United Nations Mission in Bosnia and Herzegovina

Judicial System Assessment Programme (JSAP)

THEMATIC REPORT III: ON ARREST WARRANTS, AMNESTY AND TRIALS *IN ABSENTIA*

December 1999

UNITED NATIONS

The designation employed and the presentation of material in this report do not imply the expression of any opinion whatsoever on the part of the United Nations Mission in Bosnia and Herzegovina (UNMIBH) concerning the legal status of any country, territory, city or area or of its authorities, or concerning the delimitation of its frontiers or boundaries.

CONTENTS

EXECUTIVE SUMMARY

Investigation by the UNMIBH Judicial System Assessment Programme (JSAP) into the issue of arrest warrants began in mid-1999, following the arrest of two Serbs in Sarajevo Canton. There was a perception that warrants were being selectively enforced in order to discourage returns. Further research in the courts led, however, to the conclusion that selectivity in enforcement was not, in fact, an issue, but that there were a number of other problems.

One such issue was the indiscriminate use of trials *in absentia* in courts in the Federation, frequently in situations where their use was contrary to the provisions of the Criminal Procedure Code and in breach of the European Convention on Human Rights (ECHR), against persons who had fled from what is now Federation territory during the war. The subsequent issue of arrest warrants in order to execute the sentence meant that a disproportionate number of outstanding warrants were issued against minority groups in the Federation. This practice is said not to have been used in the RS. One of the reasons for the use of this process is the inflexible requirement for judges to solve a set number of cases per month. Incorrect application of the law on trials *in absentia* by Federation courts should be brought to the attention of the judges.

Specific cases also highlighted the lack of full application of amnesty provisions, both in the Federation law and in GFAP. Incompatibility of the law and GFAP in the Federation has been resolved by the recent passage of a new and much broader amnesty law, which came into effect on 11 December 1999. Its implementation, along with that of RS Law on Amnesty, should be monitored.

At a practical level, serious problems were revealed in respect of the recording of arrest warrant issue and withdrawal. Poor communication by the courts to the cantonal Ministries of Interior (responsible for the execution of warrants) in the Federation meant that neither orders for the issue of warrants nor orders for withdrawal of warrants were communicated to the Ministries. This could result in accused persons not being liable to arrest, and, perhaps more troublesomely, instances where persons are liable to arrest after acquittal by the courts. While the onus of communication is on the courts, methods of dispersing information within the various police forces are not ideal. Both institutions need to develop methods for accurate record-keeping and record-updating.

However, perhaps the most fundamental problem with respect to the execution of valid arrest warrants is that there is no inter-entity co-operation. This absence cannot help but create a safe haven for criminals in the other entity. Arrest warrants should be enforced throughout BiH.

Essentially, the problems are systemic (lack of suitable procedures, inflexibility in rules, etc.) or political (absence of inter-entity co-operation). Resolution must be undertaken at different levels. While proper implementation of new amnesty legislation should remove the worst difficulties, for the future, adequate and country-wide systems should be in place in order to ensure that criminals are brought to justice and that the rule of law prevails.

INTRODUCTION

The impetus for an investigation into the execution of arrest warrants came from the arrest of a bus driver and a television journalist, both Serbs currently living in the RS, within Canton Sarajevo in May and June 1999 respectively. It seemed that there was at least a possibility that arrest warrants were being enforced selectively against members of minorities and could therefore be used to discourage returns and hinder the peace implementation process.

Investigation by JSAP into the two specific cases revealed that one of the accused had been tried and sentenced *in absentia* and the arrest warrant related to execution of the penalty. The other warrant was issued before trial. Following arrest, the accused was tried and acquitted.

While there was, in fact, no evidence of any selective enforcement of warrants, a number of other problems, both procedural and legal in nature, related to warrants surfaced during the inquiry, and those provided the impetus for this report.

Two issues are closely allied to the question of arrest warrants: one is whether warrants are still extant that should be invalid either because of the expiry of the limitation period or because of the application of the laws on amnesty. The second is the use of trials *in absentia* and the circumstances under which they are held, often forming the basis for the issue of warrants of arrest against absent defendants. This report, therefore, deals in turn with arrest warrants, retraction of arrest warrants - limitation periods and amnesty, and trials *in absentia*.

An in-depth study of these issues was begun by the JSAP Sarajevo team in July 1999, which began by examining the registers of arrest warrants compiled by the courts of Sarajevo Canton and also inspected a substantial number of files in which arrest warrants had been issued at the courts of Sarajevo Canton. Inquiries were continued at the Ministries of Interior of the Federation and of Sarajevo Canton and at the Search Departments at the Ilidza and Centar Sarajevo police stations. This work was complemented by similar research undertaken by JSAP Doboj, in September and October 1999, covering the Basic Courts of Doboj and Modrica (RS), the Odzak Municipal Court and the Cantonal Courts of Posavina and Zenica-Doboj Cantons as well as Police Stations in Doboj and Teslic (RS) and the Search Department of the RS Ministry of Interior (Banja Luka). The question of implementation of warrants from ICTY is not considered in this report.

Although this study could therefore be considered geographically limited in most of its field research, the laws and most of the practices referred to are applicable throughout the country. In addition, we have found nothing to suggest that the very real practical problems and breaches of law apparent in the issue and execution of arrest warrants in the regions considered are limited in any way to those specific places.

