

# ANNEX 4: MECHANISMS IN EUROPE

## INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA

### Conflict Background and Political Context

The Socialist Federal Republic of Yugoslavia (SFRY) emerged from World War II as a communist country under the rule of President Josip Broz Tito. The new state brought Serbs, Croats, Bosnian Muslims, Albanians, Macedonians, Montenegrins, and Slovenes into a federation of six separate republics (Slovenia, Croatia, Bosnia and Herzegovina, Macedonia, Montenegro, and Serbia) and two autonomous provinces of Serbia (Kosovo and Vojvodina).

Ten years after Tito's death in 1980, the country was in economic crisis and the mechanisms he had designed to both repress and balance ethnic demands in the SFRY were under severe strain. Slobodan Milošević had harnessed the power of nationalism to consolidate his power as president of Serbia. The League of Communists of Yugoslavia dissolved in January 1990, and the first multiparty elections were held in all Yugoslav republics, carrying nationalist parties to power in Bosnia, Croatia, Slovenia, and Macedonia.<sup>1763</sup> Meanwhile, Milošević and his political allies asserted control in Kosovo, Vojvodina, and Montenegro, giving Serbia's president de facto control over four of the eight votes in the federal state's collective presidency. This and the consolidation of Serbian control over the Yugoslav People's Army (YPA) heightened fears and played into ascendant nationalist feelings in other parts of the country.

Declarations of independence by Croatia and Slovenia on June 25, 1991, brought matters to a head. Largely homogenous Slovenia succeeded in defending itself through a 10-day conflict that year against the Serb-dominated federal army, but Milošević was more determined to contest the independence of republics with sizeable ethnic Serb populations. There followed a series of large-scale armed conflicts in Croatia (1991–1995); Bosnia and Herzegovina (1992–1995); and Kosovo (1998–1999).<sup>1764</sup> Between 1991 and 1999 an estimated 140,000 people were killed, almost 40,000 persons went missing, and over three million persons were displaced internally and abroad, in what became known as the worst conflict in Europe since the end of World War II.<sup>1765</sup>

In Croatia, clashes between Croatian government forces and forces opposed to succession—including Serb rebel groups and paramilitaries backed by the Serbian YPA and the Serbian Ministry of Internal Affairs (MUP)—led to bloody battles, notably in Vukovar. In March 1992, Bosnia and Herzegovina’s declaration of independence, which was widely supported by Bosnian Muslims and Croats, led to a reaction from Serb military forces. Local militias with strong backing from Belgrade took control of Serb populated areas, targeting Bosniaks (Bosnian Muslims) and Croats in campaigns of murder, torture, sexual violence, and expulsion that became known as “ethnic cleansing.” Serb forces laid siege to the capital city of Sarajevo and declared a separate state within the borders of Bosnia and Herzegovina. Majority Croat areas of the country sought to break away from Bosnia and Herzegovina, and Zagreb-backed militias engaged in campaigns of “ethnic cleansing” targeting Serbs and Bosniaks. Between 1992 and 1995, the war in Bosnia led to the deaths of around 100,000 people and the displacement of hundreds of thousands more. A “blizzard of resolutions” were adopted by the United Nations Security Council, addressing the raging conflict in Yugoslavia,<sup>1766</sup> most notably, Security Council’s resolutions 713 (1991), 764 (1992), 771 (1992), 780 (1992), 808 (1993),<sup>1767</sup> and finally resolution 827 (1993), which established the International Criminal Tribunal for the former Yugoslavia (ICTY).

Resolution 827 (1993), adopted by the UN Security Council on May 25, 1993, expressed “alarm at continuing reports of widespread and flagrant violations of international humanitarian law occurring within the territory of the former Yugoslavia.” Finding these to be a threat to international peace and security, the Security Council invoked Chapter VII of the UN Charter to create an ad hoc criminal tribunal with the purpose of “prosecuting persons responsible for serious violations of international humanitarian law committed in the territory of the former Yugoslavia between 1 January 1991 and a date to be determined by the Security Council upon the restoration of peace.”<sup>1768</sup>

While it was hoped that the creation of an international war crimes tribunal would contribute to ending atrocities and restoring peace, the ICTY was not the end of the Yugoslav wars. In July 1995, over just 10 days, the Bosnian Serb Army executed approximately 8,000 Bosniak boys and men seized in the UN “safe area” of Srebrenica, under the eyes of Dutch UN peacekeepers.<sup>1769</sup> The massacre and ongoing shelling of Sarajevo finally prompted limited NATO military strikes against Bosnian Serb positions and increased Western leverage over the parties, allowing a negotiated end to the conflicts. In December 1995, the leaders of Bosnia and Herzegovina, Croatia, and Serbia signed the Dayton Peace Accords, creating separate Bosniak/Croat and Serb majority entities within the Bosnian federation.

The Dayton Peace Accords ended the war in Bosnia but did not address the situation in Kosovo. Belgrade's increasing repression of majority Albanian demands for independence over the course of 1997–1998 ultimately led to large-scale conflict between Serbian police and military forces and the Kosovo Liberation Army (KLA). NATO airstrikes from March–June 1999 finally ended the Yugoslav wars.

For more detailed background on each of the individual conflicts, please see the separate profiles of the mechanisms for Bosnia and Herzegovina, Croatia, and Kosovo, below.

### **Existing Justice-Sector Capacity**

At the time of the ICTY's creation, the former Yugoslav republics were unwilling or otherwise unable to prosecute those responsible for atrocity crimes. Thus, the UN Security Council supported the creation of an independent criminal tribunal with a seat in The Hague, which would be able to prosecute crimes committed by all parties in the conflict. A 1995 Human Rights Watch report on the limitations of domestic war crimes prosecutions in Croatia, Bosnia, and Serbia confirms the importance of the involvement of the ICTY, especially in the prosecution of high-ranking perpetrators. The report found that the ability of the local justice system to prosecute war crimes was not in line with international standards. According to Human Rights Watch, the judiciaries were highly politicized and lacked independence, courts often failed to ensure respect for due process rights, and authorities failed to prosecute members of their own forces.<sup>1770</sup>

In 1993, the UN Security Council adopted supplementary resolutions to the ICTY statute, one of which stated that the “strengthening of competent national judicial systems is crucially important to the rule of law in general and to the implementation of the ICTY and ICTR [International Criminal Tribunal for Rwanda] Completion Strategies in particular.”<sup>1771</sup> The Security Council thus extended the tribunal's mandate beyond prosecutions, to include serving as a catalyst for national prosecutions of war crimes.<sup>1772</sup>

### **Existing Civil Society Capacity**

Countries in the former Yugoslavia do not have a strong civil society tradition.<sup>1773</sup> Although some groups engaged in antiwar activism during the conflict, civil society organizations played little to no role in the creation of the ICTY. International news

coverage of grave crimes and the work of international human rights organizations, however, contributed to focusing worldwide attention on events in the Balkans during the 1990s and were instrumental in pushing for the creation of an international tribunal. Human Rights Watch published numerous reports on human rights and serious violations of humanitarian law throughout the Yugoslav wars. It investigated human rights violations of Serb minorities in Croatia before the start of the conflict, violations of the laws of war by Serb insurgent forces and the Yugoslav Army during the Croatian War of Independence,<sup>1774</sup> war crimes that occurred during Bosnia's war,<sup>1775</sup> and human rights abuses by Serbs against Kosovo Albanians.<sup>1776</sup>

Local civil society organizations evolved over the course of the Yugoslav conflicts. According to the Council of Europe Commission on Human Rights, "A vibrant civil society in the region of the former Yugoslavia with groups of professionals and victims ... ha[s] been working for more than a decade gathering information, revealing evidence, co-operating with national and international institutions, organizing educational campaigns, giving support to victims and promoting accountability and reconciliation."<sup>1777</sup> Nongovernmental organizations have played an instrumental role in pushing for domestic prosecutions of wartime atrocities and investigations that are representative of the crimes committed and for the creation of other methods to address Yugoslavia's violent past, despite operating in a climate that is often hostile to civil society.<sup>1778</sup> The Research and Documentation Center (Bosnia), the Humanitarian Law Center (Serbia and Kosovo), and the Documenta-Center (Croatia) have been some of the key actors in this process.<sup>1779</sup>

## **Creation**

In response to reports of continued violations of human rights in the former Yugoslavia, the United Nations Security Council unanimously adopted Resolution 780 (1992), which called for the creation of "an impartial Commission of Experts to examine and analyze ... grave breaches of the Geneva Conventions and other violations of international humanitarian law committed in the territory of former Yugoslavia."<sup>1780</sup> In the "blizzard of resolutions"<sup>1781</sup> addressing the raging conflict that followed, it slowly became clear to the international community that they were dealing with the largest conflict on European soil since the end of World War II. The expert commission faced a number of difficulties in carrying out its investigations, most notably a lack of resources and absence of state cooperation, but produced a report that recommended the establishment of an international tribunal to put an end to such crimes and restore peace and security.<sup>1782</sup> In Resolution 808

(1993), the Security Council recognized the need for the creation of an international tribunal “to end ... crimes and take effective measures to bring to justice the persons who are responsible for them,” and further directed the Secretary-General to submit a proposal for constituting the court.<sup>1783</sup>

In the context of the international community’s confusion and deadlock over how to effectively address the wars raging in Croatia and Bosnia, the UN Security Council did come to agreement on Resolution 827 of May 25, 1993, establishing an ad hoc international tribunal “for the prosecution of persons responsible for serious violation of international humanitarian law committed in the territory of the former Yugoslavia since 1991.”<sup>1784</sup> The resolution contained the ICTY Statute, which determined the court’s jurisdiction and organizational structure, as well as its criminal procedure in general terms.<sup>1785</sup> The creation of the ICTY under Chapter VII of the UN charter, concerning the United Nations powers for the maintenance of peace, raised high expectations for the tribunal as a means of peacebuilding. The ICTY’s founders also intended the court to create a reliable historical record of what happened for future generations in order to avoid “dangerous misinterpretations and myths.”<sup>1786</sup> It remains disputed whether the tribunal was indeed an effective tool for the deterrence of further violence in the region, or for providing an official record of events.<sup>1787</sup>

## **Legal Framework and Mandate**

The UN Security Council created the ICTY as an extraordinary measure under Chapter VII of the UN Charter to restore international peace and security and to prosecute those (most) responsible for violations of international humanitarian law in the territory of the former Yugoslavia.<sup>1788</sup> The subject matter jurisdiction of the tribunal includes war crimes, crimes against humanity, and genocide.<sup>1789</sup> War crimes are defined as grave breaches of the 1948 Geneva Conventions and violations of the law or customs of war (violations of customary international humanitarian law). The ICTY Statute incorporates the exact definition of genocide from Articles 2 and 3 of the 1949 Genocide Convention, and it defines crimes against humanity in accordance with similar crimes within the charter and judgments of the post-World War II Nuremberg and Tokyo tribunals. The tribunal’s territorial jurisdiction is limited to the former Yugoslavia republics, and its temporal jurisdiction covers crimes committed after January 1, 1991.<sup>1790</sup> At the time of the ICTY’s creation, the wars in Bosnia and Croatia were still ongoing, and therefore, its temporal jurisdiction was left open-ended. The ICTY has jurisdiction over individual persons, and the statute specifically provides that the tribunal may prosecute heads

of state or government.<sup>1791</sup> The ICTY was the first international criminal court of its kind to include such a provision limiting head-of-state immunity.<sup>1792</sup>

The governing legal instruments of the tribunal are the ICTY Statute and the Rules of Procedure and Evidence, which the court's judges adopted on February 11, 1994.<sup>1793</sup> Secondary legal instruments were developed over time, including agreements on the enforcement of sentences with third states, the headquarters agreement between the UN and the Netherlands, and a variety of rules governing such matters as detention and a code of conduct for the defense.<sup>1794</sup>

The ICTY has concurrent jurisdiction and primacy over national courts. Early on in its existence, many already believed the tribunal should focus on prosecutions of those most responsible for crimes under the statute. Article 19 of the ICTY Statute dictates that the tribunal may at any point in the proceedings defer cases to national authorities; the court applied this concept extensively following the adoption of a completion strategy for operation (see annexes on Bosnia, Croatia, and Serbia).<sup>1795</sup> The tribunal relied on states and international organizations to carry out arrest warrants and other requests for assistance. Therefore, Article 29 of the statute sets forth the obligation of all states to cooperate with the tribunal's investigations and prosecutions.<sup>1796</sup> In practice, and especially during its first years, obtaining state cooperation proved difficult for a pioneering tribunal operating in a region where there was little political support for its work and where conflicts were ongoing. From the end of the 1990s onward, under pressure from the international community and after filing numerous reports of non-cooperation, the situation temporarily improved.<sup>1797</sup>

## **Location**

The ICTY premises are located in The Hague, the Netherlands.<sup>1798</sup> However, the tribunal may sit elsewhere if its president deems it to be in the interest of justice.<sup>1799</sup> Upon creation of the tribunal, the United Nations decided that because of the ongoing conflict in the former Yugoslavia, and lack of political will and support for the ICTY in the region, the mechanism had to be seated elsewhere. Throughout its existence, the ICTY has had to contend with the distance between it and its constituents in the region: the victims and communities affected by the crimes within its mandate.

Accused persons arrested and transferred to The Hague are held in the United Nations Detention Unit (UNDU) in the Scheveningen area of The Hague. Persons convicted of a crime before the ICTY do not serve their sentence in The Hague

but must be transferred to a prison in a third country with which the tribunal has a sentencing agreement.<sup>1800</sup>

## **Structure and Composition**

The ICTY is composed of three main branches: the Chambers, the Office of the Prosecutor (OTP), and the Registry. In line with the UN Charter, geographical representation is considered in hiring, and both national and international personnel staff these core organs.

### ***Chambers***

The ICTY's Chambers are composed of three Trial Chambers and one Appeals Chamber, assisted in their work by the Chambers Legal Support Teams. Each Trial Chamber has three permanent judges and a maximum of six *ad litem* judges appointed by the UN Secretary-General for a term of four years. Both permanent and *ad litem* judges are eligible for reelection after their first term. Each case must have a permanent judge among those assigned to hear a case and must conduct such hearings in line with the tribunal's Rules of Procedure and Evidence. The Appeals Chamber consists of seven permanent judges, five of whom are permanent judges of the ICTY and two who are permanent judges of the ICTR. Each appeal must be heard by a bench of five judges. The judges elect a president who presides over the Appeals Chamber and assigns judges to cases at the Appeals and Trial Chambers, performs diplomatic and political functions related to the tribunal's work, supervises the registrar, and submits an annual report to the General Assembly and a biannual assessment to the Security Council. The judges also elect a vice president who performs the president's functions in his or her absence. ICTY judges come from a variety of legal systems; they are expected to be persons of high moral character, impartiality, and integrity.<sup>1801</sup>

### ***The Office of the Prosecutor***

The UN Security Council appoints the prosecutor upon nomination by the Secretary-General for a four-year renewable term. A deputy prosecutor (also appointed by the Secretary-General) and other prosecutors, legal officers, and investigators supports the prosecutor's work. The OTP, which unlike at other international tribunals is not included in the statute as such, may investigate and prosecute serious violations of international humanitarian law committed in the territory of the former Yugoslavia after January 1, 1991, and operates separately

from the tribunal's other two organs.<sup>1802</sup> Since 2004, the OTP has focused mostly on prosecution of existing cases, as it issued its final indictments that year. In line with the tribunal's completion strategy, the prosecutor was involved in the scrutiny of cases with the aim of prioritizing them for prosecution, as well as handing over the rest of the cases to the national prosecutors.<sup>1803</sup>

### ***The Registry***

The Registry serves as the “engine room” of the tribunal, providing essential court management and administrative support for the Chambers and Office of the Prosecutor, and serves as the channel of communication between the ICTY and the outside world.<sup>1804</sup> The Registry consists of four divisions: the Division of Judicial Support Services, the Immediate Office of the Registrar, the Chambers Legal Support Section, and the Administrative Division. These are responsible for, among others, courtroom operations, court records and filings, witness support and assistance, legal support to Chambers, process requests for legal aid by accused persons, trial interpretation and translation of documents, supervision of the UNDU, and outreach and public information. The Registry also plays an important role, alongside other organs, in maintaining external relations and ensuring state cooperation with the court. The Registry is headed by the registrar, whom the Secretary-General appoints upon recommendation by the judges to a four-year renewable term.<sup>1805</sup>

### ***Victims and Witnesses Section***

The statute dictates that the ICTY shall provide for the protection of victims and witnesses.<sup>1806</sup> The Victims and Witnesses Section (VWS) within the Registry consists of the Witness Support and Operations Unit (WSOU) and Witness Protection Unit (WPU). Together, these two units are responsible for the safe appearance of witnesses before the tribunal in The Hague, including the logistical arrangements, psycho-social support, and security measures which may be needed throughout and after the process.<sup>1807</sup> According to the Rules of Procedure and Evidence, the ICTY's judges may order a range of protective measures for witnesses testifying before the ICTY to make sure that their identity is not disclosed to the media or public.<sup>1808</sup>

### ***Defense***

While the ICTY does not have a designated defense office, the Registry is responsible for dealing with defense matters. The Office for Legal Aid and Defense Matters within the Division of Judicial Support Services is responsible



for the ICTY's legal aid scheme. Over the years, the Registry has prepared various documents that regulate and support the work of defense counsel practicing before the ICTY, including a Directive on Assignment of Defense Counsel and a Code of Professional Conduct for Defense Counsel Appearing before the International Tribunal. Since 2002, defense counsel are organized in the Association of Defense Counsel practicing before the ICTY (ADC-ICTY).<sup>1809</sup> Although not formally part of the tribunal's structure, the ADC-ICTY was often involved by the Registry in the determination of policies concerning the defense.

### ***Outreach***

An ICTY outreach program was established in 1999, six years after the tribunal's creation.<sup>1810</sup> Then-President Gabrielle Kirk McDonald came to realize that "if the ICTY were to accomplish the UN-mandated goal of helping to bring about international peace and security, the people of the region must come to know and appreciate the Tribunal as being fair," and outreach was seen as key to achieving that goal.<sup>1811</sup> Activities carried out by the outreach program included capacity building of national judiciaries and legal professionals, awareness-raising among younger generations, grassroots community outreach, media outreach, organized visits to the tribunal, and production of information materials. The court created liaison offices in Belgrade, Sarajevo, Zagreb, and Pristina. These activities align with the program's mandate of bridging the divide between the ICTY in The Hague and local communities in the various countries of the former Yugoslavia.<sup>1812</sup> However, in part due to its very late start in organizing outreach, the ICTY has struggled with the inherently daunting task of explaining its mandate and complex proceedings in the face of misinformation campaigns. Despite the outreach program's development, the tribunal never overcame the sense of remoteness from the Balkan region for which it was established.<sup>1813</sup>

### **Prosecutions**

As of late 2017, the ICTY has concluded proceedings for 154 accused persons (19 acquitted, 83 sentenced, 13 were referred to national jurisdictions, 20 individuals had their indictments withdrawn, 10 died before transfer to the tribunal, and seven died while in custody). In total, the tribunal indicted 161 persons. As of late 2017, 10 remained in custody at the UN ICTY Detention Unit, while there were seven ongoing proceedings (one at the trial stage and six at the appeals stage).<sup>1814</sup>

In its first two years, the ICTY issued 34 indictments, but struggled to bring suspects to The Hague.<sup>1815</sup> Trials only started in 1996, and the first judgment was delivered on November 29, 1996: a sentence of 10 years' imprisonment for crimes against humanity committed in Srebrenica for Drazen Erdemović, a Bosnian Croat soldier in the Serbian army.<sup>1816</sup> Initially, the Office of the Prosecutor lacked a consistent case selection strategy, and investigations focused on crimes committed in the Bosnian war, since this is where the UN Commission of Experts had already collected evidence. Many of the first investigations concerned lower-level, direct perpetrators, and not the high-ranking political and military leaders who orchestrated crimes, and who were well known within Yugoslavia.<sup>1817</sup> The indictment of Bosnian Serb leaders Radovan Karadžić and Ratko Mladić for genocide and other charges in November 1995<sup>1818</sup> and the indictment of Serbian President Slobodan Milošević on May 22, 1999,<sup>1819</sup> were of much greater significance to the region and have helped shape perceptions of the tribunal.

The ICTY has played a pioneering role in the prosecution of and development of jurisprudence on sexual and gender-based violence in armed conflict.<sup>1820</sup> In total, almost 50 percent of the tribunal's indictments included sexual violence charges, and 32 individuals were eventually convicted under Article 7 of the ICTY Statute.<sup>1821</sup> The prosecutor's first case, *Prosecutor v. Duško Tadić*, was also the first international war crimes trial to include sexual violence charges in its indictment, including sexual violence against men.<sup>1822</sup> Other judgments included convictions for aiding and abetting rape as a war crime, which is not included in the ICTY Statute as such;<sup>1823</sup> rape as torture under customary international law;<sup>1824</sup> and sexual enslavement as a crime against humanity.<sup>1825</sup>

Although the prosecution achieved convictions of high-level perpetrators of the wars in the former Yugoslavia, its struggles with some high-profile cases have also affected regional perceptions of the court's work. Prominent acquittals included those of Croatian General Ante Gotovina,<sup>1826</sup> leading suspects of the KLA,<sup>1827</sup> Vojislav Šešelj,<sup>1828</sup> and Momčilo Perišić.<sup>1829</sup> In the former Yugoslavia, the fact that a majority of ICTY indictments and convictions were against Serbs and Bosnian Serbs is varyingly seen as an accurate reflection of atrocities perpetrated during the Yugoslav conflicts, or as confirmation that the tribunal was a biased institution, established to punish Serbs.<sup>1830</sup>

## Legacy

The UN resolution creating the ICTY expressed an expectation that through its proceedings, it would contribute to the restoration and maintenance of international peace and security.<sup>1831</sup> However, the tribunal's legacy extends beyond the areas of its formal mandate.<sup>1832</sup> Beyond the conviction of over 161 individuals for war crimes, crimes against humanity, and genocide committed in the former Yugoslavia, the ICTY itself has claimed impact in various areas: the creation of an accurate historical record of the conflicts, the general development of international humanitarian law and international justice, strengthening of the rule of law in its target countries, and bringing justice to victims of atrocity crimes.<sup>1833</sup>

### *The Deterrent Effect of the ICTY*

When the ICTY was created, at the height of the Yugoslav wars, it was hoped that the creation of a war crimes tribunal would have a deterrent effect on the commitment of future crimes. It is clear to all that the ICTY was no panacea, since the worst of the Bosnian war was yet to come, and the Kosovo war commenced five years after the tribunal came into existence. Scholars disagree on the ICTY's deterrent effect. Some claim that the tribunal has had, at best, a limited deterrent impact on mass violence in the former Yugoslavia.<sup>1834</sup> Others argue that while the ICTY's creation and its focus on the atrocities in the region did not immediately end the violence, near the end of the war and in its aftermath, the court was instrumental in altering the politics of violence, violent behavior, and the culture of impunity in Yugoslavia.<sup>1835</sup> Especially the indictments of Bosnian Serb commanders Radovan Karadžić and Ratko Mladić, whose indictments excluded them from the Dayton peace negotiations, and the later indictment of Serbian President Slobodan Milošević, who was ousted from power not long thereafter, have been described as being instrumental to guiding the region back toward peace.

### *Telling the Story of What Happened*

The ICTY has created the most complete documented history of crimes committed in the former Yugoslavia.<sup>1836</sup> Its cases have proven key in the determination of the facts of crimes committed in Yugoslavia. Academic Marko Milanović writes of the court: "The detail in which the ICTY's judgements describe the crimes and the involvement of those convicted make it impossible for anyone to dispute the reality of the horrors that took place in and around Bratunac, Brčko, Čelebići, Dubrovnik, Foča, Prijedor, Sarajevo, Srebrenica and Zvornik, to name but a few."<sup>1837</sup> The *Kvočka et al.* case, for example, was important in establishing the crimes that occurred in

Prijedor, Bosnia and Herzegovina.<sup>1838</sup> Perpetrators in *Prosecutor v. Dragan Nikolić* disclosed information on the location of mass graves near the Sušica Detention Camp in Bosnia and Herzegovina, so that the victims' families could finally locate and properly bury their dead.<sup>1839</sup>

### ***Development of International Law***

The ICTY's proceedings have made a significant contribution to international criminal law as well as international humanitarian law, which at the time of the tribunal's creation was still in its infancy.<sup>1840</sup> In the *Tadić Jurisdiction Decision*, for example, the Appeals Chamber, in defining an armed conflict, held that "an armed conflict exists whenever there is a resort to armed force between armed states or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State."<sup>1841</sup> In addition, the ICTY has been able to shape jurisprudence on genocide,<sup>1842</sup> crimes against humanity, command (superior) responsibility,<sup>1843</sup> protected persons, and taking the first steps toward the formation of the notion of joint criminal enterprise as a mode of liability.<sup>1844</sup>

### ***Strengthening Domestic Capacity***

At the time of the ICTY's creation in 1993, it was assumed that local courts in the former Yugoslavia were unable or unwilling to bring perpetrators of atrocities to justice, let alone prosecute their own. Neither was there an expectation that the tribunal in The Hague would strengthen the capacity of national courts in the former Yugoslavia.<sup>1845</sup> Over the course of its existence, perceptions started to change regarding the relationship between the ICTY and national courts. In 2003, the Secretary-General endorsed a plan of ICTY judges, which would become known as the ICTY "completion strategy." This proposed that national courts in Bosnia, Croatia, and Serbia would be invited to assist the ICTY in the completion of its mandate. The completion strategy granted the tribunal an ability to transfer cases involving mid- and lower-level perpetrators to competent national jurisdictions in the former Yugoslavia, while continuing to monitor proceedings ongoing at the national level because of remaining concerns over the capacity of national jurisdictions to process complex war crimes cases.<sup>1846</sup>

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## The ICTY and National Courts: Three Phases

**Primacy (1993–1996):** During the ICTY’s early years, atrocities in the former Yugoslavia were ongoing. Domestic prosecutions, if they happened at all, were not considered credible or adequate. While the ICTY noted that “national courts” could play an important role at the time, this was “likely directed at Western European countries that were capable of prosecuting fugitives from justice rather than courts in the Balkans.”<sup>1847</sup>

**Supervisory (1996–2002):** In 1996, the ICTY drew up an agreement with countries in the former Yugoslavia to ensure that national prosecutions met international legal standards. The ICTY retained the power to review national investigations and decide whether domestic courts could issue indictments.<sup>1848</sup> While this supervisory arrangement may have been necessary to safeguard the rights of the accused, it was ultimately disempowering for national justice systems and caused tension between the ICTY and national legal professionals. The ICTY did not view national courts as credible partners for justice, in part because of their weak capacity.<sup>1849</sup> This phase “did little to promote domestic development or to enhance the capacity of national institutions in the region” and may have caused a “chilling effect.”<sup>1850</sup>

**Spurring National Capacity (2002–Present):** In 2002, the ICTY revised its approach and drew up a new framework, emphasizing the transfer of cases to domestic courts in line with a comprehensive completion strategy.<sup>1851</sup> The ICTY created several working groups with international administrators in Bosnia (the Office of the High Representative) to shape the design of Bosnia’s War Crimes Chamber and Special Division for War Crimes in the national prosecutor’s office.<sup>1852</sup> The shift was driven in part by a practical and operational imperative to devolve cases in anticipation of the closure of the ICTY; it also reflected a shift in emphasis toward building domestic judicial capacity, more akin to a complementarity framework. While some contend the ICTY could have acted sooner and done more to strengthen domestic capacity, others insist that domestic courts were not genuinely established until 2005.<sup>1853</sup> Under the completion strategy, the ICTY amended its rules to transfer Rule 11*bis* cases and cases which had not reached the indictment stage at the ICTY (“Category II cases”), and it also returned files on suspects that had been sent to the ICTY.<sup>1854</sup> Most of these cases involved low- and mid-level defendants. This complementarity phase had varying success in different countries in the region, but spurred local capacity in three key ways: it (1) promoted transfer of information and evidence to local courts; (2) strengthened institutional and professional links in concrete ways around specific cases; (3) and shifted resources for war crimes prosecutions to the national level.

