# United Nations Mission in Bosnia and Herzegovina

**Judicial System Assessment Programme (JSAP)**

# AMNESTY AND RETURN:

# A Report on Implementation of Amnesty Legislation in the RS

***June 2000***

**UNITED NATIONS**

# 1 INTRODUCTION

In 1999, Judicial System Assessment Programme (JSAP) inquiries into the issue and enforcement of arrest warrants led to concerns about implementation of amnesty legislation in both entities of Bosnia and Herzegovina. The grant of amnesty is one reason for a court to withdraw an arrest warrant against an accused person and it was not clear that this had always been done properly. The subsequent JSAP report on the subject, issued in December 1999, recommended, amongst other things, that "Implementation of the new Federation Law on Amnesty, as well as the current RS law, should be monitored."

Since that report was published, JSAP has been advised that the Ministry of Justice of the Federation of Bosnia and Herzegovina (Federation) will undertake its own review of the implementation of the Federation Law on Amnesty of 1999 by Federation courts. JSAP, therefore, decided to wait for the outcome of that exercise.

However, early in 2000, concern grew within the international community for some assessment to be made of implementation of amnesty legislation in the Republika Srpska (RS). This was not because there was any reason to believe that it had not been implemented properly but simply because there was no information at all on the process.

In the RS, amnesty was given in 1996 for a number of war related crimes such as illegal keeping of weapons. In 1999, the ambit of amnesty was extended to include draft evaders and deserters. It was expected that this would cover a large number of people, many of whom might be displaced within the Federation or refugees abroad. Clearly, before those people would be willing to return to their places of origin, they and their host governments required some assurance that they would not be subject to arrest for crimes for which amnesty should have been granted.

Although this was therefore the primary impetus for the project which led to this report, the exercise also enabled JSAP to consider the ability of the judicial system as a whole to respond to straight-forward legislative demands in an appropriate, timely and proper manner.

Some conclusions and recommendations can be found at the end of the report.

## 2 BACKGROUND

### 2.1 The Law on Amnesty

The RS Law on Amnesty, passed in 1996, specifies the crimes to which it applies by reference to different chapters or articles of either the Socialist Federal Republic of Yugoslavia (SFRY) or RS Criminal Codes (both in force in the RS). Briefly, these are the crimes against the social system of the SFRY (SFRY Criminal Code articles 114-140), crimes against the armed forces of the RS (articles 210-239 of the SFRY Criminal Code) and the crimes of inviting resistance, spreading false information and illegal possession of weapons under articles 201, 203 and 213 respectively of the RS Criminal Code – Special Part.[1]

Article 2 of the Law on Amnesty provided that no amnesty was available for the specific crimes of draft evasion and desertion (articles 214 and 217) – crimes which otherwise would have received amnesty as falling within the chapter on crimes against the armed forces of the RS. This exception was deleted by legislative amendment in 1999 and with that deserters and draft evaders became entitled to amnesty.

This change in the law had been long anticipated, but it nevertheless produced a huge volume of work for the courts. The original law on amnesty required its granting by the courts within three days of the law coming into effect, but no specific time requirement was laid down for the granting of amnesty following the 1999 amendment. The situation was further complicated by the fact that under a 1996 amendment to the Law on Military Courts, jurisdiction over cases of draft evasion had been transferred from the military courts to the regular courts, while cases of desertion remained with the military courts.

Amnesty applies to crimes committed between 1 January 1991 and 22 December 1995.

### 2.2 Method of review

As it was not possible, given the time and resources available, to inspect every court and every criminal file, JSAP adopted the following approach:

Each of its six regional teams was asked to go to at least two courts each, including, if possible, one military court. A list of the courts inspected is set out in Annex II.

The inspection itself took a broadly two-prong approach:

- Firstly, the teams discussed with the court president or relevant judge how and when the court reviewed its files and went about granting amnesty, problems encountered and what steps were taken to retract outstanding arrest warrants as well as other relevant issues.