A number of recommendations can be found at the end of the main part of the report.

ARREST WARRANTS

The law on arrest warrants

In general terms, an arrest warrant is an order by a court to arrest an accused and bring him to justice. It may be issued if there are reasonable and probable grounds to believe that the person subject to it has committed a crime and after being summoned will not appear before the court.

In BiH, the issue of arrest warrants is governed by the provisions of the relevant Criminal Procedure Code (CPC)[1]. In both the Federation and the RS, an arrest warrant may be issued in respect of an accused against whom criminal proceedings have been instituted for a crime automatically prosecuted and carrying a prison sentence of three years or more if the accused is a fugitive and if there is an order for his apprehension or a decision ordering his detention. [2] The warrant is ordered by the court conducting the proceedings and issued by the Ministry of Interior.

The warrant names or describes the accused, sets out the alleged crime and orders the accused to be forthwith arrested and brought to justice. At least in the Federation, a decision on detention is usually made at the same time as the order to issue an arrest warrant. However, in a number of files inspected at Sarajevo Municipal Courts I and II, orders for the issue of arrest warrants were not made until after conviction and sentence. This may be a result of the practice of holding trials *in absentia*, which is discussed below.

The body that ordered the issue of an arrest warrant must immediately retract it if the person being sought is found or when the limitation period on prosecution of execution of punishment expires or if other reasons make the arrest warrant unnecessary. [3]

The only situation where an institution other than a court may order the issue of an arrest warrant is by the warden of a prison on the escape of a prisoner. These warrants do not form part of this report.

There are other court orders somewhat similar in effect to arrest warrants and also executed by the police that similarly do not form part of the discussion in this report. One is an order to bring in an accused for trial.[4] When research began for this report, there were said to be at least 10,000 arrest warrants in the Federation awaiting execution but it transpired that most of these were orders to bring in and that the number of outstanding arrest warrants is substantially smaller. However, there appears to be no little difference in effect between an arrest warrant and an order to bring in, at least as far as the person subject to the order is concerned. One practical difference in the Federation is that the Court Police are given the power to execute the latter but not the former, which presumably remain within the domain of the Ministry of Interior.[5]

---

[1] Federation Official Gazette, 43/98. The RS carried over the CPC of the former SFRY, published in the SFRY Official Gazette 26/86-789, plus amendments.
[2] Federation CPC article 533 (1), RS CPC article 551. The full text (in translation) of the relevant provision of both CPCs is given in Appendix I.
[3] Federation CPC article 535, RS CPC article 553.
[4] Federation CPC article 176, RS CPC article 184.
[5] Law on Court Police, Federation Official Gazette 19/95, article 7. As yet the court police are only established in three cantons of the Federation, with plans for a further three cantons underway.

Initially, there seemed to be a question over the right of minor offence courts to issue arrest warrants. Under the various laws on minor offences considered in preparing this report, there is no provision allowing those courts to order arrest warrants, but they do have the power to issue orders to bring in. Although some minor offence judges in both the Federation and the RS apparently stated that they do have the power to order arrest warrants, this was probably simply a translation difficulty.

Arrest warrants in Sarajevo Canton and the Federation

Lists obtained from the courts in Sarajevo Canton between July and October 1999 indicate that there are around 580 outstanding arrest warrants issued by those courts, though obviously the exact number changes daily. A spot check indicated that almost all of them were recorded in the so-called Register of Warrants held by the cantonal Ministry of Interior, which contains a total of almost 2,000 arrest warrants. The balance consists of orders to bring in and so are technically not warrants at all.

A further check of particular files in the courts of Sarajevo Canton indicated that there was a disproportionate number of non-Bosniaks amongst those subject to warrants: ten out of fourteen at Municipal Court I, nine out of 19 at Municipal Court II and sixteen out of 20 at the Cantonal Court. All but one of those arrest warrants related to offences committed either during or before the war. In addition, the check revealed that at Sarajevo Municipal Courts I and II a large number of those subjects of arrest warrants had been tried *in absentia* (six out of the fourteen non-Bosniaks in Municipal Court I and nine out of 19 at Municipal Court II). Interestingly this was not so at the Cantonal Court, where the arrest warrants were issued during the investigation phase, before indictment.

Of 372 arrest warrants included in the lists of arrest warrants ordered by Sarajevo Municipal Courts I and II, only 126 (34%) were in respect of people who were identifiable as Bosniaks on the basis of their names. Since the present population of Sarajevo Canton is overwhelmingly Bosniak, those findings are surprising and also indicate that there were a disproportionate number of trials *in absentia* of non-Bosniaks, who were more often inaccessible as a result of the war. Many of the file numbers for the first-instance criminal proceedings and criminal investigations reveal that the trial or investigation took place during the war.

In June 1999, concern over the implementation of the amnesty granted by GFAP led the Federation Ombudsmen to issue a report on the matter.[6] Although the report was primarily focussed on amnesty, it noted that the courts tended to order the issue of arrest warrants in an indiscriminate manner and contrary to the law. It also noted that in many cases that fact that a person was believed to be in the RS was taken as proof that that person was a fugitive.[7]

Recording of warrants by the courts

[6] *Special Report on Inadequate Legal Regulations Related to Amnesty under Article VI of Annex 7 of the Dayton Peace Agreement - as an Obstacle to the Return of Refugees and Displaced Persons* and addressed to the Federation Parliament, Government and Ministry of Justice.

