

Methodology of the Detecting and Investigating of War Crimes with the Special Focus on Western Balkans Cases

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Abstract

The work on the detection and prosecution of war crimes in attempting to provide evidence in criminal proceedings of war crimes at the Western Balkans is extremely hard and difficult. Despite the fact that the first investigations started more than fifteen years ago, a large number of unexplored and unresolved cases remain. The reasons for this is that research of this type of crime is more complicated and difficult than investigations of the classic crime. In this paper we suggest methods to gather personal and material evidence in war crimes cases in the Western Balkans. Paying attention to the information and attending to the recommendations of this paper, practioners and theorists alike will become familiar with the problems of investigating and prosecuting war crimes in the Western Balkans, and possibly also set the foundation for new research in the field. Based on an analysis of the specificity of the armed conflicts in the former Yugoslavia, we nevertheless conclude that none of the countries involved in the conflict has adequate technical and human resources for the effective investigation and prosecution of war crimes. This suggests that the effective investigating and prosecuting of these most serious crimes require mutual cooperation between the police and the judicial authorities of the countries of the former Yugoslavia.

Key words: methodology of war crime investigation, providing of evidence, planing of investigation, Western Balkans.

1. Introduction

The work on the detection and investigation of war crimes in attempting to provide evidence in criminal proceedings of war crimes at the Western Balkans is extremely

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hard and difficult. These crimes are both factually and legally the most complicated of crimes, not the least in terms of their severity. Knowledge of the existence of a war crime offense can come from many different sources. The *primary* source is by criminal charges from citizens (Bošković, 2015:61). Citizens report the crimes to a prosecutor and to authorized officials by submitting written information to the prosecutor, the police or by reporting the events by phone or e-mail (Bejatović, Šulić & Ilić, 2013:214). Alternative sources of information can be criminal charges from victims or witnesses. Information about the existence of a war crime is important because victims and witnesses of said crimes have been personally affected by the particular offense. They have experienced trauma during the war, as a result of the offense. Such offenses may include rape, imprisonment and torture in camps and the murder or disappearance of family members. Victims and witnesses of war crimes may due to their common traumatic experience, develop specific relations considered as a predominant connecting element for the establishment of various associations of victims and witnesses. These associations may empower the victims and the witnesses to exercise their right in an organized and synchronized way. In the former Yugoslavia, there are various associations of victims and witnesses, such as the Association of Detainees; the Women's Victims of War; the Civilian Victims of War; the Child Victims of War and the Associations of Families of Missing Persons, to name but a few.

These non-governmental organizations have catalogues of information which contain detailed statements by members who may be searching for information on crimes committed, the offenders of these crimes, the location of the crime, the location of the evidence or the identities of witnesses. These organizations have filed many reports on war crimes committed. Some of these include highly detailed descriptions of victims' and witnesses' experiences and are often very useful sources of information for the prosecutor. Many local non-governmental organizations have been active in collecting evidence about the identities of the victims or of the perpetrators. The victims may in this way come into contact with people who can testify about the crimes committed against them. Generally speaking, members of these organizations may not be trained in criminal investigations. Some organizations may also be influenced by political interests. Material gathered by them may thus be considered "hearsay" and would therefore not be admissible at trial. However, cooperation inside of these organizations may lead to valuable or tentative leads that prosecutors in turn can examine before a trial. Such pretrial dialogue may also be beneficial in building trust between the prosecutors and the victims.

The *second* source of information, the criminal charge, is submitted by an authorized official. The regular duties of authorized officials include various operational actions to prevent and detect crime. When authorized officials, as a result of these actions, gather information on the basis of reasonable doubt that a crime has been committed, they are required to notify the prosecutor, either immediately or within a specified time frame.

The *third* source of information is from cases that have not been resolved. A large number of unresolved war crimes cases have been the subject of extensive investigation during and immediately after the war by former investigative judges, military prosecutors, courts, and other investigative agencies from the countries of the former Yugoslavia. In the old investigative files one may find numerous witness statements, documentary evidence of decisions to conduct an investigation, transcripts of hearings,

international arrest warrants, and decisions on custody, summary files, and more. This information is a crucially important source for the plaintiff in any new investigation.