[1] An annotated translation of the Law on Amnesty is given in Annex I.

- Secondly, the teams inspected the criminal registers in that court. Because the RS law makes it clear which article of the Criminal Code amnesty is granted in respect of, it was presumed that a reasonably accurate view of whether amnesty had been applied or not could be gleaned from this inspection as these registers should record the criminal code article numbers under which the accused is charged as well as the outcome of the case. However, in case this premise was not correct, the teams also inspected random criminal files.

In addition, the teams were asked to check whether persons who had received amnesty were still on the court's list of persons subject to arrest warrants. From the point of view of the amnestied person, the withdrawal of an arrest warrant may be more immediately necessary than the grant of amnesty itself as it is the former step that ensures freedom from wrongful detention, and it is necessary to look further than the grant of amnesty itself when considering whether conditions encourage return. The JSAP report on arrest warrants concluded that internal court procedures to ensure warrants were withdrawn when they should be are inadequate.

# 3 GENERAL FINDINGS

Although only a small number of courts was covered, the findings are probably applicable throughout the RS. The inspection covered courts in all regions of the RS and over various sizes ranging from the one-judge court in Nevesinje in southeastern RS to the largest court in Banja Luka. While there are some variations in result, in general the findings throughout were consistent.

## 3.1 Findings in respect of returns

It can be concluded that while amnesty has not been fully and correctly applied to all who are entitled to it, in general it was granted appropriately and there is little likelihood that anyone entitled to amnesty will be arrested.

The system is not perfect and there were a few dubious applications or non-applications, discussed below, but there is a particular reason why returning deserters and draft evaders have little to fear in this respect. Most judges interviewed stated that the passage of both the amnesty law in 1996 and the amendment of 1999 were long anticipated. One judge even said that amnesty was expected as early as 1994. As a result, most cases to which it applies were not proceeded with by the court system. A large number had not even got as far as a decision by the court to accept the proposal for indictment or to conduct an investigation and those cases were therefore withdrawn by the prosecutor. In some courts, files transferred by military courts were kept separated from other criminal files in preparation for the amnesty.

A further result of this approach is that few arrest warrants were issued against persons charged under articles 214 and 217 and so, even if the courts are slow in doing the paper-work necessary to grant amnesty, there is little chance that persons eligible will be arbitrarily arrested.

Two caveats however should be made. The first is that less information was obtained on the 1996 amnesty than on the 1999 amnesty. The second is that in the case of at least three courts inspected, it seems that it was only the threat or aftermath of the JSAP inspection that prompted them to take action. For the reasons above, this probably will not affect the risks for returning refugees. However, there are a lot of uninspected courts, thereby increasing the chances of there being outstanding and inappropriate arrest warrants.

## 3.2 Findings in respect of the judicial system

### *3.2.1 Legislative reform*

Following the passage of the 1996 Law on Amnesty, the RS Minister of Justice issued instructions to all courts on how the law should be implemented. This was expected but not done in 1999. According to all judges interviewed, this did not cause problems as there were no difficulties in interpreting the amendment.

Despite the instructions in 1996, JSAP inquiries indicate that there were some interpretative difficulties:

- It was not clear what was to happen to charges involving ongoing crimes, such as illegal possession of weapons, when the crime was committed both inside and outside the amnesty period. In one case, the indictment referred to an unknown period of time in which the crime was alleged to be committed. In a number of other cases found, indictments were not reformulated to take account of the amnesty period. While this may have had no net effect on the sentence finally given, the correct procedures should and could easily have been followed.
- There was confusion about how to apply the amnesty when the defendant had been charged with or sentenced for more than one crime, not all of which were amenable to amnesty. This was dealt with by Ministerial instructions in 1996, which required the prosecutor to file a new indictment, but in at least one court the prosecutor did not take any steps and so no partial amnesty was granted.
- One potential problem, which did not directly arise during the review, is the position of persons who have been tried and received suspended sentences for amnestiable crimes. These persons do not appear from the law to get the benefit of amnesty as the amnesty provisions do not completely match the general rule on amnesty found in the article 101 of the SFRY Criminal Code, which also refers to the deletion of the sentence as well as the cancellation of the legal consequences incidental to conviction. Neither is there any provision requiring the expunging of convictions from a person's criminal record.