[7] A necessary pre-condition for an order to issue a warrant under article 533 Federation CPC.

While the number of outstanding warrants is not as significant as originally expected, there were clearly problems related to the method by which records are kept and the possibility that persons subject to arrest warrants that have or should have been retracted for one reason or another are arrested nevertheless because of inadequate procedures for either informing relevant bodies or record-keeping. Arrest warrants do not automatically expire but can only be retracted on the basis of a court order. The Ministry of Interior has no power to invalidate a warrant.

One of the things that became evident during JSAP research was that neither the police nor the courts have infallible or even adequate systems to ensure that records are kept updated and accurate.

Neither the cantonal Law on Courts nor the Book of Rules on the Internal Court Organisation oblige the courts to keep a separate register of arrest warrants issued.[8] A register is kept of warrants to enforce sentences of imprisonment, which is said to include arrest warrants issued for other purposes, although it is not clearly stated in the rules.

In order to determine the procedure for keeping track of arrest warrants and to check on whether this was in fact being followed properly, JSAP attempted to obtain lists of currently outstanding warrants from all courts in Sarajevo Canton as well as from the Modrica and Doboj Basic Courts. At JSAP's frequent meetings with the judiciary in Sarajevo Canton, numerous verbal and written requests for lists of outstanding warrants were made, which, we believe, had the ultimate effect of causing new lists to be prepared by each court. In respect of Sarajevo Municipal Court II, it eventually became clear that the court did not have a list and, in fact, had asked the cantonal Ministry of Interior to provide it with one. Although JSAP initially requested the list in July 1999, it received it only in October. In September, the court president had advised JSAP that his court would be unable to prepare this list for the next two months as the court had around 1,300 active criminal cases and it would be necessary to review every individual file in order to make the list.[9]

In the RS, the Ministry of Justice has ordered all courts to keep a separate list of outstanding arrest warrants. The Modrica Basic Court, which had no prior notice of the visit of JSAP, immediately produced a list of outstanding warrants issued by it on request. On the other hand, the Doboj Basic Court did not have a list at all. The court president stated that the court had been very busy recently.

Once an arrest warrant is ordered, judges often send the relevant files to what are termed "frozen"[10] file boxes. This is where cases of any nature than can be neither closed not progressed are kept. In practice the file becomes the responsibility of the court execution officer, who, JSAP was told, telephones the Ministry of Interior once a month to check on progress.

Execution of warrants by the police

The Federation and Sarajevo Canton

[8] However, one judge in Sarajevo Municipal Court II has started his own book registering the issue of arrest warrants.

[9] In a letter dated 7 September 1999, the Minister of Interior for Sarajevo Canton asked JSAP for assistance in getting a "clean" list of outstanding arrest warrants from Municipal Court II, including a list of persons against whom warrants had been withdrawn.

[10] "Prekidi" in the local language.

Court orders for the issue of arrest warrants are delivered by court messenger to either the cantonal Ministry of Interior or the local police station – the practice is unclear. Eventually, police stations in the canton receive orders to issue or retract arrest warrants by telex from the Search Department of the cantonal Ministry of Interior, at least in Sarajevo Canton. These telexes are filed in a register in the Duty Officer's room. Each police station also keeps a book published by the cantonal Ministry every six months, which records all outstanding warrants in the canton at the time of publication and is then updated manually by officers at each police station. Distribution within a station is up to the station itself. Not every canton publishes its own book as some do not have funds to do so.

The Ministry of Interior in Sarajevo Canton maintains a centralised database registering the names of persons against whom arrest warrants have been issued for all outstanding warrants in the canton. The office functions round the clock in order to provide information to any station that needs it on the status of any warrant to be enforced. There is no computer link between the cantonal Ministry database and the local police stations and information on warrants passes by telex. The list itself was said to be updated daily, although JSAP was unable to obtain a current list as it was in the process of compilation and the list eventually obtained was dated 1 June 1998.

If the subject of an arrest warrant cannot be located locally, the cantonal Minister of Interior makes a request to the Federation Ministry for the issue of what is known as a central warrant, executable throughout the Federation. At the time of research, there were 3,210 of these awaiting execution.

The Federation Ministry maintains a register of those central warrants, which it updates daily with information received from all cantonal Ministries. The Federation Ministry automatically sends information on the issue of central warrants to all cantonal Ministries as soon as it receives it and acts generally as a conduit for information on warrants passing between cantons. However, the cantonal Ministries do not necessarily send the information on central warrants to all police stations.

In 1999, amendments to Federation legislation on the Supreme Court and the Federation Prosecutor's Office were imposed by OHR in order to give those institutions jurisdiction over inter-cantonal crime. However, as yet, almost no steps have been taken towards implementation and so it is not known what the procedure will be for the order of arrest warrants by the Supreme Court or how they will be executed.

