above). He told Amnesty International that, without notice, he and his wife and son were moved to Belgrade, into a "safe house" - which overlooked a police medical building and was 100 metres away from a police dormitory. During his time in Belgrade, he claims that he was repeatedly threatened by members of the WPU, and told not to talk to anyone. After four months, he was told he was no longer in the WPP, and was taken back to his home. His wife told Amnesty International, "We felt physically and mentally ill-treated; we felt they were trying to destroy us. Even the prosecutor didn't want to talk to us". Slobodan Stojanović and his family told Amnesty International that they continue to fear for their lives.

Similar allegations were made by Bojan Zlatković, a former member of the Special Police Unit, who also made allegations that the OWCP had failed to act upon his complaints. He withdrew from the WPP in July 2011. [182]

Yet further allegation were made by another protected witness, Zoran Rašković , who ironically stated when he made his complaints public, *"I thought that the Witness Protection Unit was what the name says, not a unit for the protection of criminals"*.[183]

Zoran Rašković was a former member of the paramilitary group known as the "Jackals". When members of the group were indicted for killing more than 100 ethnic Albanians in the villages of Zahac, Pavlan, Ljubenić and Cuška in Kosovo in 1999, Zoran Rašković agreed to become a cooperative witness, and entered the witness protection programme. In December 2011, during the course of proceedings, he requested that his anonymity as a protected witness be removed, so that he could testify in his own name.

184

In January 2012, Zoran Rašković submitted a letter to the court, in which he detailed threats he had received not only from members of the WPU, but allegedly from a senior official in the Ministry of Interior. He also alleged that his mother and father had been threatened by the police, and that the WPU had refused to transfer him to another protected location, or – after he had revealed his identity in court– provide him with identity documents in his own name. Without these, he claimed that he was effectively stateless. [185]

The WPU (and the OWCP) have also allegedly failed to fully inform witnesses of the reasons for their removal from the programme. Amnesty International also considers that such persons should be provided with some other form of protection, once they have been removed or removed themselves from the programme, given that their public statements place them at continued risk.

While some members of the WPU have reportedly been dismissed from the unit, following these allegations, no comprehensive measures have been taken by the authorities to address these allegations; no criminal investigation has taken place. [186]

The Head of the WPU, interviewed by Amnesty International in November 2013, did not deny the allegations, but held that they were limited to two cases in which witnesses had been admitted to the WPP, were subsequently not required to testify and then taken out of the programme. Accusing those witnesses of lying, he stated, "We must stand behind the real witnesses, and provide them with protection."

PROPOSALS AND SOLUTIONS

The OWCP has for at least seven years urged that the WPU be transferred from the Ministry of Interior to the Ministry of Justice. The OSCE Mission in Serbia, which helped establish and train the WPU, have supported calls for a changes in the WPU, including its relocation to the Ministry of Justice. This position is supported by a number of NGOs, although many acknowledge the functional and line management difficulties of transferring Ministry of Interior police to another ministry.

Concerns about the WPP have been expressed by the EC in their previous progress reports on Serbia since at least 2010, but no measures have been taken to address the issue.

In 2011, the Parliamentary Assembly of the Council of Europe called on the Serbian

authorities to: *"[C]reate and implement a procedure to organise the operation of the Witness Protection Unit, ensuring that it is established according to professional standards, with suitably qualified and trained staff, in order to ensure the impartial operation of the unit, free of political or other interference, allocate adequate resources for its proper functioning and adapt legislation so that all courts dealing with serious crimes outside the War Crimes Chamber can benefit from this unit and from the Victim and Witness Support Unit;*
"[C]onsider the transfer of responsibility for the Witness Protection Unit to the Ministry of Justice, in order to avoid any conflict of interest between the members of this unit and the witnesses they are supposed to protect;"[187] The same concerns were reiterated by the then Commissioner for Human Rights of the Council of Europe in 2011.[188]

In October 2012, Jelko Kacin, the European Parliament's rapporteur for Serbia, stated that the WPU needed to be transferred to some other institution, such as the Ministry of Justice, on the grounds that witnesses were often intimidated by police.[189] In a resolution on Serbia, on 28 March 2013, the European Parliament noted *"serious deficiencies in the functioning of the witness protection programme, regarding cases of war crimes which resulted in a number of witnesses voluntarily opting out of the programme after being systematically intimidated."*

The victims of unresolved violations have also called for more effective protection: in 2012 associations of the relatives of the missing from both Kosovo and Serbia, called on the authorities in both Serbia and Kosovo, to: "Strengthen witness protection programs, taking into consideration the potential impact witness testimony may have on determining the location of clandestine gravesites that contain the mortal remains of missing persons".[190]

POLITICAL WILL

Ultimately, the protection of insider witnesses relies on political will. Whilst such witnesses are still regarded by many people in Serbia as traitors, few will have the courage to testify.In December 2011, Deputy War Crimes Prosecutor Bruno Vekarić told journalists that Zoran Raškovic's testimony, in describing the violations of international law committed by Serb paramilitaries against Albanian civilians constitutes a "brave and patriotic act … as patriotic as defend[ing] your fatherland."[191] The Serbian government needs to be making the same sort of statements.

PROTECTION OF VICTIMS OF WAR CRIMES OF SEXUAL VIOLENCE

As already noted, the CPC provides no specific measures for the protection of victim-witnesses of war crimes of sexual violence, despite the stigma that still attaches to the victims of rape and

other crimes of sexual violence, the continued presence of perpetrators in many communities, the courage that is needed to testify, and the strong possibility of retraumatization whilst providing testimony.[192]

The experience of other courts has shown that particular measures need to be in place before women, or men, may testify in proceedings related to war crimes of sexual violence. While the vast majority of survivors are female, these measures should equally be in place in cases in which men and boys have been the victims of war crimes of sexual violence.[193] Each of these victims needs specific professional and competent services in terms of medical and psycho-social services, and sensitive treatment by investigators and prosecutors.

Further, prosecutors and judges need specific expertise and experience in cases of gender-based violence, so that proceedings may be conducted in accordance with the highest standards of international law, consistent with the jurisprudence of the Tribunal, and with respect for potential witnesses, including their protection from further re-traumatization.

Protection and support measures should also include in-court protection, out-of-court protection, and appropriate psycho-social support for victim-witnesses (as set out in the previous chapter).

These should include video-link technology, separate court entrances and interview rooms for witnesses and accused persons, safe and discreet transportation to and from the court, psycho-social support in the lead up to, during and after the proceedings, and one-way glass to protect the identity of the witness from the public gallery in the court room. As already noted, the SWCC lacks many of these essential protections.

Amnesty International considers that a specific protocol should be established to ensure the protection and support of victim-witnesses, and that protection and support measures should be devised and implemented in full consultation with the witnesses themselves, in order to ensure their effectiveness.

7. THE RIGHT TO REPARATION

"*[A]ny human rights violation gives rise to a right to reparation on the part of the victim or his or her beneficiaries, implying a duty on the part of the State to make reparation and the possibility for the victim to seek redress from the perpetrator.*" Updated Set of principles for the protection and promotion of human rights through action to combat impunity. [194]

Serbia has failed to ensure that victims of crimes under international law are guaranteed the right to an effective remedy, guaranteed under Article 2 (3) of the ICCPR and Article 13 of the ECHR, to both of which Serbia is a state party.[195] This includes equal and effective access to justice; and adequate, effective and prompt reparation for harm suffered - including - restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition.[196]

Amnesty International considers that Serbia has failed to guarantee the right to reparation, through a comprehensive and effective administrative system of reparation to victims, as is the case in other states where crimes against humanity and war crimes have been committed.[197] Instead, the existing inadequate and discriminatory administrative law (discussed below), excludes certain categories of victims, and applies only to Serbian victims of non-Serb forces, providing only limited reparation, most often compensation. The law also makes no provision for the survivors of war crimes of sexual violence. The victims of Serbian forces are excluded from its provisions. They may only apply for reparation through civil proceedings, yet are most often denied reparation by the obstacles to reparation within the justice system.

THE RIGHT TO REPARATION THROUGH THE COURTS

"***Judicial*** *and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms."* **Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power. [198]**

The vast majority of victims of crimes under international law perpetrated by Serbian military, police and paramilitary forces are denied access to, "Adequate, effective and prompt reparation for harm suffered".[199]

In the absence of a comprehensive legal framework on reparation or any reparation programme, some victims and their families – primarily with the assistance of the

Humanitarian Law Centre (HLC) - have applied for compensation for wartime violations in civil proceedings.

The HLC has assisted more than 1,000 victims seeking to exercise their right to compensation for human rights violations, including torture, unlawful arrest and detention, by former Yugoslav and Serbian forces.[200] Because the law only provides for compensation in relation to violations committed on Serbian territory, the majority of cases have been brought by ethnic Albanians in complaints arising from the armed conflict in Kosovo,[201] and Bosniaks from the Sandžak region of Serbia who suffered discrimination, persecution, torture and ill treatment at the hands of Serbian police and military forces between 1992-5.[202]

Serbian courts have rarely upheld these claims and even where compensation has been awarded it has most often failed to reflect the gravity of the crime[203] and the harm suffered, due to persistent institutional and legal barriers to the success of claims, as described below. [204] Amnesty International considers that these failings point to the necessity of recognizing the right to reparation in law, and establishing an effective and comprehensive administrative reparation mechanism.

In 2007, the HLC, acting on behalf of the relatives of people from Sjeverin in Serbia, who were killed or are still missing after being abducted while travelling on a bus traveling through Mioče (in BiH) in October 1992, brought a claim for compensation against Serbia. Their claim for moral damages was dismissed by the first instance court in February 2009. HLC appealed the decision. By August 2013, as the Court of Appeal had failed to act on the appeal, HLC lodged a further appeal with the Constitutional Court, on the basis of "unjustified protraction of the proceedings before the Basic Court and the Court of Appeals in Belgrade, in which a final judgment has not yet been rendered even six years after the beginning of the proceedings". On 15 October 2013, the Constitutional Court, found that the rights of the families to a trial within a reasonable time, under Article 32 of the Constitution, had been violated. The Constitutional Court of Serbia granted compensation of €600 to each of the 22 applicants for the violation of this right. HLC subsequently filed a further appeal to the Constitutional Court, on behalf of 20 applicants, and called for a more realistic €10,000 to be awarded to each. [205]

Given the relatively small number of prosecutions brought by the OWCP or in other jurisdictions, few claimants are able to bring evidence previously confirmed in criminal proceedings. Yet, even in cases where successful criminal prosecutions have been concluded, claims for compensation have been rejected.[206]

In many cases brought by the HLC, victims have been unable to satisfy the requirement to prove actual damage (or pecuniary damage) or proof of harm and suffering. Given the circumstances under which, and length of time since, the alleged violations took place, this is not surprising.[207] Yet even where the alleged victims of torture and ill-

treatment still suffer from their physical injuries, or have provided proof of diagnosis with post-traumatic stress disorder (PTSD), the court has rejected their claims on the basis of a lack of medical documentation, or contested whether an injury or a diagnosis of PTSD, for example, is associated with the alleged violation.

Claims have also been rejected in cases where independent documentation exists. In July 1995, after the fall of Žepa (BiH), many Bosniaks fled to Serbia, where around 850 of them were arrested and detained in prison camps. There, they allege they were subject to torture, inhuman and degrading treatment. Even though the camps had been visited by UNHCR, the ICRC, and the State Commission for Missing Persons of BiH, the court did not uphold the claim.[208]

Again, in February 2014, the Belgrade Basic Court dismissed the complaint – brought in 2007 – by HLC on behalf of 12 former Croatian prisoners of war held, seeking reparation for their alleged torture at a camp in Sremska Mitrovica in 1991. The court held that, as no verdict had yet been reached in proceedings at the SWCC, a criminal act did not take place.[209] The main reason for dismissal was that the men had brought their complaint too long after their detention (see Statute of limitations, below).