Overall, many observers agree that the ICTY promoted domestic capacity to prosecute war crimes after the implementation of the completion strategy. Specialized war crimes chambers were created in Croatia (in 2003), in Bosnia (in 2005), and in Serbia (in 2005). (For more detail, please see the separate mechanism profiles.) While trials in all countries showed numerous shortcomings—signs of ethnic-bias, ineffective witness protection, lack of capacity of police forces to conduct war crimes investigations, and sometimes poor quality of the judgments<sup>1855</sup>—there is an overall consensus that the situation would have been much worse without the ICTY’s involvement. Without the cooperation between the ICTY and national jurisdictions, the prosecution of war crimes cases would not have taken place, would have been politicized and failed to respect fair trial rights, or would have only started years later. Additionally, the array of activities undertaken by the ICTY and other international organizations to further strengthen the judiciary—such as the organization of trainings and study visits to promote the transfer of skills from ICTY to national judges and prosecutors—has generally improved the capacity of domestic judicial systems in the former Yugoslavia.<sup>1856</sup>

### ***Bringing Justice to Victims***

Many have regarded the ICTY as an institution that failed to bridge the gap between The Hague and the victims and victim communities. This is partly due to the late start of its outreach program and the failure to adequately fund the program once it was launched.<sup>1857</sup> Even so, the court has had a lasting impact on victims in the region. First, many victims have traveled to The Hague to testify before the court. This contributed to a sense of recognition of what happened to them and may help create a feeling for them that justice has been served.<sup>1858</sup> As Diane Orentlicher has observed with regard to the ICTY’s impact in Bosnia: “After all kinds of war crimes and genocide, the people need some sort of satisfaction ... that someone guilty be punished.”<sup>1859</sup> She concludes that for victims, Bosnians and Serbs alike, victims felt effectively redressed by the ICTY because those responsible for atrocity crimes were punished.<sup>1860</sup>

### ***A Lasting Impact on the Region***

As mentioned above, with the adoption of Security Council Resolution 1503 in 2003, the UN endorsed a strategy for the completion of ICTY investigations. The three-phased completion strategy determined that the tribunal was to complete all investigations by the end of 2004, complete all first-instance trials by the end of 2008, and close its doors by the end of 2010.<sup>1861</sup> However, due to delays in securing state cooperation to enforce outstanding arrest warrants and extended

proceedings because of complexity of certain cases, the ICTY was unable to meet these deadlines. In late 2017, the tribunal was still in the process of completing its final cases and preparing to transfer all of its remaining functions to a newly created mechanism: The Mechanism for International Criminal Tribunals (MICT).

The United Nations Security Council created the MICT (formally, the International Residual Mechanism for Criminal Tribunals) in 2010 to continue essential functions originally performed by the ad hoc international tribunals for Yugoslavia and Rwanda.<sup>1862</sup> UNSC Resolution 1966 (2010) determined that the MICT, after its predecessors' dissolution, "shall continue the jurisdiction, rights and obligations and essential functions of the ICTY and the ICTR."<sup>1863</sup> The residual mechanism is competent to arrest and prosecute remaining fugitives, refer cases to national prosecutions, handle appeal proceedings, review proceedings or retrials after the ad hoc tribunals' closure, as well as supervise the enforcement of sentences, the protection of victims and witnesses, and the management and preservation of the former tribunals' archives.<sup>1864</sup> MICT started operations on July 1, 2013, in The Hague, the Netherlands,<sup>1865</sup> and has the same organizational structure as the ICTY.<sup>1866</sup>

The residual mechanism may not issue new indictments under the ICTY Statute, but it is mandated to continue the work that the ICTY (and ICTR) started.<sup>1867</sup> MICT has been playing and will continue to play an active role in monitoring and assisting national jurisdictions in the investigation or prosecution of war crimes, crimes against humanity, or genocide.<sup>1868</sup> Additionally, the MICT is in charge of the preservation and management of the ICTY's archives—unique records containing information on indictments, court proceedings, testimonies, judgments—which tell the story of the tribunal and its accomplishments.<sup>1869</sup>

## **Financing**

The ICTY is funded through the regular budget of the United Nations, in accordance with Article 17<sup>1870</sup> of the UN Charter, as stipulated under Article 32 of the Statute. In recent years, the ICTY's annual expenditures have been approximately US\$140 million (each for the years 2010 and 2011), US\$125 million (2012, 2013), and US\$90 million (2014, 2015).<sup>1871</sup> The downward trend in annual operating costs reflects the winding up of the tribunal and its movement into the "residual mechanism" phase. As a point of comparison, the ICTY's annual budget in 2000 was \$90 million.<sup>1872</sup> Through 2007, the court had received over US\$1.2 billion in funding.<sup>1873</sup>

The Registry reports that the court's legal aid system accounts for about 11 percent of the total annual budget.<sup>1874</sup> The language section, responsible for interpretation and translation services, also accounts for a significant portion of the tribunal's budget, since all trials require interpretation and transitional into three languages. A 2006 article put the cost of language services at 10 percent of overall Registry costs and put the Registry's costs at 69 percent of the annual operating costs of the ICTY as a whole.<sup>1875</sup>

In addition to the regular budget, the ICTY has received donations and other forms of nonfinancial support from states and other agencies. Donations, although accounting for only one percent of the tribunal's budget, have been vital for the court's operations; they have been used to fund activities including the exhumation of mass graves and outreach.<sup>1876</sup> The Registry's outreach program, which is not integrated into the court's regular budget, has relied heavily on contributions to the ICTY Outreach Program Trust Fund. Major donors have been the European Union, the United Kingdom, Luxemburg, the United States, Finland, Denmark, Norway, and the Netherlands.<sup>1877</sup> As of July 31, 2015, the voluntary fund had received approximately US\$53.4 million in donations since the ICTY's creation.<sup>1878</sup> In 2016, the EU confirmed that it would continue funding the outreach program until the tribunal's closing.<sup>1879</sup>

Many have regarded UN-created ad hoc tribunals as too expensive for the value they deliver.<sup>1880</sup> For the ICTY, this perception contributed to the development of an exit strategy by the UN Security Council. Various factors beyond judicial or staff salaries and expenses have driven the high cost of ICTY cases. These "include the length and complexity of international criminal trials; the inclusion of investigation, detention unit, and other non-judicial costs in the ICTY budget; translation and travel expenses necessitated by the international character of the tribunal and its location; unusual witness relocation costs [etc.]."<sup>1881</sup> Failures of state cooperation, including Serbian institutions' involvement in protecting fugitive Ratko Mladić from arrest, meant some trials that could have been merged had to be conducted separately, and thus started later.

The ability of the ICTY (and ICTR) to rely on assessed rather than voluntary funding has provided greater budget certainty. This funding model has also helped to protect the court from accusations it serves the interests of donors who may be biased.



## Oversight and Accountability

Because the UN Security Council created the ICTY as an ad hoc body under Chapter VII of the UN Charter, the UN has closely monitored its work. Article 34 of the ICTY Statute provides that “the President of the International Tribunal shall submit an annual report of the International Tribunal to the Security Council and to the General Assembly.”<sup>1882</sup> However, the ICTY lacks an international oversight mechanism “mandated to review the activities of the ICTY and either legislate to revise the Tribunal’s operational imperfections or present the Security Council with options and recommendations for this purpose.”<sup>1883</sup> Because the statute does not provide guidance on indicators for the measurement of the tribunal’s performance, some observers have concluded that it has operated without meaningful oversight.<sup>1884</sup>

National and international NGOs working on justice issues in the former Yugoslavia have played a significant role by monitoring the ICTY’s proceedings. Important domestic actors include the Humanitarian Law Center, Fractal, and Youth Initiative for Human Rights (YIHR) in Serbia; YIHR, Documenta: Center for Facing the Past, and Center for Human Rights in Croatia; the Humanitarian Law Center-Kosovo in Pristina; and the Nansen Dialogue Centre in Bosnia. International NGOs that have closely followed the proceedings include Human Rights Watch, the International Center for Transitional Justice, and the Coalition for International Justice.

## **BOSNIA: WAR CRIMES CHAMBER AND SPECIAL DIVISION FOR WAR CRIMES IN THE PROSECUTOR'S OFFICE**

### **Conflict Background and Political Context**

*For the broader context of the war in Bosnia and Herzegovina, see the profile of the International Criminal Tribunal for the former Yugoslavia.*

Between 1992 and 1995, around 100,000 people were killed during the war in Bosnia and Herzegovina (BiH).<sup>1885</sup> The war displaced many more Bosnians internally and abroad as they fled violence and grave crimes that included widespread sexual violence and the targeted destruction of cultural heritage. Following NATO's intervention, the Dayton Peace Accords of November 1996 formally ended the war and created a new constitution for a nominally unified country. However, the Dayton agreement solidified the country's division into two strong entities: The Federation of Bosnia and Herzegovina (FBiH) and the Republika Srpska (RS). State-level institutions were weak from the outset, as a majority of Serbs (concentrated in the RS) and many Croats (concentrated in the FBiH) rejected the state itself. Government officials in neighboring Serbia and, decreasingly over time, in Croatia continued to call into question the viability of a Bosnian state. Dayton created an international Office of the High Representative (OHR), which later gained powers to remove obstructionist officials and impose legislation.<sup>1886</sup> OHR played a central role in the creation of the State Court of Bosnia and Herzegovina and its special War Crimes Chamber (WCC), as well as the Prosecutor's Office of Bosnia and Herzegovina (POBiH) and its Special Division for War Crimes (SDWC).

The Bosnian state remains fragile. Populations remain largely segregated by ethnicity, and the Dayton constitution, negotiated by nationalist leaders, established an election system that rewards candidates running for office who play on ethnic fears and promise protection for "their" people. Milorad Dodik, who has been the president of the Republika Srpska since 2010, has led sustained political attacks on state-level institutions, including the State Court. He called for the expulsion of international prosecutors,<sup>1887</sup> and since 2015 he has pushed for a referendum to challenge the State Court's authority over Serbs.<sup>1888</sup> As centripetal forces tear at the state, the international community has grown weary of making a broken system work, but also has shown little interest in tackling the structural dysfunction of the electoral system created at Dayton. Against this backdrop, and despite their notable achievements, the State Court and POBiH will only be as viable as the state itself.

## **Existing Justice-Sector Capacity**

The complex structure of government institutions resulting from the Dayton Peace Accords was a key initial challenge in the creation of an impartial and effective legal system and in the improvement of judicial sector capacity.<sup>1889</sup> Prior to the WCC's establishment, some local courts handled war crimes cases referred from the International Criminal Tribunal for the former Yugoslavia (ICTY) under the 1996 Rules of the Road Agreement (see text box, below).<sup>1890</sup> Local prosecutions were mostly ineffective, suffering from lack of coordination, resources, and specialized war crimes prosecutors and investigators.<sup>1891</sup> Additionally, prosecutions in local courts often reflected the ethnic composition of the local communities and were perceived as “ill-suited to render impartial justice.”<sup>1892</sup>

Even as the ICTY suggested the transfer of its caseload to national jurisdictions, it raised concerns over the ability of these countries to fairly and efficiently tackle the cases, given widespread concerns about the safety of witnesses, judges, and prosecutors, as well as continued ethnic bias allegations and the overall weak capacity of the legal system.<sup>1893</sup>

## **Existing Civil Society Capacity**

In the early 1990s, civil society in the former Yugoslavia was in a nascent state, still emerging from the incomplete transition from the post-World War II authoritarian rule of Josip Broz Tito. The war further weakened these fragile institutions, as many intellectual leaders fled. Further, the war left many civil society organizations polarized along ethnic grounds. Even multiethnic organizations with an ethos of tolerance found it difficult to attempt to influence the Byzantine state structures created at Dayton, especially as its election system was primed to respond to ethnic fearmongering rather than the type of advocacy typically used by NGOs.<sup>1894</sup> As a result, even domestic civil society actors who favored the creation of a State Court and its special divisions for war crimes and organized crime had minor roles in its realization. While there were NGOs that advocated for the creation of a domestic mechanism for the prosecution of war crimes in the aftermath of the war, civil society and victims' groups were barely consulted on the establishment of the WCC.<sup>1895</sup>

## Creation

In September 2001, the ICTY's Office of the Prosecutor presented the idea of establishing a special war crimes court in Sarajevo. The OHR had commissioned a group of experts headed by a former head of investigations for the ICTY to write a report on the need for such a court.<sup>1896</sup> The WCC was created in the context of the ICTY's completion strategy and as a direct result of a 2003 agreement between the OHR and the ICTY.<sup>1897</sup> Following the creation of the State Court of Bosnia and Herzegovina in 2002 and as part of a wholesale restructuring of its judiciary, the OHR planned for the establishment of the WCC by adopting a series of laws—among them a new criminal code and criminal procedure code in 2003<sup>1898</sup>—which the national parliament later ratified. These processes were catalyzed by the ICTY's completion strategy. The high representative made extensive use of his executive powers (known as the Bonn Powers) in creating the State Court, the Prosecutor's Office of Bosnia and Herzegovina (POBiH), and its special divisions for dealing with war crimes and corruption.<sup>1899</sup> The SDWC within the POBiH was created in January 2005, and the WCC was inaugurated in May of that year.<sup>1900</sup>

## Legal Framework and Mandate

The WCC is a domestic chamber in Sarajevo that has jurisdiction over war crimes, crimes against humanity, and genocide committed during the 1992–1995 conflict. The WCC applies domestic Bosnian law and handles cases referred to it from the ICTY and cases brought by SDWC prosecutors. For a period of time, the WCC had a mixed national-international composition, but as of 2012, the WCC is comprised of 48 local judges only.<sup>1901</sup>

As stated above, in 2003, a new criminal code and criminal procedure code were approved by the national parliament. The new legislative framework substantially departed from the previous inquisitorial system. It abolished the investigative judge and placed prosecutors in charge of investigations. It also introduced the adversarial trial practices of direct and cross-examination and the concept of plea bargaining, as well as reducing the role of the judges in questioning witnesses. Despite these new elements, substantial aspects of old Yugoslav civil law remained in the 2003 criminal procedure code. For example, Bosnia still has no system of binding precedent or rules of evidence. The new code created substantial room for disagreement over how it should be interpreted.<sup>1902</sup>

Bosnia signed the 1998 Rome Statute of the International Criminal Court on July 17, 2000, and ratified it on April 11, 2002. The 2003 criminal code catalogues and issues sentencing guidelines for international crimes. These include genocide; crimes against humanity; war crimes against civilians; war crimes against the wounded and sick; war crimes against prisoners of war; organizing a group of people and instigating the perpetration of genocide, crimes against humanity and war crimes; unlawful killing or wounding of the enemy; marauding the killed and wounded at the battlefield; violating the laws and practices of warfare; unjustified delay in the repatriation of prisoners of war; and destruction of cultural, historical, and religious monuments.<sup>1903</sup> The criminal code includes the notion of command responsibility for violations of international humanitarian law.<sup>1904</sup> The Prosecutor's Office used this code in all of its prosecutions, even though it was not in effect during the conflict. In July 2013, the Grand Chamber of the European Court of Human Rights unanimously found that Bosnia's retroactive application of the 2003 code violated the human rights of two convicted persons because heavier penalties were available under that code (the 1976 Yugoslav code) than under the code in effect at the times the crimes occurred.<sup>1905</sup> The ruling applied to sentencing provisions and crimes that were defined in the 1976 code. The court noted that the 1976 code left crimes against humanity undefined, so prosecutors could still apply the 2003 code in those matters, as the offenses were defined under international law at the time of the events.<sup>1906</sup>

In 2004, the state-level parliament adopted a law to regulate the receipt of cases from the ICTY.<sup>1907</sup> It states that for cases transferred to BiH under ICTY Rule 11*bis*, "the BiH Prosecutor shall initiate criminal prosecution according to the facts and charges laid out in the indictment of the ICTY" and adapt the indictment to Bosnian law.<sup>1908</sup> Further, it provides for the possibility that the Bosnian prosecutor could add new charges to the adapted ICTY indictment in accordance with the Bosnian criminal procedure code.<sup>1909</sup> Finally, the law also mandates that the Bosnian prosecutor pursue criminal proceedings in what have come to be known as Category II cases: pre-indictment cases that the ICTY prosecutor sends to the Bosnian prosecutor, and which do not, unlike Rule 11*bis* cases, require the approval of ICTY judges.<sup>1910</sup>

Even as war crimes investigations and prosecutions increase across the region, mutual legal assistance frameworks on extradition, information sharing, and execution of sentences are weak and politically fraught.

### ***Witness Protection***

In January 2003, the international high representative for Bosnia imposed the Law on Protection of Witnesses Under Threat and Vulnerable Witnesses.<sup>1911</sup> That law specifies

that the court, the prosecutor, and other parties in the proceedings are to advise potentially threatened or vulnerable witnesses about available protection measures.<sup>1912</sup>

The criminal procedural code itself contains a general provision obligating judges to protect witnesses from in-court insults, threats, and attacks; in these events, they have the option to warn, issue fines, or even order arrests and prosecutions.<sup>1913</sup> The Law on Protection of Witnesses further mandates judges to determine whether videoconference testimony should be used<sup>1914</sup> and allows them to remove the accused from the courtroom “where there is a justified fear that the presence of the accused will affect the ability of the witness to testify fully and correctly,” in which case the accused is provided with access to live video of the trial.<sup>1915</sup> Under “exceptional circumstances,” witnesses under severe threat may testify in anonymity. Less exceptional, the law allows judges to delay disclosure of witness identity to the defense.<sup>1916</sup> Officials found to have compromised witness protection measures face prosecution.<sup>1917</sup> In September 2004, the Bosnian Parliament amended the criminal code to include penalties not only for officials, but for anyone involved in revealing the identity of a protected witness.<sup>1918</sup>

Both the criminal procedural code and the Law on Protection of Witnesses contain provisions on in-court protection for vulnerable witnesses. Victims of sexual violence are not allowed to be questioned on their past sexual behavior or predisposition.<sup>1919</sup> Judges are required to “exercise an appropriate control over the manner of the examination of witnesses when a vulnerable witness is examined, particularly to protect the witness from harassment and confusion.”<sup>1920</sup> In exceptional circumstances, the judges can pose questions to the witness on behalf of the parties and defense counsel, if these consent to the procedure.<sup>1921</sup>

Also in 2004, parliament approved the creation of a Witness Protection Department within the State Investigation and Protection Agency (SIPA), to which it gave the responsibility of conducting witness risk assessments.<sup>1922</sup> The head of the Witness Protection Department is charged with protecting the witnesses under threat “during and after criminal proceedings.”<sup>1923</sup> The program has the authority to provide protected witnesses with temporary cover identities and documents.<sup>1924</sup> In 2015, local NGOs and various UN entities working in Bosnia reported that the Witness Protection Department had been closed.<sup>1925</sup>

Shortcomings in witness protection experience and capacity led to the adoption of a Memorandum of Understanding between SIPA and the Registry of the State Court in February 2005. Although the WCC has been slow to develop witness protection

procedures, it has made significant gains after the adoption of a National Strategy for Processing of War Crimes Cases (National War Crimes Strategy) in December 2008,<sup>1926</sup> and through ad hoc procedures drawn up by judges. A national Witness Protection Program Law, which had been debated since 2008, was adopted in April 2014.<sup>1927</sup> However, the law is far from being inclusive, since the law applies only to witnesses testifying before the State Court and not to war crimes trials in District Courts in the Republika Srpska and other lower courts throughout the country.

### ***Concurrent Jurisdiction with District and Cantonal Courts***

The WCC shares concurrent jurisdiction over atrocity crimes with 16 District and 10 Cantonal Courts throughout Bosnia's Republika Srpska and Bosnian Federation entities, respectively known as "local courts."<sup>1928</sup>

Bosnia's judicial system does not provide a strict hierarchy between the State Court and the courts within the two entities, and therefore the WCC is not formally superior in jurisdiction.<sup>1929</sup> This lack of clarity has prevented the development of national war crimes jurisprudence, as Cantonal and District Courts are not required to follow the WCC's jurisprudence.<sup>1930</sup> Decisions by the WCC are not identified by author, and dissenting opinions are not public (under national law), further limiting the impact of the WCC's opinions.<sup>1931</sup> However, the WCC has applied international humanitarian law (IHL) in a sophisticated, although at times inaccessible, manner, including on international criminal modes of liability such as joint criminal enterprise and command responsibility. The presence of international judges and prosecutors from the ICTY at the WCC and SDWC bolstered the WCC's sophisticated application of IHL.

Upon the establishment of the WCC and SDWC, prosecutors of the latter loosely followed a case strategy by sending "highly sensitive" cases to the WCC and "sensitive" cases to local courts. Since the adoption of the National War Crimes Strategy in 2008 by the Council of Ministers of BiH, cases have been sorted based on "complexity criteria," taking into account "the gravity of the criminal offence, the capacity and role of the perpetrator, and other relevant miscellaneous considerations."<sup>1932</sup> The criteria did not provide clear guidance defining "most complex" and "less complex."

The 2008 strategy, which sought to "ensure a functional mechanism of the management of war crimes cases, that is, their distribution between the state-level judiciary and judiciaries of the entities," partially improved the division of tasks

between jurisdictions.<sup>1933</sup> Yet, since its creation, implementation of the plan has been “complex, fraught with difficulty, and slow.”<sup>1934</sup> One significant achievement was a comprehensive case-mapping project carried out in 2009 and 2010, which allowed the POBiH to report approximately 1,381 war crime case files on over 8,000 suspects across all jurisdictions.<sup>1935</sup> However, a study on the implementation of the strategy in 2016 showed that since the adoption of the strategy “the prosecution did not process the most complex war-crime cases to a sufficient extent” and that it was still working on 346 cases.<sup>1936</sup> Since the strategy set the deadlines for completing the most complex cases by 2015, and all remaining war crimes cases by 2023, the study also concluded that while the transfer of cases has increased over time, it remains unsatisfactory.

## **Location**

The WCC’s location just outside of Sarajevo’s city center makes it accessible to the local population, although attendance at trials has been limited.<sup>1937</sup> The modern facilities of the court, including its audio-visual equipment, are used by other specialized divisions and will remain a permanent asset to the judiciary.<sup>1938</sup> The premises include six courtrooms for war crimes trials. Defense attorneys have some designated offices in the court, although the main defense assistance office is located in a separate building. There is a real danger that the court is seen as a “Sarajevo” institution—mitigated somewhat by cantonal and district-level war crimes prosecutions. Most national court employees are Bosnian Muslims, a sign of their predominance in Sarajevo’s population and perhaps a sign of their greater acceptance of state-level institutions. Some have suggested that offering additional financial incentives could attract a more ethno-religiously diverse staff from different regions of the country.<sup>1939</sup>

## **Structure and Composition**

WCC organs comprise Chambers (trial and appellate divisions) and the Registry (housing outreach, witness protection, and public information divisions, and until 2009 the Odsjek Krivične Odbrane [OKO], a defense assistance section). The SDWC, which is responsible for bringing cases before the WCC, resides within the POBiH. Apart from a designated war crimes chamber, the State Court of Bosnia and Herzegovina contains other specialized chambers, and the POBiH contains other prosecution units to try complex crimes including organized crime, corruption, and high-level criminal cases.<sup>1940</sup>



Throughout the years of its existence, the organs within the State Court have made a shift from being internationally led to becoming fully functioning national institutions. The WCC and SDWC began with mixed composition in Chambers, the Prosecutor's Office, the Registry, and the OKO, which is the defense support office. Many international staff and judges moved from the ICTY to the WCC and SDWC, bringing a wealth of experience and strengthening institutional ties.<sup>1941</sup> International involvement was designed to enhance local capacity, transfer skills and knowledge, and blunt charges of ethnic bias in case selection and prosecution.<sup>1942</sup> However, these goals were hindered from the beginning by a lack of "strategic vision to maximize the benefits of international staff."<sup>1943</sup> Capacity building "has not worked by simple mentoring or 'by example.'"<sup>1944</sup> (For more on this, please see the *Legacy* section, below.) Many international judges came from civil law backgrounds, while international prosecutors came from common law backgrounds, compounding the difficulties the WCC faced in harmonizing practices under the new adversarial code of criminal procedure.<sup>1945</sup>

The pivotal period for the WCC was 2008–2009. A raft of reports and assessments of the WCC's and SDWC's achievements and shortcomings fed into a major restructuring of the court.<sup>1946</sup> According to the OSCE and the EU, the court emerged stronger as a result of the reform initiatives and assessments.<sup>1947</sup>

Domestic implementing legislation, agreements, and transition plans envisioned a six-phase exit of international personnel within five years, by December 14, 2009.<sup>1948</sup> At the end of 2009, OHR issued a decision to extend the presence of international judges, prosecutors, and other personnel because of concerns about the national capacity to deal with war crimes cases without international assistance.<sup>1949</sup> The Registry, which was initially an internationally led adjunct body outside of the WCC, had a fixed end date. It began phasing out international staff in 2006, earlier than the Prosecutor's Office or Chambers, which both conditioned the phasing out of international staff upon the respective offices meeting certain benchmarks.<sup>1950</sup> These benchmarks included not just the number of cases that had been dispensed with, "but their complexity and the position of the defendant, whether there is a functioning witness protection program a prosecutorial strategy for handling cases that is consistently implemented, standardized judicial practice in routine areas, and finally an assessment of the political climate's conduciveness to the ongoing accountability processes by evaluating public statements made by public figures and media reports of trials involving atrocity crimes."<sup>1951</sup> The existence of an underlying strategy to transition to a fully national court was commendable, although overly aggressive, and allowed too short of a timeframe for the impact of an international presence, given the complexity of the cases and political hostility toward the court.<sup>1952</sup>

## ***Chambers***

Three judges sit on trial court panels, and five on appeals panels. There were initially six of the former and two of the latter. The appellate structure and overbroad grounds of appeal under the criminal procedure code (including the lack of clarity in written judgments) has led to a high rate of vacancies of judgments and retrials. Initially, international judges comprised a majority on both panels, with national judges presiding as heads. In January 2008, the composition reversed. Before their withdrawal entirely at the end of 2012, international judges only sat on Appeals Panels. International judges were first seconded by their home government but were later selected through a competitive process administered by the Registry and salaried through a donor basket fund.<sup>1953</sup> The High Judicial Prosecutorial Council (HJPC) formally appointed the international judges. International judges were initially not required to have extensive experience in criminal law (although many carried that experience from previous tenure at the ICTY), but later, international judges were required to have eight years' experience in complex criminal matters (the same as national judges).<sup>1954</sup>

## ***Prosecutions: Special Department for War Crimes of the Prosecutor's Office (SDWC/POBiH)***

The SDWC is responsible for the prosecution of war crimes cases emerging from the 1992–1995 conflict.<sup>1955</sup> Prosecutors are tasked with bringing “highly sensitive” cases before the WCC, while leaving “sensitive” cases to local jurisdictions. In practice, the SDWC prosecutors were slow to prioritize cases.<sup>1956</sup> The prosecutorial strategy was not fully articulated until 2009 and has been “unclear, and in any event ... not applied consistently or predictably.”<sup>1957</sup> The Prosecutor's Office clumsily communicated its prosecutions strategy to the public, sowing confusion about the role of ethnicity in case selection and prosecution.<sup>1958</sup> The SDWC's initial prosecutions and prosecutorial strategy drew heavily upon conflict mapping information gathered by the ICTY. As national prosecutors developed cases, however, they needed a comprehensive mapping strategy keyed to national prosecutorial strategy. In response, various needs-assessments and mapping processes were carried out to assist the prosecution.<sup>1959</sup>

The identification of thousands of war crimes cases at the investigative stage resulted in a backlog in prosecutions. Some of this backlog, beyond the inherently massive challenge of dealing with crimes perpetrated on such a large scale, and a poorly executed prosecutorial strategy, must also be attributed to overall weakness of the judiciary and the fragmentation of war crimes proceedings.<sup>1960</sup>

Since 2008, prosecutors increasingly used plea bargaining, an alien practice prior to the 2003 criminal procedure code. The strategic usefulness of plea bargaining vis-à-vis the goals of case backlog reduction efforts will need to be carefully weighed by prosecutors.<sup>1961</sup>

By June 2008, six international prosecutors and thirteen national prosecutors were split into six teams, organized by region, in the war crimes prosecution section (with one international appointed per team). The mixed teams did not lead to extensive skills-sharing, as was hoped. International prosecutors were perceived to be more capable of tackling complex and politically sensitive cases (including in the State Court's specialized anticorruption division) and handled most Rule 11*bis* cases. This generated some backlash: local prosecutors complained of exclusion from work that they felt capable of handling. On all except the Srebrenica prosecution team, international and national prosecutors did not work closely together on the same cases, which minimized interaction between international and national prosecutors. International prosecutors were paired with international legal assistants and vice versa. A 2007 plan by the international head prosecutor to standardize practice, improve communication, and develop institutional arrangements for information-sharing was not fully implemented. In June 2011, four international prosecutors still remained at the WCC. International involvement ended at the end of 2012.