As already pointed out, investigations of war crimes represent serious work that require enormous resources compared to other criminal cases. Most of the criminal acts occurred in an area where the conflict was still ongoing. Witnesses are often traumatized refugees who now live in other countries around the world. Given that the crimes occurred during an armed conflict, it is much more difficult if not impossible to gather evidence compared to similar methods applied in times of peace. These and other factors make such investigations extremely difficult and expensive compared to researching crimes of a more classic nature.

The procedure of criminal investigation is generally divided into the investigative work of the police in pre-trial proceedings (so-called. criminalistics procedure) and in the investigative work of the public prosecutor in criminal proceedings (ie. during the investigation phase) (Ivanović & Ivanović, 2013:26). Unlike the procedures of a criminalistics investigation of classic crime cases, practice has shown that in the case of a war crimes investigation it is crucial that the criminal investigation procedure include an integrated legal approach and analysis by experienced prosecutors from the start. Police investigators and experienced prosecutors must work closely together when experiencing the existence of the criminal offense of war crimes. Throughout the investigation they must cooperate to ensure reliability in the investigation of the incident, so that the collected evidence is sufficient to substantiate prosecution.

2. Problems in detecting and investigating war crimes in the Western Balkans

The detection and investigation of evidence in criminal proceedings is extremely difficult because they are factually and legally the most complicated of crimes. Numerous challenges arise, such as the following:

- a lack of political will to prosecute the crimes;
- limited prosecutorial resources, including a limited number of specialised prosecutors and a shortage of prosecutors and support staff;
- the shocking fact that the majority of the perpetrators of war crimes belonged or continue to belong to legal structures that are performing the detection and prosecution of war crimes;
- the enormous lapse of time from the moment the crime was committed to the moment of starting an investigation;
- the circumstances in which the crimes were committed;
- the deliberate destruction and removal of evidence;
- the fact the crimes were committed in territories outside the jurisdiction of the state authorities;
- the lack of physical evidence and the unreliability of personal evidence;
- the negative influence of the media;
- complications from the great number of victims, offenders and accomplices in specific war crime cases;
- difficulties pertaining to the availability of evidence;
- problems with the intimidation of potential witnesses and the opportunities for their protection; and
- problems with victims' testimonies (Ivanović & Soltvedt, 2016:146).

a) Lack of political will to prosecute

In almost all countries of the former Yugoslavia, there exists some lack of political support for prosecuting these crimes, as can be seen in the campaign attacks on judicial institutions, interference in procedures, attempts to undermine the existing reforms of the judiciary and the legislature, and in the denial of crimes as determined by final judgements. Mistrust is present despite the important judicial reforms and the lack of evidence of bias in the conducting of proceedings. This indicates a concern that adverse conditions make it difficult to defend against deliberate attempts at disinformation of the public and to carry out appropriate actions for dealing with it.

In fact, high-ranking war crimes suspects of the former Yugoslavia who are members of the police or government are considered heroes by a large share of citizens. This leads to a problem where the processing of such persons can cause resentment among the public, which then results in the authorities losing popularity or perhaps even legitimacy among the citizens. The political opposition, of course, uses this resentment for what it is worth. Accordingly, politicians in power avoid giving support to the authorities tasked with prosecuting criminals because they run the risk of losing votes (Ivanović & Soltvedt, 2016:147).

Further, some of those suspected of war crimes made profits during the war so, by the end of the war, they had become very influential businessmen. In fact, they became so influential that they financed the campaigns of some political parties, or even formed their own political parties with great voter support. Finally, after the war some of these individuals became very influential in the field of organised crime, with a huge amount of capital at their disposal and a number of connections in the legislative, executive and judicial branches of government. Due to all of this, in certain periods there has neither been the will or courage of the leading political structures to process these persons nor to investigate their possible crimes.

b) Limited prosecutorial resources, including a limited number of specialised prosecutors of war crimes, crimes against humanity and genocide, and a shortage of prosecutors and staff

A major task of prosecutors when investigating war crimes is to organise the collection of physical evidence and witness testimonies in order to remove the possibility of any suspicion of doubt before seeking an indictment. They are then to prepare an indictment for trial.