However, under Section A (2) of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, "A person may be considered a victim, under this Declaration, *regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted* and regardless of the familial relationship between the perpetrator and the victim. The term 'victim' also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".[210]

STATUTE OF LIMITATIONS

"Where so provided for in an applicable treaty or contained in other international legal obligations, statutes of limitations shall not apply to gross violations of international human rights law and serious violations of international humanitarian law which constitute crimes under international law". Article 6, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.[211]

In 2004 the Supreme Court (then of Serbia and Montenegro) ruled that claims against the state must be brought within five years of the event that led to injury or of death. This ruling violates the non-applicability of statute of limitations to war crimes and

crimes against humanity including civil suits arising out these crimes. [212]

Although these provisions have not been applied in all cases, [213] the Supreme Court ruling can be an almost insurmountable obstacle to victims who wish to claim compensation.

In 2011, the UN Human Rights Committee, in its concluding observations on Serbia's second periodic report on its implementation of the ICCPR, expressed concerns, "… at the difficulties faced by individuals trying to obtain compensation from the State for human rights violations, in particular regarding war crimes, *as well as the existing statutory limitation period of five years*". The Committee urged Serbia to "ensure that all victims and their families receive adequate compensation for such violations".[214] Further with specific reference to ethnic Albanians from Kosovo, found buried in mass graves in Serbia, the Committee also urged Serbia to "ensure that the relatives of the victims are provided with adequate compensation." [215]

Also in 2011, the CoE Commissioner for Human Rights, following a visit to Serbia, noted that he was "worried by the lack of a reparation mechanism for all victims of war-related crimes in Serbia", and noted obstacles to reparation, including the five-year limitation imposed by the Constitutional Court. The Commissioner urged the authorities to "take all necessary measures to ensure reparation to victims of war-related crimes and to their families, in line with the established principles of international law as reiterated in the 2005 UN 'Basic Principles and Guidelines'".[216]

The UN Committee against Torture (CAT), in their General Recommendation 3, have also underlined a state's obligation (under Article 14 of the Convention against Torture) to "ensure in its legal system that the victim of an act of torture obtains redress and has an enforceable right to fair and adequate compensation, including the means for as full rehabilitation as possible." The CAT, in para. 20, reminds states that to "give effect to article 14, States parties shall enact legislation specifically providing a victim of torture and ill-treatment with an effective remedy and the right to obtain adequate and appropriate redress, including compensation and as full rehabilitation as possible." The CAT also stated at para. 38 that, "States parties to the Convention have an obligation to ensure that the right to redress is effective", listing a number of obstacles including "statutes of limitations" which render this right ineffective.[217]

LONGEVITY OF PROCEEDINGS

In the seven years since their case was lodged, the relatives of those killed or

disappeared at Sjeverin have still not been granted adequate reparations. A case submitted by Croatian Prisoners of War, decided in February 2014 has, even before appeal, taken six years. According to the HLC proceedings in civil courts for reparations may take an average of five years, although at least one case lasted 13 years. Delays may be attributed to the time taken for proceedings to commence and for subsequent proceedings to take place. Further delays have been caused by the continuing process of judicial reform. [218]

The combination of delays in bringing criminal prosecutions and the reluctance of courts to grant compensation in civil cases pending the conclusion of criminal proceedings amounts to a violation of victims' rights to an "effective remedy".[219]

Amnesty International therefore considers that barriers in civil law which prevent victims from receiving reparation through the courts, underscores the need to establish an effective administrative system for determining claims to compensation and other forms of reparation.

ACCESS TO ADMINISTRATIVE REPARATION

"Judicial and administrative mechanisms should be established and strengthened where necessary to enable victims to obtain redress through formal or informal procedures that are expeditious, fair, inexpensive and accessible. Victims should be informed of their rights in seeking redress through such mechanisms." Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power.[220]

Whilst any administrative framework for reparation should equally provide for both military and civilian victims of war, the absence of a comprehensive legal framework in Serbia with respect to the right to reparation for civilian victims of crimes under international law has been highlighted for many years - by Amnesty International, domestic and international NGOs and inter-governmental organizations.[221]

Of the five forms of reparation set out in international standards - restitution, compensation, rehabilitation, satisfaction and guarantees of non-repetition – the current legal framework provides only a limited number of civilian victims of war with access to a form of financial compensation in the form of a pension, and some other social benefits. The Law on the Rights of Civilian War Invalids applies only to individuals, and the families of individuals who were killed in armed conflict, or died as a result of being wounded or injured by non-Serb forces. [222] It is not available to victims of Serb forces.

Both the Serbian laws on military and civilian "invalids" provide for monetary compensation, in the form of a monthly payment, to persons disabled by war and the

families of persons killed in armed conflict or deceased as a result of injuries suffered in connection with the conflict. Yet, in many respects, the law discriminates against civilian victims of war, and fails to provide them with adequate compensation. [223] For example, the threshold for disabled military personnel is that their physical injuries have resulted in at least 20% bodily damage; for civilians, the degree of bodily injury required is 50%. Further, while families of killed or missing servicemen have the right to family disability pensions irrespective of their income, the families of killed and missing civilians are only able to invoke this right if their income is below the level established by law.[224]

While both the families of missing servicemen and civilians are required to undertake civil proceedings to declare the missing person dead,[225] the majority of family members of missing civilians are either unaware that they may receive monthly compensation under these conditions or do not wish to launch such proceedings, hoping that their relative is still alive. [226]

The rights of civilian victims of war were further restricted in 2013, when the Ministry of Labour, Employment and Social Policy revoked the status of civilian victims of war and their families, where the violations against them were committed outside of the Republic of Serbia.[227] This decision was initially applied to the relatives of those abducted at Sjeverin (see above), on the basis that – although the victims and their families were Serbian citizens – they were abducted and killed on the territory of BiH. The decision was subsequently reportedly applied to all other similar cases.[228]

Amnesty International considers that, in order to ensure the right to reparation of all victims, irrespective of their status, a more holistic approach is needed. Such an approach was initiated in 2012, by the HLC, in discussion with other actors including the Protector of Citizens, (Ombudsperson), the Office for Human and Minority Rights and the Commissioner for the Protection of Equality, with the aim of introducing a new Law on Civilian Victims of War, which would apply to all citizens of Serbia who had been the victims of war crimes and other serious violations of human rights during the armed conflicts of the 1990s. Their aim was to provide an administrative law that provided compensation, irrespective of the social, economic or other status of the victim, and that afforded some dignity to survivors and their relatives. A working group to draft the law was formed in October 2013, and HLC began working on a comparative legal analysis. In February 2014, however, the Ombudsperson and other parties withdrew from the process.[229] HLC will continue to draft a model law; yet there continues to be little political support for such measures.

REPARATION FOR THE RELATIVES OF THE MISSING

"*….the lack of the Law on Missing Persons is another problem faced by the families of missing persons, which should govern the special status of such persons and define the rights and benefits of the families of missing persons, in accordance with severity and length of the crime of enforced disappearance*".[230]

Almost 35,000 people were reported missing to the ICRC as a result of the armed conflicts of the 1990s, almost 12,000 remain unaccounted for.[231] Many of these people were disappeared by forces of the SFRY and later, the FRY and Serb forces; many others, including Bosnian Serbs, Croatian Serbs and Kosovo Serbs were the victims of abductions by non-Serb forces.

Amnesty International was encouraged by Serbia's ratification in 2011 of the International Convention for the Protection of All Persons from Enforced Disappearance (CPED) along with the recognition of the competence of the Committee on Enforced Disappearances to receive and consider communications from or on behalf of victims or other states parties. [232] Yet, as the extract from the government's report on Serbia's ratification of the Convention notes, in the absence of a Law on Missing Persons, the rights of their relatives to truth, justice and reparation, [233] including compensation and other benefits, remain unfulfilled.

In addition to the obligation to bring all those suspected of criminal responsibility of enforced disappearances to trial, and to provide their victims access to reparation though an integral administrative system or the civil justice system, Serbia also has the obligation under international law to guarantee reparation to all victims, including the relatives of the missing.[234]

As far as Amnesty International is aware, Serbia appears to have taken no measures to bring the provisions of the CPED into domestic law. Indeed, in their state party report on implementation of the convention, they observe, "*It seems that the notion of a damaged party according to the Criminal Procedure Code and the Law on Contracts and Torts is narrower than the notion of a victim within the meaning of article 24 of the Convention, for which reason the existing legal framework may leave certain persons without protection.*" [235]

THE RIGHT TO REPARATION: ENSURING THE RIGHT TO KNOW

The Convention on Enforced Disappearances (CPED) at Article 24(2) provides that each victim - the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance, (in practice, the relatives of the missing person, where the disappeared person does not survive) have the right to know the truth

regarding the circumstances of the enforced disappearance, the progress and results of the investigation and the fate of the disappeared person. In addition, the CPED also provides that each state party shall take appropriate measures in this regard.

This is a continuing obligation, irrespective of when Serbia became a state party to the CPED; under international law, the acts constituting enforced disappearances are considered as a continuing offence as long as the fate and whereabouts of the disappeared person remain unclarified.[236]

This obligation is partially discharged through the Serbian Government Commission on Missing Persons which is charged, in cooperation with the relevant authorities, with resolving the status of missing persons, informing families about the current status of cases, and where possible, the circumstances of the death of their family member. However, unlike other countries in the region, Serbia remains without a Law on Missing Persons, which should – amongst other things – guarantee relatives the right to know the fate and whereabouts of their family member.

In 2012, on the adoption of the annual report of the Government Commission on Missing Persons, the Parliamentary Committee for Human Rights called on the government to introduce a law on missing persons.[237] The head of the government commission is reluctant to support such a law, and in an interview with the Ministry of Justice it was made clear to Amnesty International that the costs of implementing such a law were considered prohibitive. [238] In the absence of such a law, Serbia is failing to guarantee the rights of victims and their relatives to truth, justice and reparation, in accordance with customary international law and the provisions of the CPED.

REPARATION FOR SURVIVORS OF WAR CRIMES OF SEXUAL VIOLENCE

Serbia has so far failed to provide the victims of war crimes of sexual violence with access to reparation. Serbian law does not envisage the right to reparation for the victims/survivors of war crimes of sexual violence: as already noted, the eligibility criteria for civilian victims of war demands evidence of 50% bodily injury, which excludes all but those severely injured. Further, civilian victims have no right to a disability pension, even if they continue to suffer from medical or psychological conditions as a result of the violation committed against them. Thus, in predicating eligibility for compensation on degrees of physical injury, the law effectively excludes the majority of victims of war crimes of sexual violence from applying.

Eligibility is also based on proof of the incident. For survivors who were raped or

suffered other war crimes of sexual violence, often by unknown perpetrators, it is often impossible to fulfil this condition.

Elsewhere in the region, victims of war crimes of sexual violence may claim some rights to reparation, including financial compensation and appropriate forms of rehabilitation. [239] Yet, the victims of war crimes of sexual violence perpetrated by non-Serb forces in BiH, Croatia and Kosovo, respectively, and who now live as refugees or displaced persons in Serbia, are denied this right, despite an extensive legal framework guaranteeing the rights of women, including with particular reference to violence against women in armed conflict. [240]

Women and girls of Serbian ethnicity who were subject to war crimes of sexual violence have received little attention in Serbia, nor have they received any government support. Possibly because of the massive public campaigns related to war crimes of sexual violence committed by Serb (or Bosnian Serb) forces in BiH, there are no reliable estimates of the numbers of women (and men) of Serbian ethnicity, who were subject to rape or other forms of sexual violence during the armed conflicts in Croatia, BiH and Kosovo.

Some women who had been raped in BiH or Croatia, and who came to Serbia as refugees from 1992 onwards, were able to receive support from the Group for Women Raped in War. In 1993 the group established the Autonomous Women's House, which continued to provide services for all women who had survived rape or sexual violence, both in war or in a domestic context; the NGO also publicly condemned rape as a weapon of war – on all sides of the conflict.[241] However, there has been no public campaign, as for example, in BiH, for the rights of victims of war crimes of sexual violence.

According to the NGO Žene u crnom (Women in Black), a proposal to include "legal protection and psycho-social and economic support to victims of violence, *including women who were exposed to torture and sexual abuse during wars on the territory of former Socialist Federal Republic of Yugoslavia*", was dropped from the National Strategy for the Elimination of all Forms of Violence against Women.[242]

Without specific legislation recognizing the rights of survivors of war crimes of sexual violence to reparation, they are also denied access to psychosocial support, adequate healthcare and other forms of rehabilitation, which should be made available to survivors, irrespective of any ongoing investigations or judicial proceedings.