### ***Registry for the State Courts of BiH and the Special Departments***

The Registry handles administrative affairs, case management, and outreach functions, and coordinates witness protection with a state agency.<sup>1962</sup> Initially, the Registry housed the defense assistance office (OKO), which is now an independent institution. The Registry was created by an agreement between the OHR and POBiH in December 2004, and the OHR appointed an international as the initial registrar. By March 2006, the international registrar and deputy were replaced by nationals, and in the same year, the Registry was “split” into two offices in the WCC and the POBiH. By 2007, the POBiH registrar position was held by a national, and by 2009, most Registry staff in both offices were nationals. The existence of two Registries caused confusion as to authority over administrative issues, exacerbated by a lack of clarity about the overlapping role of a “Management Committee,” which was tasked with administrative, personnel, and budgetary matters.<sup>1963</sup> The POBiH Registry was generally considered to be less effective, more bureaucratic, and redundant.

### ***Outreach: Public Information and Outreach Section of the War Crimes Chamber Registry (PIOS)***

A lack of comprehensive outreach programs or strategy has been a key weakness of the WCC. Although no public information and outreach program can be expected to fully protect against political attacks and misinformation, weakness in this area made the court unable to mount a vigorous response to political attacks and perceptions of ethnic bias within Bosnia. The problem was particularly acute at the outset.<sup>1964</sup> The outreach unit has, however, engaged in initiatives and steadily bolstered capacity over the years. A short-lived “Court Support Network” of NGOs carried information about the court to local communities between 2006 and 2007 but closed because of lack of funds.<sup>1965</sup> The United Kingdom funded the creation of a comprehensive public information and outreach strategy for the POBiH and the court, which was adopted by the judges in late 2008. Subsequent efforts included visits by victims to the court, media campaigns, and educational campaigns.

### ***Witness and Victim Support***

The Witness Support Section within the SIPA Witness Protection Department and the Witness Support Office within the WCC Registry (WVS) provide thorough in-court witness support services to both prosecution and defense witnesses.<sup>1966</sup> Such in-court measures include transport and logistical assistance, sophisticated technology for voice distortion and video link, modest remuneration for travel, pretrial explanation of court procedures, use of closed sessions and private waiting rooms, and limited psychosocial support (at times subcontracted through NGOs). Post-testimony follow-up services are limited: the WVS staff includes professional psychologists and social workers, who are available through a 24-hour telephone hotline. Early international staff, including the first WVS director, came from the ICTY’s Victim and Witnesses Section, bringing a sense of the importance of witness protection and lessons-learned from early missteps at the ICTY. A criminal code provision allowing courts to assign legal representation to victim-witnesses under limited circumstances has not been applied since 2007 because of a lack of resources. Victims are also entitled to seek direct compensation claims from the WCC, but in practice they are instructed to use the criminal verdict to seek compensation through civil action.<sup>1967</sup>

Out-of-court witness protection services are provided by a state agency, SIPA’s Witness Protection Unit. Early on, the Registry provided an international adviser, supported by a donor government, to facilitate the relationship between SIPA and the WCC. SIPA’s witness services have been limited due to a lack of resources and a weak national legislative framework for witness protection.<sup>1968</sup>

Prosecutions rely heavily on testimony from victims and witnesses, although the courts have failed systematically to ensure their protection and continued participation. In some cases, inadvertent disclosure of the identities of protected witnesses by the parties and the judges has raised serious concerns. In 2008, victim and witness protection frameworks were significantly strengthened through two documents: internal rules and procedures created by an ad hoc working group of judges, and a national strategy for war crimes processing. The state court failed to successfully implement the witness protection provisions called for in the National War Crimes Strategy. A long-discussed national witness protection law was adopted in April 2014. Many victims and witnesses have been called to testify numerous times at the WCC, the ICTY, and the entity courts, leading to “witness fatigue,” compounded by weak coordination between courts. Because of the law, victim and witness support increased before the State Court, and gradually improved at entity-level courts.<sup>1969</sup>

***Defense: Criminal Defense Support Section—Odsjek Krivične Odbrane (OKO)***

The Registry initially housed the OKO, which is now an independent institution and generally regarded as a good example of mixed-staffing structure. Initially, an international director and deputy headed OKO, which was staffed by nationals. International staff at times supplemented the national staff, including fellows and short-term international lawyers. In May 2007, a national lawyer replaced the international director as part of its transition to a fully national institution. OKO provides legal research, support, and assistance to national defense counsel, including translation services and training on law and practice issues.<sup>1970</sup> The American Bar Association’s Central and Eastern European Law Initiative (ABA-CEELI) initially funded and assisted OKO.<sup>1971</sup>

Accused are represented by privately retained national counsel and remunerated by the court, if justified by the defendant’s financial status. National defense counsel vary widely in quality. In most cases, the WCC appoints an additional ex officio defense attorney. OKO staff cannot directly represent accused, but often receive power of attorney from defense counsel, entitling them to review case files and attend closed sessions. While through 2012 there were international prosecutors, there were only international defense attorneys under rare circumstances. This lack of congruity raised procedural fairness concerns, especially as national defense attorneys initially lacked experience in conducting defense investigations. OKO maintains a list of counsel eligible to take cases at the WCC, and to be listed, most counsel are required to participate in its trainings. Over time, this has improved the quality of defense before the WCC. In response to concerns over defense

counsel's limited access to ICTY evidence, the ICTY amended its rules to facilitate easier access to documents by all outside parties (the Rule 75H process). OKO's international staff initially served as crucial intermediaries between national defense attorneys and the ICTY.<sup>1972</sup>

## Prosecutions

By 2017, the WCC had issued 96 war crimes verdicts.<sup>1973</sup> According to statistics from the OSCE War Crimes Processing Project—a project focused on expediting the fair and effective processing of war crimes cases in Bosnia—as of March 2013, 214 war crimes cases were completed in BiH (roughly evenly split between the WCC and the Cantonal and District Courts); a total of 235 persons were convicted and sentenced; and approximately 1,315 war crimes cases remained to be prosecuted.<sup>1974</sup> By 2017, the War Crimes Map of the OSCE listed 410 war crimes cases that were adjudicated throughout BiH since the end of the war.<sup>1975</sup> The ICTY transferred six cases involving 10 defendants to the court under Rule 11*bis*, and motions to transfer cases were either denied or withdrawn in five other cases.<sup>1976</sup>

Although a significant number of WCC cases included charges of sexual violence as either war crimes or crimes against humanity,<sup>1977</sup> the overall number of sexual violence cases before the Bosnian courts remains low in comparison to the occurrence of such crimes during the 1992–1995 conflict. The OSCE reported in 2015, “Over the last decade, more than 170 war crimes cases against over 260 defendants have been concluded at the entity level and Brčko District BiH courts. Of these cases, 35 involved allegations of sexual violence against 45 defendants, wherein 34 perpetrators were convicted in 27 cases—representing a conviction rate of around 75 percent. At the end of December 2014, proceedings in 20 cases involving allegations of sexual violence were ongoing before the courts, while many more such cases were under investigation.”<sup>1978</sup> In 2017, Amnesty International estimated that less than one percent of the total number of rape and sexual violence victims have come before the courts.<sup>1979</sup>

The 2008 National Strategy for War Crime Cases set the goal to complete the most complex and highest priority war crimes cases by 2015, and all other cases by 2023. In the beginning of 2016, 346 cases against 3,383 individuals were still being processed by the Bosnian courts, which is not even half of the cases that need to be considered, according to the 2009–2010 case-mapping project.<sup>1980</sup> This leads us to believe that it will be difficult—if not impossible—for the Bosnian courts to complete war crimes prosecutions before the set deadlines.

## Legacy

The work of the WCC and SDWC—together with the work of the ICTY—has undoubtedly had an impact on the judicial system and Bosnian society as a whole, and has at least theoretically paved the way for truth-telling and reconciliation. A few years into the courts' creation, Mirsad Tokaca, the director of the local NGO Research and Documentation Centre, stated: “While the ICTJ [International Center for Transitional Justice], the OSCE Mission to BiH, and others have identified a number of concerns relating to the BWCC [Bosnian War Crimes Chamber], it has generally received high marks for its overall performance and is now seen as a model form of hybrid court.”<sup>1981</sup>

### *Impact on Society*

Although “public appetite for justice in Bosnia as dispensed by the [WCC] has shrunk over time,”<sup>1982</sup> the court engaged the population and implemented a genuine and sustainable process for war crimes prosecutions. OSCE surveys and measurements of public perception of the WCC and the other divisions of the State Court show that “public confidence in war crimes processing is fragile and widespread distrust in the institutions is still a feature in BiH society.”<sup>1983</sup> A 2015 survey by the UN Resident Coordinator's Office in BiH showed a slight increase in public support for work of the WCC and other local courts. While 29.1 percent of the population showed confidence in the work of the Bosnian courts in 2013, this number increased to 42.1 in 2015.<sup>1984</sup> The study also showed that while the vast majority of the population has little or no experience with war crimes proceedings, of those who had, only half recognized its relevance, while the other half held a neutral position toward the work of local courts.<sup>1985</sup>

A 2010 study on the perceptions on war crimes trials in Prijedor, a region northwest of Bosnia that suffered from brutal and widespread violence during the war, concludes: “However, the apathy and indifference towards the war crimes trials among victims betray a sense of hopelessness and utter lack of expectations that such trials will change much when it comes to their current status and relations in their communities. Victims' expectations now appear to be solidly focused on individual perpetrators being removed from their midst. The dominant perception among Prijedor victims is, however, that a comprehensive, transformative, sort of justice is beyond reach and that war crimes trials cannot deliver on such promises in the present political and communal climate.”<sup>1986</sup>

Ethnicity continues to play a major role in perceptions of wartime suffering. A UN survey in 2013 observed: “Bosniaks are convinced that their ethnic group suffered the most during the war. Croats believe that everyone suffered during the war but not equally, whereas Serbs believe that everyone suffered equally. The majority of citizens state that people from their ethnic groups were not responsible for the war crimes, and Bosniaks are more convinced in this than Serbs and Croats.”<sup>1987</sup> Overall, many members of all ethnic groups remain unwilling “to face their own crimes or victims.”<sup>1988</sup> And until today, persons who have been convicted or charged with war crimes remain in political power and sustain public support from their own ethnic group.<sup>1989</sup>

Twenty-five years after the end of the war, ethnic tensions remain engrained in the Bosnian society, and reconciliation between Bosniaks, Serbs, and Croats is largely absent, which is partially due to the far-reaching ethnic separation cemented in Bosnia’s state structure and perpetrated through its election system. A 2014 report on the effects of the WCC on the reconciliation process in BiH concludes that while both victims and perpetrators of war crimes express that war crimes proceedings will contribute to truth-telling and prevention of further crimes in the future, they do not believe that war crimes trials in BiH have supported reconciliation.<sup>1990</sup> Others also see that the State Court only remains a “potential path to reconciliation.”<sup>1991</sup>

Finally, the Nuhanovic Foundation Center for War Reparations reported in 2014 that while the right to reparation is recognized under Bosnian laws, “the path to a successful claim for compensation or other forms of satisfaction in Bosnia and Herzegovina is an extremely arduous one and claimants are routinely thwarted by problems that are inherent in the post-war system of government.”<sup>1992</sup> Legal victories by sexual violence survivors in 2015 opened up new prospects for reparation in their cases.<sup>1993</sup>

### ***Impact on Legal Reform***

The introduction of new criminal code and criminal procedural code in 2003 was designed to facilitate war crimes prosecutions and transfers of cases and evidence from the ICTY,<sup>1994</sup> and it managed to avoid some of the jurisdictional inadequacies facing other domestic war crimes courts.<sup>1995</sup> However, a compromise agreement fragmented the judiciary, and entity courts are not required to follow the jurisprudence of the WCC. Local legal professionals experienced difficulties in implementing and shifting to the new system. The reforms were drafted mostly by foreign lawyers, creating some tension with local legal professionals, who felt the foreign lawyers did not adequately understand, appreciate, or adapt to the local legal context.<sup>1996</sup>



Before the WCC and the creation of a specialized war crimes prosecutions unit, there was little sustained involvement or investigations by District and Cantonal Courts into war crimes cases. Developing local capacity “became a concern only as a result of the need to close down the [ICTY].”<sup>1997</sup> In mid-2010, survey and mapping exercises conducted with local and SDWC prosecutors of investigative stages of war crimes proceedings improved the situation.<sup>1998</sup> Cantonal and district-level prosecutions are often tried under the Criminal Code of the former Yugoslavia, which does not foresee crimes against humanity (in contrast to the 2003 BiH Criminal Code applied by the WCC), hindering the full application of international humanitarian law at the local level.<sup>1999</sup> Many District and Cantonal Courts do not have specialized war crimes prosecution and investigation units.<sup>2000</sup> While there are many recommendations for how the process could have maximized coordination with local courts and generated a broader spill-over effect, the WCC, SDWC, and the 2008 National War Crimes Strategy generally improved capacity at the entity level, although inconsistently.<sup>2001</sup>

As of 2012, both the WCC and SDWC are operating as independent institutions. According to many, despite all the remaining challenges and the continued involvement of a range of international actors, “it can be considered a successful example of phasing out international staff and assumption of the full ownership of national staff.”<sup>2002</sup> While the performance of the State Court and other courts to address war crimes cases remains far from perfect, the EU continues to report improvements in the capacity to address the backlog of war crimes cases; a positive trend in the prosecution of war crimes cases involving sexual violence; and an increase in the use of victims and witness support and protection structures.<sup>2003</sup>

### ***Training and Skills-Sharing***

The WCC and SDWC lacked a focused and specialized training program or strategy to facilitate knowledge transfer between international and national personnel. Skills-sharing has been largely ad hoc and personality-driven. Numerous “study visits” by WCC judges and SDWC prosecutors to the ICTY helped form professional and institutional relationships between individuals, but yielded little transfer of operational “know-how.”<sup>2004</sup> When conducted in the context of a specific case or investigation, however, study visits were fruitful, because “there were concrete concerns to discuss and practical outcomes that were sought.”<sup>2005</sup> Outside groups conducted numerous trainings for personnel on international law and practice issues. In its early years, the court indiscriminately accepted training offers. As a result, many training courses were redundant and not responsive to the actual legal and

practical needs of the court, especially in management skills. Trainings yielded mixed results and led to “training fatigue.” Local legal professionals noted that trainers often were not well versed in Bosnia’s legal system—and international personnel noted they had not been properly trained themselves on local law and practice.

The WCC and the broader judiciary formalized several initiatives, including:

- *Witness Protection*: In the early phase of the WCC, an international advisor on witness protection coordinated procedures between the court and the state witness protection agency. OSCE facilitated several high-level roundtables on witness protection guidelines.
- *ICTY Legacy Initiatives*: Includes study trips and seminars led by ICTY staff for national counterparts, internships for junior prosecutors from the Balkans at the ICTY, and the publication of a “developed practices” guide.<sup>2006</sup>
- *Judicial Education*: Since 2007, a Judicial Education Committee, chaired by an international judge, “assess[es] offers of training and select[s] appropriate topics based on existing needs.”<sup>2007</sup>
- *Judicial and Prosecutorial Training Centers (JPTC)*: Since 2002, JPTC’s have operated across the FBiH and Republika Srpska entities. JPTCs offer crucial trainings for prosecutors and judges across the judiciary.<sup>2008</sup>

## Financing

According to Article 5 of the *Law on Court of Bosnia and Herzegovina*, the court has its own budget, “which shall be included in the budget of Bosnia and Herzegovina” and includes separate items for the work of Section I (for war crimes) and Section II (for organized crime, etc.).<sup>2009</sup>

The cost of the WCC project was estimated (in June 2006) at EUR 46.7 million. Figures from 2007 put the figure at EUR 48.5 million.<sup>2010</sup> In the past, the funding came from contributions from international donors. Salaries for international personnel were funded directly by states and managed separately from the WCC’s budget. International donors also provided contributions toward the WCC’s operational costs. From 2006 onward, the Registry commenced a process of transferring staff (and associated costs) and assets to the court proper, to be contained in the future within the budget funded by BiH.<sup>2011</sup> By 2007, the proportion

of international to national funds had “shifted from almost double to almost even.”<sup>2012</sup> While there were some difficulties in generating the requisite funding early on in the chamber’s lifespan (for example, at the 2006 donor conference) generally its funding has been sustainable.

The WCC Transition Strategy transferred budgetary management from the Registry to national authorities. International funding was channeled through and managed by the Registry, and overseen further by the Transitional Council and ad hoc coalitions of donor countries. Because contributions to the WCC and SDWC were voluntary and independent of the UN, the Registry expended considerable effort in raising sufficient funds from a broad range of donor countries.<sup>2013</sup> Generally, strong donor commitments from the outset sustained the WCC’s and SDWC’s financial situation. One exception was in the area of outreach, where a lack of initial support led to delays. The UK eventually funded a comprehensive public information and outreach strategy. As national funding increased, donors also viewed the court as a cost-effective, long-term investment. It was expected that the budget of the WCC and SDWC would be entirely funded from the national budget by 2010, and while this is formally the case,<sup>2014</sup> Bosnia continues to receive financial support for war crimes proceedings from international donors such as the EU.<sup>2015</sup>

The BWCC and the SDWC of the Prosecutor’s Office “have operated as cost-effective institutions, and their funding basis has been solid.”<sup>2016</sup> As noted in the 2008 analysis of the WCC and SDWC by the ICTJ, the “trials at the BWCC [were] far less costly than those of international tribunals. ... From 1994 to 2005 the average cost of each first-instance ICTY judgment by accused was 15 million euros; at the International Criminal Tribunal for Rwanda (ICTR) it was 26.2 million. At the State Court the average cost was around 955,000 euros in 2006, around 680,000 euros in 2007, and the estimated cost for 2008 is a little less than 400,000 euros.”<sup>2017</sup> Nonetheless, ICTJ’s review also notes some of the reasons why such comparisons are imperfect, for example, not reflecting the vast body of adjudicated facts (from the ICTY’s findings) admitted into evidence before the WCC, which significantly reduced the length of trials. The use of courts to try political and military leaders in relation to a large number of acts is also much more complex than the trial of an individual perpetrator.

## **Oversight and Accountability**

Oversight over the independence and accountability of the judiciary is in the hands of the High Judicial Prosecutorial Council of Bosnia and Herzegovina (HJPC), which was created in 2004. The HJPC appoints and supervises judges and prosecutors of

the State Court and local courts, drafts and oversees the courts' budgets, and plays an important role in steering judicial and legal reforms.<sup>2018</sup> From 2005 until 2012, the HJPC was formally responsible for the appointment of international judges. The appointment process steadily increased the quality of international judges, who brought "credibility and public trust to the court but much less in terms of capacity or skills building than might have been expected."<sup>2019</sup> Criticisms of the design of the role of international judges include the following: (1) The one-year appointment periods for some international judges did not allow judges to develop familiarity with the Bosnian legal system and the complex cases, and created unequal caseloads. (2) The selection process and criteria did not always yield judges with relevant criminal law experience or technical knowledge. (3) Information transfer and capacity building between international and national judges were not institutionalized, but occurred on a mostly ad hoc basis.<sup>2020</sup>

The OSCE monitors trials as required under ICTY rules.<sup>2021</sup> The OSCE's long-term presence significantly contributed to building domestic judicial capacity in a number of areas beyond monitoring. Other local and international organizations, including the OHR and the UN Committee for Human Rights, also monitor trials and provide technical assistance to Bosnia's judiciary. The EU monitors judiciary reform and the implementation of the National Strategy for War Crimes in the light of Bosnia's future EU accession.<sup>2022</sup>

In 2005, the Balkan Investigative Reporting Network (BIRN), launched a "Justice Series" on war crimes trials in Bosnia and continues publishing daily reports on war crimes cases before the State Court and local courts today.<sup>2023</sup>

Early in the process, the ICTY had a direct role in oversight of Bosnian prosecutions: the so-called "Rules of the Road" procedure. The procedure, agreed to in Rome in 1996, was created in response to concerns about the state of local trials: that they were being used as tools of ethnic revenge; that there was a lack of due process; and that there was a lack of coordination in handling war crimes case files among local courts and with the ICTY. The Rules of the Road procedure allowed the ICTY to review prosecutions undertaken by the authorities in BiH to prevent arbitrary arrests and unfair trials.<sup>2024</sup> Under the arrangement, it was agreed that the ICTY's Office of the Prosecutor would review case files of those suspected of committing international crimes during the conflict to determine whether the files contained sufficient and credible evidence to support the issue of an arrest warrant. The ICTY performed this function from 1996 to 2004, reviewing 1,419 cases against 4,985 persons, with approval given for 989 persons to be arrested on war crimes charges.<sup>2025</sup>

# CROATIA

## Conflict Background and Political Context

The Croatian nationalist party declared independence from the Socialist Federalist Republic of Yugoslavia (SFRY) on June 25, 1991, which led to the Croatian War of Independence—also known in Croatia as the “homeland war.” Local Serb military forces, backed by the Yugoslav People’s Army (JNA), and Croatian government forces fought the war between July 1991 and November 1995. Ethnic Serbs organized local militia groups fiercely opposed to independence and declared their own independent Republic of Serbian Krajina (RSK) after claiming almost a third of Croatian territory and attempting to create an all-Serb state within Yugoslavia. In October 1991, the JNA began a seven-month siege of the southern Croatian city of Dubrovnik. Serb militia and JNA forces likewise besieged Vukovar, leading to the city’s complete destruction and a large-scale “ethnic cleansing” campaign against ethnic Croats.

After the establishment of a UN ceasefire in 1992, and the European Union’s recognition of Croatia, the United Nations Security Council established an international peacekeeping force in Croatia, the United Nations Protection Force (UNPROFOR).<sup>2026</sup> In the following years, violence abated, but there was no settlement of the war. In an attempt to end the war and reconquer lost territory, Croatian forces launched military operations Flash and Storm in 1995, which led to widespread killings and disappearances, and caused some 200,000 Serbs to leave the country.<sup>2027</sup> The war effectively ended in 1995, and after two years of transitional administration under the auspices of the United Nations, Croatia regained control over Serb-held territories in 1998.<sup>2028</sup>

During the Croatia’s War of Independence, Croatian and Serb forces committed grave crimes, including war crimes. Over twenty years after the war, there was still “no reliable, verifiable and undisputable number of victims of war, killed or missing on the territory of the Republic of Croatia.”<sup>2029</sup> According to Amnesty International, approximately 20,000 people were killed, hundreds of thousands of people were internally displaced, and an estimated 300,000 to 350,000 Croatian Serbs left the country during and in the aftermath of the war.<sup>2030</sup>

## Existing Justice-Sector Capacity

Domestic courts have prosecuted war crimes cases since the start of the Croatian war in 1991, but international monitors have generally regarded local courts as incapable and ineffective in dealing with these cases. Concerns include the limited number of finalized cases; a disproportionate number of prosecutions and convictions of Serb perpetrators; the failure to investigate senior Croatian political and military leaders; and the absence of adequate witness protection mechanisms.<sup>2031</sup>

In 2004, Human Rights Watch concluded that the courts in Croatia were ill-equipped to hear politically sensitive and legally complex war crimes cases, and observed a general absence of political will and public support for war crimes prosecutions against ethnic Croats.<sup>2032</sup> The Organization for Security and Cooperation in Europe (OSCE), which has monitored war crimes trials since 1996, has expressed concern about basic fair trial guarantees, collective in absentia trials against Serb perpetrators, and a discrepancy in the application of sentencing between Croats and Serbs.<sup>2033</sup> Furthermore, in a 2010 report, Amnesty International raised concerns that the domestic legal framework still remained unsuited to the prosecution of international crimes in accordance with international standards.<sup>2034</sup>

## Existing Civil Society Capacity

Since the war's end, three local organizations in particular—Documenta: Center for Dealing with the Past; the Centre for Peace, Non-Violence and Human Rights in Osijek; and the Civic Committee for Human Rights—have played an important role in the monitoring of war crimes trials alongside international organizations such as the OSCE. Additionally, the Civic Committee for Human Rights (CCHR), established during the war, organized searches for missing and displaced people, set up the first legal aid systems in war-affected areas, and has monitored war crimes proceedings with an emphasis on cases in which there is fear of ethnic bias.<sup>2035</sup> The Documenta: Center for Dealing with the Past engages in “documenting and investigating prewar, wartime and postwar events” by organizing public debates, managing a database on wartime human losses, and monitoring war crimes at local and regional levels.<sup>2036</sup> After 2000, local civil society groups and international pressure in the context of Croatia's accession to the European Union were able to influence the implementation of judicial reforms and improvements in domestic war crimes prosecutions.<sup>2037</sup>

## **Creation**

War crimes proceedings first began during the war in Croatia. All county courts have jurisdiction to prosecute war crimes, but amendments to the Croatian Criminal Code in 2000 allowed for the transfer of complex war crimes cases to county courts in Zagreb, Osijek, Rijeka, and Split: Croatia's four largest cities, and the locations of the largest State Attorney's Offices.<sup>2038</sup> In 2001, the United Nations Human Rights Committee (UNHRC) observed that while war crimes investigations and prosecutions were ongoing, national courts only had a limited capacity to finalize proceedings and suspected crimes committed by Croats (including those committed during Operation Storm) were not being investigated. Consequently, the UNHRC recommended that Croatia proceed "with the enactment of the draft law on the establishment of specialized trial chambers within the major county courts, specialized investigative departments, and a separate department within the Office of the Public Prosecutor for dealing specifically with the prosecution of war crimes."<sup>2039</sup>

The United Nations Security Council adopted the completion strategy of the International Criminal Tribunal of the former Yugoslavia (ICTY) in 2003, which recommended the deferral of ICTY cases against mid- and lower-level perpetrators to competent courts in the former Yugoslavia.<sup>2040</sup> During this period, the European Union was pressing Croatia to comply with international legal standards and effectively deal with its violent past. In October 2003, Croatia's Parliament adopted the Law on the Application of the Statute of the International Criminal Court and the Prosecution of Criminal Acts against the International Law of War and International Humanitarian Law (Law on Crimes against International Law).<sup>2041</sup> The parliament also adopted a Law on Witness Protection.<sup>2042</sup> This legislation allowed for the creation of a strengthened structure for the investigation and prosecution of international crimes, including four new Specialized War Crimes Courts in the regular court system of Croatia. The first war crimes case was transferred to the Zagreb county court in December 2005,<sup>2043</sup> but it was not until the beginning of 2011 that the War Crimes Chambers were fully functional.<sup>2044</sup>

## **Legal Framework and Mandate**

There are two aspects to the legal framework in Croatia for the prosecution of international crimes committed during the disintegration of the former Yugoslavia. The first concerns investigations originating in Croatia and prosecuted under Croatian law, and the second pertains to cases transferred to Croatia from the

ICTY, pursuant to Rule 11*bis* of the ICTY's Rules of Procedure and Evidence. The 21 Croatian county courts apply domestic law and handle cases brought by country prosecutors or the State Attorney's Office (SAO) and, on an occasional basis, cases transferred to national courts by the ICTY.