All former Yugoslav countries had have problems, especially in the initial years after the armed conflict with a shortage of prosecutors. In the war crimes context, they have a very small number of prosecutors specialising in these crimes and almost none who work exclusively on cases like these. Trials in such cases require expertise in international law, including the Geneva Conventions, customary international law, the human rights conventions and the jurisprudence of international and hybrid courts.

Further, investigating these crimes, especially those committed years ago, requires specialist qualifications and knowledge. In the former Yugoslav countries, there is no specialisation of prosecutors by type of crime; all prosecutors involved process all types of crime. Solving this problem started with the establishment of special departments for prosecuting war crimes whose staff were trained in the field of crimes under international law. The problem of an inadequate number of prosecutors is also reflected

in a universal lack of support personnel in the Office. The result of this shortage is that prosecutors are forced to do almost all aspects of work related to a case, working alone on witness interviews, the development of criminal charges and other routine administrative tasks.

c) The majority of war crime perpetrators belonged or still belong to legal structures detecting and prosecuting war crimes

Responsibility for detecting, prosecuting and gathering war crimes evidence lies primarily in the hands of the police. However, it is difficult to expect this type of help from the police when many members of the police force are themselves perpetrators of war crimes who have either destroyed or concealed the evidence of their crimes. In fact, a significant number of individuals suspected of committing the said crimes following the former Yugoslav conflict still belong to the police, the military or the security services. Certainly some of them have retired, but they remain in contact with former colleagues and friends who exert a significant influence on the functioning of these institutions. This has all led to enormous challenges in carrying out and efficiently processing war crimes investigations. There is a reasonable suspicion that some people still in the police, the military or the security forces deliberately obstructed investigations and misdirected them. Also, it is reasonable to believe that members of these services have sabotaged the locating and arresting of war crimes suspects (Ivanović & Soltvedt, 2016:148). These persons are tipped off in advance about suspicions and orders to arrest suspects. Further, there are reasonable grounds to suspect that members of the police, military and security services directly participate in concealing persons suspected of war crimes by providing them with shelter, transport, logistical support, false identification documents, funds, and more.

However, despite the above, it must be noted that many members of the War Crimes Investigation Service have revealed a high degree of efficiency and professionalism when acting according to the requirements of the War Crimes Prosecutor.

d) Large time lapse from the moment of crime perpetration to the initiation of investigation

War crimes in this region took place in the period between 1991 and 1999, whereas the actual investigation of these crimes and their perpetrators is happening only at the present time. The great lapse in time between the crimes committed and the start of the investigating these crimes provides another complication. In the detection and prosecution of crimes in former Yugoslavia time has not been a good ally because the high-ranking perpetrators at the time the crimes took place were in aged their fifties or older. In other words, many of them have died. The situation is similar with older witnesses or victims who have also died or whose paths in life have taken them on different parts around the world. Unfortunately, judicial authorities find it difficult to track the latter.

Younger perpetrators between 17 and 30 years and who were lower ranking members of the police, the military, the security or the paramilitary may have gone to South Africa and to Latin America where for work they protect narcotics bosses. Some are even mercenaries fighting in armed conflicts in Asia and Africa, making them subsequently unavailable to the state police and prosecuting authorities.

e) The circumstances in which crimes were committed

War crimes committed during the armed conflict prevented the collection of physical evidence such as written reports, crime scene examinations, ballistics and other forensic reports. This caused valuable material evidence to be lost forever because the duration of the war inhibited authorised services from making it to the crime scene and taking investigative measures.