CONCLUSIONS AND RECOMMENDATIONS

Many of the concerns addressed in this report have been repeatedly raised for many years by Amnesty International, by Serbian NGOs working on transitional justice, by the Council of Europe and by the European Commission in their progress reports. Yet those concerns appear to have gone unnoticed, or have been ignored by successive Serbian governments.

Not without some justification, the government's position - also held by large sections of the population – is that international justice, and in particular the ICTY – has not only failed Serbia, but has actively targeted Serbia to the exclusion of other warring parties.[243]

However, the President of Serbia and other key political figures have continued to make statements which undermine the international justice system, and reinforce the climate of impunity in Serbia. Such statements demonstrate the lack of political will to support the investigation and prosecution of crimes committed by Serbian armed forces, police and paramilitary forces.

Amnesty International considers the lack of demonstrable political will to be the main obstacle in addressing the concerns raised in this report. Without the political will to address obstacles such as the lack of an adequate legal framework or provide additional resources for the effective investigation and prosecution of crimes under international law, justice will not be delivered to the victims of those crimes.

It is over twenty years now since Yugoslavia tore itself apart in a bitter conflict involving widespread war crimes and crimes against humanity. This is a long time, but injustice does not fade. The few high profile prosecutions at the ICTY do not begin to address – and should not be allowed to gloss over – the prevailing impunity for crimes committed and the ongoing failure to provide the vast majority of victims with truth, justice and reparation. Their needs, and their rights, do not diminish with time and these cannot be sacrificed on the altars of political expediency, cost or the desire to move on.

Serbia has embarked on a process of accession to the EU which has at least a further five years to run. This process provides Serbia with an opportunity to address these

concerns in a systematic and accountable manner, ensuring that measures are taken, laws amended and resources provided, to ensure a functioning police, prosecutorial and judicial system which may independently, impartially and effectively address Serbia's legacy of impunity. The EU cannot ignore these failings; the Serbian government must address them.

Amnesty International therefore calls on the government of Serbia to publicly declare their full support for the process of transitional justice, and for the institutions charged with the task of ensuring that all victims are guaranteed access to justice.

INVESTIGATIONS AND PROSECUTIONS

Amnesty International believes that the government of Serbia should adopt the following measures in order to increase the capacity of the Office of the War Crimes Prosecutor and the War Crimes Investigation Service for the investigation of crimes under international law:

- Allocate additional financial resources to ensure that the OWCP is provided with sufficient additional personnel, including investigators and analysts, in order to bring timely and adequate indictments;

- Review, and if necessary, reform the current WCIS, with the aim of ensuring an impartial and professional unit, with the organizational capacity and technical resources to carry out prompt, impartial, thorough and effective investigations;

    - Consideration should be given to the relocation or changes in the functional accountability of the WCIS.

- Conduct an independent mapping exercise to establish the scale and scope of the backlog of uninvestigated crimes, the resources needed to address that backlog and, in conjunction with the OWCP, design a prosecution strategy.

LEGAL FRAMEWORK

- Apply and interpret the legality principle in full accordance with international law, so as to ensure that nothing under Serbian law may prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of international law.

WITNESS SUPPORT

Amnesty International urges the government of Serbia to take measures to:

- Adopt the principles set out in relevant international and regional standards;

- Create, and provide sufficient financial resources and staffing, for a unified Witness Support Unit at the SWCC, available to both the OWCP and the judiciary, to provides support before, during and after proceedings have been concluded;

- Improve in-court protection, and technical and material conditions in the court building, including by providing separate entrances and additional spaces to enable the segregation of witnesses and defendants, and the secure passage of witnesses throughout the building;

- Recruit additional staff to the WSU, proportionate to their workload, including experienced professionals competent to provide appropriate psycho-social support, before, during and after the proceedings;

- Strengthen out-of-court protection, both during the course of proceedings and including safe and discreet transportation to and from the court;

- Amend the Criminal Procedure code to provide appropriate procedures and protections for victims of war crimes of sexual violence in evidentiary procedures;

- Consult with witnesses to ensure that these measures provide them with effective support.

WITNESS PROTECTION

Amnesty International expects that the European Commission will include measures to reform and review practices within the WPU in the conditions to be negotiated in Chapter 23. To this end the organization makes the following recommendations to the Serbian authorities:

- Initiate a full, independent and impartial investigation into allegations against the Witness Protection Unit made by former protected witnesses, bringing to justice those reasonably suspected of any criminal offence;

- Review the internal protocols and practices of the WPP with the aim of strengthening the organization including through the provision of adequate resources and the appointment of professional staff to ensure that all protected witnesses and their families receive the highest standard of protection;

- Consider options, including the transfer of the office of the WPU to the Ministry of

Justice, which would improve protection for witnesses in cases of crimes under international law;

- Amend the relevant section of the CPC covering courtroom procedure and the examination of witnesses, to make special provision for the protection of the rights of victims of sexual violence through adequate safeguards during witness examination and cross-examination, including the exclusion of evidence of previous sexual history.

THE RIGHT TO REPARATION

Amnesty International considers that the Serbian authorities should:

- remove obstacles that deny the victims of crimes under international law and human rights violations committed during wars of the 1990s their right to reparations, including compensation, including by:
  - Introducing legislation to ensure that all victims of crimes under international law receive access to reparation through an effective, impartial and non-discriminatory administrative procedure.
- Where civil cases remain to be determined:
  - Ensure that the 2004 ruling by the Constitutional Court on the applicability of the statute of limitations is reversed by a subsequent ruling;
  - Exempt the applicants from the costs of civil proceedings, and ensuring their access to free legal aid.

With respect to missing persons:

- Enact and enforce legislation on missing persons whereby all victims of crimes under international law by Serb forces obtain full reparation and prompt, fair and adequate compensation through an administrative and simple system, without discrimination;
- Fully implement the International Convention for the Protection of all Persons from Enforced Disappearance;
- Support the drafting of a revised law on civilian victims of war, ensuring that victims are provided with effective and adequate reparation in relation to the harm suffered, without discrimination;

With respect to the victims of war crimes of sexual violence:

- Ensure the recognition of victims of war crimes of sexual violence as civilian victims of war as a form of symbolic recognition of the violations against them; survivors should be consulted as to the form that this recognition will take;

- Ensure that reparations should be transformative, that is they should aim to challenge stereotypes about survivors of sexual violence;

- Introduce amendments to the Law on Civilian Victims of War to ensure victims of war crimes of sexual violence are eligible to receive access to reparation, including appropriate medical services and psychosocial support.

ENDNOTES

[1] International Committee of the Red Cross, *Figures related to the persons missing from the Balkans conflicts*, March 2014.

[2] Namely, violations of the laws and customs of war (war crimes); crimes against humanity and genocide.

[3] Between 1995 and 2003, only nine war crimes trials took place in Serbia, Organization for Security and Co-operation in Europe (OSCE) Mission to Serbia and Montenegro, *War Crimes before Domestic Courts: OSCE monitoring and empowering of the domestic courts to deal with war crimes*, October 2003, pp. 10-14, http://www.osce.org/serbia/13494

[4] Including, for example, the failure between 2001-3 to promptly and impartially investigate the organized cover-up of one of the most egregious crimes under international law, namely the removal of the mortal remains of Kosovo Albanians from Kosovo to mass graves in Serbia in April May 1999, following the discovery of the bodies; see Amnesty International, *Burying the Past: Impunity for Enforced Disappearances and Abductions In Kosovo*, 2009, pp.19-20, and p.41-44, http://www.amnesty.org/en/library/info/eur70/007/2009/en

[5] Quoted in HLC, *War Crimes Trials in Serbia 2012*, p. 4-5, citing an interview in *Vecernje novosti*, 1 August 2012, in which the minister was referring to the big fish in the pool of organized crime and corruption. According to media reports, the Minister has yet to visit the Special War Crimes Court.

[6] Until March 2014, serving officers indicted by the OWCP were not necessarily suspended from their posts. After the HLC called for his suspension pending trial, Vladan Krstović, a serving Gendarmerie Commander, was suspended in March 2014. He had indicted in November 2013, for war crimes against the civilian population, for his part in the killing of 46 Kosovo Albanian civilians in Ljubenić in Kosovo on 1 April, 1999, see http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_11_22_LAT.pdf. See HLC, *Persons Indicted for War Crimes in Police Uniform*, http://www.hlc-rdc.org/?p=25759&lang=de; HLC, *Suspended member of Gendarmerie accused of war crimes*, 28 March 2014, http://www.hlc-rdc.org/?p=26473&lang=de

[7] An initial screening of Serbia's compliance with the requirements of these chapters had been completed at the time of writing, but had not been made public.

[8] Including *Documenta*, Croatia, http://www.documenta.hr/en/home.html; TRIAL (*Track Impunity Always*) in Bosnia and Herzegovina, http://www.trial-ch.org/BiH/Pocetna.html; and Human Rights Action (*Akcija za ljudska prava*) in Montenegro, http://www.hraction.org/

[9] In December 2004, amendments to the law on the court, provided for evidence collected by the ICTY, to be presented before the SWCC, in accordance with Rule 11 bis of the Rules of its

Procedure and Evidence. The first case was transferred in 2007.

[10] Statistics for cases resolved at the second instance, excluding appeals and retrials, as of 19 May 2014, http://www.tuzilastvorz.org.rs/html_trz/predmeti_eng.htm

[11] As of 19 May, http://www.tuzilastvorz.org.rs/html_trz/predmeti_eng.htm

Not all indictments are based on investigations by the OWCP: some are transfers from the ICTY under Rule 11 bis. Evidential material in the case of Vladimir Kovačević was handed over to the OWCP in November 2006, http://www.icty.org/sid/8680; the OWCP issued an indictment in July 2007, although the case has been deferred due to the ill-health of the indicted suspect. http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2007/VS_2007_07_30_ENG.pdf

Other indictments are based on initial investigations by prosecutors in BiH or Croatia. See for example, the case again Alić *et al*,(later Skočić,) was originally investigated by the Tuzla Prosecutor in BiH. See also, http://www.balkaninsight.com/en/article/serbia-and-bosnia-uniting-for-justice

[12] For example, members of the KLA, known as the Gnijlane group, arrested in southern Serbia in 2008, B92, "Former KLA members arrested in Preševo", 26 December 2008, http://www.b92.net/eng/news/politics.php?yyyy=2008&mm=12&dd=26&nav_id=56000

[13] http://www.tuzilastvorz.org.rs/html_trz/predmeti_eng.htm,as of 19 May; interview with Chief Prosecutor, November 2013. A similar number was cited by the OWCP in an interview in 2009.

[14] See for example, (OSCE), *War Crimes Before Domestic Courts* ,2003, *op.cit*; Human Rights Watch, *Justice At Risk: War Crimes Trials On Croatia, Bosnia and Herzegovina, and Serbia And Montenegro*, 2004, http://www.hrw.org/node/11965/section/4#_ftn15; International Centre for Transitional Justice, *Against the Current—War Crimes Prosecutions in Serbia*, 2007, pp. 2-3, http://ictj.org/publication/against-current-war-crimes-prosecutions-serbia-0; Amnesty International, *Burying the Past, op.cit,* pp. 42-44, http://www.amnesty.org/en/library/info/EUR70/007/2009/en

[15] The low number of indictments in 2012-13 is attributed by the OWCP to demands placed on the office by the introduction of amendments to the CPC.

[16] KTP3 7/08 Skočić, on 26 February 2013; KTO 6/13 Hondo, on 22 November 2013; OWCP "Court finally convicts Milan Škrbić of a war crime against civilians committed in Ključ, Bosnia in 1992",13 September 2013, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_09_13_ENG.pdf; KTO 4/12 Kašnjeti, (following appeal) on 21 June 2013.

[17] KTO 3/13 Bihać (Đuro Tadić) on 6 February 2014 (transfer from BiH); KTRZ 4/10 Ćuška, on 11 February 2014.