### ***Domestic Legal Framework***

During and after the war, Croatia continued to use the Criminal Code of the Socialist Federal Republic of Yugoslavia (SFRY CC). However, the SFRY CC did not include provisions on command responsibility and crimes against humanity, and did not clearly define war crimes. Although the Croatian Parliament adopted a "basic" criminal code in 1993 and a new criminal code in 1997, which somewhat expanded the definition of war crimes in comparison to the SFRY CC, many regarded this new code as insufficient for the prosecution of wartime crimes.<sup>2045</sup>

In October 2003, Croatia adopted the Law on Crimes Against International Law, which allowed for the prosecution of "crimes against international law of war and humanitarian law under Croatian law and other crimes within the jurisdiction of international criminal courts." In 2004, the parliament amended the 1997 Croatian Criminal Code to define a wide array of international crimes, including genocide, the crime of aggression, crimes against humanity, war crimes against the civilian population, war crimes against the wounded or sick, war crimes against prisoners of war, torture, and other cruel or inhumane treatment. The amended code also includes the concept of command responsibility for crimes under international humanitarian law.<sup>2046</sup> The Law on Crimes Against International Law assigns competence for the prosecution of these crimes to the county courts of Osijek, Rijeka, Split, and Zagreb,<sup>2047</sup> and envisages that investigations will be conducted by specialist investigative units within the four county courts.

The 2003 Law on Witness Protection established a structure and procedures for the protection and support of witnesses in criminal proceedings, and a new Law on International Legal Assistance, International and Bilateral Agreements regulated regional and international legal cooperation.<sup>2048</sup>

The Council of Europe Commissioner for Human Rights concluded in 2010 that Croatia has an "adequate legal framework relating to the prosecution of war-related crimes."<sup>2049</sup> However, judges continued to apply the SFRY CC or 1993 criminal code in war crimes cases.<sup>2050</sup> Since the adoption of a Strategy for the Investigation and Prosecution of War Crimes by the State Attorney's Office in 2011, a subsequent



implementation plan, and additional changes to the Croatian Criminal Code in 2013, specialized war crimes courts have made progress in applying more recent codes and laws in war crimes trials.<sup>2051</sup>

### ***Referral of ICTY Cases***

In 2000 the UN Security Council adopted the ICTY Completion Strategy, thereby recognizing the role of domestic jurisdictions in the prosecution of international crimes committed during the war in the former Yugoslavia. Pursuant to the ICTY's Rule 11*bis* of the Rules of Procedure and Evidence, amended in 2002, the ICTY may decide to transfer cases to other courts, including those "in whose territory the crime was committed; in which the accused was arrested; or having jurisdiction and being willing and adequately prepared to accept such a case."<sup>2052</sup> Previously, concerns over fair trial standards, lack of capacity, and possible ethnically biased judiciaries barred the transfer of cases to Bosnia and Croatia.<sup>2053</sup> The ICTY "referral bench" sent eight cases against 13 mid- and low-level accused to national jurisdictions.<sup>2054</sup> The ICTY remained involved in the cases, keeping the authority to order victim protection measures and to monitor cases until their conclusion. At any time prior to judgment at the national level, the referral bench could order the case to be recalled to The Hague.<sup>2055</sup>

### **Location**

War crimes cases can be heard by any of the 21 Croatian county courts throughout the country. The 2003 Law on Crimes Against International Law leaves intact the jurisdiction of all country courts but allows for prosecution of war crimes in four specialized war crimes chambers in Osijek, Rijeka, Split, and Zagreb.<sup>2056</sup>

The majority of proceedings in Croatia have taken place in courts situated in areas most affected by the 1991-1995 conflict.<sup>2057</sup> In 2002, the OSCE reported that while over three-quarters of Croatia's courts were involved in war crimes proceedings, the majority of trials were initiated in the courts of Osijek and Vukovar, as had been the case in previous years.<sup>2058</sup> The advantage of this is that the trials are accessible to local audiences. However, regular county courthouses are not designed for war crimes trials, and this increases the risk of witness intimidation and judicial impartiality. A lack of separate entrances or waiting rooms for victims or witnesses leads to interactions between victims and defendants.

## **Structure and Composition**

### ***Specialized War Crimes Chambers***

Croatia has a tripartite judicial system consisting of 67 municipal and 21 county courts, the Supreme Court, and the High Court of Croatia.<sup>2059</sup> War crimes prosecutions take place within this structure. The 2003 Law on Crimes Against International Law created specialized war crimes chambers in four of Croatia's county courts as well as centers for the investigation of international crimes.<sup>2060</sup> However, it was not until 2011 that the war crimes sections became fully operational and received the first cases transferred from regular county courts.<sup>2061</sup>

### ***Specialized War Crimes Prosecution***

The State Attorney's Office of the Republic of Croatia is composed of a principal State Attorney's Office in Zagreb, and municipal- and county-level State Attorney's Offices.<sup>2062</sup> The 2003 Law on Crimes Against International Law established specialized prosecution offices within the Office of the Public Prosecutor, alongside the four specialized war crimes courts in Osijek, Rijeka, Split, and Zagreb. In the same manner as the specialized courts, the specialist prosecutors' offices only started operations after the implementation of the 2011 action plan on the implementation of the Strategy for the Investigation and Prosecution of War Crimes. In 2015, the UN Human Rights Council reported that the specialized war crimes offices were now working in accordance with the 2011 action plan, and that "efficacy is increased in the work in cases against known perpetrators, and also in cases in which the perpetrators have not yet been found."<sup>2063</sup> The State Attorney's Offices have a limited capacity to deal with war crimes cases. In 2017, the Zagreb prosecutor's office had two officials working on war crimes.<sup>2064</sup>

### ***Witness Protection and Support***

The 2003 Law on Witness Protection created a Witness Protection Unit within the Ministry of Interior which "carries out and organizes the Protection scheme, carries out and organizes urgent measures and performs all other duties connected to protection of endangered persons, unless this Act provides to the contrary. Protection Unit is responsible for implementation of the Protection scheme."<sup>2065</sup> Additionally, a specialized Witness Support Unit was established within the Croatian Ministry of Justice in 2005.<sup>2066</sup>

In 2008, with support of the United Nations Development Program, the first four witness support offices were introduced in the Vukovar, Osijek, Zadar, and Zagreb county courts, followed by the opening of three additional offices in Rijeka, Sisak, and Split in 2011.<sup>2067</sup> In total, the seven offices are staffed by 14 personnel and 200 volunteers. The program aims to ensure adequate witness protection in war crimes and other types of cases. The offices also provide free psychosociological support for witnesses in the preparation for and during trials, as well as provide general information to witnesses and victims about their roles and rights in trials. The witness support offices also take responsibility for nationwide awareness raising campaigns and “liaising with NGOs and public institutions, managing the witnesses/victims database, and documenting witness and victim support activities.”<sup>2068</sup>

### ***Public Information on War Crimes Trials***

No outreach or public information program on war crimes prosecutions exists within the Croatian judicial system. On the contrary, there is very little information available on the events of the 1991–1995 war, and civil society organizations are convinced that the Croatian government is “purposefully withholding the information about the actions of members of Croatian forces in relation to commitment of war crimes.”<sup>2069</sup> From 2000 to 2010, the ICTY maintained a field office in Zagreb through which it conducted outreach activities.<sup>2070</sup> As of 2017, the ICTY continued to organize limited outreach activities in Croatia. Upon the ICTY’s closure, the Mechanism for International Criminal Tribunals (MICT) is supposed to take over these responsibilities.<sup>2071</sup>

## **Prosecutions**

### ***Domestic War Crimes Prosecutions***

According to the State Attorney’s Office, by December 2014, prosecutors had initiated war crimes proceedings against 3,553 persons and achieved convictions against 589. Of these, 44 were from Croatian military forces. First-instance criminal proceedings against 642 persons and investigations of 220 persons were still ongoing.<sup>2072</sup> In a 2016 review of war crimes trials before the Croatian courts, the Croatian NGO Documenta noted that “the Croatian judiciary is still faced with a large number of unprocessed war crimes, [and] the percentage of completely resolved crimes is very low.” As of late 2017, Croatia had delivered a total of 141 war crimes verdicts, which was the highest figure of all countries in the former Yugoslavia.<sup>2073</sup>

The practice of in absentia trials within Croatian courts explains the discrepancy between the total number of war crimes verdicts and the number of persons convicted. International observers have found that “in the period from 1992 to 2000, 578 persons were convicted by Croatian courts for war crimes, out of whom 497 were in absentia ... [which amounts to] 86% of the defendants.”<sup>2074</sup> In 2016, this had shifted: only one-third of the trials before the four specialized war crimes chambers were in absentia.<sup>2075</sup> Following the transfer of early in absentia cases to specialized chambers, these and the Supreme Court ultimately overturned many verdicts.

There have been few prosecutions before the specialized war crimes chambers. In 2010, Amnesty International reported that since the 2003 adoption of the Law on Crimes Against International Law, only two cases had been transferred to and prosecuted by the special war crimes chamber, and both at the county court in Zagreb.<sup>2076</sup> In late 2011 and the beginning of 2012, regular county courts transferred 15 cases to the four specialized chambers, and several of these were then suspended out of concerns over in absentia trials.<sup>2077</sup> During 2016, the specialized State Attorney’s Offices in Rijeka, Split, and Zagreb issued 12 indictments against 84 persons (the specialized State Attorney’s Office in Osijek issued none); there were judgments for 21 persons during the year.<sup>2078</sup>

Several important wartime events remain uninvestigated. As of 2014, there had been no convictions for war crimes during Operation Storm, an operation that reportedly killed over 650 and destroyed over 20,000 buildings. While the State Attorney’s Office of Croatia has registered 167 victims and 27 war crimes related to Operation Storm in its database, the perpetrators of 23 of the crimes remain unknown.<sup>2079</sup> Crimes committed during the 1991 siege of Vukovar have only been partially investigated and prosecuted.<sup>2080</sup>

### ***Rule 11bis Cases***

As of 2016, “verdicts of the ICTY with final judgments, as well as one case referred to Croatia under the terms of Rule 11bis of the Tribunal’s Rules of Procedure and Evidence, prompted [the] Croatian judiciary to initiate only a few criminal proceedings based on established facts about the crimes committed.”<sup>2081</sup> Since the adoption of the completion strategy, the ICTY has transferred one war crimes case involving two defendants—the Croatian generals Rahim Ademi and Mirko Norac—to Croatian courts. The Zagreb county court delivered a first-instance judgment in May 2008, finding Norac guilty of war crimes against civilians and acquitting Ademi of all charges. In November 2009, the Supreme Court of Croatia upheld the initial

judgment, and Norac was sentenced to six years imprisonment.<sup>2082</sup> In February 2005, the ICTY referral bench requested the referral of a second case to the Croatian courts, but the request to transfer the “Vukovar three” was eventually withdrawn and the accused judged before the ICTY.<sup>2083</sup>

## **Legacy**

Over the past twenty years, Croatia has improved the handling of domestic war crimes cases, but fair and effective justice for victims of the 1991–1995 war remains elusive.

### ***Domestic Capacity for War Crimes Prosecutions***

In 2010 Amnesty International concluded that since the end of the war in Croatia, and seven years after the ICTY started transferring cases to the Croatian courts, “only a very limited number of perpetrators have been brought to justice before the Croatian courts, and these proceedings have in majority not been in accordance with international criminal law and international fair trial standards.”<sup>2084</sup>

However, since the adoption of a strategy for war crimes prosecutions and investigation and State Attorney’s offices and ministries action plans in 2011, as well as the 2010 and 2012 strategies for the development of the judiciary,<sup>2085</sup> the overall competence of the Croatian judiciary and the prosecution of war crimes have been enhanced. Improvements include the commencement of the usage of specialized war crimes courts in Osijek, Rijeka, Split, and Zagreb; the opening of State Attorney’s Offices dedicated to war crimes prosecutions in the four specialized war crimes courts; the creation of an electronic database on all war crimes committed on the territory of Croatia; better witness protection and support services in certain county courts; and the adoption of a strategy for the revision of trials conducted in absentia.<sup>2086</sup>

Throughout the years, domestic war crimes trials have been marred by ethnic bias. The majority of prosecutions—by 2009, over 80 percent—have been against Croatian Serbs for crimes committed against Croats, leading to allegations of ethnic bias in prosecutions and sentencing practices.<sup>2087</sup> Since 2001, the OSCE “continued to observe a trend toward increased efforts by the Croatian authorities ... to pursue all individuals responsible for war crimes, regardless of the national origin of perpetrators and the victims.”<sup>2088</sup> In 2008, the State Attorney’s Office issued instructions aimed at addressing the prosecution bias against Serbs.<sup>2089</sup>

Additionally, civil society raised concerns over in absentia proceedings, which generally violated international fair trial standards.<sup>2090</sup> Despite the adoption of a state attorney's strategy on in absentia trials in 2016, these types of trials continue to make up one-third of the total. "Before the Osijek County Court all the trials are held in absentia, more than a half of trials before the Rijeka CC, and one fourth before the Zagreb CC."<sup>2091</sup>

### ***Witness Protection and Support***

Local trials lacked effective witness protection and support procedures as well as infrastructure until 2009, which allowed witness interference and intimidation in trials.<sup>2092</sup> Basic security procedures, such as separate entrances for witnesses and accused, are often not in place.<sup>2093</sup> With the assistance of the UN Development Program, basic witness protection and support units were established at seven out of 21 county courts in Croatia. In 2016, the Commissioner for Human Rights of the Council of Europe reported that "even though a legislative and institutional framework has been put in place ... additional efforts are needed to ensure effective witness protection and to encourage more people to disclose information, including information related to possible burial places, mass graves and potential perpetrators. [And] the laws and programs pertaining to the support and protection of witnesses needed to be strengthened and systematized."<sup>2094</sup>

### ***Specialized War Crimes Chambers***

Since the adoption of the 2003 Law on Crimes Against International Law, only a limited number of war crimes cases have been processed in the four specialized war crimes chambers in Zagreb, Osijek, Rijeka, and Split. In 2010, Amnesty International reported that only two war crimes cases had been brought before the War Crimes Chambers, and that a majority of proceedings continue to take place before county courts that lack experience and resources to effectively and independently prosecute international crimes.<sup>2095</sup> In 2016, a total of 18 trials were underway before specialized war crimes chambers, and judgments in 13 cases against 26 defendants were issued.<sup>2096</sup> According to the Croatian NGO Documenta, trials before specialized war crimes chambers were "marked by seldom-scheduled major hearings, lengthy procedures, frequent repetitions, absence of the defendant, and low prison sentences."<sup>2097</sup>

### ***Impact on Society***

"In general, dealing with the past, which includes ...war crimes trials aimed at establishing the facts, bringing justice, acknowledging victims' suffering and

recovering affected and vulnerable groups, as well as society as a whole, was almost completely absent [in Croatia].”<sup>2098</sup> Limited information remains available on crimes committed during the war. Reconciliation between countries within the former Yugoslavia and between ethnic groups within the countries is still in its infancy. Moreover, the political will to prosecute Croatian political and military leadership for crimes committed during the war remains limited. The ICTY acquittal of Croatian generals Ante Gotovina, Mladen Markač, and Ivan Čermak—all of whom received a warm welcome upon their return to Croatia—for war crimes during Operation Storm in November 2012 was representative of this sentiment.<sup>2099</sup>

A 2010 study titled “Dealing with the Past in Croatia: Attitudes and Opinions of Post-War Actors and Public” shows that the majority of the Croatian population has not come to terms with its violent past. There is a widespread public understanding that the crimes committed during the Croatian war of independence were legitimate and necessary for regaining control over Croatian territory.<sup>2100</sup> The study shows that 52 percent of the Croatian population thought that ethnic Croats were the only victims of the war, 31 percent believed that the majority of the wartime victims were ethnic Croats, and none of the interviewees thought that the majority of victims had been Serbs. Furthermore, while almost 100 percent of the study’s respondents had heard of crimes committed in the city of Vukovar, only 68 percent had heard of Serb casualties during Operation Storm.<sup>2101</sup>

## **Financing**

Domestic war crimes prosecutions in Croatia are financed through the regular state budget of the Republic of Croatia and initially received financial and in-kind contributions from international donors. Furthermore, the Law on Witness Protection sets out that the funds that witness protection and information measures will be included as a special budgetary item in the regular state budget.<sup>2102</sup>

In 2011, the annual budget for the judiciary in Croatia was about €368 million.<sup>2103</sup> In the years thereafter, the budget slightly decreased to approximately €313 million for 2013.<sup>2104</sup> In that same year, €1.7 million had been allocated to the judicial academy for the training of judges and prosecutors.<sup>2105</sup> According to the World Bank, with 43 judges per 100,000 inhabitants, Croatia has one of the largest court systems in Europe and expends 0.7 percent of its GDP for the judiciary.<sup>2106</sup>

## Oversight and Accountability

The domestic system in Croatia includes several checks and balances for the independence and impartiality of the judicial system. The Croatian Supreme Court ensures “the uniform application of laws and equal protection under the law” and therefore may review all final judicial decisions.<sup>2107</sup> In 2005, the OSCE reported that the Supreme Court overturned 65 percent of appeals judgments.<sup>2108</sup> As a result of the EU accession preparations, Croatia adopted legal changes in 2011 and consequently strengthened its State Judicial Council and State Prosecutorial Council, which are responsible for overseeing the appointment and evaluation of the work of judges and prosecutors.<sup>2109</sup> The Croatian Ombudsman, which maintains offices in Zagreb, Rijeka, Osijek, and Split, may hear complaints of human rights violations and discrimination.<sup>2110</sup>

The OSCE Mission to Croatia monitored domestic and Rule 11*bis* war crimes proceedings and published annual reports on domestic war crimes trials until the end of 2007.<sup>2111</sup> A variety of other international monitoring bodies, including the European Commission, the Council of Europe Commissioner of Human Rights, and the UN Human Rights Council, have continued monitoring the Croatian judiciary ever since—some in the light of assessing Croatia’s readiness for EU accession.

At present, domestic civil society groups, including the Documenta: Center for Dealing with the Past, continue to publish annual reports on domestic war crimes trials.<sup>2112</sup>



## KOSOVO

This annex covers three approaches to international justice in Kosovo since the end of the 1998–1999 war: (1) Regulation 64 Panels under the United Nations Interim Administration Mission in Kosovo (UNMIK); (2) war crimes trials under the European Union Rule of Law Mission in Kosovo (EULEX); and (3) the Kosovo Specialist Chambers and Specialist Prosecutor’s Office. Common sections covering background on the conflict and the capacities of the domestic justice sector and civil society precede separate detail on each mechanism.

### **Conflict Background and Political Context**

Under Joseph Tito’s Socialist Federal Republic of Yugoslavia (SFRY), Kosovo had the status of an autonomous province within Serbia. While the region had no equal standing with the six republics of the Yugoslav federation, it and another autonomous region (Vojvodina) had the right to create its own constitution and some government institutions. Despite this limited autonomy, Serbian dominance—and neglect—of Kosovo created an impoverished country with weak institutions dominated by minority ethnic Serbs.<sup>2113</sup> Kosovo Albanians, treated as second-class citizens, increasingly agitated for status as a full Yugoslav republic. Widely supported non-violent protests began in the early 1980s. Slobodan Milosevic, president of Serbia, revoked Kosovo’s autonomy in 1989. In response, Kosovar Albanians created their own parallel government institutions and called for independence from the SFRY. For the next two years, Serbia “systematically suppressed Kosovo Albanians and suspended their institutions, shut down the education and health care system and expelled some 150,000 Albanians from their jobs in police, education, [and] state companies.”<sup>2114</sup>

The Kosovo Liberation Army (KLA) have initiated scattered armed violence against the Serbian authorities since 1997, having been disillusioned by the exclusion of the “Kosovo question” from the Dayton peace negotiations on Bosnia and Herzegovina in 1995. The Serbian government’s heavy-handed response targeted civilians as well as militants, which created broader support for the KLA within the Kosovo Albanian population. The violence in Kosovo reached its apogee between March and June 1999. State-sponsored Serb forces committed mass atrocities and ethnic cleansing of the majority ethnic Albanian population. The KLA also committed significant violations of international humanitarian law. In March, Serbian police and the military of the rump-Yugoslavia (Serbia and Montenegro) launched a military

offensive in Kosovo in a “methodically planned and well-implemented campaign” that expelled nearly 80 percent of the entire population of Kosovo from their homes, including more than 850,000 ethnic Albanians from Kosovo.<sup>2115</sup> NATO’s air campaign, Operation Allied Force, between March 24 and June 10, 1999, ended the conflict, but not before inflicting large-scale damage.

In the war’s aftermath, the United Nations Security Council passed Resolution 1244 (1999), handing jurisdiction of Kosovo to the UN, which created the United Nations Interim Administration Mission in Kosovo (UNMIK). UNMIK had a mandate to provide Kosovo with a “transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo.”<sup>2116</sup> Together with the Organization for Security and Cooperation in Europe (OSCE), the UN shared responsibility for rebuilding the rule of law in Kosovo. At the end of 2008, the UN handed over overall rule of law assistance, including war crimes prosecution, to the European Union Rule of Law Mission in Kosovo (EULEX).

Kosovo declared its independence from Serbia on February 17, 2008, but Serbia continues to claim Kosovo as an autonomous region. However, on April 19, 2013, the prime ministers of Kosovo and Serbia signed the Brussels agreement, with the aim of normalizing relations.<sup>2117</sup> As of September 2017, 113 countries had recognized Kosovo.<sup>2118</sup> The EU considers Kosovo to be a potential candidate for European Union membership but abstains from taking a position on Kosovo’s statehood claim.<sup>2119</sup> Negotiations on the final status of Kosovo continue under the EU auspices.

In January 2017, the Kosovo Specialist Chambers and Specialist Prosecutor’s Office (KSC)—also known as the Kosovo Relocated Specialist Judicial Institution (KRSJI)—was created alongside EULEX. This Netherlands-based mechanism was tasked with the mandate to prosecute war crimes and crimes against humanity that were not addressed by UNMIK or EULEX, nor by the International Tribunal for the former Yugoslavia (ICTY).

## **Existing Justice-Sector Capacity**

After decades of instability and tensions between ethnic Albanians and Serbs, as well as a devastating civil war, Kosovo’s state institutions had completely collapsed. The conflict gutted the country’s physical infrastructure and judicial system, creating an “accountability and justice crisis.”<sup>2120</sup> Beyond the absence of or severe damage to the

physical infrastructure of the judicial system—including court buildings, equipment, law libraries, and prisons—there was an “extreme lack in capacity.”<sup>2121</sup> The absence of qualified judges, lawyers, and prosecutors, and significant ethnic imbalances among those legal professionals who remained in Kosovo after the war, cast a shadow over the legitimacy of the courts in the eyes of the local Serbian population. Kosovo’s majority Albanian population, following exclusion from participation in judicial functions under Serbian rule, had no public confidence in the legal system as a whole.<sup>2122</sup>

The UN Secretary-General observed that there was “an urgent need to build genuine rule of law in Kosovo, including through the immediate re-establishment of an independent, impartial and multi-ethnic judiciary.”<sup>2123</sup> By late 1999, prisons were overcrowded with detainees awaiting trial for atrocity crimes committed during the conflict. In response to these immediate justice demands, UNMIK established an international judiciary on the domestic administration of law, although the internationalization of the judiciary came in several phases, as described below.<sup>2124</sup>

## **Existing Civil Society Capacity**

### ***Civil Society after the War***

In the 1990s, civil society started to organize alongside the Albanian parallel government structures in Kosovo, but due to Serbian repression, it struggled to mature.<sup>2125</sup> Civil society organizations began reorganizing themselves in the aftermath of the war and started recording human rights violations. One of UNMIK’s first actions was to pass legislation regulating NGO registration and operation, which paved the way for the formation of many new organizations.<sup>2126</sup> Throughout the years, domestic organizations have played an important role in holding war criminals accountable for their actions through trial monitoring, collection of evidence for trials, promoting public awareness, and keeping accountability on the agenda of policymakers.

The Humanitarian Law Center-Kosovo (HLC), which opened an office in Pristina in 1996, published numerous reports on killings and disappearances of Albanians, as well as reports on KLA-perpetrated crimes against Serbs and other minorities.<sup>2127</sup> International human rights organizations such as Human Rights Watch cooperated with, among others, the Center for the Protection of Women and Children, the Mother Theresa Society, and the Kosovo Helsinki Committee in the collection of evidence.<sup>2128</sup> The Council for the Defense of Human Rights and Freedoms (CDHRF),

an organization that had been forced to stop its human rights work during the war, played an important role in the exhumation of graves all over Kosovo, sometimes working directly with the ICTY. Civil society pressure led UNMIK to first start exploring the idea of a war crimes tribunal (see text box on the Proposed Kosovo War and Ethnic Crimes Court [KWECC], below).<sup>2129</sup>

### ***Civil Society after Independence***

Civil society grew rapidly following Kosovo's declaration of independence in 2008. The majority of new organizations were devoted to reconstructing the nation, easing ethnic tensions, and promoting reconciliation.<sup>2130</sup> International donors gave generously, enabling the sector's growth.<sup>2131</sup> However, this dependence on outside funding became a weakness; international funding has diminished in recent years, making it challenging for civil society organizations to sustain themselves. Of the more than 7,000 NGOs registered in 2013, fewer than 10 percent were estimated to be still active in 2017.<sup>2132</sup> Since the political agenda in Kosovo has been overwhelmingly focused on pressing issues such as encouraging the international community to officially recognize Kosovo as a state, it has been challenging for civil society organizations to push their own agendas.<sup>2133</sup> However, some organizations continue to play a role in influencing public policy, and several local groups, including Medica Kosova<sup>2134</sup> and the Humanitarian Law Center of Kosovo, continue to push for accountability for grave crimes.