f) The deliberate destruction and removal of war crimes evidence

The perpetrators of war crimes have systematically covered up evidence of their crimes, of the murder of war prisoners, civilians, the wounded and the war-time sick. Basically the perpetrators have done this by removing bodies, relocating bodies from mass graves to individual graves, burning bodies and by removing and replacing clothing and personal belongings in order to impede the identification process. Covering up war crimes also occurs by transferring bodies from mass graves to several secondary mass graves, as well as by the systematic destruction of documents describing the involvement in these crimes of certain individuals from the military, the police forces or the political establishment.

g) Crimes committed in territories outside the jurisdiction of state authorities

The collection of evidence is especially difficult because the crimes were committed in territories actually outside the jurisdiction of the state authorities. While it would be normal for the state to exercise criminal jurisdiction for acts committed inside its territory, or for acts committed by its citizens, international humanitarian law provides universal jurisdiction for grave breaches of the notion of war crimes. Thus, this law requires all states to prosecute war criminals regardless of their citizenship, the citizenship of the where the war crimes were committed does not have its own citizenship. In this region (former Yugoslavia) war crimes occurred, as a rule, inside an area not presently under the jurisdiction of the state authorities; these authorities having the responsibility to conduct proceedings against the perpetrators of these crimes. The witnesses, on the other hand, are usually located outside the state in which the crimes are investigated. These facts point to the need for regional cooperation which would be in addition to the above, and consist of the possibility and the right of a state to carry out certain investigations in the territory of other states in the region. In this way, national authorities competent in the prosecution of war crimes would have free access to the scene, the victims and the witnesses which would be of great value for the effectively resolving these cases.

Regarding war crimes in the former Yugoslavia there is a problem of witnesses' willingness to participate in the process if it takes place in another country. There is also lack of professional support teams for such witnesses. Some countries, however, have entered into an agreement to exchange information and cooperate in the investigation of such crimes. For example, such an agreement was signed by representatives of the Republic of Croatia and the Republic of Serbia. With this agreement, they have committed themselves to exchange information, reports, documents and information assisting in the investigation of war crimes.

The largest obstacle to regional cooperation in these cases is the ban on the extradition of states' citizens between countries in the region. Hence, extradition is prohibited by the laws of Bosnia and Herzegovina, of Serbia and of Croatia. As the suspects often have dual nationality or are foreign, it is frequently impossible to ensure their presence at trial. Therefore, 'a space for impunity' has been created, which of course poses a serious obstacle to justice for many victims (Ivanović & Soltvedt, 2016:150).

h) Lack of physical evidence and the unreliability of personal evidence

The war crimes in former Yugoslavia happened 15 or 20 years ago, and the detection and prosecution of the offenders is only now underway. This has resulted in a scarcity of physical evidence. Given the passage of time, in most cases there is not enough physical evidence showing a connection between a specific person and a specific crime. Corpses are frequently found in an advanced state of decay so that it may be difficult to conclude whether a person died in legal battle or they died as a civilian or a prisoner. Yet a very small amount of physical evidence presents itself in the following forms. Various objects are found in mass graves, such as personal documents, blindfolds and wires used to bind a person's arms, personal items, canned food, and more. Also, there are certain documents that may indicate the identity of the people who were in the camp before they were killed. Then there is evidence that may appear in certain written correspondence between military leaders, as well as transcripts of intercepted conversations between military and police officers. In addition, there are sources of material evidence which can serve as images and photos. In the majority of cases, the most important pieces of evidence are eyewitness testimonies, other witnesses and witnesses who are also victims. However, it should be noted that their view of past events may be unreliable, given the passage of time and the fact that the witnesses of war crimes are often traumatised.

i) The negative influence of the media

Many people in the countries of former Yugoslavia are against the trials by the ICTY. In addition, some believe that the suspects from their own countries are heroes or patriots; people who were simply following orders to defend their homeland and their people. They believe that judging these people makes no sense anywhere.