Officials of both Federation and cantonal Ministries of Interior lamented the fact that co-operation with the courts in Sarajevo was "very bad", evidenced by the fact that the police were rarely, if ever, informed about whether persons who had been arrested under a warrant had been released by the court and whether they were still subject to the warrant. This kind of information was only obtained through private unofficial channels and was considered to adversely reflect upon the police if the person was subsequently wrongly arrested, giving the police a bad name and not the courts. If the Ministry of Interior gets information through official channels it can go back to the courts for confirmation, but is unable to act on information obtained unofficially.

The absence of proper communication between the courts of Sarajevo and the cantonal Ministry of Interior has resulted in the fact that it is questionable whether the list of warrants awaiting execution by the Ministry is credible. In one case chosen at random, the name of a defendant against whom proceedings were recorded as terminated by the Sarajevo Cantonal Court on 15 August 1997 on the grant of amnesty, continues to appear in the list of warrants finally produced by that court and,

therefore, the warrant list of the cantonal Ministry of Interior and that of the Federation Ministry.[11] As indicated above, the latter depends upon information supplied by cantonal Ministries in the compilation of its own list and so errors or misleading information provided by any court to a cantonal Ministry will be repeated in the Federation list.

On the other hand, the Maglaj Municipal Court (Zenica-Doboj Canton) reported that the practice of the police from other cantons is to telephone the court before executing a warrant in order to ensure that it is still in force. However, this information has not been objectively checked.

Republika Srpska

In the RS, court orders for the issue of arrest warrants are sent to the police station in the locality where the accused lives or is expected to be found. The Crime Technician in each station is in charge of warrants and he keeps a record of the warrant and then notifies the RS Ministry of Interior in Banja Luka. The Ministry keeps a centralised register and notifies every police station in the RS of the issue of each warrant by whatever means are available (fax, mail, etc.). Although the Ministry register is computerised, the link between the Ministry and the stations is not electronic. Before execution, the police will contact the court that requested the warrant in order to ensure that it is still in force.

JSAP examined the centralised register in the RS Ministry of Interior and found ten entries in respect of warrants previously selected at random at the Doboj Police Station. This seems to indicate that the system, such as it is, works, although some errors were found in the spelling of the names of some of the persons sought.

The same procedure was followed with regard to the list of warrants produced by the Modrica Basic Court. However, this time, only eleven of fourteen warrants were located, with no satisfactory explanation provided regarding the three cases that were not registered. The Ministry claimed that these warrants were never registered with it. We are unable to say with any authority where the problem lies.

Inter-entity co-operation

There is no mechanism for inter-entity co-operation on the location and apprehension of persons subject to warrants. No requests for help from the RS had been received within Sarajevo Canton with respect to the apprehension of fugitives and the reverse would also seem to be true. There is limited and not totally effective co-operation between the Ministers of Interior of both entities for extra-ordinary cases, but on the whole any co-operation that exists is informal and relies on personal contacts. While some hope was expressed that the situation will improve when the common border police force is established, it is unclear how this will help.

In many of the cases of outstanding warrants in the Sarajevo region, there were indications that the subject of the arrest warrant is outside the Federation, and in several cases there were clear pointers to that person being in the RS.

[11] The defendant is Horvat Drazen, believed to be of Croat or Serb ethnicity. His name continued to appear on the latest list from the Sarajevo Cantonal Court, dated 1 November 1999.

This absence of co-operation generates a haven for criminals who can act with impunity by simply moving to the other entity (or possibly in the future to the Brcko District) as warrants against them will not be registered or implemented in the place where they take up residence. The absence is one of the main problems in the execution of arrest warrants.

Conclusions

- While courts have some procedures for keeping track of arrest warrants, at least in the case of warrants for execution of sentence, the fact that the courts were unable to produce lists of persons subject to warrants within a reasonable time indicates that the procedures are not being used or used fully.

- Communications between the courts and the Ministries of Interior are poor. Courts do not always inform the Ministry of Interior about orders to issue warrants or about the withdrawal of warrants. The latter constitutes a breach of the ECHR.

- The Ministry system of publishing lists of outstanding warrants only every six months, if at all, within the Federation is inadequate and use should be made of modern recording and communication techniques to produce updated lists more regularly.

- The centralised system within the RS is less cumbersome or prone to error, although the same problems of communication by the courts remain.

- The absence of inter-entity co-operation is perhaps the greatest weakness as it gives criminals an easy way to avoid justice. This risk might later extend to the Brcko District.

RETRACTION OF ARREST WARRANTS

Time bars and limitation periods

Both the Federation and RS Criminal Codes (CC) contain provisions barring the conduct of criminal proceedings and the execution of punishments after the lapse of a certain period of time.[12] A number of factors can intervene to stop the limitation period running, including, in the case of execution of punishment, the issue of an arrest warrant against the convicted person. However, an absolute time bar could still arise, preventing any further action.

Concern has been expressed that arrest warrants are still outstanding even though the relevant limitation period on either the holding of the proceedings or execution of the sentence has expired and the warrant should be withdrawn.

Investigation of files in Sarajevo Municipal Court I indicated that execution of sentence is not barred absolutely in any of the files in which arrest warrants were ordered by that court. That court was the only court in Sarajevo Canton whose list of ordered arrest warrants gives the date that the judgement came into effect. What is lacking in the lists from all three courts is any information on actions taken in regard to the execution of the punishment that would stop the limitation period running. It is thus impossible to tell from the list itself when the limitation period might expire.