[18] Articles 9-10, Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, (Official Gazette of the Republic of Serbia, no. 67/2003), 1 July 2003, (henceforth, Law on Organization and Jurisdiction); amended in 2004: Law Amending the Law on Organization and Jurisdiction of Government Authorities in Prosecuting Perpetrators of War Crimes, (Official Gazette RS, no. 135/2004, 21 December 2004, Article 3 (amending Article 2 of the original law), The name of the law was also changed to "Law on the Organisation and Competence of

Government Authorities in War Crime Proceedings",
http://www.osce.org/serbia/18571?download=true

[19] Article 3, Law on Organization and Jurisdiction.

[20] Article 2, Law on Organization and Jurisdiction.

[21] Articles 4-7, Law on Organization and Jurisdiction, 7; Article 8.

[22] See for example, KTRZ 13/08 Harbourers (Lovre and others),
http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2010_12_14_ENG.pdf

[23] According to the OSCE as of February 2014, some 145 individuals had been prosecuted in 45 cases; another nine individuals have been prosecuted as "harbourers", OSCE Mission to Serbia, Rule of Law and Human Rights Department, *Project support to monitoring of National War Crimes Trials, Monthly Report Issue#1,* p. 2. Proceedings continue at the ICTY (at first instance or appeal), for 20 out of the 161 suspects indicted, *Key Figures of the Cases*, http://www.icty.org/sid/24

[24] Ktrz 4/10 Ć uška, Amended Indictment (Miladinović and others), 17 December 2012. This was the 6th version of the indictment,
http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_12_17_ENG.pdf

[25] See http://www.tuzilastvorz.org.rs/html_trz/optuznice_eng.htm

[26] http://www.tuzilastvorz.org.rs/html_trz/pocetna_eng.htm, (* Data not available).

[27] OWCP, Press Release, "Amidst Štrpci operations, threats launched against prosecutors, police and witnesses", 29 May 2014,
http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_05_29_ENG.pdf

[28] Amnesty International interview, OWCP, November 2013.

[29] Article 8, Law on Organization and Jurisdiction. "The Service shall act on requests of the Prosecutor for War Crimes, in accordance with law".

[30] Amnesty International interview, OWCP, November 2013.

[31] Amnesty International interview, Ivan Jovanović, then the head of the Criminal Justice System Unit in the OSCE Mission to Serbia, November 2013.

[32] See footnote 22.

[33] Under Article 8 of the Law on Organization, the Head of the WCIS is appointed by the Minister of Interior, "after obtaining the opinion of the War Crimes Prosecutor". However, media reports suggests that he may not have been consulted on the appointment of Dejan Marinković, *Politika*,"Novi šef Službe za otkrivanje ratnih zloč ina", http://www.politika.rs/rubrike/Hronika/Novi-shef-Sluzbe-za-otkrivanje-ratnih-zlochina.lt.html

[34] Amnesty International interview, Ivan Jovanović, as above, November 2013.

[35] See box page 13, and footnote 51.

[36] Amnesty International interview, Dejan Marinković, November 2013.

[37] Amnesty International interviews with OWCP, HLC and OSCE, February 2009; see also page 37.

[38] Amnesty International interview, Dejan Marinković, November 2013.

[39] Criminal Procedure Code ("Official Gazette of the RS, Nos 72/11 and 101/11), see also Law on Amendments and Supplements to the Criminal Procedure Code. Under Article 608, the new CPC was introduced in other courts from January 2013, http://www.ecoi.net/file_upload/1930_1321698777_serbia-2011-cpc-english.pdf

[40]For commentary and analysis of these changes, see, New *trends in Serbian criminal procedure law and regional perspectives (normative and practical aspects)*, esp. pp. 17-18. http://www.osce.org/serbia/102752

[41] Amnesty International interview, November 2013.

[42] See, for example, Chap 7 and 15.2, 2011 CPC.

[43] "We only produced a small number of indictments in 2012, because of the changes in the law, and trainings in the law," Amnesty International interview with OWCP, November 2013.

[44] See for example, HLC, *Criminal Complaint Against Yugoslav Army Officer for Crime Committed Against 17 Kosovo Albanians and One Ashkali*, 27 December 2013, http://www.hlc-rdc.org/?p=26011&lang=de

[45] See M.Bergsmo, K.Helvig, I.Utmelidze and G.Žagovec. "The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina". *Forum for International Criminal and Humanitarian Law (FICHL) - International Peace Research Institute, Oslo (PRIO)*, Oslo 2009; Chapter 5, "Case selection and prioritization criteria", provides a useful and practical explanation of the need to develop such criteria, providing examples from different jurisdictions, including the ICTY, ICC and BiH. See also, Olga Martin-Ortega, " Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina, *International Criminal Law Review 12* (2012) 589–628, see esp. p. 598, http://www.nuhanovicfoundation.org/user/file/2012_ortega_on_prosecuting_war_crimes_in_state_court_of_bih.pdf_-_to_place.pdf

[46] See for example, *Serbia and Montenegro, Amnesty International's concerns submitted to the Human Rights Committee, February 2004*, pp. 3-5; on 24 June 2003, Vladan Batić, Serbian Minister of Justice specifically referred to the investigations at Batajnica and Petrovo Selo, indicating that these cases would be amongst the first to be prosecuted under the new Law on War Crimes when it entered into force on 1 July 2003**.** On 25 October 2003, the Special Prosecutor for War Crimes Vladimir Vukčević reportedly stated in an interview with B92, that the Batajnica case had been

processed and that unnamed persons were under investigation, and that indictments would be filed on completion of the investigation.

[47] See, for example, Section VII, Concealment of Bodies, pp. 501-552, http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf

[48] In 2012, the mortal remains of 160 Bosniaks were also found in the lake, http://www.balkaninsight.com/en/article/more-than-160-perucac-victims-identified

[49] In 2004, the Committee observed: "While noting the effective work regarding exhumations and autopsies of some 700 bodies from mass graves in Batajnica, the Committee is concerned at the lack of progress in investigations and prosecutions of the perpetrators of those crimes" ... The State party should, along with the exhumation process, immediately commence investigations into apparent criminal acts entailing violations of the Covenant. The particular needs of the relatives of the missing and disappeared persons must equally be addressed by the State party, including the provision of adequate reparation", *Concluding Observations of the Human Rights Committee: Serbia and Montenegro*, para 10, 12/08/2004, CCPR/CO/81/SEMO, http://www.unhchr.ch/tbs/doc.nsf/0/c4f9dd7baa1e61aec1256ee1004c4a96?Opendocument

In 2011, the Committee again addressed the same concern: "With reference to its previous concluding observations (para. 10), the Committee remains concerned that no significant progress has been made to investigate, prosecute, and punish those responsible for the killing of more than eight hundred persons whose bodies were found in mass graves in and near Batajnica, and to compensate the relatives of the Victims"... "The State party should urgently take action to establish the exact circumstances that led to the burial of hundreds of people in Batajnica region, and to ensure that all individuals responsible are prosecuted and adequately sanctioned under the criminal law. The State party should also ensure that relatives of the victims are provided with adequate compensation", para 12, *Consideration of reports submitted by States parties under article 40 of the Covenant: Concluding observations of the Human Rights Committee* - Serbia, 20 May 2011, CCPR/C/SRB/CO/2, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSRB%2fCO%2f2&Lang=en;

[50] http://www.balkaninsight.com/en/article/serbia-arrested-gendarmerie-member-for-ljubenic-massacre/1452/47; OWCP, *Ljubenić War Crime Suspects Under Arrest*, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_05_21_ENG.pdf

[51] See OWCP, *Office of the War Crimes Prosecutor, Ten years later*, pp.7-9, http://www.tuzilastvorz.org.rs/html_trz/POCETNA/P_MONOGRAFIJA_10_GODINA_ENG.pdf; Human Rights Committee, *Concluding observations of the Human Rights Committee: Serbia*, Addendum: Information received from Serbia on the implementation of the concluding observations of the Committee* [25 July 2012], CCPR/C/SRB/CO/2/Add.1, 22 January 2013, paras. 2-10, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CCPR%2fC%2fSRB%2fCO%2f2%2fAdd.1&Lang=en

[52] Law on the Organization and Competence of the Government Authorities in Aar Crimes

Proceedings, Official Gazette of the Republic of Serbia No 67/2003, 135/2004, 61/2005, (101/2007 and 104/2009).http://arhiva.mpravde.gov.rs/images/Law%20on%20the%20organisation%20and%20competences%20of%20the%20government%20authoriteis%20in%20war%20crimes%20proceedings_180411.pdf

In addition Article 2 (3) provided for the court to investigate and try those accused of "harbouring" suspects inducted by the ICTY, through "the criminal offence of aiding and abetting an offender after the commission of a criminal offence referred to Article 333 of the Criminal Code, if committed in connection with criminal offences referred in sub –paragraphs 1) and 2) of this Article".

[53] See, for example, Applicability of the Obligation to Arbitrate under Section 21 of the United Nations Headquarters Agreement of 26 June 1947 (Advisory Opinion), I.C.J. Rep. (1988), p.34 (noting "the fundamental principle of international law that international law prevails over domestic law"). And also: «*C'est un principe généralement reconnu du droit des gens que, dans les rapports entre Puissances contractantes d'un traité, les dispositions d'une loi interne ne sauraient prévaloir sur celles du traité*, C.P.J.I. série B no.17, p.32. Robert Jennings and Arthur Watts, *Oppenheim's International Law*, 1992, 9th ed., vol. 1, pp. 82 – 86; Malcolm N. Shaw, *International Law*, Cambridge: Cambridge University Press, 4th ed., 1997, pp.102 -103; Gerald Fitzmaurice, '*Law and Procedure of the International Court of Justice*', 1954 - 9 - General Principles and Sources of International Law, Brit. Y.B. Int'l L., 1959, 183; Edwin Borchard, '*The relation between international law and municipal law*', Va. L. Rev., vol. 27, p. 137.

[54] Annemie Schaus, 'Article 27 (1969)', *Les Conventions de Vienne sur le droit des traités: Commentaire article par article*, Olivier Corten & Pierre Klein (eds.), Bruxelles: Bruylant-Centre de droit international-Université Libre de Bruxelles, 2006, p.1136 (« L'article 27 de la Convention de Vienne, quant à lui, prescrit certainement, dans l'ordre juridique international, la primauté du droit international sur le droit interne »). Mark E. Villiger, *Commentary on the 1969 Vienna Convention on the Law of Treaties*, Leiden: Martinus Nijhoff / Brill, 2009, p. 375 ("Article 27 expressed the principle that on international level international law is supreme").

[55] Vienna Convention on the Law of Treaties (VCLT), Vienna, 23 May 1969. Entry into force: 27 January 1980, in accordance with article 84(1). Serbia became a state party to the VCLT on 12 March 2001 through succession. The former Yugoslavia signed and ratified the Convention on 23 May 1969 and 27 August 1970, respectively.

[56] Committee on Enforced Disappearances, Consideration of reports submitted by States parties under article 29, paragraph 1, of the Convention, Serbia, 29 January 2014, (henceforth: Report submitted to Committee on Enforced Disappearances: Serbia), para.10, http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/SRB/INT_CED_INR_SRB_7067_E.pdf "According to the Constitution of the Republic of Serbia, ratified international treaties shall be an integral part of the legal system in the Republic of Serbia, applied directly and they must be in accordance with the Constitution (art. 16, para. 2). Laws and other general acts enacted in the Republic of Serbia may not be in non-compliance with ratified international treaties and generally accepted rules of the international law (art. 194, para. 4)".

[57] Article 7, Statute of the International Criminal Court, http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[58] Report submitted to Committee on Enforced Disappearances: Serbia, para.14, see footnote 56.

[59] G. Werle, *Principles of International Criminal Law*, Second Edition, TMC Asser Press, p.192.

[60] ICCPR, New York, 16 December 1966. Entry into force: 23 March 1976, in accordance with article 49, for all provisions except those of article 41; 28 March 1979 for the provisions of article 41 (Human Rights Committee), in accordance with paragraph 2 of the said article 41. Serbia became a state party on 12 March 2001. The former Yugoslavia had signed the Covenant on 8 August 1967 and ratified it on 2 June 1971.

[61] Manfred Nowak, *UN Covenant on Civil and Political Rights, CCPR Commentary, 2nd revised edition*, N.P. Engel, Publisher, p.360.