## **UN Regulation 64 Panels (2000–2008)**

### **Creation**

Immediately after the Kosovo war ended, the UN Secretary-General established the United Nations Interim Administration Mission in Kosovo (UNMIK) under Resolution 1244. UNMIK acted as the sovereign entity in Kosovo, administering the country as a UN protectorate until Kosovo's independence. UNMIK engaged in building state institutions at the national and local levels, and the Special Representative of the Secretary-General (SRSG) executed UNMIK's mandate to exercise "all legislative and executive authority with respect to Kosovo."<sup>2135</sup> UNMIK shared a mandate with the Organization for Security and Co-operation in Europe (OSCE) to reconstruct the rule of law, and this was supported by a number of fledgling Kosovo governmental and nongovernmental bodies.<sup>2136</sup>

To step into the vacuum of a *nonexistent* judicial system, UNMIK established a civilian police force (CIVPOL) and an emergency justice system (EJS) compromising local judges and prosecutors.<sup>2137</sup> From the start, concerns were raised over ethnic bias and lack of capacity among legal professionals to deal with war crimes cases so soon after the war's end. In late 1999, UN administrators considered several options for establishing judicial accountability mechanisms for atrocity crimes, including a proposed ad hoc tribunal, called the Kosovo War and Ethnic Crimes Court (see text box, below).<sup>2138</sup>

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### **Proposed Kosovo War and Ethnic Crimes Court (KWECC)**

In late 1999, UNMIK, UN Member States, and officials from the national judiciary began negotiations for a stand-alone, ad hoc, international-led tribunal that would sit in Kosovo, modeled on the International Criminal Tribunal for the former Yugoslavia (ICTY).<sup>2139</sup> The negotiations reached advanced planning stages.<sup>2140</sup> The KWECC expected to begin operations in mid-2000: the Special Representative of the Secretary-General, Bernard Kouchner, signed an establishing regulation; appointment procedures for international and local judges had begun; and a chief international prosecutor, Fernando Castanon, had already been appointed and had arrived in Kosovo.<sup>2141</sup>

The proposed court would have “concurrent, primary jurisdiction with domestic courts of Kosovo” over violations of international humanitarian law, as well as war crimes, genocide, and crimes against humanity committed since January 1, 1998.<sup>2142</sup> The court would have simultaneous jurisdiction with the ICTY, with KWECC designed to prosecute lower-profile offenders not tried by the ICTY.<sup>2143</sup> The court would consist of panels composed of international and local judges, prosecutors, and staff.<sup>2144</sup> The proposal included plans for a witness protection unit and defense office. The proposed court was ultimately abandoned for numerous reasons, and plans were fully put to rest as the Regulation 64 Panels began full operations in the fall of 2000. Reasons included:

- concerns from UN and international policymakers about replicating the costly ad hoc international criminal tribunals;
- political obstacles arising from disagreement between the United States and the UN over reaching agreements for security arrangements;
- concerns from the United States that the court would investigate alleged war crimes committed by NATO forces;

- opposition among Kosovo Albanian legal professionals concerned about potential resource drains to the judicial system;
  - fears that the KWECC would be “too independent” and exacerbate ethnic tensions by prosecuting ethnic Albanians; and
  - a lack of consultation with civil society.
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After a flare-up of violence in February 2000 in the divided northern city of Mitrovicë/Mitrovica and a hunger strike by Kosovo Serb detainees awaiting trials in May, the judicial crisis came to a head. UNMIK realized that there was a need for non-biased judges and proceeded, through trial and error, to internationalize the judiciary in three successive phases.

First, in February 2000, the SRSG issued UNMIK Regulation 2000/6, allowing for the appointment of an international judge and international prosecutor (collectively IJP) in the Mitrovica region. Usually, these judges were minorities on three-judge panels. Second, in May, the SRSG issued UNMIK Regulation 2000/34, extending the power to appoint IJPs to all five judicial districts in Kosovo, including one on the Supreme Court.<sup>2145</sup> However, IJPs under Regulation 2000/34 were still a minority on judicial panels, meaning they were “not only consistently outvoted by the locals, but they were outvoted on the most significant inter-ethnic cases, which then permitted the Albanian judges to ‘overcharge’ the convicted Serbs in the sentencing phase.”<sup>2146</sup>

The third phase created judicial panels with majority international judges. In Regulation 2000/64 of December 2000, prosecutors, the accused, or defense counsel (as well as UNMIK, of its own accord) were granted the right to petition UNMIK for the assignment of international judges and prosecutors to ad hoc panels. These became known as Regulation 64 Panels.<sup>2147</sup> This trigger mechanism for international panels in Regulation 64 was initially flawed, containing a procedural loophole about the transfer of cases to international panels and leading to reversals of several cases before the Supreme Court.<sup>2148</sup> A subsequent regulation fixed the loophole, requiring local prosecutors who abandoned a case to notify an IJP, who could then file for the case’s transfer.<sup>2149</sup>

In 2008, Regulation 64 Panels wound down, and the UN transferred responsibility to prosecute war crimes cases to a European Rule of Law Mission in Kosovo (EULEX), which was to “assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella,” in accordance with UN Security Council Resolution 1244 (1999).<sup>2150</sup>

## Legal Framework and Mandate

UNMIK authorized Regulation 64 Panels to exercise jurisdiction within domestic courts, trying crimes defined under domestic law. However, the definition of applicable domestic law was contested. UNMIK, acting as sovereign administrator, initially determined that applicable law comprised the criminal code prior to the March 1999 NATO intervention: the law of the Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC), with some modifications. UNMIK made this decision with little consultation with local authorities, prompting early resentment of UNMIK's judicial projects.<sup>2151</sup> In response, UNMIK "issued new resolutions describing the applicable law to be the law in force in Kosovo on March 22, 1989, but like the initial decision, the applicable law was to be a hybrid of pre-existing local law and international standards. ... Local law was only applicable to the extent that it did not conflict with international human rights norms."<sup>2152</sup>

In 2003, UNMIK enacted a Provisional Criminal Code of Kosovo, but determining the applicable law in the "network of laws" remained difficult for both local and international judges.<sup>2153</sup> The new code formed the basis of criminal law in Kosovo, incorporating criminal offenses under international law and shifting the Kosovo legal system toward a more common law design. The confusion and shifts of the applicable law (as well as previously mentioned procedural loopholes in Regulation 64) had severe and negative consequences for the effective and expeditious prosecution of war crimes cases and led the Supreme Court of Kosovo to overturn several cases or send them back for retrial.

The confusion over which law should be applied in war crimes cases, especially in the early years after the conflict, has contributed to the high number of retrials in war crimes cases. These negative trends led to mistakes resulting in subsequent reversals by the Supreme Court, which sent the cases back for retrial. This problem has been exacerbated by the frequent change of international actors in the judicial system, coming from different judicial systems and having different interpretations of the law, which could be influenced by their own jurisdictions.<sup>2154</sup>

The 2003 Provisional Criminal Code and the SFRY CC of 1997 had a different scope and definition of crimes under international law. The Provisional Criminal Code includes genocide, crimes against humanity, and war crimes (as defined under customary international law and the Geneva conventions),<sup>2155</sup> while the SFRY CC only encompasses genocide and war crimes.<sup>2156</sup> In practice, the international crimes trials in which IJPs were involved focused primarily on war crimes.<sup>2157</sup>

Although the ICTY maintained concurrent and primary jurisdiction over national courts concerning atrocity crimes, the ICTY prosecutors focused only on the most senior perpetrators. Based on the experience elsewhere in the former Yugoslavia, UNMIK recognized the need for international involvement in domestic war crimes prosecutions to try and to prosecute lower-level perpetrators. UNMIK justice sector officials “have described the relationship with the ICTY as collaborative and complementary, noting that UNMIK regularly assists the ICTY with its investigations.”<sup>2158</sup> However, in creating the Regulation 64 Panels, UNMIK set up a separate framework for the prosecution of international crimes that did not take full account of the experience of the UN ad hoc tribunals for Yugoslavia and Rwanda.

## **Location**

The Regulation 64 Panels were part of the regular court system in Kosovo, and international judges and prosecutors could be placed in courts throughout the country. For the most part, IJPs used pre-existing buildings, with the exception of a single high-security courthouse built for the proceedings. The offices of international judges and prosecutors were often in separate buildings from their national counterparts, limiting interaction with the legal system and between national and international judges.<sup>2159</sup> This limited the exposure of national judges to international legal practices and ran counter to hopes that international involvement would build capacity in the national judiciary.

## **Structure and Composition**

### ***Appointment of International Judges and Prosecutors***

Regulation 64 Panels could be appointed on the motion of the SRSG or upon request by prosecutors, the accused, or defense counsel, where “necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice.”<sup>2160</sup> Regulation 64 did not contain clear criteria for the appointment of international judges or prosecutors, but “in practice the primary reasons for relying on [special panels] are either fears about perception of bias or concerns about intimidation of local judges,” and IJPs were appointed “mainly in cases involving interethnic conflict.”<sup>2161</sup> UNMIK, responsible for the administration of the entire justice sector, often constituted international panels to handle non-atrocity crimes cases. IJPs in Kosovo heard a range of cases from “serious humanitarian crimes to



traffic accidents and illegal woodcutting.” The use of the panels at times appeared “arbitrary and ad hoc” and the panels suffered from a legitimacy problem.<sup>2162</sup>

### ***Registry and Judicial Support***

The International Judicial Support Section (IJSS) was established within the Kosovo Department of Justice (DOJ) to support international prosecutors and judges. It also provided legal support and Registry functions. In March 2003, a Criminal Division answerable to the DOJ provided support to the chief international judge (a position created in 2005) and prosecutor, and monitored developments in the cases.<sup>2163</sup>

### ***Judges***

The total number of international judges in the panels varied. By 2001, 17 international judges were assigned, declining to 14 by 2005. The short-term appointment contracts (six months) discouraged applications from sitting judges in Western Europe and the United States. At times, international judges left before cases were fully adjudicated, meaning that at times “the main trial must start from the beginning, which may include re-administration of evidence.”<sup>2164</sup> Almost none of the judges had experience in international humanitarian or international criminal law, and some did not have backgrounds in any form of criminal law. Many international judges were only superficially trained on the features of Kosovo’s legal system. International judges were located in the capital, Pristina, limiting their interaction with the legal system in the provinces, even if they were assigned to cases in other parts of the country. International law experts generally regard the jurisprudential quality of the decisions as poor, with little reference made to decisions under international law or jurisprudence beyond the UNMIK Regulations.

### ***Prosecutors***

By December 2000, three international prosecutors had been appointed, a number that eventually grew to 11 before shrinking back to nine by 2005. The quality of international prosecutors was generally considered to be quite good, but most had little experience with complex international humanitarian or criminal law cases. The interaction with national prosecutors was minimal: “International prosecutors tended to work alone, and cases are not shared between local and international prosecutors, and also because IPs are not required to take on a mentoring role. Many feel that joint teams of national and international prosecutors would have been a good idea, but time constraints and security concerns have been held to prohibit this.”<sup>2165</sup>

In 2005, steps were undertaken to establish a Special Prosecutor's Office for the prosecution of high-profile war crimes cases, but such an office never came into existence under UNMIK. The idea was that the office would be staffed by national prosecutors, with transitional assistance by international prosecutors, and the idea was eventually implemented by EULEX.<sup>2166</sup> (See Special Prosecution Office under EULEX *Structure and Composition*, below).

### ***Defense***

Defense counsel before the special prosecutors were often Kosovar, with many Albanian and Serb defense lawyers. Senior defendants—often members of the Kosovo Liberation Army (KLA)—usually retained private defense counsel. The Department of Judicial Administration under the Ministry of Public Services remunerated court-appointed counsel, paying them in lump sums (which some observers noted was a disincentive to work more hours). Respect for the rights of the accused before Regulation 64 Panels remained a significant concern throughout the process, but improved somewhat through training and support provided by an NGO funded by the Kosovo Criminal Defense Resource Centre and the Kosovo Chamber of Advocates.<sup>2167</sup>

### ***Witness Protection***

A specialized police unit provided witness protection services. UNMIK regulations allowed witnesses to remain anonymous in certain circumstances, in light of the frequent threats and reprisals against witnesses. UNMIK incorporated victim and witness protection regulations into the provisional criminal code, but a law on witness protection only passed after UNMIK transferred responsibility for grave crimes cases to EULEX. (See EULEX profile, below.)

### ***Translators and Interpreters***

The Regulation 64 Panels faced severe understaffing of legal translators and interpreters, in part because the UN was reluctant to hire nationals, based on security concerns.<sup>2168</sup>

### ***Outreach***

UNMIK did not have an outreach program to support the work of the international judges' panels. Simultaneous prosecutions of Kosovo-related cases at the ICTY complicated public information campaigns. The ICTY established an outreach office in Pristina in 2001 that continued activities throughout Kosovo until the end of 2012.<sup>2169</sup>

## ***Training***

The Kosovo Judicial Institute (KJI) coordinated judicial training, including study visits to the ICTY and war crimes law seminars. Shortly after the end of the deployment of the Regulation 64 Panels, the capacity of the domestic justice sector to adequately try war crimes cases remained low. Local justice-sector professionals received inadequate training in war crimes law and practice. A 2010 review by the OSCE of war crimes trials under UNMIK found that “throughout the reporting period there has been a lack of expertise in dealing with war crimes cases on the part of judges, prosecutors, defense counsel and investigators.”<sup>2170</sup> Placing international judges with local judges on mixed panels was done in part to allay concerns about biased judges, as well as to institute knowledge-sharing and skills transfer. However, without institutionalized programs in place, little capacity transfer occurred between international and national staff.

## **Prosecutions**

Initially, IJPs handled war crimes cases against Serbs, inheriting over 40 cases that ethnic Albanian judges had adjudicated before the creation of the Regulation 64 Panels. Beginning in 2006, IJPs increasingly focused on organized crime and corruption cases. Difficulties in securing extradition of suspects from Serbia led to a decrease in prosecutions against Serbs, causing a perception that prosecutions were disproportionately focused against Kosovo Albanians.<sup>2171</sup>

By the end of 2001, IJPs were handling around 80 ongoing court cases. The number of cases reached a plateau at 92 in mid-2004. In late 2003, the first verdict against Kosovo Albanians for war crimes committed within Kosovo was delivered in the *Llapi Group* case, which attracted widespread public attention. By 2004, the Criminal Division had begun proceedings in over 300 cases, including 83 war crimes cases. At the beginning of 2006, war crimes constituted approximately 10 percent of the cases initiated by international prosecutors.<sup>2172</sup> The OSCE estimated that by the end of 2009, 37 individuals had been tried for war crimes in Kosovo.<sup>2173</sup> Half of these were pre-2000 war crimes cases against Kosovo Serbs, which Regulation 64 Panels retried out of concern over ethnic bias.<sup>2174</sup> In December 2008, UNMIK handed over 1,000 war crimes cases to its successor, the EU-led rule-of-law mission (EULEX). The EULEX War Crimes Investigation Unit conducted a review of nearly 900 of these cases by early 2010 and began a mapping and case selection process.<sup>2175</sup>

Transferring cases from local to international prosecutors required a reworking of the investigative file, the indictment, and at times, new translation of documents—

all of which caused significant delays.<sup>2176</sup> Even once cases were fully transferred to international prosecutors, cases were often delayed at the trial and appellate stages, due to an understaffed and under-resourced international judiciary. International judges and prosecutors had difficulty in securing appearances by witnesses and defendants not in detention (many of whom had fled to Serbia). Witnesses, fearing personal reprisals and a general return to ethno-political violence, were reluctant to appear before the international panels. The police and national prosecutors also may have deprioritized war crimes cases, focusing on immediate ordinary crimes and the deteriorating security context.<sup>2177</sup>

UNMIK made only limited progress toward investigating and prosecuting war crimes. By 2008, 250 complaints had been lodged against UNMIK by families whose relatives had gone missing during the conflict.<sup>2178</sup> These complaints alleged that UNMIK had not made any effort to investigate the abductions of their loved ones. The UNMIK Human Rights Advisory Panel investigated these claims and found that UNMIK had systematically failed to collect evidence and conduct thorough investigations into these cases.<sup>2179</sup> UNMIK's involvement with the Kosovo judiciary ended in November 2008. In UNMIK's decade of running Kosovo's legal system, it completed just over 40 war crimes trials, leaving over 1,000 others waiting to be heard.<sup>2180</sup>

## Legacy

In a joint review of the ten years of UN-led efforts to prosecute war crimes in Kosovo, the OSCE and UNMIK noted that it faced “difficulties in obtaining reliable statistics of war crimes cases ... due to the number of different authorities and institutions engaged in this area,” and also admitted “there has been a systemic failure to adjudicate war crimes cases.”<sup>2181</sup>

The Regulation 64 Panels had no formal mentorship or training program between internationals and their domestic counterparts, disappointing policymakers and observers, and forming one of a myriad criticisms levied at the panels.<sup>2182</sup> However, it is unclear whether UNMIK intended the Regulation 64 Panels to deliver sustainable and long-term rule-of-law capacity building. Rather, UNMIK may have created the panels as a necessary response to a biased and inadequate judiciary—in part because of the role thrust upon the UN as sovereign administrator of Kosovo—including the responsibility to administer a judicial system. As with other hybrid courts, the Regulation 64 Panels held potential for long-term and sustained benefits, but some have suggested that the international panels were “initiated in

reaction to pressing security and justice needs, not designed around a long-term vision of the system's legacy."<sup>2183</sup>

Evaluating the “success” of the panels is difficult, then, as different actors held different expectations and conceptions about the panels' purpose. Their legacy is best measured by their achievements in context, rather than their shortcomings compared to an ideal hybrid court:

Clint Williamson, Justice Department Director of Kosovo from October 2001 to November 2002, assessed the 64 Panels as a mixed success. He pointed out that despite some inadequately qualified international judges and prosecutors, some intimidation of local staff by perpetrators on the ground, and occasional local abdication of responsibility to internationals in high-risk trials, the [64] Panels proved a very valuable tool in Kosovo. While he encountered widespread resentment against the ICTY as an imposition by outsiders, he believed that local and international staff maintained very collegial relations within the hybrid structure, which received local buy-in. An OSCE report endorsed the Kosovo hybrid experiment overall, lending credence to arguments that despite significant flaws, Kosovo represents an improvement on the hybrid model over the East Timor Process.<sup>2184</sup>

## **Financing**

The financing for the Regulation 64 Panels was mostly provided through the UNMIK budget (based on assessed contributions by UN Member States, handled by the Department of Peacekeeping Operations) and the Kosovo Consolidated Budget. The Panels faced severe budget shortfalls throughout their existence, and a sharp cutback in the overall UNMIK budget in 2001 decreased funding for judicial and rule-of-law programs in Kosovo. The total amount budgeted for Kosovo's legal system was around 17.3 million euros in 2004, comprising some 2 percent of the total UNMIK budget.<sup>2185</sup>

## **Oversight and Accountability**

The primary international monitor of the Kosovo judicial system during the operation of the Regulation 64 Panels—and still as of late 2017—is the OSCE.<sup>2186</sup> The Legal System Monitoring Section (LSMS) of the OSCE mission in Kosovo has been

monitoring criminal and civil trials in Kosovo since 1999.<sup>2187</sup> It shares its observations and recommendations with major actors of the judicial system and with the KJI, which the OSCE established to train domestic judges and prosecutors.<sup>2188</sup>

Both UNMIK as a whole and its judges' panels have been starkly criticized for lacking internal oversight and accountability mechanisms. International observers, such as the OSCE and the EU, questioned the excessive executive powers of the SRSG in the appointment and oversight of IJPs. IJPs were not, like their local peers, subject to the scrutiny of the Kosovo Judicial and Prosecutorial Council (KJPC), and UNMIK never created an independent monitoring body.<sup>2189</sup> In an effort to counter criticism, UNMIK started creating various internal and domestic oversight bodies—the Ombudsperson Institution, Claims Committee, and Human Rights Advisory Panel within the UNMIK structures—and it supported the creation of an impartial judicial council. However, according to Human Rights Watch, the internal oversight mechanisms were “either dormant or improperly constituted,” and the Kosovo Judicial and Prosecutorial Council was never realized under UNMIK.<sup>2190</sup>

## **Grave Crimes Proceedings under EULEX (2008–present)**

### **Creation**

In 2006, during final negotiations over Kosovo's future status, the Secretary-General's Special Envoy on Kosovo recommended, given the weakness of Kosovo's judiciary, that international judges and prosecutors be kept in place to handle atrocity crime trials, as well as prosecution of organized crime, corruption, and inter-ethnic cases.<sup>2191</sup> In preparation for its increased involvement in Kosovo, in 2006 the EU established the EU Planning Team (EUPT Kosovo) for the establishment of a crisis management operation in Kosovo in the field of rule of law and possibly other areas.<sup>2192</sup> Pursuant to the work of the planning team, in December 2007 the EU expressed that it would be eager to “play a leading role in strengthening stability in the region in line with its European perspective and in implementing a settlement defining Kosovo's future status.”<sup>2193</sup>

On February 4, 2008, the European Union released Council Joint Action 2008.124. CFSP,<sup>2194</sup> forming the European Union Rule of Law Mission in Kosovo (EULEX). Not coincidentally, Kosovo declared its independence two weeks later, and the United Nations Security Council (UNSC) announced that the United Nations Interim

Administration Mission in Kosovo (UNMIK) would reconfigure its international civilian presence in Kosovo and that the EU would be taking over its rule-of-law responsibilities.<sup>2195</sup> To fulfill this mandate, EULEX is tasked with ensuring

Cases of war crimes, terrorism, organized crime, corruption, interethnic crimes, financial/economic crimes, and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently, and by measures including, as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities.<sup>2196</sup>

The support of EULEX in building the rule of law in Kosovo encompasses a large number of areas and institutions, including police, justice, and customs. This includes, among others, improving the performance and capacity of the Kosovo Police (KP), the Special Prosecution Office of the Republic of Kosovo (SPRK), the Special Chamber of the Supreme Court (SCSC), the Kosovo Judicial Council (KJC), the Kosovo Prosecutorial Council (KPC), and the Joint Rule of Law Coordination Board.<sup>2197</sup> EULEX also took over responsibility for the UNMIK Office of Missing Persons and Forensics (OMPF), which later became the Department of Forensic Medicine (DFM) within Kosovo's Ministry of Justice.

EULEX assumed the responsibilities laid out in UN Resolution 1244 in December 2008 and reached full operational capacity in April 2009. After 2008, EULEX's mandate was renewed every two years, and as of late 2017, its most recent extension was due to expire in June 2018.<sup>2198</sup>

## **Legal Framework and Mandate**

EULEX has a mandate to assist Kosovo's authorities in the development of a sustainable and accountable justice free from political interference and ethnic bias. As described above, the EU rule-of-law mission aims to investigate and prosecute war crimes, organized crime, and other serious crimes.<sup>2199</sup> The 2008 Council Joint Action additionally sets out a Monitoring, Mentoring, and Advising (MMA) objective to strengthen the justice sector and enhance the capacity of local judges and prosecutors.<sup>2200</sup> EULEX judges may intervene in any case pursued by the SPRK, but have primary jurisdiction over war crimes, terrorism, organized crime, inter-ethnic violence, or other serious crimes listed in Article 3(d) of the Council Joint Action.<sup>2201</sup>

War crimes trials in Kosovo take place through the ordinary court system and are heard by mixed panels of international EULEX judges and Kosovo judges. The Law on Courts dictates that war crimes cases should be heard by the Serious Crimes Division of the Basic Court.<sup>2202</sup> The Serious Crimes Division hears cases with a panel of three judges, one of whom is designated as the presiding judge. When hearing war crimes, the panels are presided over by a EULEX judge, and a majority of the seats on each panel are filled by EULEX judges. These panels have jurisdiction over cases prosecuted by the Special Prosecution Office, which is responsible for investigating and prosecuting the most serious criminal offenses, including international criminal offenses, genocide, war crimes, organized crimes, and crimes against humanity.

Although the Kosovo criminal procedure code states that domestic law should apply in war crimes cases, judges must determine *which* domestic law is applicable: the Criminal Code of the Federal Republic of Yugoslavia (SFRY CC), or the heavily revised, post-independence criminal code (KCPC).<sup>2203</sup> The choice of legal code places EULEX judges (from countries with differing positions on Kosovo's status) in the position of taking a stance on the recognition of Kosovo's institutions, and thus the territory's independence.

All crimes under international law have been prosecuted under article 142 of the SFRY CC (war crimes against the civilian population).<sup>2204</sup> There are significant differences between the SFRY CC and the KCPC's codification of international crimes. The SFRY CC has limited treatment of international crimes. It includes genocide (Article 141) and several articles on war crimes (Articles 142–144).<sup>2205</sup> The KCPC is more in line with modern international standards and includes crimes against humanity (Article 149) and command responsibility (Article 161).<sup>2206</sup> Since EULEX has only prosecuted crimes under the SFRY CC, there have been no prosecutions for crimes against humanity. There are consequences for not prosecuting crimes under crimes against humanity. Should a crime not fit within the definition of a “war crime,” it will be prosecuted under normal criminal law and subject to a statute of limitations.<sup>2207</sup> With a massive backlog of crimes from the conflict with Serbia, it is likely that many victims will not receive justice because the statute of limitations will expire before their case is prosecuted. Kosovo's constitution states that exceptions to the principal of legality should be made for crimes against humanity: “No one shall be charged or punished for any act which did not constitute a penal offence under law at the time it was committed, except acts that at the time they were committed constituted genocide, war crimes or crimes against humanity according to international law.”<sup>2208</sup>



The EU rule-of-law mission consisted of two operational phases. From 2008–2012, EULEX was organized around three pillars set out in the 2008 Council Joint Action: police, judiciary, and customs. Following a strategic review of the mission’s performance, from 2012 onward EULEX was rearranged to work according to a new structure made up of an Executive Division, through which EULEX continues to exercise its executive mandate within the area of the police, customs, and judiciary, as well as a Strengthening Division, through which it implements its MMA program.<sup>2209</sup>

Since 2012, there have been two concurrently operating witness protection programs in Kosovo: the EULEX Witness Protection Program and the new Kosovo Witness Protection Program. The EULEX Program has been in operation since assuming responsibility from UNMIK in 2008 and will continue to operate residually until the end of EULEX operations. The Kosovo Witness Protection Program began in 2012 and is now the prevailing protection program. The legal foundation for witness protection measures in Kosovo is the Law on Witness Protection, passed in July 2011.<sup>2210</sup> (See *Witness and victim protection and support*, below.)