The three sets of information record the nature of the offence committed by the subject of the arrest warrant, though that from Sarajevo Municipal Court II does not distinguish the former from the current CC. As sentences for various crimes have changed under the new law, the limitation period will be affected as a consequence. Close scrutiny reveals some inconsistency between the articles of the different laws recorded as applicable, which affects both the limitation period and the application of the laws on amnesty.

Conclusions

- There is no evidence that there are any warrants outstanding that should be retracted because of the expiry of the limitation period. However, discrepancies in the criminal case register of CC articles leave room for doubt as to whether the limitation period or provisions on amnesty are always applied when relevant.

- Although courts are probably dealing appropriately in closing files in which the limitation period has expired, comments made elsewhere in this report about failure to communicate with the Ministry of Interior would still apply.

[12] Federation CC, Chapter XI; RS CC Chapter X.

Amnesty

Conceptually, amnesty is a political solution tending to favour reconciliation in a society torn apart through civil war or internal disturbances. Even if the grant of amnesty arouses controversy due to depriving victims of due process, this is, in effect, the only way to restructure a traumatised society. Technically, amnesty usually refers to an official act prospectively barring criminal prosecution but may also cover persons already serving prisons terms.

Under Protocol II, 1977, of the Geneva Conventions

at the end of the hostilities, the authority in power shall endeavour to grant the broadest possible amnesty to persons who have participated in the armed conflict, or those deprived of their liberty for reasons related to the armed conflict, whether they are interned or detained. [13]

War crimes, crimes against humanity and genocide should be excluded from any grant of amnesty.

Within BiH, there are two sources for granting amnesty: GFAP[14] and the Law on Amnesty for each Entity.[15]

As it is normally considered an attribute of the State to issue an amnesty for crimes committed under its domestic laws, one question that arises is whether amnesty could be granted through an international peace treaty such as GFAP. In practice in BiH, amnesty is actually granted through entity level laws. The RS Law on Amnesty was amended in July 1999 in order to make it compatible with GFAP and a new Federation law grants a much broader amnesty than that required by GFAP.

Under the former Federation Law on Amnesty[16,] which was in force when the research for this report was undertaken, amnesty applied to all persons who, prior to 22 December 1995, committed various crimes relating to the foundation of the social system and security of Bosnia and Herzegovina and military forces, calls to resist, propagation of false information, illegal possession of weapons and explosives, non-compliance with any call-up for military service and various crimes of a political nature. The RS Law on Amnesty is largely similar. Various provisions in the original RS law that narrowed the class of people to whom amnesty applied have since been repealed.

The new Federation law applies to almost anybody who committed a crime between 1 January 1991 and 22 December 1995 except for certain very serious crimes such as those against humanity and international law and those defined in the Statute of the ICTY, as well as specified crimes under the criminal code such as rape and murder.

The grant of amnesty in any particular case is made by the court.

In order to ascertain implementation of the now former Law on Amnesty in the Sarajevo courts, 39 randomly-chosen arrest warrant files were inspected at the Sarajevo Cantonal Court. Fifteen of

[13] Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts (Protocol II), Article 6, paragraph 5.

[14] General Framework Agreement for Peace, Annex 7 article VI.
[15] Official Gazette of the Federation 48/99 and Official Gazette of the RS 13/96 and 17/99
[16] Official Gazette of the Federation 9/96 and 19/96

them appeared to relate to crimes committed under paragraph 3 of article 226 of the former CC, which was subject to amnesty.

In one other case (referred to above), amnesty had been granted to the accused and an order made terminating the proceedings and recalling the warrant, but this information was not transmitted to the Ministry of Interior and the warrant was therefore still outstanding. This is clearly in breach of Federation law, as well as being a violation of the ECHR in its provisions regarding the right to liberty[17] and the freedom of movement within the state and freedom to leave its territory [18].

Other cases involved matters that were amenable to amnesty under GFAP but not under the then Federation law. For example, in the Cantonal Court, three accused, all of Serb nationality, in the months leading up to the war allegedly committed the crimes of abuse of office or official authority and forgery of official documents by misappropriating exhibits in criminal cases, some of which included weapons, and transferring them to the SDS Party in Pale in anticipation of the country being divided. In another case 23 accused, all Serbs and all employees of the Ministry of Interior, were accused of misappropriating official weapons in March and April 1992. These cases should have now received amnesty under the new law.

In Posavina Canton, the Cantonal Court stated that it had supervised the granting of amnesty (under the old law) by the municipal courts and the Odzak Municipal Court provided evidence to JSAP that every current criminal case in that court had been reviewed in order to ensure that amnesty was granted when appropriate. A similar situation in Zenica-Doboj Canton was reported by the Maglaj Municipal Court.

Prior to the passage of the new Law on Amnesty, the Federation Ministry of Justice made some effort towards addressing the problems of outstanding warrants in respect of crimes subject to amnesty in association with the return of refugees and DPs to the Federation. An undated letter sent by the Minister to UNMIBH (along with other international organisations) and received in July 1999 expressed the Ministry's concern that the Law on Amnesty was not being properly implemented and advised that the Ministry had often requested Cantonal Ministries of Justice and courts to update their warrants for the period from 1 January 1992 onwards.