[62] Convention for the Protection of Human Rights and Fundamental Freedoms, Rome, 4 November 1950. Article 7. Entry into force: 3 September 1953. Serbia signed the Convention on 3 April 2003 and deposited the instrument of ratification on 3 March 2004.

[63] Manfred Nowak, *UN Covenant on Civil and Political Rights*, p.367.

[64] European Court of Human Rights, Grand Chamber, case of *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment, 18 July 2013, para.55.

[65] European Court of Human Rights, case of August Kolk and Petr Kislyiy against Estonia, Judgment, 17 January 2006.

[66] Special Tribunal for Lebanon, Appeals Chamber, *Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging*, STL-11-01/1, 16 February 2011, para.133.

[67] Concluding observations of the Committee against Torture, Serbia, 19 January 2009, CAT/C/SRB/CO/1, para.11. See also the concluding observations of the Human Rights Committee, at footnote 36.

[68] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, G.A. res. 2391 (XXIII), annex, 23 U.N. GAOR Supp. (No. 18) at 40, U.N. Doc. A/7218 (1968), entered into force Nov. 11, 1970. Serbia is a state party since 12 March 2001. The former Yugoslavia had signed and ratified the Convention on 16 December 1968 and 9 June 1970, respectively. According to HLC, some three cases have been prosecuted as ordinary crimes, in courts of general jurisdiction: Miloš Lukić, charged with murder, at the Prokuplje High Court; the *Orahovac/Rahovec* case before ay the Pozarevac Higher Court; and the Emini case, ethnically motivated murder), under Article 113 of the FRY Criminal Code at the High Court in Niš, see HLC, *War Crimes Trials in Serbia 2012*, and *Report on War Crimes Trials in Serbia in 2011*, http://www.hlc-rdc.org/wp-content/uploads/2012/07/Report-on-War-Crimes-Trials-in-Serbia-in-2011-July-202012-ff.pdf

[69] Article 4, International Convention for the Protection of All Persons from Enforced Disappearance,

New York, 20 December 2006. Entry into force: 23 December 2010, in accordance with article 39(1). Serbia signed the Treaty on 6 Feb 2007 and ratified it on 18 May 2011.

[70] Report submitted to Committee on Enforced Disappearances: Serbia, para.36. At paragraph 41 Serbia repeats: "Criminal legislation of the Republic of Serbia does not have a specified act of enforced disappearance in the manner defined by the Convention in article 2."

[71] As set out in Amnesty International, *No impunity for enforced disappearances: Checklist for effective implementation of the International Convention for the Protection of All Persons from Enforced Disappearance*, (Index: IOR 51/006/2011), www.amnesty.org/en/library/info/IOR51/006/2011/en

[72] See Amnesty International, *Rape and sexual violence: Human rights law and standards in the international criminal court*, (Rape and Sexual violence), Index: 53/001/2011, March 2011, http://www.amnesty.org/en/library/info/IOR53/001/2011/en

[73] Various kinds of coercion recognized in international law include threats of force, duress, detention, psychological oppression, abuses of power, the perpetrator's taking advantage of a coercive environment, and the perpetrator's taking advantage of a victim's incapacity to genuinely consent. See, Amnesty International, *Rape and Sexual Violence: Human Rights Law and Standards in The International Criminal Court*, 1 March 2011, pp. 19-28, http://www.amnesty.org/en/library/info/IOR53/001/2011

[74] See for example, Article 7 (1) (g)-1, Crime against humanity of rape, para (2), "The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person, or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent, International Criminal Court , *Elements of Crimes*, http://www.icc-cpi.int/nr/rdonlyres/336923d8-a6ad-40ec-ad7b-45bf9de73d56/0/elementsofcrimeseng.pdf

[75] Also defined as a war crime in the Rome Statute, Article 8 (2) (b) (xxii).

[76] Within the within the jurisdiction of the ICC, all acts of rape amounting to crimes against humanity or war crimes charged are factually and legally contiguous with the crime of torture as a war crime or a crime against humanity and should be charged as such, *Rape and sexual violence*, pp.38-39.

[77] The responsibility of commanders and other superiors is set out in Article 384, Failure to Prevent Crimes against Humanity and other Values Protected under International Law, of the 2005 Criminal Code.

[78] Command responsibility is part of customary international law and has been included as a mode of responsibility both in *ad hoc* tribunals and in the ICC. The Statute of the International Criminal Tribunal for the Former Yugoslavia (Article 7(3) ("The fact that any of the acts referred to in articles 2

to 5 of the present Statute [grave breaches of the Geneva Conventions of 1949, violations of the laws or customs of war, genocide and crimes against humanity] was committed by a subordinate does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof.") and the Rome Statute of the International Criminal Court – to which Serbia is a party - define the responsibility of commanders and other superiors. However, in at least some respects, the Rome Statute falls short of other international law. For example, principles of superior responsibility with regard to civilians in the Statute are not as strict as required by customary international law, as well as conventional international law, such as Protocol I, which holds civilian superiors to the same standards as military commanders. See *Amnesty International, The International Criminal Court: checklist for the implementation* (AI Index: IOR 40/11/00), July 2000.

[79] G. Mettraux, *The Law of Command Responsibility*, OUP, 2009, p.21.

[80] Serbia is a state party to the Protocol I since 16 October 2001.

[81] Amnesty International, *Amicus curiae* observations on superior responsibility submitted pursuant to Rule 103 of the Rules of Procedure and Evidence, in the case of *The Prosecutor v. Jean Pierre Bemba Gombo*, International Criminal Court, No.ICC-01/05-01/08, 20 April 2009.

[82] G. Werle, *Principles of International Criminal Law*, p. 185.

[83] Constitution of the Republic of Serbia, Article 34, para.1 ("No person may be held guilty for any act which did not constitute a criminal offence under law or any other regulation based on the law at the time when it was committed, nor shall a penalty be imposed which was not prescribed for this act").

[84] HLC, 'Dossier 549th Motorized Brigade of Yugoslav Army', 2013, pp.3-4, http://www.hlc-rdc.org/wp-content/uploads/2013/03/Dossier-549th-Motorized-Brigade-of-Yugoslav-Army.pdf

[85] Vienna Convention on the Law of Treaties, article 27.

[86] In original translated as "could".

[87] "Dossier: 549th Motorized Brigade of the Yugoslav Army", p.4, and footnote 11, Article 21, *Direction on the application of the rule of International Humanitarian Law in the Armed Forces of the Socialist Federal Republic of Yugoslavia*, Official military gazette, no. 10, 1988.

[88] With respect to Kosovo, for example: on 23 January 2014, the Tribunal Appeals Chamber upheld the 2009 Trial Chamber verdict in the case of Šainovic et al, www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf. Four of the most senior political and military leaders were convicted of the murder, deportation and inhumane treatment of ethnic Albanians in March to May 1999. While the Appeals Chamber partially granted both Prosecution and Defence appeals in the cases of Nikola Šainović (former vice-president of the FRY), Sreten Lukić (chief of staff of the Serbian

MUP in Kosovo), Vladimir Lazarević (chief of staff of the VJ Priština Corps) and Nebojša Pavković (commander of the Third Army of the VJ, it reaffirmed that the defendants were all part of a joint criminal enterprise, headed by former President Slobodan Milošević (who died in the custody of the Tribunal on 11 March 2006). Former Serbian President Milan Milutinović had previously been acquitted of all charges in the first instance ruling. Former VJ chief of staff Dragoljub Ojdanić was also sentenced in 2009 to 15 years' imprisonment, but following a deal with the prosecution, decided not to appeal, and was released in 2013. On 27 January 2014, the Appeals Chamber partially upheld the 2011 conviction of former Serbian assistant Interior Minister Vlastimir Djordjević but reduced his sentence from 27 to 18 years' imprisonment after finding him not guilty of one of the charges, http://www.icty.org/x/cases/djordjevic/acjug/en/140127-summary.pdf; for judgement, see http://www.icty.org/x/cases/milutinovic/acjug/en/140123.pdf; or in summary,http://www.icty.org/x/cases/milutinovic/acjug/en/140123_summary.pdf

[89] See *Prosecute Officials for War Crimes, Serbia Urged*, 18 January 2013, http://www.balkaninsight.com/en/article/serbia-urged-to-prosecute-high-profile-war-crime-cases

[90] http://www.balkaninsight.com/en/article/serbian-justice-dismays-lovas-atrocity-survivors

[91]HLC, *Reactions to the Judgment in the Lovas Case*, 26 June 2012, http://www.hlc-rdc.org/?p=20614&lang=de

[92] HLC, *War Crimes Trials in Serbia 2012*http://www.hlc-rdc.org/wp-content/uploads/2013/01/Findings-on-WC-Trials-in-2012-ENG1.pdf, pp. 5-6.

[93] HLC, *Lovas case first-instance judgment demonstrates professionalism of Trial Panel*, 3 July 2012, http://www.hlc-rdc.org/?p=20715&lang=de; the Appeal Court, in a decision, dated 9 December 2013, returned the case for retrial, including on the basis that "a significant part of the first-instance judgment was based substantially, but not formally, by reference to responsibility in international law known as "command responsibility", Appeal Court, KZ1 PO2 3/13, 9 December 2013, http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-3-13.html

[94] HLC, *020712, Beli Manastir verdict delivers incomplete justice*, 2 July 2012, http://www.hlc-rdc.org/?p=20710&lang=de; verdict not publicly available.

[95] KTRZ 4/10 Ć uška, Amended Indictment (Miladinović And Others) , 17 December 2012, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_12_17_ENG.pdf

[96] OWCP Press Release, *Court Passes First-Instance Judgment For Crimes In Ć uška, Pavlan, Ljubenić And Zahač*, 11 February 2014, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_02_11_ENG.pdf

[97] In 2013, the OWCP reported that he had indicted Serbian army officer Pavle Gavrilović and Rajko Kozlina, a non-commissioned officer for war crimes against civilians in the village of Trnje, in the municipality of Suva

Reka on 25 March 1999. Pavle Gavrilovć and Rajko Kozlina ,are reportedly indicted, as former members of the 549th Motorised Brigade of Yugoslav Army, along with other unidentified members of the Logistics Battalion for the of killing 27 civilians. The announcement specifically notes that Pavle Gavrilovi*c* gave orders for the attack to subordinates, including Rajko Kozlina, stating: "There should be no survivors", OWCP, "Podignuta optužnica protiv Pavla Gavrilović a i Rajka Kozline za ratni zločin u trnju 1999. Godine, 6 November 2013", [indictment not publicly available] http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_11_06_LAT.pdf For further information, see http://www.hlc-rdc.org/wp-content/uploads/2013/03/Dossier-549th-Motorized-Brigade-of-Yugoslav-Army.pdf

[98] KTRZ 17/04 Zvornik 2 (Grujić i Popović), 22 October 2008, p. 8 http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2008_10_22_LAT.pdf

[99] HLC, *War Crimes Trials in Serbia 2012*, p.6. The verdict was confirmed by the Appellate Court in December 2011, http://www.naslovi.net/2011-12-20/b92/potvrdjene-presude-za-zvornik/3046496

[100] Amnesty International interview, Ivan Jovanović, then Head of the Criminal Justice System Unit, OSCE Mission to Serbia, November 2013.

[101] Amnesty International interview, OWCP, November 2013.

[102] Amnesty International interview, Ivan Jovanović, as above, November 2013

[103] OWCP, *Ljubenić War Crime Suspects Under Arrest*, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_05_21_ENG.pdf

[104] OWCP Announcement, *Indictment raised for a 1999 Ljubenić War Crime*, 22 November 2013, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_11_22_ENG.pdf

[105] Under Article 371 (cc, 2005) the definition of crimes against humanity includes: "detention or abduction of persons without giving information on it so as to deprive them of the protection of the law".

[106] IT-05-87/1-PT, Fourth amended Indictment, Prosecutor against Vlastimir Đorđević, para. 61(d). (Vlajko Stojiljković, Minister of Interior from 1997 to 2000, shot himself on the steps of the parliament in April 2002).

[107] Case No. IT-05-87/1-T, Public Judgement, http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf; the specific elements described above were confirmed on appeal.