Kosovo’s supervised independence formally ended in September 2012, which triggered the transfer of authority over the police and judicial institutions from EULEX to the government of Kosovo. While EULEX continued heading investigations and adjudicating complex and highly sensitive criminal cases—including war crimes, terrorism, interethnic crimes, organized crime, and corruption<sup>2211</sup>—this meant limiting the work of international judges and prosecutors to ongoing cases.<sup>2212</sup>

## **Location**

Since war crimes cases are heard through the regular criminal court system in Kosovo, they are first tried in regional basic courts in locations throughout the country. This has the advantage of making war crimes trials easily accessible to the public. However, a major drawback is that there is no courthouse that is specifically designated for war crimes trials. The basic court buildings are not structured to protect vulnerable witnesses. There are no separate entrances or waiting rooms for witnesses, making it possible for witnesses to be confronted by defendants. Often witnesses must wait in the halls of the courthouses before they testify, standing alongside defendants’ supporters.<sup>2213</sup> Another disadvantage is that a single war crimes trial may have many defendants and many victims, which can be hard to accommodate in a regular courtroom.

## Structure and Composition

The courts in which EULEX prosecutors and judges operate are the same as those in which UNMIK authorities operated (Municipal Courts, District Courts, Basic Courts, Court of Appeals, and the Supreme Court). War crimes cases are tried at one of the five District Courts of Kosovo.<sup>2214</sup> There is no distinct War Crimes Chamber charged to hear these cases. Rather, at the height of EULEX's involvement, war crimes cases were heard in front of a mixed panel of judges, with a majority of these judges being international EULEX judges.

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### Lack of Designated War Crimes Chamber

Kosovo does not have any special procedures or court structures for hearing war crimes trials. War crimes trials are heard through the normal criminal court system by mixed panels, in the same manner as all other "serious" crimes. The absence of a designated War Crimes Chamber has resulted in a very small number of war crimes making it to trial, judicial incompetence, and inadequate protection for judges and witnesses.

First, by using the domestic criminal courts system, war crimes cases do not have priority over other criminal cases, which results in very few war crimes cases making it to trial each year.<sup>2215</sup> This problem is particularly serious in light of a massive backlog of war crimes cases. Without prioritization of these cases, it will take many years for all of them to come to trial. War crimes cases are time sensitive because, as years pass, fewer witnesses will be alive to testify and accurate evidence will be more difficult to come by. Also, hearing war crimes trials through the criminal court system means that domestic judges with no experience with international criminal law are assigned to these sensitive and complex cases.<sup>2216</sup> Finally, local judges have often sought to avoid placement on panels hearing war crimes trials.<sup>2217</sup> The Organization for Security and Cooperation in Europe (OSCE) has found that many Kosovo judges report being threatened, and a number are the victims of physical acts of violence each year.<sup>2218</sup> A situation of threats and intimidation of judges involved in war crimes cases continues to exist in 2017.<sup>2219</sup>

The OSCE has noted that the creation of a specialized War Crimes Chamber would address many of these problems. War crimes cases would be prioritized and heard in a timely fashion.<sup>2220</sup> Local judges sitting in the War Crimes Chamber would become familiar with international criminal law and the nuances of war crimes cases. Finally, measures could be taken to enhance the protection of judges and prosecutors working for the War Crimes Chamber. Supporters of the current system

argue that the creation of a War Crimes Chamber would drain needed resources away from regular Kosovo courts.<sup>2221</sup>

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From 2008 to 2014, a combination of EULEX and Kosovo government departments made up the domestic response to war crimes trials. Since the end of Kosovo's supervised independence in 2012, EULEX phased out its involvement in domestic war crimes prosecutions and started transferring its powers to domestic institutions. As of 2017, EULEX judges and prosecutors "continue to be embedded in Kosovo institutions and serve in accordance with Kosovo law until the complete transition of functions to the competent Kosovo's authorities."<sup>2222</sup> Cases transferred to the Kosovo institutions continue to be monitored by EULEX's Strengthening Division.

All war crimes prosecutions are handled by the SPRK, which is partly composed of EULEX prosecutors. The EULEX Police War Crimes Investigation Unit was established to investigate war crimes claims, with support from the DFM. EULEX supported the creation of the Kosovo Police War Crimes Investigation Unit (KPWCIU), which started operations in 2014. Initially, witnesses were assisted and protected by the EULEX Witness Protection Program and from 2012 onward by the Kosovo Witness Protection Program.

### ***Internationalized Judiciary***

From 2008 onward, mixed panels of judges heard war crimes cases. The panels are composed of a majority of international EULEX judges and are presided over by a EULEX judge. As of 2014, despite concerns about the readiness of local judges to handle war crimes cases by themselves, EULEX involvement in the judiciary has diminished. Today, the distribution of judges has shifted toward panels with a majority of or exclusively comprised of domestic judges,<sup>2223</sup> except for "selected highly sensitive criminal cases" and cases before the Mitrovica Basic Court.<sup>2224</sup>

The responsibilities of EULEX judges extends beyond hearing war crimes cases. These judges have an expansive role with two focuses: mentoring and exercising judicial power under the MMA component of the mission.<sup>2225</sup> Judges are assigned to local courts throughout Kosovo. While embedded in these courts, they assist the local judicial authorities with establishing judicial framework and best practices.<sup>2226</sup> EULEX judges also sit on mixed panels with Kosovo judges to address specific cases. Within their primary competence are all SPRK-investigated or prosecuted cases. These cases include the most serious criminal cases, such as war crimes, genocide, and crimes against humanity, as well as organized crimes and terrorism, corruption,

and economic crimes. In 2012, only four of the 50 international EULEX judges were assigned to war crimes trials.<sup>2227</sup> This limited the number of war crimes cases that may be heard at any one time.<sup>2228</sup> In certain circumstances, EULEX judges have subsidiary competence to take over cases not prosecuted by the SPRK. For criminal cases, these circumstances included situations where the local judge has been threatened, crimes that are ethnically motivated, and crimes of great sensitivity or complexity.<sup>2229</sup> Subsidiary competence was limited for civil cases, but EULEX judges may take over cases where there is a suspicion of impartiality or an inability of the Kosovo judges to hear the case in a fair manner.<sup>2230</sup>

The panels in which EULEX judges exercised their jurisdiction were typically “of mixed composition with a majority of EULEX judges and presided over by a EULEX judge.”<sup>2231</sup> However, Article 3 of the Law on Jurisdiction allows the president of the Assembly of EULEX Judges (AEJ) to decide “for grounded reasons” that panels in a criminal case should be composed of a majority of Kosovo judges. The president of the AEJ also has authority to decide that panels be “fully composed of Kosovo judges or not to assign EULEX judges at particular stages of the criminal proceeding.”<sup>2232</sup> After 2012, this mechanism was exercised more frequently. In several instances, mixed panels were composed of a majority of local rather than EULEX judges.<sup>2233</sup> From 2010 to 2014, international judges were most active in criminal proceedings before the Supreme Court, the Court of Appeals, and courts of Mitrovica.<sup>2234</sup> Between 2012 and 2014, EULEX judges were also assigned civil cases related to property disputes resulting from the 1998–1999 conflict.<sup>2235</sup>

EULEX judges are hired either through secondment or by contracting. Seconded judges are selected and funded entirely by their home nations. Contracted international judges apply directly to EULEX. Once hired, EULEX pays their salaries. All EULEX judges sign one-year contracts with the possibility of renewal.<sup>2236</sup> EULEX judges have criticized the contracts for being too short to allow judges hailing from different legal cultures to familiarize themselves with the Kosovo legal system.<sup>2237</sup> In 2012, the OSCE observed that the process for the selection of international judges had improved in comparison with UNMIK, because judges can now be dismissed or sanctioned when they underperform.<sup>2238</sup>

Together the EULEX judges make up the self-governing body of the AEJ, which meets a minimum of four times a year to make resolutions that are necessary to carry out the work of the EULEX judiciary.<sup>2239</sup> If necessary, it divides into small working groups to discuss and address any issues the judges face.<sup>2240</sup> The AEJ is also responsible for making disciplinary decisions regarding misconduct of EULEX judges.<sup>2241</sup>

### ***Special Prosecution Office***

War crimes prosecutions are under the exclusive competence of the SPRK. The SPRK is a specialized office that operates within the Office of the State Prosecutor of Kosovo. Throughout the duration of EULEX's mission in Kosovo, EULEX prosecutors will be heavily involved in the operations of the SPRK.<sup>2242</sup> As of June 2011, the office was composed of 11 EULEX prosecutors, 10 Kosovo prosecutors, 60 support staff members, and five financial experts assigned to the Anti-Corruption Task Force.<sup>2243</sup> The SPRK has the authority to request additional support from other divisions of the Office of the State Prosecutor of Kosovo.<sup>2244</sup> The SPRK is presided over by the head of the SPRK, an office which was long held by an international EULEX prosecutor, and the deputy head of the SPRK, a domestic prosecutor.<sup>2245</sup> By 2015, the office was led by a local prosecutor.<sup>2246</sup>

The SPRK has exclusive competence over the most serious crimes, leaving less sensitive cases to local prosecutors. Crimes that are exclusively investigated and prosecuted by the SPRK include terrorism, organized crime, genocide, war crimes, and any case that is referred to Kosovo from the ICTY.<sup>2247</sup> SPRK also has subsidiary competence over crimes typically investigated by the state prosecutor of Kosovo. It may exercise this competence in situations where the crime is “threatening the stability of the state” or is part of a larger transnational conspiracy.<sup>2248</sup>

The SPRK is in the challenging position of handling a large workload of both recent criminal cases and past war crimes cases. When EULEX and SPRK became responsible for prosecuting war crimes in 2008, they inherited UNMIK's snarled backlog of open war crimes investigations. UNMIK transferred 179 open cases to EULEX, of which 63 were war crimes cases.<sup>2249</sup> In addition, EULEX received 1,049 war crimes police reports that UNMIK prosecution had never investigated.<sup>2250</sup> A thorough review of these reports was conducted, which resulted in around 500 cases being closed or dismissed due to lack of evidence.<sup>2251</sup> Many of the viable inherited cases proved to have incomplete files. In some cases, evidence was intentionally “misplaced” or disappeared.<sup>2252</sup> The need for thorough re-investigation has limited the number of indictments that SPRK is able to make each year.

Although SPRK has made some progress with prosecuting war crimes, the number of war crimes cases that adjudicated each year is very low. By March 2012, four years after EULEX involvement began, the SPRK had prosecuted only 20 war crimes cases.<sup>2253</sup> Appeals or retrials of cases that UNMIK had opened largely made up the first wave of cases EULEX handled.<sup>2254</sup> In 2015, a representative from the SPRK stated that there were about 300 cases of war crimes on the list of the prosecutor's

office, of which 84 cases with 335 accused were under investigation at that time.<sup>2255</sup> Hundreds of war crimes remained to be investigated and prosecuted, and the rate of adjudications strongly suggested that the SPRK lacks the operational capacity to sufficiently address these. It was also unclear whether SPRK and EULEX had mapped out crimes and developed a cohesive prosecution strategy.<sup>2256</sup>

SPRK and EULEX have not hesitated to prosecute Kosovo Albanians for their role in atrocities. This has turned public opinion in Kosovo against them.<sup>2257</sup> The public is unaware that SPRK and EULEX have also cooperated with the Belgrade Special War Crimes Chamber to prosecute Serbs.<sup>2258</sup> War crimes prosecutors, like judges, are the victims of threats and intimidation from the public, which can severely inhibit prosecutorial freedom.<sup>2259</sup> In some cases, prosecutors have been physically attacked.<sup>2260</sup> Prosecutors have stated that they do not feel that the security system currently in place provides adequate protection.<sup>2261</sup>

In addition to the backlogs of war crimes cases inherited from UNMIK, there are many other war crimes that took place in Kosovo that have not been reported or sufficiently investigated. SPRK's small staff has been unable to devote attention to these crimes. In 2011, Swiss senator Dick Marty released a report alleging that former Kosovo Liberation Army (KLA) leaders were involved in an organized crime ring that engaged in abductions, murder, and organ trafficking.<sup>2262</sup> Under concerns that the SPRK would be unable to conduct an impartial, credible investigation into these claims, EULEX launched the internationally staffed EU Special Investigative Task Force to further investigate these crimes (see text box discussion of Special Investigative Task Force, below).<sup>2263</sup> In 2016, the Kosovo government and European Union established a War Crimes Chamber based in the Netherlands and presided over by international judges to hear these cases.<sup>2264</sup> (See *The Kosovo Specialist Chambers and Specialist Prosecutor's Office*, below.)

### ***EULEX Judges and Prosecutors***

At its height, the justice component of EULEX was composed of more than 50 judges and around 30 prosecutors.<sup>2265</sup> However, the number of EULEX personnel dedicated to the investigation and prosecution of war crimes appears to have been inadequate in light of the current number of outstanding cases.<sup>2266</sup> Only four international judges regularly adjudicated war crimes cases and only two international prosecutors worked on war crimes cases.<sup>2267</sup> From 2012 onward, EULEX judges also started to work on property-related civil proceedings in the Special Chamber of the Supreme Court (SCSC). In 2014, eight EULEX judges were assigned to this chamber.<sup>2268</sup>

In 2011, the SPRK was comprised of 11 international prosecutors and 10 local Kosovo prosecutors. However, only two international prosecutors and two local Kosovo prosecutors worked within the War Crimes Investigation Unit (WCIU).<sup>2269</sup> By contrast, five international prosecutors and three local prosecutors worked within the Special Anti-Corruption Department or Task Force (ACTF).<sup>2270</sup> In 2017, the SPRK was comprised of eight prosecutors and 30 support staff, and it continues to work with a number of EULEX prosecutors.<sup>2271</sup>

### ***EULEX Police War Crimes Investigation Unit***

The WCIU is a team of EULEX police officers, which in 2012 had a staff of 29 people.<sup>2272</sup> WCIU works in partnership with the SPRK to conduct thorough investigations into war crimes and is mostly assisting with exhumations and preliminary interviews. Like the SPRK, the WCIU has been confronted with the challenge of working through the backlog of unorganized and incomplete cases left by UNMIK.<sup>2273</sup> SPRK has made steady but slow progress with investigations. In 2012, the unit had the capacity to conclude two to three investigations each year.<sup>2274</sup> Subsequently, they decided to prioritize cases with multiple victims.<sup>2275</sup> In addition to domestic investigations, WCIU cooperates across borders with the Serbian Office of the War Crimes Prosecutor by providing them with evidence and helping witnesses who live in Kosovo to testify in Serbian trials.<sup>2276</sup> In 2014, EULEX started transferring responsibilities to the KPWCIU,<sup>2277</sup> which will ultimately take over the responsibilities of the EULEX WCIU.

### ***Department of Forensic Medicine***

While initially a EULEX institution, the DFM was transferred into the responsibility of the Kosovo Department of Justice in 2010, with continued mentorship from EULEX.<sup>2278</sup> The DFM has a mandate “to clarify the fate of missing persons” and has “competence in forensic medicine and in forensic examinations related to ongoing criminal investigation.”<sup>2279</sup> Accordingly, it plays an important role in providing evidence for the prosecution of war crimes, alongside the WCIU.<sup>2280</sup> As of 2017, over 1,600 persons remained missing.<sup>2281</sup> The infrastructure of the DFM has improved in the past few years with new equipment, thanks to outside donors.<sup>2282</sup> The DFM’s major weakness is that there are no local forensic anthropologists or archeologists assigned to the department.<sup>2283</sup> Without skilled locals on the team, they will struggle to continue their work when EULEX support is completely removed from the program. EULEX claims that the unit is a victim of “political interference and poor management” by the Department of Justice.<sup>2284</sup> There is little governmental support for recovering the bodies of the missing, and the government has provided the DFM with insufficient funds to carry out its work.<sup>2285</sup>

A full transfer of the responsibilities of the DFM from EULEX to the Ministry of Justice of Kosovo was envisioned to take place in 2012. However, a report published by Amnesty International in 2012 recommended delaying the transfer due to insufficient local capacity to carry out case investigations.<sup>2286</sup> In April 2016, the new Law on Forensic Medicine finally came into force, paving the way for the DFM to become a fully operational independent agency.<sup>2287</sup>

### ***Outreach***

EULEX has an active Press and Public Information Office (PPIO). The PPIO represents all of EULEX, not just EULEX involvement in the Kosovo court system. At the height of operations, the PPIO had a spokesperson on-call 24 hours a day in order to support PPIO's policy of taking "a pro-active approach with full transparency on mission objectives and a timely response to enquiries."<sup>2288</sup> The PPIO has a diverse approach to public information, using methods such as billboards and commercials to ensure that the public is aware of the work of EULEX. The PPIO also makes extensive use of social media. All information posted to these pages, as well as to the EULEX website, is provided in Albanian, Serbian, and English.

With regard to war crimes trials, the EULEX website features an archive of court opinions presided over by EULEX judges.<sup>2289</sup> However, there are no recently updated statistics available that show how many war crimes trials have been completed and how many have yet to be heard, and it is impossible to determine if the online archives are up-to-date. Until the end of 2014, the PPIO kept individuals informed on war crimes trials by posting frequent updates to its social media pages and website, as well as publishing press releases.<sup>2290</sup> PPIO also engaged in outreach by bringing EULEX staff members into the community to educate and increase awareness.<sup>2291</sup> In the past, EULEX prosecutors led a class on war crimes trials for students at a Kosovo law school. Similar outreach efforts have included facilitating presentations at high schools throughout Kosovo. SPRK does not have a stand-alone public outreach office, but the PPIO publicizes the work of EULEX prosecutors.

In the beginning of 2015, the Kosovo Judicial Council and Kosovo Prosecutorial Council formally took over the public communications role of EULEX on court and prosecution cases. Since then, the SPRK and State Prosecution have their own spokesperson. However, EULEX continues to support the Kosovo institutions in their outreach and public information duties.<sup>2292</sup>



### ***Witness and Victim Protection and Support***

Witness and victim protection and support in Kosovo is the responsibility of the EULEX Witness Protection Program and the Kosovo Witness Protection Program. The competency of these programs is critical to ensuring the success of war crimes trials. In Kosovo, many witnesses are reluctant to testify against suspected war criminals, either out of fear of retaliation or out of respect for defendants' roles in the conflict.<sup>2293</sup> In order for witnesses to feel comfortable testifying, they must feel that they will be adequately protected from harm. Fears of retaliation are compounded due to the small size of Kosovo, where relocation within the national borders is typically insufficient to protect the individual. Witness intimidation is a serious problem that EULEX has not dealt with. On the topic of witness intimidation, Special Investigative Task Force Prosecutor Clint Williamson asserted, "There is probably no single thing that poses more of a threat to rule of law in Kosovo and of its progress toward a European future than this pervasive practice."<sup>2294</sup>

Under the Law on Witness Protection, endangered witnesses to specific crimes may be eligible for protection measures. These crimes include criminal offenses against Kosovo or its citizens, international law, or the economy, and any other criminal offenses that are punishable by imprisonment of five or more years.<sup>2295</sup> Protection measures available to these witnesses include basic measures, such as temporary relocation to a safe house, physical protection, and sealing identifying documents, as well as more extreme measures, such as a permanent change of identity, relocation inside or outside of Kosovo, and minor plastic surgery.<sup>2296</sup> Financial support is available for witnesses for up to 12 months for witnesses unable to support themselves while under protection.<sup>2297</sup> Additionally, the law offers witnesses social and legal support to "guarantee their security and his or her welfare as well as minimum living standard."<sup>2298</sup> Although the Law on Witness Protection has strengthened the support offered to many vulnerable witnesses in Kosovo, it fails to include specific measures of protection for the victims of war crimes or sexual offenses.

Although there are in-court methods to protect witnesses, Kosovo's judges and prosecutors rarely invoke these protections, leaving the identity of witnesses exposed and the witnesses vulnerable to threats and harassment.<sup>2299</sup> Additionally, when a witness arrives at a courthouse to testify, there is no support or protection, leaving them at risk of intimidation and re-traumatization. As mentioned above, Kosovar courthouses generally lack designated waiting rooms for witnesses, leaving witnesses to stand in the halls alongside defendants' supporters and occasionally leading to confrontations.<sup>2300</sup>

The EULEX Witness Protection Program was solely responsible for witness protection until the Kosovo Witness Protection Program was formed in 2012. Critics decried the witness program as understaffed and ineffective throughout its tenure. Failures of protection slowed investigations and prosecutions.<sup>2301</sup> According to an Amnesty International report in 2012, a SPRK prosecutor stated that under EULEX there is “no witness protection or support available in the court system for victims of war crimes.”<sup>2302</sup> Criticism of EULEX mounted following the 2011 suicide of Agim Zogaj, a war crime witness reportedly under EULEX protection.<sup>2303</sup> According to Zogaj’s suicide note and a complaint his family lodged against EULEX, Zogaj was under intense stress and had received death threats.<sup>2304</sup> His death prompted some diplomats to condemn EULEX for failing to recruit qualified candidates to the Witness Protection Program and for failing to implement the existing protections for vulnerable witnesses.<sup>2305</sup>

EULEX has struggled to protect witnesses requiring international relocation. The international community has been reticent to accept witnesses from Kosovo, who often have large families to support and do not speak a Western European language. Additionally, these countries hesitate because of lingering uncertainty over Kosovo’s statehood status. In 2011, the Council of Europe called upon its member states to support witness protection in the Balkans by accepting witnesses from Kosovo.<sup>2306</sup>

In 2012, EULEX started setting up the Kosovo Department of Witness Protection with the support of the EU-funded Witness Protection in the Fight against Serious Crime and Terrorism II (WINPRO II) Project,<sup>2307</sup> although it was not until June 2014 that EULEX reported that the department had become fit for operations.<sup>2308</sup> Although Kosovo has made progress in the establishment of a legal infrastructure and institutions for the protection of witnesses in war crimes trials, witness intimidation remains problematic.<sup>2309</sup> Remaining challenges include “international cooperation, education and awareness raising of the responsible actors, social, cultural and geographical factors as well as in the logistics aspect for financing witness protection programs.”<sup>2310</sup>

## ***Defense***

The Kosovo Criminal Procedure Code (KCPC) gives all defendants the right to assistance by a defense council throughout all criminal proceedings.<sup>2311</sup> In cases of “mandatory defense,” for individuals who are unable to afford a private defense attorney, a pretrial judge can assign a defense council paid for by the public. Cases of mandatory defense are cases where the defendant is disabled in a way that would

impair their ability to defend themselves, cases that are being heard on remand, and cases where the defendant plans to plead guilty.<sup>2312</sup> In addition to the mandatory defense cases, a defendant may be assigned defense council at public expense if he is indicted for an offense with a sentence of eight years or more.<sup>2313</sup> Finally, regardless of sentence length, a publicly funded defense council may be appointed “in the interest of justice ... if [the defendant] is financially unable to pay the cost of his or her defense.”<sup>2314</sup>

The Kosovo Chamber of Advocates (KCA) maintains a list of advocates who have volunteered to serve as ex officio defense council. It is the responsibility of the judge or the prosecutor to call the KCA and request an advocate if the defendant requires one. However, an insufficient number of attorneys have volunteered to be on this list, and some are underqualified for the cases in question. There is no specific list of attorneys that specialize in war crimes defense. Additionally, according to the American Bar Association, placing this responsibility in the hands of the judge or prosecutor can result in selecting “an advocate who will only do the bare minimum and will not challenge the prosecutor in any way.” A more recent pilot program revamps this system. With the new system, there is no volunteer list. KCA employees directly contact licensed advocates in the area, asking them to provide services.<sup>2315</sup>

While the state should pay defense attorneys, this is not always the case. There have been reports of defense attorneys asking for pay and being refused.<sup>2316</sup> Without a guarantee of fair compensation, defense attorneys are less likely to take on ex officio representation.

### ***The Kosovo Judicial Council***

EULEX recognized the importance of “independent, professional and impartial” oversight with the creation of the KJC in 2011.<sup>2317</sup> To achieve this mandate, the KJC is tasked with selecting and proposing candidates for appointment and reappointment to judicial office”<sup>2318</sup> as well as overseeing “disciplinary proceeding of judges” and the general management of judicial reform.<sup>2319</sup> The KJC is also responsible for implementing the budget of the judiciary with the assistance of EULEX advisors. EULEX advisors consist of “two international advisors, a national legal advisor and a national language assistant.”<sup>2320</sup> Membership of the KJC cannot contain members of the executive branch of government.<sup>2321</sup> However, the composition of the KJC does not satisfy European standards. While European standards require that all members of a judicial council be elected by their peers (the judiciary), the Constitution of Kosovo only requires five of the thirteen members be elected by their peers.<sup>2322</sup> The eight remaining judges are appointed by government bodies.<sup>2323</sup>

### ***The Kosovo Prosecutorial Council***

The KPC is an independent institution responsible for “recruiting, proposing, transferring, reappointing and disciplining prosecutors.”<sup>2324</sup> It is chaired by the chief state prosecutor and consists of an “advisor, a national legal advisor and an admin/language assistant” with members from “the prosecution offices (experts) and from other parts of the civil society.”<sup>2325</sup>

### ***Joint Rule of Law Coordination Board***

In 2008, EULEX established the Joint Rule of Law Coordination Board (JRCB), composed of the EULEX head of mission, the deputy prime minister of Kosovo, and representatives of the KJC and KPC, with the aim of coordinating efforts to build the rule of law in Kosovo and ensure capacity building of local institutions.<sup>2326</sup> At the end of 2012, the JRCB also became responsible for monitoring the implementation of the “Compact” agreement between the Kosovo Ministry of Justice, the EU special representative, and the head of EULEX.<sup>2327</sup>

### ***The Assembly of the EULEX Judges***

The AEJ is comprised of judges appointed by the head of mission to play the role of “watchdog of judicial independence.”<sup>2328</sup> The AEJ is tasked with endorsing the method of case selection and case allocation. It also has competence to assist with other issues that relate to judicial independence, including training of judges, ruling on appeals from disciplinary decisions, and electing members of a Disciplinary Board.

## **Prosecutions**

EULEX inherited over 1,000 war crimes cases not previously investigated by UNMIK.<sup>2329</sup> In 2010, the EULEX WCIU began a review of these cases and implemented a case selection process.<sup>2330</sup> The Council of Europe found that the war files, especially dealing with suspected KLA perpetrators, “were turned over by UNMIK in a deplorable condition (misplaced evidence and witness statements, long time lapses in following up on incomplete investigative steps).”<sup>2331</sup>

In 2012, Amnesty International judged that EULEX had made progress in the investigation of war crimes cases, but has not done enough to overcome the backlog of the UNMIK legacy. Under EULEX, the WCIU was only able to conclude, on average, two or three cases per year because the prosecution of war crimes was

only one of several EULEX priorities.<sup>2332</sup> According to Bernard Rabatel, deputy head of the EULEX justice component, the prosecution of organized crime and corruption cases was EULEX's top priority.<sup>2333</sup> In 2015 the Humanitarian Law Centre-Kosovo estimated that in 17 years of war crimes prosecutions under UNMIK and EULEX, only 44 cases had been completed. This included 20 cases involving 63 Albanians and 22 cases involving 43 Serbs.<sup>2334</sup> If compared to OSCE calculations that 37 individuals had been tried for war crimes by the end of 2009,<sup>2335</sup> it appears that under EULEX 69 individuals had been tried from 2010 to 2015. In January 2017, Human Rights Watch reported that EULEX judges had been involved in 38 war crimes verdicts since the mission's establishment in 2008.<sup>2336</sup> As of 2017, prosecution of war crimes and other serious crimes continued under EULEX auspices, but as the mission continued to transfer rule-of-law responsibilities to Kosovo's domestic authorities, after 2014, new cases were only to be instigated by national judges.<sup>2337</sup> In 2015, for the first time since the transfer of authority, local prosecutors filed a war crimes indictment, which in 2017 was under consideration by local judges.<sup>2338</sup>

Beyond the modest number of prosecutions, progress in the investigation of missing Kosovo Albanians by Serb forces under EULEX has been slow,<sup>2339</sup> and investigations into the fate of Serbs allegedly abducted by KLA members have been almost nonexistent or ineffective. The Klecka case is an excellent example of the difficulties Kosovo prosecutors face in bringing cases against former KLA commanders. In 2012, the Supreme Court—consisting of a panel of two international and one local judge—ordered the acquittal of Fatmir Limaj and nine other ex-KLA fighters for detention, torture, and murder of Serbs and Albanians in Klecka, Limaj, and three others.<sup>2340</sup> The SPRK appealed the judgment and ordered a retrial, but Limaj was acquitted again in 2017.<sup>2341</sup> Prosecutors viewed Limaj's acquittal, as well as his previous acquittal for alleged crimes against humanity and war crimes in the Lapušnik Prison Camp (near Klecka), as the result of witness interference. After a key witness was found dead in Germany in 2012, the evidence was deemed first inadmissible and then unreliable.<sup>2342</sup> Eventually, the difficulties in witness protection in the prosecution of former KLA leaders was a key reason for the creation of the Kosovo Specialist Chambers outside the territory of Kosovo.