This sentiment is present every day, be it in print, on television, on the Internet, the radio or in other forms. Members of the media may go so far during a trial as to often express their own views and draw their own conclusions on important facts from the legal proceedings. The media may conceal or openly root for its 'candidates' and underestimate the court and the judicial organs. Very often, the media publishes biographies of suspects, depicting the honourable origins of the person's family, the difficulties he or she has had to face in life, or interviews with close relatives in which they praise the suspect as a good and honest person. These pressures and circumstances usually have a negative impact on participants in the legal process; they must resist, remain cool-headed and clear of mind, and strictly keep to the law and the relevant facts. There have also been cases in which the identity of protected witnesses has been revealed by the media. These situations have, of course, a negative influence on the acquisition of new witnesses for the legal process. Other challenges related to the

detection, prosecution and trial of war crimes in the Western Balkans involve complications due to the large numbers of victims, offenders and accomplices in specific cases, difficulties pertaining to the availability of evidence, problems related to intimidation of potential witnesses and, finally, problems with the testimony of victims themselves.

In many cases, witnesses of war crimes from former Yugoslav countries received inadequate protection and, due to intimidation, were reluctant to give their testimony in court. In fact, there have been cases where they changed previously given testimony. Naturally, victims play a crucial role in war crimes proceedings. In interviews with the investigator and by giving their testimony in court, victims contribute to the process of establishing the truth regarding war crimes. This requires considerable courage on the part of the witnesses (Ivanović & Soltvedt, 2016:152).

Fifteen years after the war, witnesses are simply less willing to testify, and that is the main problem – many have returned to their homes and are again friendly with neighbours from the other ethnic group. Many victims are reluctant to talk about their war experiences under any circumstances and prefer to move on with their lives. More than a decade since the end of the conflict, many have died or left the country, and the testimony of the remaining witnesses is less detailed and, thus, less useful for the prosecutors. If witnesses are elderly, many have forgotten many details of their experiences; especially if the period from crime to trial is more than 20 years. In the meantime, much has happened in their lives and they choose to forget what they saw. However, it has been noted that some witnesses simply refuse to speak about what they know. Perhaps, this is one form of psychological defence mechanism. Certainly, these people do not want to remember a trauma they experienced 20 years ago and which they no longer wish to be a part of.

3. Categories of perpetrator's of war crimes

Before we describe how such an investigation should be undertaken, it would be useful to point to the different categories of people involved in a war crime. Some of these people are aware of their participation in the crime, while others are unaware and may simply be involved as instruments used to assist in the crimes.

The *first* category of offenders are the direct perpetrators. These are the person or persons who are in contact with the victim and who are physically committing the crime. This group also includes the immediate superior of the direct perpetrators if they are directly involved in the planning, ordering, instigating or committing of the crime (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013: 32).

The *second* category consists of the perpetrators that are more indirectly involved in the crime. This middle category includes those distant offenders who do not belong to the high-level offenders but who knowingly participate in the commission of crimes by the direct perpetrators. For example, if the direct perpetrators are soldiers, the indirect perpetrators are those superiors who are aware of any criminal activity and who give logistic support to the direct perpetrators of the crimes, or who do not take the necessary measures to ensure the prevention of the crimes or punish the perpetrators. These indirect perpetrators may be any higher level police or civilian authorities who abuse their powers or who participate in the crime in some other way.

The *third* category consists of higher-level members of the military, police and political institutions that have used their authority to initiate or participate in crimes that are committed by the direct perpetrators. These are offenders whose participation is often carried out through complex institutional channels under their control. These are the people that the UN Security Council and the International Criminal Court deem "most responsible" for war crimes. These distant perpetrators of high-level crimes can initiate or participate in crimes that are carried out by the direct perpetrators and are aware of the types of crimes that are being carried out. In addition, they are aware of who the victims are, but they do not need to know the specific crimes or victims who the direct perpetrators have selected for their crime.

The *last* group of persons who may be involved in this complex operational crime chain are those who have a legal duty to act but who are unwilling to do so. They are linked to the operational crime chain and are used as tools by the perpetrator of the crime. This is the so called side level.

So, in the investigation of war crimes we have several levels of execution or contribution to execution, and we therefore have a multi-level investigation. First, we have the primary level - the level of direct physical execution, then the middle level of more indirect support by higher level officials, then the highest level - that of high-ranking individuals who use their authority to initiate the crimes and, finally, the side level - people who are used as instruments for the actual execution of the crime.