[108] Kumanovo Agreement, http://www.nato.int/kosovo/docu/a990609a.htm; UNSCR 1244/99, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/N99/172/89/PDF/N9917289.pdf?OpenElement

[109]KTRZ 16/08 Gnjilane Group (Ajdari And Others), 11 August 2009, see p. 4, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2009_08_11_ENG.pdf

[110] HLC, *Case: Gnjilane Group, the indicted Fazli Ajdari and others Belgrade Court of Appeals – War Crimes Department No. of case: Kž 1 Po2 No. 2/13 (appeal)*, http://www.hlc-rdc.org/wp-content/uploads/2013/10/Gnjilane-Group-14.05.2013.pdf)

[111] Although the "Gnjilane group" was acquitted after appeal, the Court of Appeal did not acquit on the basis of the qualification of the crime, but on the failure of the prosecutor to provide any independent verification of the evidence, which had been provided by a single protected witness, see http://www.hlc-rdc.org/wp-content/uploads/2013/10/Gnjilane-Group-13.05.2013.pdf; Appeal Court decision available at, http://www.bg.ap.sud.rs/lt/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-2-13.html

[112] See, for example, *UNMIK's Legacy: The failure to deliver justice and reparations to the relatives of the abducted*, (Index: EUR 70/009/2013), 27 August 2013, http://www.amnesty.org/en/library/info/EUR70/009/2013/en

[113] Despite these concerns, "the Presiding Judge gave identical reasons for the guilty judgment on which the Trial Chamber based the original first instance judgment" ,HLC, *Mark Kashnjeti Convicted*, 24 June 2013, http://www.hlc-rdc.org/?p=23373&lang=de. See, Kž1 Po2 1/13, 8 March 2013, http://www.bg.ap.sud.rs/cr/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-1-13.html

[114] Kž1 Po2 5/12, 18 January 2013, http://www.bg.ap.sud.rs/lt/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-5-12.html. The appeal followed a retrial in May 2012, under an amended indictment under Article 144, issued in April 2012 which begins, "In the first half of July 1999, in the context of and in close connection with the armed conflict..", KTRZ 5/06 Braća Bitići, Precizirana Optužnica (Popović i Stojanović) [not available in English], 5 April 2012, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_04_05_LAT.pdf

[115]The ICTY Trial Chamber found in *Milutinović et al* that there was "a broad campaign of violence directed against the Kosovo Albanian civilian population during the course of the NATO airstrikes, conducted by forces under the control of the FRY and Serbian authorities, [including] "*sexual assault.....including the rape of women* in the municipalities of "Decani/Dečan, Srbica, in Beleg village (Peć), Ćirez (Kline) and Pristina". The Trial Chamber classified sexual assault as a form of persecution, as a crime against humanity, paras. 27, 72, http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf, paras 183 -203, http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e1of4.pdf

The Trial Chamber considered that former VJ General Pavković and Police General/Assistant Minister of Internal Affairs, Sreten Lukić, in occupying position of command responsibility, had reason to forsee, and therefore prevent, such sexual assaults, http://www.icty.org/x/cases/milutinovic/tjug/en/090226summary.pdf. The Appeals Chamber upheld the first instance decision in 2014, in *Šainovic et al*.

In addition, the Appeals Chamber in Djordjević found the former Assistant Minister of Interior guilty

"of the crime of persecutions through sexual assaults as a crime against humanity", Case No.: IT-05-87/1-A, http://www.icty.org/x/cases/djordjevic/acjug/en/140127-summary.pdf; Appeals Chamber Judgement, paras. 914-929, http://www.icty.org/x/cases/djordjevic/acjug/en/140127.pdf

[116] The indictment against a Kosovo Albanian, Siniša Morina, notes that "members of his group committed murders and rapes"; however no further detail is provided, see KTRZ 1/07 Orahovac Group (Morina), 13 July 2005, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2005_07_13_ENG.pdf The case is pending retrial following quashing of the first instance verdict on appeal.

[117] KTRZ 7/04 Đakovica (Lekaj), Indictment, 7 July 2005, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2005_07_07_ENG.pdf.

[118] KTRZ 16/08 Gnjilane Group (Ajdari and Others), 11 August 2009, as above.

[119] Kž 1 Po2 No. 2/13 (appeal) (Ajdari and others), HLC report of Appellate Court proceedings, http://www.hlc-rdc.org/wp-content/uploads/2013/10/Gnjilane-Group-13.05.2013.pdf

[120] Expanded indictment KTRZ 7/08 Skočić, Singular Indictment (Bogdanović and Others), 4 December 2012, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_12_04_LAT.pdf, not available in English; The previous indictment, KTRZ 11/10 Zvornik 5 (Alić), Indictment, 23 February 2011, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2011_02_23_ENG.pdf, was joined to that of Bogdanović.

The case in summarized in *Statement Regarding the Conviction in Skočić Case*, 26 February 2013, http://www.hlc-rdc.org/?p=22549&lang=de; Zoran Đurđević and Zoran Stojanović were each sentenced to 20 years' imprisonment; Zoran Alić and Tomislav Gavrić were each sentenced to 10 years, Dragana Đekić and Đorđe Šević to five years each; Damir Bogdanović was sentenced to two years imprisonment. A summary of the initial verdict is available in summary on http://www.bg.vi.sud.rs/

[121] Expanded indictment KTRZ 7/08 Skočić, Singular Indictment (Bogdanović and Others), 4 December 2012, as above.

[122] KTRZ 7/10 Bijelina (Jović and others), 5 May 2011; http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2011_05_05_ENG.pdf; on appeal the sentence of the youngest accused was reduced to 10 years, Kž1 Po2 6/12. 25 February 2103, http://www.bg.ap.sud.rs/lt/articles/sudska-praksa/pregled-sudske-prakse-apelacionog-suda-u-beogradu/krivicno-odeljenje/ratni-zlocini/kz1-po2-6-12.html

[123] HLC, *War Crimes Trials in Serbia 2012*, pp. 39-43

[124] OWPC, Announcement, 11 February 2014, http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_02_11_ENG.pdf; for Indictment, 17 December 2012, para 3.2, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_12_17_ENG.pdf;

additional information from HLC.; the written verdict is not yet available

[125] Then the head of the Criminal Justice System Unit in the OSCE Mission to Serbia, Several others have commented on the lack of meaningful and solid indictments, including the judiciary at the SWCC, the EU Delegation and HLC.

[126] *War Crimes Trials in Serbia 2012*, pp. 50-52.

[127] http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2012/VS_2012_05_09_LAT.pdf

[128] KTRZ 3/05 Scorpions 1, Amended Indictment (S.Medić and others), 9 October 2006, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2006_10_09_ENG.pdf. Popović et al. (IT-05-88) "Srebrenica", http://www.icty.org/x/cases/popovic/ind/en/popovic-060804.pdf; for a summary of the case, see http://www.icty.org/x/cases/popovic/cis/en/cis_popovic_al_en.pdf

See also http://www.nytimes.com/2007/04/10/world/europe/10cnd-serbia.html?_r=0

[129] Amnesty International interview, November 2013.

[130] The final indictment for Ć uška, KTRZ 4/10, was issued on 17 December 2012; it amended five previous indictment, the first of which was issued on 10 September 2010, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_12_17_ENG.pdf

[131] Refik Hodžić, International Centre for Transitional Justice, quoted in IWPR,"Poor Protection for Balkan Trial Witnesses", 22 November 2012, http://iwpr.net/report-news/poor-protection-balkan-trial-witnesses

[132] Amnesty International interview, November 2014

[133] The rights of victims and witnesses to life, liberty and security, and respect for private and family life, are guaranteed under ECHR, Articles 2, 5 and 8; the right to witness support has been underlined by regional bodies, including the Council of Europe, "[The Assembly] considers that witnesses should be given support – Including legal and psychological support – before, during and after the trial, see Council of Europe, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, para 7. http://assembly.coe.int/CommitteeDocs/2010/20100622_ProtectionWitnesses_E.pdf

[134] See Chapter 7, *Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law*, para.10, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

[135] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985, UN Doc. A/RES/40/34, http://www.un.org/documents/ga/res/40/a40r034.htm.

[136] For concerns about the credibility of key witnesses, see HLC index: 019-3361-1, 25 September 2012, *Chief Prosecution Witness "Not Credible" but 11 Convicted in Gnjilane Case Re-trial*, http://www.hlc-rdc.org/?p=21078&lang=de

[137] "Victims should be treated with humanity and respect for their dignity and human rights, and appropriate measures should be taken to ensure their safety, physical and psychological well-being and privacy, as well as those of their families. The State should ensure that its domestic laws, to the extent possible, provide that a victim who has suffered violence or trauma should benefit from special consideration and care to avoid his or her re-traumatization in the course of legal and administrative procedures designed to provide justice and reparation", *Basic Principles*, as above, para.10.

[138] "The Higher Court in Belgrade shall form a unit for injured party and witness assistance (hereinafter: Assistance and Support Unit), which shall perform administrative and technical tasks, tasks relating to the assistance and support to injured parties and witnesses, as well as tasks of providing conditions for the application of procedural provisions of the present Law. The work of the Assistance and Support Unit shall be regulated by an act issued by the Chief Justice of the Higher Court in Belgrade, with the approval of the minister responsible for the judiciary", Article 11, *Law on the Organisation and Competences of the Government Authorities in War Crimes Proceedings*; regulated by the Rule Book on internal organization and position classification in the High Court in Belgrade, SU No 9/10 – Article 14, http://www.bg.vi.sud.rs/cr/articles/o-visem-sudu/uredjenje/zaposleni/zaposleni.html

[139] Amnesty International interviews, November 2013.

[140] Amnesty International interview, November 2013.

[141] Amnesty International interviews, November 2013.

[142] Amnesty International interview, November 2013.

[143] Amnesty International interview, Head of WSU, November 2013.

[144] "[E]nsure that witness support measures are available from the beginning of the investigation, for instance by setting up support sections employing social workers and psychologists, in particular in the offices of the specialised prosecutors", *The protection of witnesses as a cornerstone,* para. 16.1.8.

[145] Amnesty International interview, November 2013.

[146] Amnesty International interview with Vladimir Vučković, OWCP, November 2013.

[147] Amnesty International interview with Vladimir Vučković, November 2013.

[148] See Bocos-Cuesta v. the Netherlands, ECtHR, 10 November 2005, para. 69; Accardi and others v. Italy, ECtHR, 20 January 2005, para. 1., quoted in OSCE, *Witness Protection and Support in BiH Domestic War Crimes Trials: Obstacles and recommendations a year after adoption of the National Strategy for War Crimes Processing*, 2010, p.10, footnote 8.
http://www.oscebih.org/documents/osce_bih_doc_2010122314375593eng.pdf

[149] In 2012, in proceedings in the Bijelina (Jović and others) case, (K.Po2 7/2011),Hajreta Avdić was

able to give her evidence to the presiding judge in the Serbian Embassy in Vienna, because of the possibility of secondary traumatization, *War Crimes Trials in Serbia 2012*, p.40.

[150] Rule 71 , Evidence of other sexual conduct, *ICC Rules of Procedure and Evidence*, http://www.icc-cpi.int/en_menus/icc/legal%20texts%20and%20tools/official%20journal/Documents/RulesProcedureEvidenceEng.pdf

[151] HLC, *War Crimes Trials in Serbia 2012*, pp. 23-24.

[152] "The protected witnesses, 'Alfa', 'Beta' and 'Gama', two of whom were minors at the time, had been repeatedly raped by the defendants on 4 December 2012; they were subsequently taken with other Roma from their community by truck to a neighbouring village in Zvornik, and separated from the group, forced into sexual slavery, forced to do the laundry, cook and undertake housework and sexually abused until January 1993", KTRZ 11/10 Zvornik 5 (Alić), 23 February 2011, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2011_02_23_ENG.pdf, joined to KTRZ 7/08 Zvornik 5 (Bogdanović and Others), 30 April 2010, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2010_04_30_ENG.pdf

[153] HLC, *War Crimes Trials in Serbia 2012*, pp. 23-24.