A disproportionate percentage of Serbs, Roma, and other minorities—450 out of 499—remain unaccounted for.<sup>2343</sup> The lack of proper investigation into missing minorities is likely the result of a lack of political will to investigate these crimes by government authorities in Kosovo.<sup>2344</sup> Authorities in Albania and Kosovo have not been cooperative in efforts to locate Serbs or Kosovo Albanians thought to have fallen victim to crimes committed by members of the KLA.<sup>2345</sup> However, since

a 2011 Council of Europe report affirmed allegations of organ trafficking by KLA forces, authorities in Kosovo and Albania have demonstrated greater willingness to facilitate investigations of missing Serbs.

## **Legacy**

After 10 years of EU involvement in the development of the rule of law in Kosovo, a tremendous amount of legislation has been passed and new institutions created that have contributed to the rule of law in Kosovo. However, according to former EULEX judge James Hargreaves, a culture of impunity persists.<sup>2346</sup> Judges and prosecutors continue to work in a highly politicized and ethnically polarized environment, and problems with the implementation of witness protection remains a problem.<sup>2347</sup>

By 2017 one observer described EULEX's results as "mixed at best and a debacle at worst."<sup>2348</sup> The "judicial system remains a mess. Despite limited achievements, the mission has struggled to make a substantial improvement to the Kosovo's rule of law, and has not met the expectation to bring justice to key perpetrators of war crimes and corruption."<sup>2349</sup> The decision to establish the Kosovo Specialist Chambers in The Hague is an "implicit recognition of the failure of both UNMIK and EULEX to investigate and try ... sensitive [war crimes] cases."<sup>2350</sup>

### ***Phaseout of International Personnel and Transition to a National Institution***

On June 14, 2016, the Council of the European Union approved an extension of the EULEX mission to June 2018.<sup>2351</sup> The EU granted this extension in order to give EULEX more time to strengthen the rule of law. While EULEX anticipates successfully completing the transition by the appointed end date, it reserves the right to request an additional extension or to otherwise "modify their engagement" should they believe it necessary.<sup>2352</sup>

The EULEX mandate extension ushers in a period of transition where EULEX will gradually phase out international engagement in Kosovo institutions. The focus of this period will be capacity building and security.<sup>2353</sup> EULEX prosecutors will continue existing work, but will not take on new cases.<sup>2354</sup> Similarly, EULEX judges will continue to preside over continuing cases and appeals of cases that are already open, but will not hear new cases.<sup>2355</sup> The composition of mixed panels will shift, making a majority of the judges local Kosovo judges.<sup>2356</sup> EULEX judges will remain on the mixed panels until the end of the mandate. EULEX judges and prosecutors will continue their role of mentoring and advising Kosovo rule-of-law institutions

throughout the transition.<sup>2357</sup> There will be a sizable reduction in EULEX staff members in proportion to their reduced role in Kosovo.

### ***Impact on Legal Reform***

EULEX came into Kosovo with the intention of strengthening rule of law. Their mission has involved mentoring, monitoring, and advising alongside their exercise of executive authority. However, after years of involvement in Kosovo, EULEX has struggled to build capacity and empower local judicial institutions. Prior to 2014, critics argued that EULEX's lead in justice matters failed to allow Kosovo legal professionals to take ownership of the judiciary.<sup>2358</sup> Since EULEX formally transferred all rule of law responsibilities to the domestic institutions in 2014, the rate of war crimes proceedings has fallen, suggesting that the judiciary is unprepared to stand on its own feet.<sup>2359</sup> More broadly, critics say that EULEX has failed to build the rule of law and improve the local judiciary.<sup>2360</sup>

The Kosovo judiciary remains weak, and it will continue to face many challenges after EULEX's departure. The greatest risks to domestic war crimes trials are security and lack of experience. Kosovo judges adjudicating sensitive cases, including war crimes cases, face threats and intimidation from the political elite and the public.<sup>2361</sup>

### ***Impact on Society***

Public approval of EULEX is very low; as of 2013, only 22 percent of the population reported satisfaction with the mission.<sup>2362</sup> EULEX officially takes a neutral stance on Kosovo statehood. For many Kosovo Albanians, a neutral stance is tantamount to aligning with Serbia.<sup>2363</sup> The Kosovo Foundation for Open Society asserts that “no international rule of law mission can be successful in winning over public support in Kosovo if it does not clearly recognize Kosovo's independence and statehood.”<sup>2364</sup>

Little information exists on public perception of domestic war crimes trials. Amnesty International reported in 2012 that there was a public impression that EULEX was targeting Kosovo Albanians for war trials.<sup>2365</sup> This has resulted in low support for the current domestic war crimes trials mechanism.

## **Financing**

EULEX receives its funding from the member states of the European Union. The Council of the European Union approves the annual proposed budget.<sup>2366</sup> In 2014,

the EULEX annual operating budget was 111 million euros.<sup>2367</sup> This amount covered operations for all branches of EULEX—policing, judiciary, and customs. EULEX pays the salary of EULEX judges.<sup>2368</sup> EULEX is financed by 26 EU member states (all member states except Cyprus)<sup>2369</sup> through the Common Foreign and Security Policy (CFSP) budget and by participating non-EU states, which include Canada, Croatia, Norway, Switzerland, Turkey, and the United States.<sup>2370</sup> While general information on the financing of EULEX is available,<sup>2371</sup> EULEX does not disclose information relating to the salaries of international judges.<sup>2372</sup> Funding for Kosovo’s domestic institutions, such as the SPRK, the witness protection program, and the judiciary, comes from the Kosovo national budget. The budget is set by the Committee for Budget and Finance of the Kosovo Assembly.<sup>2373</sup> Many of these institutions, most notably the witness protection program, struggle due to insufficient funding.<sup>2374</sup>

A report by the American Bar Association published in 2010 found that Kosovo judges had been underpaid for several years. Prior to 2011, no law protected judicial salaries in Kosovo, and the salaries of local judges and prosecutors had not increased since 2002, despite a considerable increase in the cost of living.<sup>2375</sup> District Court judges earned “less than 18 Euro per day (550 Euro per month gross).”<sup>2376</sup> Lay judges did not receive regular salaries but rather a “modest per-case-fee.”<sup>2377</sup> Judicial personnel and their international partners expressed that “a fully independent and strong judiciary is only possible with respectable salaries for judges ... and the dire situation with judicial salaries has existed for so long in the fact of such uniform and persistent criticism due to a deliberate attempt by other branches of government to keep the judiciary subservient and ineffective.”<sup>2378</sup> The situation improved in January 2011 when provisions within the Law of Courts came into effect and tied judicial salaries to equivalent positions in the executive branch of Kosovo’s government. For example, the salary of the Supreme Court president now matches that of the prime minister.<sup>2379</sup> Under this scheme, a judge’s salary depends on the level of court they preside over. For certain judges in high-level courts, this new scheme resulted in a 60 percent increase over their 2010 salary.<sup>2380</sup>

There have been problems with underpayment of the Kosovo Police, which according to Amnesty international is “not enough to encourage impartiality.”<sup>2381</sup> Similarly, the staff of the DFM are underpaid considering the qualifications required for their work. This poses a serious challenge to investigating allegations of organized crime against KLA forces.<sup>2382</sup>

In accordance with Article 9(2) of the Council Joint Action of February 4, 2008, on the European Union Rule of Law Mission in Kosovo, EULEX consists primarily



of staff seconded by EU member states or EU institutions.<sup>2383</sup> EULEX does not disclose information relating to the salaries of international judges.<sup>2384</sup> As mentioned above, member states and EU institutions bear the costs associated with the staff they second to EULEX. These costs include “travel expenses to and from the place of deployment, salaries, medical coverage and allowances other than daily allowances and applicable risks and hardship allowances.”<sup>2385</sup> EULEX may also recruit international and local staff on a contractual basis.<sup>2386</sup> While non-EU states participating in the mission may second staff to EULEX, nationals from non-EU states are recruited on a contractual basis only, and exceptionally where no qualified applications from member states are available.<sup>2387</sup>

## **Oversight and Accountability**

EULEX is not accountable to Kosovo’s Parliament, Ombudsman, or Anti-Corruption Agency,<sup>2388</sup> but the mission has created several internal accountability mechanisms within its structures. The Human Rights and Legal Office (HRLO) is an advisory and policy body responsible for ensuring that all EULEX’s activities are in line with international human rights standards.<sup>2389</sup> The Human Rights Review Panel (HRRP), which has been operational since June 2010, addresses human rights violations that have been committed within the execution of the EULEX mandate. The HRRP panel is composed of four members, including one EULEX judge and international experts in human rights law. Since 2010, it has registered 188 complaints, out of which 24 cases were deemed violations.<sup>2390</sup>

At the end of 2014, the Kosovo daily newspaper *Koha Ditore* published an article accusing EULEX officials and international judges and prosecutors of corruption, including taking bribes.<sup>2391</sup> The EU High Representative for Foreign Affairs and Security Policy Federica Mogherini appointed an independent expert to investigate the allegations; the expert published a report on the matter in March 2015.<sup>2392</sup> The report concluded that the allegations were unfounded, but that EULEX should have opened an international investigation at the time and highlighted several weaknesses in the mission’s management and structure. These allegations, in addition to general critiques of the effectiveness of the rule of law mission, have damaged the credibility of EULEX in Kosovo.

The creation of the KJC, KPC, and AEJ as independent oversight mechanisms within the domestic structure of Kosovo are a positive step forward in the establishment of an impartial and independent judicial system in Kosovo. While under UNMIK,

the SRSG appointed local judges and prosecutors, but appointments are now made through independent mechanisms.

Domestically, the Humanitarian Law Center-Kosovo (HLC) has been monitoring war crimes trials in Kosovo since 2000, providing a measure of informal oversight.<sup>2393</sup> HLC writes and publishes annual reports that analyze all war crimes trials heard in Kosovo as well as the work of EULEX and the SPRK.<sup>2394</sup>

## **Kosovo Specialist Chambers and Specialist Prosecutor's Office**

### **Creation**

In April 2008, the former Chief Prosecutor of the International Tribunal for the Former Yugoslavia (ICTY) Carla Del Ponte published her memoirs, in which she claims that Kosovo Liberation Army (KLA) fighters kidnapped several hundred persons, mostly ethnic Serbs, and took them to prison facilities in Kosovo and northern Albania where they suffered further serious abuse. The book alleged that crimes against these abductees included illegal organ removal, organ trafficking, torture, and murder.<sup>2395</sup> Under pressure from international media and civil society,<sup>2396</sup> the European Union Rule of Law Mission in Kosovo (EULEX) reluctantly opened what it called a preliminary examination into the crimes committed in the “Yellow House” in Drenica, Albania, in the aftermath of the war. A year later, the EU mission reported that it found no evidence of torture and murder in northern Albania, and was thus closing the case.

Simultaneously, the Parliamentary Assembly of the Council of Europe started an investigation into Del Ponte’s allegations. In 2011, the Swiss rapporteur of the Committee on Legal Affairs and Human Rights presented a report titled “Inhuman treatment of people and illicit trafficking in human organs in Kosovo.” The report discussed war crimes and crimes against humanity against Serbs and Kosovar Albanians, with a focus on torture, inhumane and degrading treatment, and disappearances in detention centers under KLA control during and following the Kosovo war (see text box for *Council of Europe Report*).<sup>2397</sup>

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## **Council of Europe Report on Inhuman Treatment of People and Trafficking in Human Organs in Kosovo**

Following the allegations made by former ICTY Prosecutor Carla Del Ponte, in 2008 the Council of Europe launched a formal inquiry into organized crime, including human organ trafficking, by KLA forces. The inquiry led by Human Rights Rapporteur Dick Marty culminated in a report published in 2010: “Inhuman treatment of people and illicit trafficking in human organs in Kosovo” (also known as the “Marty report”).<sup>2398</sup>

The Marty report concluded that a “number of indications” appeared to confirm that organs were removed from a subset of Serb captives held at a clinic in Albania and trafficked abroad. Evidence suggested that these captives were “initially kept alive, fed well and allowed to sleep, and treated with relative restraint by KLA guards ... moved through at least two transitory detention facilities, or ‘way stations’ before being delivered to the operating clinic.” KLA forces—specifically, affiliates of the Drenica Group—allegedly controlled these “way stations” in Dica, Burrel, Rripe, and Fushe-Kruje. Marty’s report found that the ICTY’s exploratory mission in Albania had been superficial, with a standard of professionalism prompting “bewilderment.” Moreover, the ICTY’s jurisdiction was limited to exploring crimes committed up to June 1999, and it had no authority to conduct investigations in Albania, except with the consent of Albanian authorities. However, organ trafficking by the KLA was “alleged to have occurred from the summer of 1999 onwards,” after Serbian forces had left Kosovo and NATO’s international forces were starting to establish themselves: a period of transition and chaos.<sup>2399</sup>

In addition to crimes committed by KLA forces in the context of the Kosovo conflict, the Marty report found information related to suspected involvement of KLA leaders and international affiliates in the trafficking of organs through the Medicus Clinic in Pristina. The report stated that the “information appears to depict a broader, more complex organized criminal conspiracy to source human organs for illicit transplant, involving co-conspirators in at least three different foreign countries besides Kosovo, enduring over more than a decade.”<sup>2400</sup>

The Marty report recommended:

- that additional funds be allocated to EULEX for complex war crimes and organized crime investigations and prosecutions;
- that EULEX dedicate special attention to the crimes of organ trafficking, corruption, and organized crime; and

- that Kosovo authorities break the “glass ceiling of accountability” and cooperate with investigations into allegation of crimes committed by KLA forces in northern Albania.<sup>2401</sup>
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In response to the publication of the Council of Europe, the EU established, along with EULEX, a Special Investigative Task Force (SITF) in 2011 to investigate “possible abductions, detentions, mistreatment and killings ... as well as any other crimes related to the allegations in the [EU] report.”<sup>2402</sup> John Clint Williamson, lead prosecutor of the SITF, held meetings with judicial authorities as well as the diplomatic community in Pristina, Belgrade, and Tirana to discuss their cooperation with the investigation.<sup>2403</sup> Kosovo’s President Atifete Jahjaga and other authorities in Kosovo pledged their full support for and cooperation with the investigation. Serbia’s then-President Tadic and Albania’s Prime Minister Berisha also committed to cooperate with the investigation. Moreover, in May 2012, the Albanian government passed a bill providing the task force access to Albanian territory for the purpose of investigating allegations of organ trafficking<sup>2404</sup> as well as the authority to call witnesses and search premises through requests of mutual legal assistance.<sup>2405</sup>

Under pressure from the EU, the United States, and the UN Security Council, the parliament of Kosovo agreed to the creation of a special mechanism.<sup>2406</sup> On August 3, 2015, the Kosovo Assembly adopted constitutional amendments and legislation allowing for the prosecution of crimes under domestic law by a mechanism placed outside Kosovo: the Kosovo Specialist Chambers and Specialist Prosecutor’s Office.<sup>2407</sup> In September 2016, the mandate and staff of the SITF were transferred from the auspices of EULEX to the newly established Kosovo Specialist Chambers in The Hague. While the appointment of a registrar in April 2016 marked the commencement of the work, the court only became fully operational following the appointment of the specialist prosecutor on September 1, 2016, and the appointment of nineteen international judges in February 2017.<sup>2408</sup> In July 2017, President Ekaterina Trendafilova announced that with the judges’ adoption of Rules of Procedure and Evidence for the Specialist Chambers, there “are no [longer any] legal impediments to receiving any filings or indictments.”<sup>2409</sup>

## **Legal Framework and Mandate**

The Kosovo Specialist Chambers and Specialist Prosecutor’s Office were established to prosecute under Kosovo law any war crimes, crimes against humanity, and other crimes committed between January 1, 1998, and December 31, 2000. The

Law on the Specialist Chambers and the Specialist Prosecutor's Office dictates a specific material jurisdiction to the mechanism, in relation to allegations of grave trans-boundary and international crimes "which related to those reported in the Council of Europe Parliamentary Assembly Report ... and which have been the subject of criminal investigation by the [SITF]." <sup>2410</sup> Beyond the prosecution of war crimes and crimes against humanity, such as torture or inhuman treatment, hostage taking, murder, and enforced disappearances, investigations are likely to focus on transnational crimes, such as illegal organ transplantation and trafficking, which are defined under Kosovo law. The court's territorial jurisdiction extends to both crimes committed and commenced within Kosovo, given that many of the crimes described in the Marty report are alleged to have taken place in northern Albania. <sup>2411</sup>

The Specialist Chambers has jurisdiction over crimes under international and national law. The Constitution of Kosovo prescribes that customary international law has primacy over domestic law and certain international human rights treaties. Specialist Chamber judges may thus directly apply international law and apply jurisprudence from international criminal tribunals. However, Kosovo law will determine sentencing. Judges must take into account the prevailing punishment under Kosovo law at the time crimes were committed. <sup>2412</sup>

The Law on the Specialist Chambers and Specialist Prosecutor's Office and the Rules of Procedure and Evidence, adopted by the judges in August 2017, constitute the mechanism's governing legal framework. The Host State Agreement between the Kingdom of the Netherlands and the Republic of Kosovo determines that the Host State shall only allow the temporary detention of suspects and witnesses, and that sentences of convicted persons shall not be served in the Netherlands. <sup>2413</sup> Therefore it can be expected that the KSC will enter into bilateral detention agreements with other states.

The KSC is a court under national law that administers justice outside of Kosovo. The Specialist Chambers are attached to each level of the court system in Kosovo, including the Basic Court of Pristina, the Court of Appeals, the Supreme Court, and the Constitutional Court, but operates completely independent of the courts of Kosovo and has primacy over all other courts. <sup>2414</sup> In principle, the relation between the Specialist Chambers and national courts is nonexistent, except that the prosecutor may order the transfer of proceedings from any of the other courts in Kosovo. <sup>2415</sup> In its composition, the Specialist Chambers is a new species among existing hybrid tribunals. It is the first among internationalized courts that does not employ staff from the region <sup>2416</sup> since, according to a Kosovo law (ratifying an exchange of letters between the president of Kosovo and the EU high representative

for foreign affairs and security policy), the chambers must only be staffed with and operated by international staff and judges.<sup>2417</sup> Scholars have questioned whether the mechanism should be considered an international court or internationalized (domestic) court. While its structure and personnel are international, legally it is a domestic mechanism because it is a court based on Kosovo law.<sup>2418</sup>

## Location

The Specialist Chambers are an integral part of the Kosovar judicial system and have a seat in both Kosovo and The Hague, the Netherlands. The Host State Agreement between the Netherlands and the Republic of Kosovo on the Relocated Specialist Judicial Institution (the name that is used to refer to both the Specialist Chambers and the Specialist Prosecutor's Office in the Host State Agreement) determines that the court will be hosted for the duration of its work. When necessary, and when it is in the interest of the mechanism's administration or in the interests of justice, the Specialist Chambers may reside elsewhere.<sup>2419</sup>

From the start of the discussions on the creation of the Specialist Chambers, it was evident that the mechanism needed to be located outside of Kosovo to secure independence and security of trials. Since the end of the war, the ICTY, the United Nations Interim Administration Mission in Kosovo (UNMIK), and EULEX courts have attempted to investigate KLA crimes, but all had limited success.<sup>2420</sup> This has everything to do with the challenging climate for investigations in Kosovo. The ICTY had to drop almost all but one of its cases against KLA commanders because of lack of evidence.<sup>2421</sup> Several cases showed signs of systematic and widespread witness interference and intimidation. In the *Haradinaj et al.* case, for example, it was reported that nine potential witnesses were killed while investigations were ongoing.<sup>2422</sup> A second reason why it was decided to prosecute crimes within The Hague was the favorable climate for former KLA commanders, who continue to be regarded as heroic liberation fighters by many Kosovar Albanians. Popular support for KLA leaders was evident at the large-scale protests in Pristina in January 2017 to demand the release of former Prime Minister Ramush Haradinaj who was detained in France based on a Serbian arrest warrant.<sup>2423</sup> The first SITF report of July 2014 concluded that conditions for conducting an investigation remained "extremely challenging," among others because of a climate of intimidation that undermines the investigation of KLA crimes. Therefore, the EU, Kosovar, and Dutch authorities agreed that the protection of victims and witnesses could be better ensured by seating the mechanism in The Hague.<sup>2424</sup>

At the time the mechanism began operations at the end of 2016, the court's building was still under construction. According to the municipality of The Hague, the premises will be finalized in April 2018.

## **Structure and Composition**

The Kosovo Specialist Chambers and Specialist Prosecutor's Office (at times referred to as the Kosovo Relocated Specialist Judicial Institution or the Kosovo Specialist Court) consist of the Specialist Chambers proper (made up of four chambers and the Registry, which houses among other units, the Defense Office, Victims' Participation Office, Witness Protection and Support Office, Detention Management Office, and Ombudsperson's Office) and the Specialist Prosecutor's Office as a distinct entity.<sup>2425</sup> While legally part of the judicial system of Kosovo, the Hague-based court is a temporary construct for the period of investigations of crimes under the Law on Specialist Chambers.

### ***Chambers***

The Specialist Chambers is made up of a Trial Chamber, Appeals Chamber, Supreme Court Chamber, and a Constitutional Court Chamber, each composed of three judges. A single judge performs the functions of a pretrial chamber.<sup>2426</sup> The head of the EU Common Security and Defense Policy Mission in Kosovo (the head of EULEX) appoints judges to a roster of independent international judges upon the recommendation of an independent selection panel composed of at least two international judges.<sup>2427</sup> The same process is used to select the Specialist Chambers' president and vice president from among the judges.

The president is the only judge who serves the court on a full-time basis.<sup>2428</sup> The judges on the roster will only be present at The Hague when the work so requires and as required by the president. Judicial functions may be exercised remotely, in part to contain costs.<sup>2429</sup>

The head of EULEX appointed the KSC's first president, Ekaterina Trendafilova (a former judge at the International Criminal Court), on December 14, 2016,<sup>2430</sup> and then appointed a roster of 19 international judges originating from Europe and the United States of America on February 17, 2017.<sup>2431</sup> According to Articles 25 and 33 on the Law on the Specialist Chambers, the president will assign judges to the various chambers, or panels, only once the special prosecutor files an indictment in the Specialist Chambers or upon other required judicial activity.<sup>2432</sup>

## ***Office of the Prosecutor***

The specialist prosecutor has the authority to investigate and prosecute persons who have committed crimes within the jurisdiction of the Specialist Chambers. Unlike in many international or internationalized hybrid tribunals, but similar to domestic institutions, the prosecutor's office acts independently of the other entities within the Specialist Chambers, as well as from other prosecution authorities in Kosovo.<sup>2433</sup> To ensure continuity of the work of the EU's SITF, the last SITF prosecutor, David Schwendiman, was appointed as the first specialist prosecutor in September 2016.<sup>2434</sup> The head of EULEX appoints the prosecutor for a four-year term, and the prosecutor may be subject to reappointment.<sup>2435</sup> The chief prosecutor is supported in his work by other prosecutors and can make use of the Kosovo police forces and other domestic law enforcement authorities, to the same extent as Kosovar prosecutors.<sup>2436</sup>

Since the Specialist Chambers are part of the domestic system of courts in Kosovo, there is no bar to the prosecutor investigating crimes within the territory of Kosovo.<sup>2437</sup> The status of the Office of the Specialist Prosecutor within Kosovo's formal justice system may enhance cooperation between Pristina and The Hague.

## ***Registry***

The Registry is responsible for the administration and servicing of the Specialist Chambers and the registrar is responsible for the budget of both the Specialist Chambers and the Specialist Prosecutor's Office. The head of EULEX appoints the registrar for a four-year term. Beyond the Victims' Participation Office, Defense Office, Witness Protection and Support Office, and Detention Management Office, the Registry houses the Ombudsperson's Office. The creation of the function of an ombudsman mirrors domestic Kosovo institutions and is another feature that distinguishes the Specialist Chambers from international tribunals. The Office of the Ombudsperson will act as an independent oversight mechanism which will "monitor, defend and protect the fundamental rights and freedoms enshrined in Chapter II of the Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor's Office." The ombudsperson can receive and investigate complaints, but "shall not intervene in cases or other legal proceedings before the Specialist Chambers, except in instances of unreasonable delays."<sup>2438</sup> The Registry, like the Office of the Prosecutor, can avail itself of domestic authorities such as the Kosovo police, and has the same authority as the Kosovo police under Kosovo law.<sup>2439</sup>



### ***Witness Protection and Support Office***

The Law on the Specialist Chambers and the Rules of Procedure and Evidence set out a comprehensive system of witness protection in the Kosovo Specialist Chambers. The Witness Protection and Support Office (WPSO) is “responsible for protecting witnesses, victims participating in the proceedings and, where appropriate, others at risk on account of testimony given by witnesses.” It is the role of the WPSO to set out adequate protection measures for victims and witnesses, and to provide administrative, logistical, as well as psychological assistance to those participating in proceedings. Victims will participate in proceedings as a group and may be represented by a victims’ counsel who is appointed by the Registry.<sup>2440</sup> Victims may be awarded individual or collective reparations through an order against a convicted person, either by a Kosovo (civil) court or by a KSC panel.<sup>2441</sup>

### ***Outreach***

The Registry is responsible for communications from the Specialist Chambers to the general public.<sup>2442</sup> Early in its existence, the court recognized the importance of explaining its mandate and responsibilities, because of the difficult political climate in which it operates. The president, prosecutor, and registrar have regularly engaged with the media and civil society, encouraged visits to the court, and held press conferences to inform the public about important developments. Officials visited Pristina and Belgrade in its first year in a bid to foster cooperation with the court. Once proceedings begin, hearings will be live-streamed in English, Albanian, and Serbian, which will allow people in the region to follow the proceedings closely.<sup>2443</sup>

### **Prosecutions**

As of late 2017, the prosecutor had not issued any indictments. The mechanism’s mandate makes explicit reference to alleged crimes included in the 2011 Council of Europe report. In July 2014, then-Chief Prosecutor of the SITF Clint Williamson stated that three years of investigations throughout Europe had led to compelling evidence of war crimes and crimes against humanity committed by top KLA leaders. He stated that KLA officials “bear responsibility for a campaign of persecution that was directed against ethnic Serbs, Roma and other minority populations of Kosovo,” citing evidence of crimes including unlawful killings, abductions, enforced disappearances, illegal detention, sexual violence, and inhumane treatment.<sup>2444</sup> The Specialist Prosecutor’s investigations might concern high-level government officials and politicians. The Martyr report made specific mention of former Drenica

group member Hashim Thaçi, who currently serves as the president of Kosovo.<sup>2445</sup> Those under previous ICTY indictment in the *Haradinaj et al.* case, including current Prime Minister Ramush Haradinaj, could also be suspects.