4. Investigation at the primary level

The investigation at the primary level includes an investigation of the direct and immediate physical execution. One of the most important questions that should be answered at the primary level is the identity of the direct perpetrators, as well as the determination of the military units that participated in committing the crime. This question is often difficult to answer because these offenders usually do not wish the victims or witnesses to know their identity, so they wear a mask, or remove all identifying characteristics from their uniforms and equipment. Victims and witnesses who survive such serious crimes can be too anxious or preoccupied with attempting to escape, so that some of them will not be able to make detailed observations that can reliably identify the perpetrators and organizations which they may belong to. Notwithstanding the trauma of surviving horrific crimes, victims and witnesses still often show amazing recall with respect to the perpetrators and are able to provide detailed information useful in the investigation (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). It is necessary to conduct in-depth interviews as soon as possible to gather as much information as possible from these valuable witnesses. Even if such evidence cannot conclusively identify the perpetrator, it can provide important clues useful to the investigation. Witnesses should be asked about all information which they can give about the identity of the individual perpetrators, including their clothes, names, nicknames which were used in communicating with each other and in which accent they spoke. Careful analysis of the statements made during the crimes, often in the light of other information, can reveal important clues regarding the group to which the perpetrator belonged (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). The careful descriptions of the

uniforms, even without the insignias, when analyzed in the context of the evidence, may discover reliable information about the perpetrators.

During the investigation, it may happen that a member of the group that committed the crimes decides to cooperate with the investigators. In such cases, at first apparently insignificant information obtained from witnesses about nicknames, clothing and vehicles may become very important with the help of an insider witness, who may explain the internal organization and functioning of his unit or group (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:39). It is further necessary to consider reviewing the logistics records, daily reports and border crossing records that can reveal which military units were stationed in the area when the crimes were committed. Practice has shown that, although these groups conceal their identities from victims and witnesses, their identity is often recorded in official documents. Any evidence that could indicate which group or unit that belong to the offender is important. This evidence may include observations that are presented by the witnesses about the direct perpetrators (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

It is also important to consider the possibility of locating witnesses who were in the area of the crime before it was committed. If the perpetrators were there and prepared the crimes, these witnesses might be able to provide detailed information that will help determine the identity of the perpetrator (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

It is desirable to look at official records that document the movement of different units and groups in the area where the crime occurred. These records can be found in logistics documents or books kept at border crossings and checkpoints. It is important to try to locate and review the daily reports that were prepared by the units that might have been located in the area. It is also necessary to determine which types of existing records can be used to determine the identity of the direct perpetrators. It is important to identify and collect all the evidence relating to communications which is available, bearing in mind that one may need to contact the governments that had some reason to collect such evidence through their intelligence services (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40). Some governments may be in possession of satellite images or photographs made by means of aerial surveillance, manned or not. Countries that are located adjacent to an armed conflict are interested in obtaining reliable information about the fighting so they can be prepared for possible consequences. In this connection, one should consider the possibility of contacting these countries in order to find out whether they have relevant intelligence information, and if they want to deliver it to the authorities of our country. If in the area of the conflict international observers are present, then they should be interviewed and their records reviewed for the purpose of providing further evidence.

If local or international humanitarian workers were present in the area where the crimes were committed, then they should also be interviewed about their perceptions of the events that occurred. It is, as already stated, necessary to find a way to identify and examine the members of the group of perpetrators who may be involved. Finding an "insider" may be an effective way of getting important information (although biased) about the group. Such cooperation may provide important investigative leads that in turn may lead to more objective sources of evidence (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:40).

5. Investigation at the secondary level

When the organization of the direct perpetrator is identified, the investigation must consider the structure of the organization. The most important initial step in the investigation of the organization is to achieve clear insight into its structure. The investigation must be able to accurately identify the persons in authority and to determine how different people in the organization exchange information and collaborate with each other. A detailed organizational chart should be made of each institution under investigation. It should show all the key positions of power and their relationships with other key positions. People who are in these positions will change over time so the chart should be displayed in such a way that it may be possible to determine the time periods during which each individual was in a certain position. Information on the organizational structure can be obtained from various sources, including laws and regulations, witnesses (both inside and outside the organization) and internal correspondence demonstrating the relationships between the different parts of the organization (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:41).