[154] Article 43(6), Rome Statute of the International Criminal Court, adopted on 17 July 1998 (A/CONF.183/9), http://www.icc-cpi.int/nr/rdonlyres/ea9aeff7-5752-4f84-be94-0a655eb30e16/0/rome_statute_english.pdf

[155] Rules 16-19, and Rules 70-71, ICC, *Rules of Procedure and Evidence*. For further information, see Amnesty International, *Making rights a reality: The duty of states to address violence against women*, 2 June 2004, p, 21 ff, http://amnesty.org/en/library/info/ACT77/049/2004/en

[156] The Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence, (Istanbul Convention), adopted on 11 May 2011, http://www.coe.int/t/dghl/standardsetting/convention-violence/convention/Convention%20210%20English.pdf;

[157] Istanbul Convention, see in particular, Article 56 – Measures of protection

1. Parties shall take the necessary legislative or other measures to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and judicial proceedings, in particular by:

(a) providing for their protection, as well as that of their families and witnesses, from intimidation, retaliation and repeat victimisation; (b) ensuring that victims are informed, at least in cases where the victims and the family might be in danger, when the perpetrator escapes or is released temporarily or definitively; (c) informing them, under the conditions provided for by internal law, of their rights and the services at their disposal and the follow-up given to their complaint, the

charges, the general progress of the investigation or proceedings, and their role therein, as well as the outcome of their case; (d) enabling victims, in a manner consistent with the procedural rules of internal law, to be heard, to supply evidence and have their views, needs and concerns presented, directly or through an intermediary, and considered; (e) providing victims with appropriate support services so that their rights and interests are duly presented and taken into account; (f) ensuring that measures may be adopted to protect the privacy and the image of the victim; (g) ensuring that contact between victims and perpetrators within court and law enforcement agency premises is avoided where possible; (h) providing victims with independent and competent interpreters when victims are parties to proceedings or when they are supplying evidence; (i) enabling victims to testify, according to the rules provided by their internal law, in the courtroom without being present or at least without the presence of the alleged perpetrator, notably through the use of appropriate communication technologies, where available.

2. A child victim and child witness of violence against women and domestic violence shall be afforded, where appropriate, special protection measures taking into account the best interests of the child.

[158] Decision 2012/29/EU of the European Parliament, and of the Council of 25 October 2012, Establishing Minimum Standards on the Rights, Support and Protection of Victims of Crime, and replacing Council Framework Decision 2001/220/JHA .

[159] Amnesty International interview with EU Delegation to Serbia, November 2013.

[160] Witness protection was developed by the HLC, in conjunction with the OWCP and police. Despite subsequent developments, some of the core concerns outlined in the following article still prevail, see HLC, "How to Protect Witnesses Who Are Seen by Public and Police as Traitors?", 7 February 2004, http://www.hlc-rdc.org/?p=13581&lang=de

[161] For concerns about the right of defendants in relation to protected witnesses, see *Impunity Watch*, p.47

[162] Including, for example, protective provisions for interviewing minors and mitigating against the confrontation of witnesses, Article 109, 2006 CPC; unofficial OSCE and US Embassy translation available at http://www.osce.org/serbia/24811?download=true

[163] Based on their "age, experience, lifestyle, gender, state of their health, nature or consequences of the criminal offence, i.e. other circumstances of the case", Article 110 (1), 2006 CPC; Article 102-104, 2011 CPC.

[164] These include: (Article 117 (3)) "1) closed trial; 2) alteration, removal from the record or ban on the disclosure of any data referring to the witness's identity; 3) withholding of any data referring to the witness's identity; 4) examination of the witness under a pseudonym; 5) concealment of the face of the witness; 6) testifying from a separate room through voice-distortion devices; 7) examination of the witness in a room outside the courtroom, in another place in the country or abroad,

communicated to the courtroom by means of the picture and sound transmission devices, with the possibility of using voice- and image-distortion devices. See also Articles 105-109, 2011 CPC,

[165] CPC, Article 116, (Arts 231 and 369, 2011 CPC)

[166] Article 14 (a), "The measures for the protection of witness or injured persons which were ordered when the case was ceded to a local court by the International Criminal Tribunal for the Former Yugoslavia shall remain in force", OSCE translation, http://www.osce.org/serbia/18571

[167] *The Law on Organization and Jurisdiction* originally provided that the war crimes trials apply specific provisions of Chapter 29 (articles 504 (o-ć) and the 2002 CPC, which created the status of a cooperating witness,
http://www.ohchr.org/Documents/Issues/Mercenaries/WG/Law/Serbia/CriminalProcedureCode.pdf.

This status may be afforded to a suspect against whom a criminal charge has been brought, but the significance of their testimony outweighs the consequences of their being released from punishment, or handed down a lighter punishment. See also CPC, 2006, Articles 156-164. *The Law on the Protection Programme for Participants in Criminal Proceedings*, Official Gazette of the RS, No 85/2005 introduced the concept of "protected witnesses" into the CPC.

[168] "Zakona o programu zaštite učesnika u krivičnom postupku", (Official Gazette of the RS", no. 85/2005), entered into force 1 January 2006,
http://www.paragraf.rs/propisi/zakon_o_programu_zastite_ucesnika_u_krivicnom_postupku.html

[169] Under Article 5 (2) the WPP are assigned to cases of criminal offences "against humanity and other values protected by international law" (*protiv čovečnosti i drugih dobara zaštićenih međunarodnim pravom*).

[170] Articles 14 and 12, "Zakona o programu zaštite učesnika u krivičnom postupku".

[171] Amnesty International interview with Head of WPU, November 2013.

[172] See also, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, para. 116, as above.

[173] The Unit is currently receiving training, as part of regional EU-funded project (WINPRO II), designed to strengthen witness protection, implemented by Northern Ireland Co-operation Overseas in cooperation with the UK Ministry of Justice and EUROPOL, mainly focussing on organized crime, see
http://wbif.eu/ipa_projects?direction=asc&ident=IPA%2BProjects%2BDatabase&page=96&per_page=10&sort=regDonors.name

[174] According to media reports, in November 2013, 20 police officers in the WPU filed a petition to the authorities against Milos Perović, Head of the WPU for "arrogance, incompetence, improper use of budgetary funds and abuse of authority", *E-Novine*, "Državna banda socijalnih radnika",

http://www.e-novine.com/srbija/srbija-tema/96478-Dravna-banda-socijalnih-radnika.html

[175] "Serbia's War Crimes Witness Protection Unit 'Failing'", 29 November 2013, http://www.balkaninsight.com/en/article/serbia-s-war-crimes-witness-protection-unit-failing

[176] Amnesty International interview, November 2013.

[177] http://www.mup.gov.rs/cms_lat/direkcija.nsf/jedinica-za-zastitu.h, via http://archive.is/CQ24W

[178] Police officers Nenad Stojković, Zoran Marković, Dragan Milenković, and Zoran Nikolić were arrested after the HLC filed a criminal complaint against 17 former members of the Battalion on 2 March 2009 in relation to war crimes in Kosovo, HLC, "Letter to Ivica Dačić, Minister of Internal Affairs", HlcIndexOut: 038-1550-2, 18 March 2009;

[179] Quoted in IWPR, "Poor Protection for Balkan Trial Witnesses", 12 November 2012, http://iwpr.net/report-news/poor-protection-balkan-trial-witnesses;

[180]Amnesty International has independently conducted interviews with serving police officers who told the organization that they were reluctant to testify, based on what they had heard about the possible treatment they might receive from the WPU. The organization has also received written testimony from protected witnesses, and others who have been reluctant to enter the programme on the basis of reports of alleged threats or other inappropriate treatment by the WPU.

[181] For a summary of complaints related to allegations against the WPP, (as sent in a confidential report*, Report on Irregularities in War Crimes Proceedings in the Republic of Serbia*, dated 15 November 2010, and seen by Amnesty International, and later made public); later made public, see *Participation of the Humanitarian Law Center in War Crimes Prosecutions in Serbia*, April 2012, pp. 2-5 and ff, http://www.hlc-rdc.org/wp-content/uploads/2012/04/HLC-Participation-in-war-crimes-prosecution-in-Serbia-April-302012-ff.pdf

[182] For detailed allegations in the case of Bojan Zlatković, see "Protected Witness Appeal", in *Trials For War Crimes And Ethnically Motivated Crimes In Serbia In 2010*, pp 69-83, http://www.hlc-rdc.org/wp-content/uploads/2012/03/Reports-on-war-crimes-trials-in-the-Republic-of-Serbia-2010.pdf

[183] "Mislio sam i da je Jedinica za zaštitu svedoka jedinica kako i sam naziv kaže, da nije jedinica za zaštitu zločinaca", (AI translation).

[184] For a summary of his testimony, see," On je uvek pucao za Srbiju", http://pescanik.net/2011/12/on-je-uvek-pucao-za-srbiju/; "Beleška sa suđenja za zločine u Ćuški – januar 2012", http://zeneucrnom.org/index.php?option=com_content&task=view&id=768&Itemid=68

[185]"Zaštićeni svedok: "Šakali" prete meni i porodici", (Protected witness: "Jackals" threatening me and my family), 25 January 2012, http://www.blic.rs/Vesti/Hronika/303442/Zasticeni-svedok-Sakali-prete-meni-i-porodici; see also http://www.balkaninsight.com/en/article/zoran-raskovic-the-paramilitary-who-

repented

[186] For other reports on these concerns, see, PACE, Committee on Legal Affairs and Human Rights, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans: Report*, Doc. 12440, 29 November 2010, see esp. paras. 117-119, http://assembly.coe.int/ASP/Doc/XrefViewPDF.asp?FileID=12581&Language=en; IWPR, "Poor Protection for Balkan Trial Witnesses", 12 November 2012, http://iwpr.net/report-news/poor-protection-balkan-trial-witnesses;

[187] PACE Resolution 1784 (2011), *Protection of witnesses as a cornerstone for justice and reconciliation in the Balkans*, paras 16.5.1-16.5.2, http://assembly.coe.int/Main.asp?link=/Documents/AdoptedText/ta11/ERES1784.htm

[188] *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia on 12-15 June 2011*, https://wcd.coe.int/ViewDoc.jsp?id=1834869, see esp. para. 23. European Parliament resolution of 18 April 2013 on the 2012 Progress Report on Serbia, para 11, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-186

[189] European Parliament resolution of 18 April 2013 on the 2012 Progress Report on Serbia, para, 11, http://www.europarl.europa.eu/sides/getDoc.do?type=TA&language=EN&reference=P7-TA-2013-186; see also http://www.balkaninsight.com/en/article/eu-urges-serbia-to-change-witness-protection, 3 October 2012.

[190] ICMP, *Conclusions from the Conference: "The Future of the Missing Persons Process from The Kosovo Conflict",* 20 December 2012, http://www.ic-mp.org/wp-content/uploads/2012/12/icmp-jcsi-107-1-doc.pdf

[191] "Cuska - a "brave and patriotic" trial", *International Justice Tribune*, 18 January 2012, http://www.rnw.nl/international-justice/article/cuska-a-%E2%80%9Cbrave-and-patriotic%E2%80%9D-trial

[192] The WPU were unaware of the specific protection needs of such witnesses, "We don't have a psychologist…Sometimes we have to provide assistance with health care; if they are not feeling well, we take them to specialists at the hospital", Amnesty International interview, November 2013.

[193] Cases involving male victims have already been heard, see above.

[194] United Nations, Commission on Human Rights. *Updated Set of principles for the protection and promotion of human rights through action to combat impunity.* E/CN.4/2005/102/Add.1, 8 February 2005, Principle 31, http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement

[195] ICCPR, Article 2 (3) (a) [To] ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity; (b) [To] ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative

authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy; (c) [To] ensure that the competent authorities shall enforce such remedies when granted." http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx

For non-repetition, see Impunity Watch, *Action to Combat Impunity in Serbia: Options and Obstacles*, pp. 53-71, http://www.impunitywatch.org/docs/BCR_Serbia_Serbian.pdf

[196] Principle 7, UN Basic Principles and Guidelines on the Right to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (UN Basic Principles), adopted by the UN General Assembly in 2005. See especially, paras. 19-23, http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

[197] Administrative reparation has been provided to victims of crimes under international law and human rights violations in many Latin American states, like Argentina (Law 23.644), Chile (Law 19.123), Colombia (Law 975/05), Peru (Law 28.592) and Uruguay (Law 18.956).