In addition to those areas of legislative confusion, there was also one case of wrong interpretation. One court considered that it had no duty to consider persons serving sentences of imprisonment for amnestiable crimes and so took no steps in this regard. It considered that this was the duty of the prison wardens, which is only the case where the first instance court is not in the RS. However, no cases were found in where this misunderstanding caused any unnecessary time spent in prison.

In terms of procedural policy, under the Law on Amnesty, a second instance court dealing with cases in which amnesty should be granted must send them back to the first instance court for the grant of amnesty. Given that the higher court must go through some procedure in order to determine which cases those are, this seems an unnecessarily cumbersome and time consuming method of approaching a simple problem.

### *3.2.2 Supervision of the process – the role of the Ministry of Justice and the district courts*

No direct inquires have been made with the Ministry of Justice, but it appears from discussions with the courts that the Ministry has not taken any role in the implementation of the 1999 amendments, either in terms of instructions as for the earlier law, in ensuring that the courts were sufficiently equipped to be able to undertake the task or in checking the process was completed. Annex II indicates, where known, the huge number of cases of amnesty granted in many of the courts inspected. That a sizable quantity of work would be involved was known in advance, at least in 1999. The benefits of an organised and consistent approach are obvious, as is the need for resource issues to be considered beforehand, whether coming from the Ministry or a superior court.

The district courts did not play any significant role in directing the work of the basic courts, although some undertook a minor supervisory function, usually limited to ensuring that the process was completed. In the event, the work of the courts proceeded on an individual basis, with each one determining its own procedure and developing its own forms. This ad hocism is inefficient and leads to inconsistencies in application.

### *3.2.3 Procedure*

Within the limits of the task, the courts used a wide variety of techniques in applying the law. There was no attempt to develop a unified approach and generally the sharing of model forms between courts, for example, took place well after implementation should have taken place.

In general, the military courts appeared better organised than the regular courts and dealt with the question of amnesty more efficiently. The Bileca Military Court received permission from the Ministry of Justice not to transfer draft evasion cases to the regular courts, so that it could deal with all cases under the 1999 amendment. This does not seem to have been the case elsewhere.

Following the transfer of cases from the military courts, some regular courts kept the files separate from ordinary criminal files in anticipation of the amnesty for draft evasion, for example by means of a separate register or separate filing system.

Two courts, Bileca Military Court and Visegrad Basic Court, did a comprehensive review of all incoming criminal files between relevant dates, including both pending and solved cases. Most other courts relied on each criminal judge to review the files for which he or she was responsible. In the worst case, in 1996, the Zvornik Basic Court relied on the memory of judges and did not perform any type of systematic review.

The Kozarska Dubica Basic Court used the provisions of article 32(7) of the Criminal Procedure Code to join all cases to which the new amnesty applied and issued one decision for all cases. This technique was not used elsewhere.

The Sokolac and Teslic Basic Courts designed their own form or model resolution for the process. The former distributed its form for the use of other courts within its district after a meeting in March 2000 in which some courts were still looking to the district court for guidance.

The Sokolac Basic Court made its decisions on amnesty on 20 July 1999, shortly after the law came into force. On the other hand, the Teslic Basic Court had not completed its efforts at the time of the JSAP review. It gave amnesty cases less priority than normal cases, although it has now employed two interns for the purpose of going through the files. On the other hand, the Doboj Basic Court informally prioritised amnesty cases.

In most courts, cases finalised through the amnesty procedure counted towards a judge's quota of solved cases for the month, which provided an incentive for them to be dealt with efficiently. However, the Teslic Basic Court advised that it considered the granting of amnesty to be an administrative not judicial act, and for that reason cases would not contribute to the solved quota. This may explain the relative lack of action in that court, which was exacerbated by the poor working conditions there, including the need for clerical staff to share its few antiquated typewriters.