6. Investigation at the highest level

When the investigation establishes the identity of the direct perpetrators and determines their formal and de facto relationship with the military, police and political institutions, then the investigation must consider whether senior officials are involved. If so, an investigation may be launched to determine whether they are responsible for the crimes committed by the direct perpetrators. A decision about the investigation of a senior official may be the result of a careful legal analysis of the laws and regulations of the country which clearly indicate that the officer had authority and responsibility in relation to the direct and indirect perpetrators. In some cases, in the absence of formal links between senior officials and the direct and indirect perpetrator, the evidence can confirm that the senior person still participated in the activity that could have contributed to the commission of the crime. Then the investigation must consider whether such participation constitutes a criminal offense.

At this level the investigation must focus on some key issues:

- a) What is the role of the senior officials in enabling crime?
- b) Which senior officials knew about the crime and his or her impact and participation in the crime?
- c) What is the competence of the senior official in relation to the direct and indirect perpetrators of the crime?

At the highest level, it is necessary to clearly identify legal and de facto relationships between a senior official who is the subject of the investigation and the direct and indirect perpetrators. Evidence of formal relations can be found in state laws and regulations. If it is a de facto chain of jurisdiction which bypasses the formal link, it will be important to identify witnesses within the organization (insiders) who may provide convincing and reliable information. Public statements that may be relevant to the investigation of a suspect at the higher level should be obtained and systematically reviewed. When these public statements are analyzed in the context of other evidence, they can substantiate conclusions about what the senior person knew at the time which

is relevant to the investigation. One should also seek to obtain access to communications between the senior official and the indirect perpetrator.

7. Investigation of people used as instruments

In the complex chain of jurisdiction used by higher-level officials in the execution of a crime, one is likely to find people who are used as instruments of enforcement. Depending on how important the role of certain persons in the chain of jurisdiction is, that person can be an important and valuable witness in determining some of the links in the chain. The person, as well as detailed records, may help determine the relationship between the person who ordered the distribution of material and the units that participated in the criminal activity. It is clear that these people are attractive as witnesses because they are not themselves involved in committing the crime. They are witnesses from the inside ("insiders") without personal guilt, and they do not have problems with neither credibility nor reliability in comparison to insiders who are guilty or potentially guilty.

Finally, it should be noted that when the investigation identifies individuals who are suspected, then one should begin to consider how these suspects will defend themselves, or what their defense strategy will be based upon. It is necessary to take steps to consider possible ways of defense and gather evidence to support or refute them. Possible elements of defense will depend on the particular case and may be numerous. The usual defense of senior officials, who are claimed to be criminally responsible as a superior, is that they were taking certain steps, but unfortunately without success, to prevent and punish crimes committed by their subordinates.

8. Planning the investigation

The investigation plan is a key element that greatly affects the success and efficiency of the investigation. Making such a plan may involve the following (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2103:144-145):

- Determining the known facts and circumstances, as well as the well-known direct or indirect evidence of war crimes and offenders
- Making an hypothesis (or legal theory)
- Defining the objectives of the investigation
- Determining whether it is necessary to implement measures to insure the presence of the suspect or the accused in the criminal proceedings
- Defining the facts and circumstances necessary and useful to the investigation in the certain case of a war crime
- Determining the investigative measures to be applied in order to prove specific facts and circumstances
- Determining individuals who will carry out the plan defined by investigative measures (investigators, authorized officials, associates, other prosecutors)
- Establishing the order by which investigative measures will be carried out
- Determining deadlines for all investigative measures
- Determining deadlines and means of communication between the prosecutor, the investigator, the authorized officials and analysts involved in the investigation of the crimes.