[198] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985, http://www.ohchr.org/EN/ProfessionalInterest/Pages/VictimsOfCrimeAndAbuseOfPower.aspx

[199] Principle 7, UN Basic Principles and Guidelines, above.

[200] Amnesty International acknowledges the years of research, advocacy and litigation in this field by the HLC, on behalf of the victims of crimes under international law. This section of the report draws heavily on their work. See, for example, HLC, *Material Reparations for Human Rights Violations Committed in the Past: Court Practice in the Republic of Serbia*, January 2012, http://www.hlc-rdc.org/wp-content/uploads/2011/12/Material_Reparations.pdf

[201] Considered by Serbia, and under UN Security Council Resolution 1244/99 to remain part of Serbia, following Kosovo's unilateral declaration of independence.

[202] See *Serbia and Montenegro: A Wasted Year, The continuing failure to fulfil key human rights commitments made to the Council of Europe,* 22 March 2005, pp. 27-29, http://amnesty.org/en/library/info/EUR70/005/2005/en

[203] See for example, HLC, "Humiliating Compensation for Kosovo Albanians Who Survived Torture by Members of Ministry of Interior", 8 July 2013, http://www.hlc-rdc.org/?p=23505&lang=de

[204] For a comprehensive analysis of both unsuccessful and successful appeals, , see *Material Reparations, op.cit.*

[205] *Constitutional Court: Right to Fair Trial Violated In Case of Families of Victims from Sjeverin*, HLC, 18 October 2013, http://www.hlc-rdc.org/?p=25106&lang=de, Family *Members of Victims of War Crimes from Sjeverin Seek Justice before constitutional court*, HLC Index out– 133F88388, 6 November 2013, http://www.hlc-rdc.org/?p=25261&lang=de. The appeal is based on violations of: the right to life; the prohibition of

discrimination; the right to a fair trial, rehabilitation and compensation of damages, and to equal protection and legal remedy.

[206] See HLC, *Material Reparations*, p.10-11; Amnesty International, *Burying the Past*, p. 58.

[207] In the Sandžak, local human rights groups informed Amnesty International that doctors were forbidden to issue medical certificates to victims of police torture in the period 1992-5, *Serbia and Montenegro: A Wasted Year*, p. 28.

[208] *Material Reparations*, p. 14. The case involved allegations against members of the Ministry of the Interior Police, the Serbian State Security (DB) and the VJ, of the ill-treatment and murder of Bosniak refugees, who were amongst some of 850 Bosniaks who had fled Žepa and surrounding villages, between the end of July 1995 and April 1996 and held in the Sljivovica and Mitrovo Polje detention camps in Serbia.

[209] http://www.balkaninsight.com/en/article/serbia-denies-compensation-to-croat-prisoners; Proceedings continue as of 30 May 2014, at the SWCC against Marko Crevar, a former military reservist and member of, indicted in March 2013 under Article 144 (war crime against prisoners of war) for the torture, during interrogation, of Croatian prisoners detained at Sremska Mitrovica. See indictment, 5 March 2013, http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2013_03_05_ENG.pdf

[210] UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, adopted by General Assembly resolution 40/34 of 29 November 1985. Amnesty International emphasis in bold.

[211] http://www.ohchr.org/EN/ProfessionalInterest/Pages/RemedyAndReparation.aspx

[212] Convention on the Non-Applicability of Statutory Limitations to War Crimes and Crimes against Humanity, adopted 26 November 1968, entered into force on 11 November 1970. Serbia became a state party by succession in 2001, http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-6&chapter=4&lang=en; *Material Reparations*, pp. 8-10, and footnote 12, Su No: I-400/1/3-11. In July 2011, the Constitutional Court of Serbia, in a slightly more positive decision, also decided that, in cases where the perpetrator had been convicted, that "the request for damages against any responsible person, not just the offender, is barred once the time allowed for the prosecution is up."

[213] In the case of Sead Rovčanin, for example, the Appellate Court reversed the first instance court decision concerning the application of the statute of limitations, on the basis that the complainant was still receiving treatment for the torture he suffered in 1993, *Servicing Justice or Trivializing Crimes? Fulfilling the Right for Victims of Human Rights Abuses to seek Reparation before the Serbian Courts*, HLC, 2012, pp. 30-35, http://www.hlc-rdc.org/wp-content/uploads/2013/06/Fulfilling-the-Right-for-Victims-of-Human-Rights-Abuses-to-seek-Reparation-before-the-Serbian-Courts.pdf

[214] Concluding observations of the Human Rights Committee, Serbia, 20 May 2011, para.12

[215] Consideration of reports submitted by States parties under article 40 of the Covenant, Concluding

observations of the Human Rights Committee, Serbia, CCPR/C/SRB/CO/2, 20 May 2011, para.10. This has also been underlined by the Committee against Torture, "The Committee regrets the Supreme Court ruling of 2005 where it applied a statute of limitation in respect of the crime of torture", Concluding observations of the Committee against Torture: Serbia, CAT/C/SRB/CO/1, 19 January 2009, para.5, http://tbinternet.ohchr.org/_layouts/treatybodyexternal/Download.aspx?symbolno=CAT/C/SRB/CO/1%20&Lang=En

[216] *Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia on 12-15 June 2011*, CommDH(2011)29, 22 September 2011, paras. 24-27; para.60, https://wcd.coe.int/ViewDoc.jsp?id=1834869

[217] Committee Against Torture, *Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, General Comment No. 3 of the Committee against Torture, Implementation of article 14 by States parties*, CAT/C/GC/3, 19 December 2012, http://www2.ohchr.org/english/bodies/cat/docs/GC/CAT-C-GC-3_en.pdf

[218] HLC, *Material Reparations*, p. 13.

[219]Rodríguez v. Uruguay, Communication No. 322/1988, UN Doc. CCPR/C/51/D/322/1988, 9 August 1994. See similarly the ruling of the European Court of Human Rights in Mikheyev v. The Russian Federation, Application No.77617/01, Judgment of 26 January 2006, para.142.

[220] Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, see footnote 198.

[221] *Burying the Past*, see especially pp. 50-51.

[222] The Law on Rights of Civilian War Invalids, "Službeni glasnik RS" ("Official Gazette of RS") No. 52/96. The law provides for various forms of reparation including financial and heath care benefits, a monthly cash payments and funeral expenses; for HLC translation, see http://www.hlc-rdc.org/wp-content/uploads/2014/03/Law_on_Disability_Rights_of_the_Civilian_Victims_of_War.pdf.

[223] HLC, *Material Reparations for Human Rights Violations Committed in the Past: Court Practice in the Republic of Serbia*, http://www.hlc-rdc.org/wp-content/uploads/2013/01/Material_Reparations.pdf

[224] HLC & Documenta, *Transitional Justice in Post-Yugoslav Countries*, *Report 2007,* p. 51, http://www.forumnvo.org.rs/docs/Transitional_Justice.pdf

[225] Article 13 (1) of the Law on the Basic Rights of Servicemen, Military Invalids and Families of Deceased Servicemen, Official Gazette of the SRJ, numbers 24/98, 29/98 and 25/200, applies to families of servicemen who "died or disappeared". The term "disappeared" is not included in Article 3 (2) of the Law on the Rights of Civilian War Invalids, *Official Gazette of the RS*, No 52/96.

[226] *Transitional Justice in Post-Yugoslav Countries,* p.51.

[227] This was prompted by a decision in the case of relatives of Serbian citizens from Sjeverin abducted in Mioče in BiH, see above.

[228] See *Letter to the Prime Minister Ivica Dačić*, http://www.hlc-rdc.org/?p=23628&lang=de

[229] Amnesty International interviews with HLC, November 2013, March 2014. For HLC's analysis of the current legal framework, see http://www.hlc-rdc.org/wp-content/uploads/2014/03/Administrative_reparations_-in_Serbia_an_analysis_of_the_existing_legal_framework.pdf

[230] *Report to the Committee on Enforced Disappearances*: Serbia, para.145.

[231] According to the ICRC, of the 34,884 persons reported as missing during the armed conflicts on the 1990s, 11,443 cases are still open, including 2,205 in Croatia, 1,712 in Kosovo, and 7,526 in BiH, *Figures Related to the Persons Missing from the Balkans Conflicts*, March 2014.

[232] International Convention for the Protection of All Persons from Enforced Disappearance, (CPED), http://www.ohchr.org/EN/HRBodies/CED/Pages/ConventionCED.aspx; ratified by Serbia, 18 May 2011, http://treaties.un.org/Pages/ViewDetails.aspx?mtdsg_no=IV-16&chapter=4&lang=en

[233] See Amnesty International, *Burying the Past*, especially pp. 50-51.

[234] Article 24(1), CPED, "As provided by the CPED, for the purposes of the Convention, "victim" means the disappeared person and any individual who has suffered harm as the direct result of an enforced disappearance". In the majority of cases, this applies to the family of the disappeared person.

Further Article 2 of the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power, op. cit., "*A person may be considered a victim, under this Declaration, regardless of whether the perpetrator is identified, apprehended, prosecuted or convicted and regardless of the familial relationship between the perpetrator and the victim. The term "victim" also includes, where appropriate, the immediate family or dependants of the direct victim and persons who have suffered harm in intervening to assist victims in distress or to prevent victimization".

[235] Committee on Enforced Disappearances, *Consideration of reports submitted by States parties under article 29, paragraph 1, of the Convention, Reports of States parties due in 2013 Serbia**, [30 December 2013], CED/C/SRB/1, 29 January 2014, para.145, http://tbinternet.ohchr.org/Treaties/CED/Shared%20Documents/SRB/INT_CED_INR_SRB_7067_E.pdf

[236] *Cyprus v Turkey*, Judgment of the European Court of Human Rights (10 May 2001) at paras. 136, and 150; Article 8(1)(b) of the International Convention on the Protection of All Persons from Enforced Disappearance; Article 17(1) of the Declaration on the Protection of All Persons from Enforced Disappearance.

[237] http://www.danas.rs/danasrs/iz_sata_u_sat/u_regionu_12329_nestalih_lica_.83.html?news_id=57766

[238] Amnesty International interviews: Vjelko Odalović, Head of Government Commission on Missing

Persons; Vladimir Pandurić, Ministry of Justice, November 2013.

[239] These rights, however, are not guaranteed to all survivors without discrimination, and remain inadequate in their implementation, see, *Amnesty International, Bosnia and Herzegovina: When everyone is silent: Reparation for survivors of wartime rape in Republika Srpska in Bosnia and Herzegovina*, 31 October 2012, http://www.amnesty.org/en/library/info/EUR63/012/2012/en; *Old Crimes, Same Suffering: No justice for survivors of wartime rape in north-east Bosnia and Herzegovina*, 29 March 2012, http://www.amnesty.org/en/library/info/EUR63/002/2012. In March 2014, the Kosovo Assembly adopted an amendment providing for the rights of survivors of rape, including to reparation. In April 2014, the Croatian authorities made public draft legislation aimed at providing the victims of war time rape or sexual abuse with access to reparation including adequate healthcare and compensation.

[240] Including the National Action Plan for Implementation of UN Security Council Resolution 1325 – Women, Peace and security in the Republic of Serbia 2010-2015.

[241] Donna M. Hughes, Lepa Mladjenović and Zorica Mrsević, "Feminist Resistance in Serbia", *European Journal of Women's Studies*, Vol. 2, No 4, pp. 509-532, 1995, http://www.uri.edu/artsci/wms/hughes/femres.htm

[242] Women in Black, *Independent Monitoring of the Implementation of Resolution 1325 in Serbia*, 2012, p.71, http://zeneucrnom.org/pdf/independent_monitoring_of_the_implementation_of_resolution1325_in_serbia.pdf

[243] This position has hardened since November 2012, when the ICTY Appeals Chamber acquitted Croatian Generals Ante Gotovina and Mladan Markač, and former KLA leader, Ramush Haradinaj and others, all indicted for war crimes against Serbian civilians, "Appeals Chamber Acquits and Orders Release of Ante Gotovina and Mladen Markač", 16 November 2012, http://www.icty.org/sid/11145; "Haradinaj, Balaj, and Brahimaj Acquitted on Retrial", 29 November 2012, http://www.icty.org/sid/11159.

AMNESTY
INTERNATIONAL

www.amnesty.org