As previously stated, if the courts kept accurate criminal case registers, properly recording the article of the Criminal Codes involved in each case and the date of the offence, locating files to which amnesty may be applicable through the register should be easy and the method fool-proof. However, registers are not properly kept. In particular, information is put in the wrong column or not included at all, and the references to Criminal Code articles often fail to distinguish between the two relevant codes. Also, the date of the offence was not always recorded, neither in the register nor in the indictment itself.

The courts are required to notify the defendants of the grant of amnesty. This has not usually been possible and a number of the courts resorted to placing a list of names of those amnestied on the court notice board.

### *3.2.4 Specific problems identified*

- In the Zvornik Basic Court, four cases were found in which the 1996 amnesty should have been granted, but was not.
- In the Bijeljina Basic Court, several cases were found where the amnesty was not properly recorded in the register.
- Also in that court, nine cases were found where amnesty was improperly granted for draft evasion committed after the amnesty period.

### *3.2.5 Arrest warrants*

When conducting research in late 1999 for its report on arrest warrants, JSAP was told by courts in the Doboj region that the RS Minister of Justice had instructed courts to keep a separate list of all arrest warrants ordered. These instructions were apparently given at a conference of judges in Banja Luka and may also have been sent out in writing. However, when inquiries were made as part of this amnesty exercise, most courts stated that they had never received any such instructions from the Minister of Justice and did not, in fact, maintain such a list. Some courts have their own method of record keeping such as keeping copies of the warrant order in a separate file.

In most cases, no order to issue an arrest warrant had been issued by the courts for the cases subject to amnesty as its granting was anticipated. In most courts, if warrants were ordered, it was found that they had been properly withdrawn. However, in the Doboj Basic Court, six arrest warrants in respect of cases to which amnesty should have been granted were found not to have been withdrawn. At the Bijeljina District Court, 470 arrest warrants issued on the order of the military court prior to the transfer of cases were not withdrawn on the grant of amnesty until the visit of the JSAP team. At the Bijeljina Military Court, 50 warrants are still waiting to be withdrawn.

# 4 CONCLUSIONS

- While amnesty was not fully and correctly applied to all entitled to it, in general it was granted appropriately. There is little likelihood that anyone entitled to amnesty will be arrested and that should encourage return.

- The relevant legislation, while laudably brief, failed to clarify or take into account some relevant matters, and indicates a lack of appreciation on the part of the drafters of any complexity of the issues involved.

- The fact that judiciary also failed to appreciate some of the subtleties of the application of the legislation or, in some cases, to apply it properly, is worrying.

- The absence of any direction or supervision from the Ministry of Justice or higher courts has meant that the methods, speed and accuracy of implementation have varied widely between courts.

- On the whole, the district courts did not fill the supervisory void as they could have done under the Law on Courts then in force.[2]

- The judicial system itself, with all its different levels and focus on form rather than substance, has helped make what should be a simple process more complex. This was aggravated by poor record-keeping practices.

- While most courts dealt with a substantial number of cases in an appropriate and efficient manner and with no corresponding increase in resources, the performance of some courts can only be described as inadequate.

- If the judicial system is unable to work in a unified fashion in relatively simple task, doubts are raised as to the capacity of the system to cope with more complex issues in a coherent and timely fashion.

- The concerns first expressed in the JSAP report on arrest warrants must be reiterated regarding lack of action by the courts to withdraw arrest warrants when necessary, including on the granting of amnesty.

[2] Since the review that is the subject of this report was undertaken, a new law on courts has come into force in the RS.

## 5 RECOMMENDATIONS

- The legislative drafting process should take full and better account of the complexity of legal issues involved.

- The legislature and the executive should ensure that the courts have sufficient resources in terms of staff, training and equipment, to undertake the tasks given to them.