In practice, a good plan of investigation should answer all questions relevant to the investigation, including the following:

Are there:

- Witnesses or potential witnesses of crimes:

- Whether potential witnesses alive, healthy and willing to testify
- How many witnesses should be examined in order to prove certain charges?
- Is there need to enter into a plea agreement with the suspect / accused to prove an offense or a particular count of the indictment?
- Which documents are required as evidence?
- Is there an element of widespread or systematic attack?
- Is there a need for analysis of written evidence located in the database of ICTY. (Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina, 2013:145)

Good investigations are carried out on the basis of a good *plan of investigation*. The plan of investigation in complex cases are usually made after a preliminary study phase, when all the available information is carefully investigated, analyzed and evaluated. Furthermore, the investigation plan is developed as a management tool and is used as an overall guide for the conduct of the investigation. In most cases, a plan of investigation is produced by the prosecutor together with leading investigators and analysts who are engaged in the case. It is a flexible document that must be updated and revised as the investigation progresses.

The Investigation plan should include:

- Clear objectives and strategy of the investigation
- A description of the nature of the allegations that are being investigated
- The identity of potential subjects or suspects and their location, function and so on at the time of the alleged offense;
- The provisions of the legislation violated by the alleged behavior and the essential elements of the crimes
- Information about potential subjects and key witnesses for the investigations
- Tasks to be carried out in the investigation, and resources that will be needed
- Risk assessment of investigations which may face the investigation team and potential witnesses

9. Conclusion

Based on the foregoing, we can conclude that the investigation and prosecution of war crimes in the Western Balkans is a complex job; a job that will work over generations in order to deal with the many war crimes cases that have occurred in the area. To avoid the infamous impunity gap, they should all be thoroughly investigated and their perpetrators adequately punished.

Despite the fact that the first investigations started more than fifteen years ago, a large number of unexplored and unresolved cases remain. The reasons for this is that research of this type of crime is more complicated and difficult than the investigations of classic crime. Based on an analysis of the specificity of the armed conflicts in the former Yugoslavia, we can conclude that none of the countries involved in the conflict has adequate technical and human resources for the effective investigation and prosecution of war crimes. As evidenced and argued elsewhere an analysis of statistical data on

prosecuted and adjudicated cases of war crimes, suggest that effective investigating and prosecuting of these most serious crimes require mutual cooperation between the police and the judicial authorities of the countries of the former Yugoslavia.

Considering the existence of armed conflict around the world including the Arab Spring, the conflict in Afghanistan, in Syria, the recent invasion of Israel on the Gaza Strip and now the conflict that is currently taking place in the Ukraine, it is evident that research in the field of the investigation of war crimes will continue to be of immense importance. In this regard, the experience of the countries of the former Yugoslavia can be valuable to both domestic as well as international judicial bodies that deal with such investigation, and to the prosecution of possible war crimes that occurred in these conflicts. Finally we suggest that the education of future lawyers incorporate content related to the methodology of the detection , investigation and proving of war crimes, described above.

References:

Bejatović, S., Škulić, M., Ilić, G., (2013) *Priručnik za primenu Zakonika o krivičnom postupku*, Udruženje javnih tužilaca i zamenika javnih tužilaca i Misija OEBS u Srbiji, Beograd.

Bošković, A., (2015) *Radnje policije u prethodnom krivičnom postupku i njihova dokazna vrednost*, Institut za kriminološka i sociološka istraživanja, Beograd.

Ivanović, B. A. & Ivanović, R. A., (2013) *Kriminalističke procedure*, Policijska akademija, Danilovgrad.

Ivanović, R. A., Lars Petter Soltvedt, (2016) *Investigating and Prosecuting War Crimes in the Western Balkans*, VARSTVOSLOVJE, Journal of Criminal Justice and Security, year 18, no. 2. University of Maribor, Faculty of Criminal Justice and Security, Ljubljana, pp. 133-159.

Manual for investigations of war crimes, crimes against humanity and genocide in Bosnia and Herzegovina. (2013). Sarajevo: OSCE Mission to Bosnia and Herzegovina