In preparation for the coming into force of the new law, the Minister wrote to all Cantonal Courts and penal institutions on 24 November 1999, noting that they should begin preparations for implementation of the law by updating their files. We have since been informed that following the law coming into force on Saturday 11 December 1999, courts in Sarajevo Canton worked over that weekend reviewing their files for application of the law.

In the RS, the Modrica and Doboj Basic Courts reported that all pending criminal cases were reviewed and amnesty granted when appropriate.

Conclusions

- Within the Federation, there were a substantial number of current criminal cases or cases awaiting execution of sentence at the time of initial research that are now subject to the new

[17] Article 5.
[18] Article 2, Protocol IV.

Law on Amnesty. The Federation Minister of Justice has taken steps to ensure that the courts apply the new law and it seems that the courts have, in fact, been doing so. However, the situation should be monitored to ensure that amnesty is granted throughout the Federation in every applicable case and that outstanding arrest warrants are withdrawn.

- We have not found any suggestion that the RS Law on Amnesty has not been applied fully by the courts or that corresponding arrest warrants have not been withdrawn. However, this could be further investigated.

TRIALS IN ABSENTIA AND THE ECHR

A cornerstone principle in criminal law is that every accused has the right to a fair and public trial within a reasonable time by an independent and impartial tribunal established by law. Although the right to a fair hearing applies in both civil and criminal cases, higher standards are applied in criminal than civil cases.

In respect of criminal cases, "it flows from the notion of a fair trial that a person charged with criminal offences should, as a general principle, be entitled to be present at the trial hearing"[19]. The accused has the right to participate effectively in the conduct of his case[20].

This also needs to be seen in relation to article 6 of the ECHR, which gives the right to a fair trial in which equality of arms is a basic rule. Obviously, the absence of the accused undermines this and other principles regarding a fair trial.

Paragraph 3 of article 300 of the RS CPC, also in force in the Federation until November 1998, states:

An accused may be tried in absentia only if he had fled or is otherwise inaccessible to government agencies, and ***if there are particularly important reasons*** *for trying him although he is not present.[emphasis added]*

Paragraph 3 of article 295 of the current Federation CPC states:

An accused may be tried in absentia only if he had fled or is otherwise inaccessible to government agencies, ***even after all necessary measures have been undertaken to locate him, and if there are particularly important reasons*** *for trying him although he is not present.[emphasis added].*

As stated earlier in this report, a significant proportion of arrest warrants ordered by the courts in Saraejvo Canton relate to execution of punishment in cases tried *in absentia*.

In virtually every case examined by JSAP in Sarajevo Canton, the courts did not explain the "important reasons" militating in favour of the trial being held *in absentia*. The prosecutor's office limits its role in such cases to perusing the documents in a file and thereafter suggesting to the court that it conduct the trial *in absentia* if conditions warrant that. In a few randomly chosen case files, JSAP did not find in any single case any explanation justifying holding the trial *in absentia*.

An example is the *Lin Robustelli* case in Cantonal Court in Sarajevo. Robustelli was charged with a crime involving obtaining money under false pretences. The presiding judge initially stated that the accused was inaccessible to the court as she was in the USA and that was the reason for holding the trial *in absentia*. Further reasons advanced were that the injured party should be protected and also that the case should be completed due to the impending expiry of the limitation period. She then decided as president of the panel of judges to conduct the trial *in absentia* and did not consult the other members of the panel as prescribed by law.[21] In fact there had been no attempt to notify the

[19] Ekbatani v. Sweden A 134 para 25 (1988)
[20] Stanford v. U.K A 280-A para 26 (1994). Cf. Colozza and Rubinat v. Italy A 89 para 25 (1985)
[21] Paragraph 4 of article 295.

defendant in the USA. There was no proof that the accused had been served with or had seen the indictment. On the contrary, the judge said she did not believe that the accused was familiar with the fact that there were proceedings against her.[22]

The decision of the court to hold this trial *in absentia* when no effort had been made to notify the accused abroad is clearly contrary to decisions of the Human Rights Court.[23] In fact, the ECHR is never mentioned in these cases.

In a case of theft before Sarajevo Municipal Court II against Alukic Mirsad, the Municipal Prosecutor's Office suggested to the court that it hold the trial *in absentia* without any justification. When asked by JSAP for the "important reason" for conducting the trial *in absentia*, the judge replied that the reason was that the accused could not be found. She explained that the courts always act like this if an accused cannot be found, in order to avoid the case being "stuck", and went on to say that the accused can get a retrial.

When a court decides to conduct a trial *in absentia*, a defence lawyer is always appointed *ex officio*, purportedly to protect rights and interest of the accused. In practice, however, JSAP has found that such defence lawyers are virtually somnambulant during the trial. In the *Robustelli* case, the defence lawyer did not even peruse the indictment prior to the hearing.

Similar views on the use of trials *in absentia* were expressed by judges of the Posavina Cantonal Court.