- In the future, the planned judicial training centres should play a key role in providing training and guidance to judges and prosecutors on the implementation of new legislation.

- Greater informal co-ordination and discussion between judicial institutions at all levels should be encouraged.

- Court record-keeping practices should be overhauled with a view to greater accuracy and efficiency and to ensure that all necessary registers are kept.

## ANNEX I

## Law on Amnesty[3]

### 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 January 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.**]**

**[]**as amended in 1999

### Article 2

[deleted by amendment of 1999]

### Article 3

If a criminal proceeding has been taken for a crime referred to in article 1 of this law, then the criminal proceeding shall not be taken and if the proceeding is in the process but not effectively ended, it shall be terminated.

### Article 4

A decision on the grant of amnesty shall be made, depending on the phase of the proceeding, by an investigating judge or by the President of the Court Council who was or currently is involved in deciding at first instance.

The decision referred to in paragraph 1 of this article shall be made ex officio within the period of three days following the date this law comes into force.

[3] Official Gazette of the RS, 13/96 with amendments from 1999 (Official Gazette 17/99) inserted.

## Article 5

A defendant, his or her counsel or any person referred to in paragraph 2 of article 360 of the Criminal Procedure Code may file an application for the grant of amnesty.

The court must make a decision on that application within three days of the date that the application is submitted.

## Article 6

An appeal against the decision on the grant of amnesty may be filed by a public prosecutor, the defendant or his or her counsel. A person referred to in paragraph 2 of article 360 of the Criminal Procedure Code may file an appeal against a decision not to grant amnesty only if the application was filed by that person.

An appeal shall not suspend enforcement of the decision.

## Article 7

If a defendant, on release from prosecution or release from execution of a penalty under the provisions of this law, is in detention or serving a prison sentence, the court shall decide on an immediate release to freedom.

**[**If a person referred to in article 1 of this law has been delivered a valid sentence of imprisonment, he or she shall be freed from serving the sentence completely or the non-served part.**]**

**[]** inserted by amendment 1999

## Article 8

If a defendant is in custody or serving a prison sentence and the seat of the court before which the proceeding at first instance was or currently is conducted is not in the territory of the Republika Srpska, the decision under articles 4 and 5 of this law shall be made by the manager of the correctional institute where the defendant is situated. The Minister of Justice and Administration shall make a decision on an appeal against the decision of the manager of the correctional institute.

## Article 9

The provisions of the Criminal Procedure Code shall apply as appropriate to the delivery of documents, calculation of periods of time and procedure on appeal.

## Article 10

Detailed instructions on the implementation of this law shall be issued by the Minister of Justice and Administration in agreement with the Minister of Defence.

## Article 11

This law shall come into force eight days after its publication in the Official Gazette of the Republika Srpska

## Annex II

## Courts visited and number of cases in which amnesty granted

| **Name of Court** | **No. of cases amnesty granted in 1996** | **No. of cases amnesty granted in 1999** |
|---|---|---|
| Banja Luka Basic Court | Not known | 2,934 |
| Banja Luka Military Court | 5,000 approx. | 6,000 approx. |
| Bileca Military Court | Not known | 6,590 |
| Bijeljina Basic Court | Not known | 1976 |
| Bijeljina Military Court | Not known | 6,456 |
| Doboj Basic Court | Not known | 333 |
| Kozarska Budica Basic Court | 33 | 98 |
| Nevesinje Basic Court | Not known | 160 approx. |
| Novi Grad Basic Court | 1 | 50 |
| Prijedor Basic Court | Not known | 170 |
| Sokolac Basic Court | Not known | 22 |
| Teslic Basic Court | Not known | 130 granted out of 1618 potential cases |
| Trebinje Basic Court | Not known | not known |
| Visegrad Basic Court | | 3 (not clear if 1996 or 1999) |
| Zvornik Basic Court | 0 | 26 |
| Zvornik Supreme Military Court | All amnestiable cases transferred to lower court | All amnestiable cases transferred to lower court |