JSAP research into how Federation courts interpret article 295 indicates that the following considerations are taken into account in deciding to hold a trial *in absentia*:

- The seriousness of the crime charged. Judges consider that if the case is less serious there are not necessarily important reasons to conduct a trial *in absentia*.
- The sole fact that the accused is inaccessible, even though the law requires additional "important reasons".
- The fact that the accused will have the opportunity to seek a retrial.
- The fact that the court should process cases and not allow them to become "stuck".
- The fact that the limitation period might otherwise expire.
- The perception that victims need protection of their civil right to damages.

The problem for the courts is that their work is driven by the need to comply with the requirement for judges to resolve a certain number of cases every month and trials *in absentia* are obviously one way to do this. While JSAP has doubts in any event about the effectiveness of a performance evaluation system based simply on numbers of cases solved, it is clear that the drive for efficiency should not be allowed to overtake the rights of the accused.

In the RS, judges of the Modrica Basic Court stated that trials *in absentia* should only be used in exceptional cases. This view is shared by the RS Minister of Justice. However, no objective investigation into this has been conducted.

---

[22] In fact, due to expert evidence that the amount of money involved in the case was less than originally charged, the case was eventually not dealt with *in absentia*. It is no longer a considered a serious matter.

[23] E.g. T v Italy 80/1991/332/405 ECHR. In that case the inquiries of the Italian police to discover the defendant, who was clearly working abroad, were limited to the latter's address in Italy. He was then declared untraceable. However, at one point he had had his passport renewed abroad at an Italian consulate.

Conclusions

- The practices used by Federation courts in holding trials *in absentia* are contrary to both the CPC and the ECHR.

- We have not found any evidence to indicate that this practice is followed in the RS.

RECOMMENDATIONS

- Courts should be required to keep separate registers of outstanding arrest warrants. While this would not, of itself, ensure that records are kept properly or improve communication with the Ministry of Interior, it would ease access to information should a request be made and would draw the attention of the courts to the importance of dealing properly with these matters. This could be undertaken as part of the exercise of introducing a model book of rules on internal court organisation within the Federation and by means of a separate initiative within the RS.

- At the same time, the requirement for judges to solve certain numbers of cases each month should be replaced by other mechanisms for assessing their performance.

- Communications between the courts and the Ministries of Interior on arrest warrants should be improved, for example by holding joint meetings at appropriate levels to discuss procedures.

- The cantonal Ministries of Interior should issue more frequent lists of outstanding arrest warrants rather than relying on local stations to update manually.

- All arrest warrants should be enforced throughout BiH.

- There should also be exchange of information on wanted persons between the Federation Court Police and the regular police throughout the country.

- The issue of arrest warrants should also be appropriately dealt with in implementation of the increased jurisdiction of the Supreme Court.

- Implementation of the new Federation Law on Amnesty, as well as the current RS law, should be monitored.

- The fact that current Federation court practices on trials *in absentia* breach both the CPC and the ECHR should be brought to the attention of all Federation judges.

APPENDIX I

LEGAL PROVISIONS RELATING TO WARRANTS OF ARREST

FEDERATION

Code of Criminal Procedure

Chapter XXXIII

Procedure for the Issue of a Warrant for Arrest of a Fugitive and for Issue of a Public Notice

Article 532

If the permanent or temporary place of residence of the accused is not known, the court shall request that law enforcement authorities trace the accused and report his address to the court.

Article 533

(1) The issue of an arrest warrant may be ordered when the accused against whom criminal proceedings have been instituted for a crime automatically prosecuted and carrying a prison sentence of 3 years or more severe penalty under the law is a fugitive, and there is an order for his apprehension or a decision ordering custody.

(2) The issue of a warrant for arrest of a fugitive shall be ordered by the court before which the criminal proceedings are being conducted.

(3) The issue of a warrant for arrest of a fugitive shall also be ordered if the accused has fled from an institution where he/she was serving a sentence, regardless of the length of sentence or when he/she has fled from an institution where he/she was serving an institutional measure involving deprivation of liberty. In this case the order shall be issued by the warden of the institution.

(4) The order of the court or the warden of the institution to issue a warrant for arrest of the fugitive shall be delivered to law enforcement authorities for execution.

Article 534

(1) If information is needed on certain articles related to the crime or these items need to be found, and especially if this is necessary in order to establish the identity of an unidentified corpse that has been found, it shall be ordered that public notice be given requesting that the data or information be given to the body or agency conducting the proceeding.

(2) Law enforcement authorities may also publish photographs of corpses and missing persons if there is a reasonable suspicion that the death or disappearance of these persons occurred because of the crime.

Article 535

The body or agency that ordered the issue of the warrant for arrest of a fugitive or a public notice must immediately retract it when the person or article being sought is found or when the limitation period for criminal prosecution or execution of punishment has expired or when other reasons make the arrest warrant or public notice unnecessary.

Article 536

(1) The warrant for arrest of the fugitive and the public notice shall be issued by the law enforcement agency with jurisdiction over the place of the body or agency before which the criminal proceeding is being conducted or over the location of the institution from which the person serving the sentence or the institutional measure has fled.

(2) The news media may also be used to inform the public about the arrest warrant or public notice.

(3) If it is likely that the person against whom a warrant for arrest of a fugitive has been issued is abroad, the Ministry of Civil Affairs and Communications may also issue an international arrest warrant.

(4) At the request of the foreign authority, the Ministry of Civil Affairs and Communications may also issue a warrant for arrest of a fugitive suspected to be in the Federation, if the petition includes a declaration that his extradition will be sought if that person is found.

REPUBLIKA SRPSKA

Criminal Procedure Code

Chapter XXXIII

Procedure for the Issue of a Warrant for Arrest of a Fugitive and for the Issue of a Public Notice

Article 550

If the permanent or temporary place of residence of the accused is not known, the court shall request that law enforcement authorities trace the accused and report his address to the court.

Article 551

(1) The issue of an arrest warrant may be ordered when the accused against whom a criminal proceeding has been instituted for a crime automatically prosecuted and carrying a prison sentence of 3 years or more severe penalty under the law is a fugitive, and there is an outstanding order for his apprehension or a decision ordering custody.

(2) The issue of a warrant for arrest of a fugitive shall be ordered by the court before which the criminal proceedings are being conducted.

(3) The issue of a warrant for arrest of a fugitive shall also be ordered if the accused has fled from an institution where he/she was serving a sentence, regardless of the length of sentence or when he/she has fled from an institution where he/she was serving an institutional measure involving deprivation of liberty. In this case the order shall be issued by the warden of the institution. The order of the court or the warden of the institution to issue a warrant for arrest of the fugitive shall be delivered to law enforcement authorities for execution.

Article 552

(1) If the necessary data on certain articles related to the crime or the articles themselves need to be found, and especially if this is necessary in order to establish the identity of an unidentified corpse that has been found, it shall be ordered that public notice be given requesting that the data or information be given to the body or agency conducting the proceeding.

(2) Law enforcement authorities may also publish photographs of corpses and missing persons if there is a reasonable suspicion that the death or disappearance of these persons occurred because of the crime.

Article 553

The body or agency that ordered the issue of the warrant for arrest of a fugitive or a public notice must immediately retract it when the person or article being sought is found or when the limitation period for criminal prosecution or execution of punishment has expired or when other reasons make the arrest warrant or public notice unnecessary.

Article 554

(1) The warrant for arrest of the fugitive and the public notice shall be issued by the law enforcement agency with jurisdiction over the place of the body or agency before which the criminal proceedings are being conducted or over the location of the institution from which the person serving the sentence or the institutional measure has fled.

(2) The news media may also be used to inform the public about the arrest warrant or public notice.

(3) If it is likely that the person against whom the warrant for arrest of fugitive has been issued is abroad, the Federal Secretariat for Internal Affairs may also issue an international arrest warrant.

(4) At the request of a foreign agency, the Federal Secretariat for Internal Affairs may also issue a warrant for arrest of a fugitive suspected to be in the Yugoslavia if the petition includes a declaration that his extradition will be sought if that person is found.

APPENDIX II

LEGAL PROVISIONS ON AMNESTY

FEDERATION

Former Law on Amnesty

Article 1

Amnesty applies to all persons who until 22 December 1995 committed crimes against the foundation of the social system and security of BiH – Chapter 15, against military forces - Chapter 20 of the Criminal Code carried over from SFRY, calls to resist under article 201, dissemination of false information under article 203, illegal possession of weapons and explosives under article 213 provided in the relevant Criminal Code applied in the territory of the Federation of BiH (hereafter Federation) as well as the criminal act of not responding to military call-up or avoidance of military service by making oneself incapable or by deceit and voluntary departure and escape from the armed forces provided under article 8 of the Law on Application of the Criminal Code of the Republic of BiH and the Criminal Code (Official Gazette of RbiH no 6/92, 11/92, 21/92) of the punishment of those persons is provided by this law or other relevant law applicable in the territory of the Federation.

Current Law on Amnesty

Article 1

By this law, amnesty from criminal prosecution or total release from any imposed sentence or the unserved portion of any sentence (hereafter amnesty) is granted to all persons who, in the period from 1 January 1991 until 22 December 1995) committed any of the crimes set out under the relevant criminal codes that were in force in the territory of the Federation of BiH (hereafter Federation) except for the punishment of crimes against humanity and international law under Chapter XVI of the carried-over Criminal Code of SFRY, crimes defined in the Statute of the International Tribunal for the Former Yugoslavia and the crimes of murder under article 38, rape under article 88, acts against the dignity of the person and morality under articles 90, 91 and 92, cases of aggravated theft and robbery under article 151 and under 186 (2) and in connection to article 182 of the Criminal Code of the Republic of BiH, if that or other relevant law that was in use in the territory of the Federation, prescribes punishment for persons committing those crimes.

REPUBLIKA SRPSKA

Law on Amnesty

Article 1

This law shall grant complete deliverance from criminal prosecution or from the imposed or non-served portion of a sentence (hereafter amnesty) for all persons who, in the period from 1 Janaury 1991 to 22 December 1995, committed any crime against the foundation of the Republika Srpska social establishment under Chapter XV, crimes against the armed forces of the Republika Srpska provided in Criminal Code of the Republika Srpska (Chapter XX of the Criminal Code of SFRY that was carried over) acts of calling to resist under article 201, spreading false information under article 203, illegal possession of weapons and explosive materials under article 213 of Criminal Code of the Republika Srpska – Special Part.