## **Legacy**

As of late 2017, the KSC was just getting underway, and it was too early to assess its legacy. The mechanism could provide a new opportunity for the people of Kosovo to deal with a violent past and to take a much-needed step in addressing a persistent culture of impunity.<sup>2446</sup> If it provides accountability for KLA-perpetrated grave crimes, KSC proceedings could provide a sense of justice to the victims and contribute to a more complete understanding of crimes perpetrated during the Kosovo war. However, if the KSC is unable to overcome the challenges faced by previous mechanisms (including the ICTY) when investigating and prosecuting suspected KLA perpetrators, it could underscore impunity and have negative effects on the “stable” peace and progress that Kosovo has made since its declaration of independence in 2008.<sup>2447</sup>

## **Financing**

The Specialist Chambers are financed by a grant to the KSC registrar through the budget of the Common Foreign and Security Policy (CFSP) of the European Union. The European Commission first approved the budget for the mechanism at US\$29.1 million in 2016 and allocated US\$41.3 million to the mechanism for the period from June 15, 2017, to June 14, 2018.<sup>2448</sup> Beyond EU support, the mechanism has received financial contributions from third parties, including Canada, Norway, Switzerland, Turkey, and the United States of America.<sup>2449</sup>

## **Oversight and Accountability**

The EULEX in Kosovo, under the EU CFSP, is responsible for the appointment of the Kosovo Specialist Chambers president, judges, prosecutor, and registrar. The EU, the Organization for Security and Cooperation in Europe (OSCE), and the UN, who have been involved in building the rule of law in Kosovo since the end of the war, will play an important role in monitoring the proceedings of the Kosovo Specialist Chambers.

Within the Registry of the Specialist Chambers, an Ombudsperson’s Office has been created to “defend and protect the fundamental rights and freedoms enshrined in Chapter II of the [Kosovo] Constitution of persons interacting with the Specialist Chambers and Specialist Prosecutor’s Office in accordance with the Law and the Rules.” The ombudsperson may investigate complaints of misconduct by either the chambers or Specialist Prosecutor’s Office.<sup>2450</sup>

For years, national and international NGOs have played an important role in the collection of evidence and pushing for accountability of crimes committed during the Kosovo war. Such organizations such as the Humanitarian Law Center—Kosovo, Human Rights Watch, Amnesty International, and other civil society groups may continue to provide informal oversight by monitoring and reporting on the Specialist Chambers’ proceedings.

# SERBIA

## Conflict Background and Political Context

The Socialist Federal Republic of Yugoslavia (SFRY), and later the Federal Republic of Yugoslavia (FRY) consisting of the remaining republics of Serbia and Montenegro, spent the majority of the 1990s embroiled in wars in Croatia, Bosnia, and its then province of Kosovo.

For an overview of the dissolution of the SFRY and resulting conflicts, see the profile mechanism for the International Criminal Tribunal for the former Yugoslavia. For greater detail on the conflicts in Croatia, Bosnia, and Kosovo, see the separate mechanism profiles for each.

Following the wars, Serbia continued to be politically tense. In the postwar years the country weathered the dissolution of the rump Federal Republic of Yugoslavia, when Montenegro ended its union with Serbia in 2006; in 2008, the province of Kosovo declared independence. While a majority of the world's countries recognizes Kosovo as an independent state, Serbia does not, and it maintains strong influence in majority Serb enclaves within Kosovo.<sup>2451</sup> Serbia has also endured changes in political leadership, assassinations, and territorial disputes. Ethnic nationalists have remained powerful, including within security institutions. Nationalists have encouraged obstruction of the ICTY and continued to question the sovereign integrity of Bosnia and Herzegovina.<sup>2452</sup>

Nevertheless, international pressure, has compelled the Serbian government to take actions at odds with often-prevailing nationalist sentiment. After years of resisting cooperation with the ICTY, Serbia arrested and handed over former President Slobodan Milošević to the court under threat of a U.S. aid suspension in 2001. In 2003, Serbia became a potential candidate for European Union membership,<sup>2453</sup> and in the face of Dutch and Belgian insistence on conditionality attached to advancement through the stages of EU accession, Belgrade ultimately made a grudging series of arrests and transfers to the ICTY. These included the most prominent remaining fugitives: former Bosnian Serb political leader Radovan Karadžić in 2008 and, finally in 2011, his erstwhile military general Ratko Mladić.<sup>2454</sup> Additionally, Serbia has agreed to take steps to improve its relationship with Kosovo. To that end, the Brussels Agreement was signed in 2013, normalizing relations between Serbia and Kosovo. Serbia was granted official EU candidate status in 2012.<sup>2455</sup>

## **Existing Justice-Sector Capacity**

While the ICTY was formed to prosecute suspected war criminals, it was never intended to be the only method of prosecuting international crimes committed in the former Yugoslavia. All countries involved were expected to deal with lower-profile war crimes domestically. Nominally, Serbia conducted war crimes cases through its criminal court system.<sup>2456</sup> From 1995 to 2003—a period when Serbia was ruled by the nationalists Milošević and then Vojislav Koštunica—Serbia remained especially reluctant to prosecute individuals domestically. Despite the Serbian Ministry of the Interior collecting records of several hundred criminal acts, few investigations were opened and a mere seven cases made it to trial.<sup>2457</sup> Prosecutors were far from impartial, primarily investigating crimes attributed to Kosovo Liberation Army soldiers. In several instances, Serbian police were investigated for war crimes, but these investigations were only instigated when there was publicity surrounding the cases.<sup>2458</sup>

In January 2012, a new criminal procedure code also went into effect that has significantly changed the Serbian judicial system, transforming it from an inquisitorial system into a more adversarial system. All preliminary proceedings and investigations are now the responsibility of the prosecution.<sup>2459</sup> Investigative judges have been reassigned to play a passive role at preliminary proceedings.<sup>2460</sup> Courts are no longer required to establish the “material proof”; they will only examine evidence presented to them in motions from the parties. The new criminal procedure code has also introduced cross-examination.<sup>2461</sup> Both parties are still given an equal opportunity to present their side of the case.<sup>2462</sup> Ultimately, these procedural changes are designed to encourage prosecutors to prepare cases more thoroughly.

## **Existing Civil Society Capacity**

While some human rights organizations operated in Serbia in the 1990s and early 2000s, they faced an unsupportive government and “violent intimidation” from nationalist organizations.<sup>2463</sup> An additional barrier to civil society engagement around post-conflict accountability was public sentiment, encouraged by Milošević, that Serbs had been the most victimized ethnic group in the armed conflicts.<sup>2464</sup> This resulted in widespread popular rejection of war crimes trials.<sup>2465</sup> Nevertheless, there are a small number of NGOs operating in Serbia that have played an important role in supporting and monitoring both the ICTY’s work as well as domestic trials in Serbia. Chief among these are the Humanitarian Law Center, the Helsinki Committee for Human Rights in Serbia, the Youth Initiative for Human Rights, and Women in

Black. These organizations have challenged dominant nationalist narratives through activities including advocacy, documentation of crimes, and victim representation.

## **Creation**

In July 2003, the Serbian National Assembly passed the Law on Organization and Competence of State Bodies in the Proceedings against War Crimes Perpetrators. This law established the Special War Crimes Chamber (WCC) within the District Court of Belgrade and also created the Office of the War Crimes Prosecutor (OWCP), which would devote itself solely to investigating and prosecuting those suspected of war crimes.<sup>2466</sup> In 2009, the WCC was renamed the Department of War Crimes (WCD), within the Higher Court of Belgrade.

The 2003 law also created several auxiliary departments in order to help carry out the work of the OWCP and WCC/WCD: a War Crimes Investigation Service, a Special Detention Unit, and a Witness Protection Unit.<sup>2467</sup> Additionally, the law established several procedural innovations, including the ability for witnesses to testify via video and mandatory audio recording and written transcripts of all trials.<sup>2468</sup>

The impetus for the WCC/WCD's creation appears to have largely been driven by ICTY prosecution of Serbs, which helped push Serbia to create a domestic method for trying war crimes. Furthermore, as transfer of war crimes cases to domestic courts became part of the ICTY's completion strategy, this provided a useful framework in which Serbia could show that it was capable of handling war crimes prosecutions locally.<sup>2469</sup> Outside parties, including the Organization for Security and Cooperation in Europe (OSCE), also helped Serbia establish this new system. The OSCE played an instrumental role in drafting the legislation and developing the court;<sup>2470</sup> the ICTY helped train WCC judges and prosecutors;<sup>2471</sup> and the United States helped finance training for court staff and also funded the construction of WCC/WCD courtrooms.<sup>2472</sup> The first trial held in the WCC began in March 2004.<sup>2473</sup>

## **Legal Framework and Mandate**

The WCC/WCD's jurisdiction formally encompasses crimes against humanity and violations of international humanitarian law committed within the territory of the former Yugoslavia since 1991. The court applies Serbian law and hears cases referred to it by the Serbian Office of the War Crimes Prosecutor.

In 2005, parliament amended the Law on Organization and Competence of Government Authorities in War Crimes Proceedings (Law on War Crimes Proceedings) to reflect changes to the WCC's jurisdiction per the revised Serbian Criminal Code, which came into force on January 1, 2006.<sup>2474</sup> The amended Criminal Code gave the WCC jurisdiction over genocide, crimes against humanity, and war crimes.<sup>2475</sup> Rather than use the revised code, however, the OWCP has continued prosecutions under the 1976 SFRY Basic Criminal Code, because that was the code in force when the crimes were committed.<sup>2476</sup> Human rights organizations have criticized this interpretation of the legality principle. In practice, it means that, unlike in Bosnia, Croatia, and Kosovo, Serbia's war crimes prosecutor has never brought charges of crimes against humanity.

The legislation that created the WCC and the OWCP also laid out guidelines to regulate the transfer of cases from the ICTY to the WCC/WCD. Once transferred to Serbia, the case is heard under domestic law but can continue to be prosecuted based upon the facts that were the foundation of the ICTY indictment.<sup>2477</sup> Additionally, the OWCP may prosecute using evidence that was collected by the ICTY.<sup>2478</sup> Finally, representatives of the ICTY have the right to attend any stage of the proceedings or request information about the developments of the case.<sup>2479</sup>

The authorities of the WCC in the District Court of Belgrade and Supreme Court of Serbia were transferred to the Department for War Crimes of the Higher Court and Department for War Crimes of the Court of Appeal in Belgrade after the implementation of judicial reforms in 2009.<sup>2480</sup>

In February 2016, the Serbian Parliament adopted a long-awaited National Strategy for the Prosecution of War Crimes in Serbia (National War Crimes Strategy)<sup>2481</sup> with the aim "to significantly improve the efficiency of the investigation and prosecution of war crimes in the Republic of Serbia."<sup>2482</sup> The strategy sets out that this can be achieved by prosecution of higher-level perpetrators, increased regional cooperation, harmonization of jurisprudence, and an improved mechanism for victims and witness protection.<sup>2483</sup>

## **Location**

The WCD is located in the Serbian capital of Belgrade. Although the WCC was a department of the Belgrade District Court, trials were not held at ordinary district courthouses but at a specialized courthouse, later also used by the WCD.<sup>2484</sup> In

addition to housing the WCD, the Special Court building houses the Office of the War Crime Prosecutor, the Chamber for Organized Crime, and the Special Prosecutor for Organized Crime.<sup>2485</sup> In 2006, the Victim and Witness Support Unit was given an office in the courthouse to accommodate victims and witnesses before and after they are called to testify.<sup>2486</sup> While the WCD's location in Belgrade has helped the court become accessible to the local population, it has also had the effect of alienating non-Serb victims and witnesses. The WCD has sought to mitigate this by offering the option of off-site interviews with Serbian prosecutors, coordinated through the Prosecuting Office of the witnesses' home country.<sup>2487</sup> On several occasions, the WCD has also permitted live video testimony during trials, though most of the witnesses are expected to testify at the courthouse.<sup>2488</sup>

## **Structure and Composition**

The WCC was not established as a free-standing court, but rather it was built into the court system of Serbia as one of a dozen departments within the Belgrade District Court (later the Higher Court of Belgrade).<sup>2489</sup> Despite being at the same level as other District Courts, the WCC/WCD has several unique features, discussed below. The WCD includes the War Crimes Panels, an outreach department, and the Witness Assistance and Support Unit.<sup>2490</sup> Two additional organs complete the Serbian domestic response to judicial accountability for war crimes: the Witness Protection Unit and the War Crimes Investigation Unit, both of which fall under the authority of the Ministry of the Interior.<sup>2491</sup>

### ***Chambers***

The Department of War Crimes of the Higher Court of Belgrade (WCD, formerly in the Belgrade District Court) has six judges, who hear war crimes cases in two Trial Chambers of three judges each.<sup>2492</sup> In addition to these six judges, there is one judge for preliminary proceedings. Until the criminal procedure code was revised in 2012, these judges served as investigative judges. As investigative judges, they played an active role in gathering evidence and determining whether the case should be brought to trial.<sup>2493</sup> With the changes to the criminal procedure code, they now fill a monitoring role at the preparatory hearing.<sup>2494</sup> These hearings help establish which facts are not in dispute and do not need to be brought into evidence; also, the judges make determinations on detention time or bail amounts, and order searches and exhumations. The Higher Court president chooses WCD judges from among the bench of judges within the Higher Court.<sup>2495</sup>



WCD judges generally do not have experience in the field of international criminal and humanitarian law, and neither are they accustomed to using foreign literature and jurisprudence, largely because they do not have knowledge of English.<sup>2496</sup> Throughout the years, judges have received training from the ICTY, OSCE, and local NGOs on substantive international criminal law and practical skills, and groups of WCD judges have visited the chambers of the ICTY in person.<sup>2497</sup> Since the end of a long-term OSCE project on strengthening the capacities of judicial institution in Serbia in 2011, no consequent training of the judiciary has taken place, and there has been significant turnover.<sup>2498</sup>

The Department of War Crimes of the Court of Appeals in Belgrade (formerly the Supreme Court of Serbia) is the appellate body responsible for war crimes prosecutions. The WCD within the Court of Appeal consists of a single Trial Chamber with five judges, which are assisted by six judicial assistants.<sup>2499</sup> According to a 2015 report of the Humanitarian Law Center: “The work of the Higher Court Department and the Appeals Court Department may generally be considered appropriate, professional and successful. However, certain aspects of these departments are subject to criticism. These include mild penal policies, particularly with regard to the implementation of the mitigating circumstances, a number of politically motivated judgments and a complete absence of the public relations program.”<sup>2500</sup>

### ***Prosecutions***

The OWCP includes the war crimes prosecutor, deputy prosecutors, a secretary, and other supporting staff members. The number of deputy prosecutors has changed over time, ranging from five in 2003 to nine in 2013.<sup>2501</sup> It initially had a designated spokesperson, but in recent years, that has no longer been the case, and a deputy prosecutor takes up this role.<sup>2502</sup> It has the same rights and responsibilities as other public prosecutor’s offices in Serbia; thus, all Serbian laws governing public prosecution apply to the office.<sup>2503</sup> The prosecutor is elected by the National Assembly and is responsible for appointing the deputies, who are subsequently approved by the republic public prosecutor. Both the prosecutor and deputies are appointed for a four-year term, with the possibility of reappointment.<sup>2504</sup> After the mandate of chief prosecutor Vladimir Vukčević expired on December 31, 2015, the position of war crimes prosecutor was left vacant for a year and a half.<sup>2505</sup>

Like the WCD judges, prosecutors generally do not have experience in international criminal law, but the majority of the office’s associates and investigators are former ICTY employees and thus bring professional capacity to the institution. According to international observers, the OWCP has increased its professional capacity as a result of participation in trainings from the OSCE and other organizations.<sup>2506</sup>

The OWCP maintains a substantial backlog of uninvestigated cases from the 1990s onward.<sup>2507</sup> Due to resource constraints, it currently relies heavily on authorities in Croatia as well as Bosnia and Herzegovina to make evidence available to it before the decision to initiate an investigation is made.<sup>2508</sup> There are regional agreements for cooperation in criminal matters among Bosnia, Croatia, Serbia, and Montenegro, and bilateral agreements among the prosecutors of Serbia, Croatia, and Bosnia.<sup>2509</sup> There are also memoranda of understanding that allow evidence to be shared between prosecutor's offices in Serbia and Croatia, and Serbia and Bosnia under certain circumstances.<sup>2510</sup> The OSCE has also collaborated with the prosecutor's offices in Croatia and Bosnia to conduct joint investigations.<sup>2511</sup>

Despite these advancements, the OWCP has been criticized for its reluctance to take on command responsibility cases, as well as other cases involving high-ranking officials. The Humanitarian Law Center, a leading human rights organization in Serbia, contends that the OWCP has attempted "to conceal evidence of the involvement in war crimes of the institutions of the Republic of Serbia and the Federal Republic of Yugoslavia and of the individuals who hold important positions in these institutions."<sup>2512</sup> The relationship between the OWCP and UNMIK/EULEX in Kosovo has also been difficult. As Serbia considers Kosovo to be part of its territory, this led to disputes with UNMIK and the European Union over jurisdiction, and it is challenging for the two justice systems to develop cooperation agreements.<sup>2513</sup> The OWCP and UNMIK/EULEX have, however, worked together on several occasions.<sup>2514</sup>

### ***War Crimes Investigative Service***

The legislation that created the WCC also established the War Crimes Investigation Service (WCIS), a predecessor of a war crimes unit that was created in 2001 in response to the discovery of mass graves of Kosovo Albanians in Serbia.<sup>2515</sup> A branch of the Ministry of Interior, the WCIS is a specialized office of the Serbian police that is responsible for investigating war crimes, searching for missing persons, and cooperating with the ICTY.<sup>2516</sup> In 2015, the WCIS had 49 employees, including 16 investigators, 10 analysts, and nine officers in charge of international legal assistance requests from the ICTY and countries in the region.<sup>2517</sup>

From the beginning, the WCIS has failed to initiate investigations into war crimes and is only reacting to investigation requests from the OWCP. The OWCP has complained of a general lack of commitment of the WCIS to investigate crimes, and therefore it has lobbied to have the WCIS removed from the Interior Ministry Police and placed under its command to improve cooperation between the departments.<sup>2518</sup>

Many police officers consider a position on the WCIS to be undesirable because it is dangerous and could be perceived to be unpatriotic.<sup>2519</sup> Serbian police forces have been widely implicated in the perpetration of grave crimes.<sup>2520</sup> Despite these challenges, the WCIS has played a critical role in locating missing persons and arresting suspects in several WCD cases.<sup>2521</sup>

### ***Outreach***

The OWCP initially had an outreach department established in 2003, consisting of one spokesperson and an OSCE-funded public information coordinator.<sup>2522</sup> The department's main goal was to help sensitize Serbian journalists to war crimes issues and inform them that non-Serbs were being prosecuted for their crimes.<sup>2523</sup> Some of these efforts were successful, while others faltered. The WCC attempted to hold biweekly press briefings in late 2004 and early 2005, but stopped these events because of poor attendance.<sup>2524</sup> Media reporting on WCD trials generally remains minimal. A December 2006 OSCE public interest survey indicated that 72 percent of respondents believed that domestic coverage of the WCC was inadequate.<sup>2525</sup> Since financial assistance by the OSCE Mission in Serbia declined after 2011, the WCD stopped doing outreach altogether, and the Belgrade Higher Court merely issued press releases to announce judgments in cases.<sup>2526</sup>

### ***Victim and Witness Support Unit***

The Law on Organization and Competence of Government Authorities in War Crimes briefly touched upon witness protection and support: the legislation called for a "Special Department" that would be responsible for "tasks relating to witness and victim protection." However, it was not until 2006 that the WCC president established a Victim and Witness Support Unit (VWSU). The unit is small, with only three staff members since 2010, and is housed in an office in the WCC/WCD building.<sup>2527</sup> The main tasks of the VWSU are to interact with witnesses, make arrangements for travel and accommodations, and offer explanations about trial procedures.<sup>2528</sup> Another task of the VWSU is to provide psychological support. The staff members were trained by OSCE and have attended victim support conferences organized by the ICTY in The Hague.<sup>2529</sup> The unit also works closely with the Humanitarian Law Center, which provides representation for witnesses. The VWSU had no state-provided budget and was reliant on modest donor funds.<sup>2530</sup> In the past, the United States provided the unit with US\$17,000 to cover travel and accommodation for witnesses.<sup>2531</sup> More recently, funds for witness travel and accommodation have come out of the presiding judge's budget.<sup>2532</sup>

While the legal framework for witness protection is in line with international standards, the witness protection program has had problems in implementation.<sup>2533</sup> These relate to the security of witnesses, as well as VWSU and court staff being unprepared and not properly trained to deal with vulnerable witnesses.<sup>2534</sup> The Humanitarian Law Center also notes an absence of a psychological support system for victims, with this task being outsourced to external agencies or specialized NGOs. Witnesses coming from Bosnia, Croatia, and Kosovo are expected to request support in their own countries.<sup>2535</sup>

### ***Witness Protection Unit***

The WPU was established in 2006 and is part of the Ministry of the Interior. The Law on the Program to Protect Parties in Criminal Proceedings establishes that the WPU's mission is to provide the "economic, psychological, social, and legal assistance" necessary to protect the life and property of witnesses.<sup>2536</sup> Under Article 106 of the Criminal Procedural Code, special protective measures apply if the prosecutor determines that the "life, health or freedom of the witness or a person close to him is threatened to such an extent that it justifies restricting the right to defense."<sup>2537</sup> Identity protection measures include: denying any questions that might reveal the individual's identity, using a pseudonym, altering or erasing identifying data from the record, conducting examinations from a separate room using distortion of the witness's voice, and conducting examinations using a device that alters sound and image.<sup>2538</sup> The Law on Organization and Competence of Government Authorities in War Crimes adds additional protections for witnesses and victims who testify in the WCD, including allowing victims or witnesses to testify via videoconference link.<sup>2539</sup> Additionally, the court may choose to protect personal information of a witness, should there be a compelling reason to do so.<sup>2540</sup>

However, the WPU has suffered from underfunding.<sup>2541</sup> Although the unit was once seen as a successful model of witness protection for the region, its main shortcoming is a lack of vetting for new staff, or accountability mechanisms for misconduct.<sup>2542</sup> It has faced allegations of unprofessionalism and incompetence, including intimidation and witness harassment.<sup>2543</sup> This has been an issue particularly when the witness is a current or former police officer, seen as an "insider" witness. There have also been reports that certain officers employed by the WPU have themselves committed war crimes.<sup>2544</sup>

### ***Criminal Defense Support***

While defendants have the option of hiring a private defense attorney, those who are indigent can request appointment of counsel through the District Court in

Belgrade.<sup>2545</sup> The District Court is responsible for paying the defense counsel, who is typically a contracted private attorney.<sup>2546</sup> Defense attorneys receive the same wages for their work at the WCD as they would receive in the normal District Court, but this fee is approximately half of what a privately hired defense attorney would receive for the same work.<sup>2547</sup> Low levels of compensation have the potential to affect the quality of the defense, including discouraging defense attorneys from conducting their own investigations. Furthermore, there is no structure in place to ensure that lawyers wishing to represent war crimes defendants have knowledge of international criminal law or human rights law, or are provided with training in these and other relevant areas.<sup>2548</sup>

## **Prosecutions**

By November 2017, after almost fifteen years in operation, the WCC/WCD had adjudicated 66 cases, resulting in the conviction of 83 individuals, the acquittal of 49 suspects, and the suspension of eight cases involving 13 others.<sup>2549</sup> A further 13 cases involving 43 accused were at the trial stage and six cases remained before the Appellate Court.<sup>2550</sup> According to the OWCP, investigative proceedings were underway for 14 cases.<sup>2551</sup> The number of annual indictments peaked in 2010 (with nine) and has steadily declined.<sup>2552</sup> To date, most prosecutions have been against low-ranking military officers or police from the Socialist Federal Republic of Yugoslavia and the Federal Republic of Yugoslavia for war crimes against the civilian population that were committed in Kosovo, Croatia, and Bosnia and Herzegovina.<sup>2553</sup> Several additional prosecutions have been brought against Kosovo Albanians. The ICTY transferred one case to the WCC: that of Vladimir Kovačević, a former officer of the Yugoslav People's Army.<sup>2554</sup> The overall sentiment among victims, lawyers, and human rights organizations is that the number of cases adjudicated has been too low.<sup>2555</sup>

## **Legacy**

The WCD and the OWCP continue to operate in a hostile political context, and their legacy in terms of public knowledge and acceptance in Serbia remains as yet uncertain. Nevertheless, in terms of knowledge transfer and capacity building, the court has had a positive impact: Serbian judges and staff have all reported that their knowledge of international criminal law and international humanitarian law has improved as a result of the chamber's creation. Judges also reported that their

engagements with ICTY and other judicial counterparts played an important role in the learning process.<sup>2556</sup> In terms of the country's legal framework, the WCC also partially led to the 2005 revision of the domestic criminal code, which codified international crimes.<sup>2557</sup> Whereas the previous version of the code listed only two violations of international humanitarian law, the new code has sixteen articles covering such crimes as genocide and destroying cultural heritage. Other revisions to the criminal procedure code in 2006 also included the addition of witness protection provisions modeled after procedures of the ICTY.<sup>2558</sup> Notably, these provisions apply not just to war crimes cases but also those of organized crime.

## **Financing**

The Serbian government is responsible for funding the OWCP and the WCC; however, early on, these departments received significant financial support from outside entities.<sup>2559</sup> The most significant donors have been the embassies of the United States, the Netherlands, and Norway, as well as the OSCE.<sup>2560</sup> This outside financial assistance has dwindled over the years, and the OWCP has struggled to meet its costs. From the time of the change of the criminal procedure code that put the OWCP in charge of grave crimes cases until at least 2016, there had been no increase in the OWCP budget. In the past, the office has been forced to rely on assistance from the United States and the OSCE to pay for international investigative trips.<sup>2561</sup> The OWCP has also struggled because it cannot afford to hire legal support staff that could enable them to conduct broad investigations.<sup>2562</sup> Neither do they have the “continuity and sustainability of the budget” to afford training of staff.<sup>2563</sup> As discussed above, the VWSU has also faced serious financial struggles.

## **Oversight and Accountability**

The president of the Belgrade Higher Court assigns WCD judges from the preexisting judges of that court.<sup>2564</sup> Judges currently sitting on other Serbian courts may also be seconded to serve a term on the War Crimes Panel.<sup>2565</sup> This framework has raised questions about the WCD's independence, particularly as Freedom House's 2014 report on Serbia described the country's judiciary as “inefficient and vulnerable to political interference.”<sup>2566</sup>

WCD judges serve a six-year term that is meant to allow the judges to develop expertise and commitment to international criminal justice.<sup>2567</sup> However, in 2014

an experienced WCD judge was removed by the president of the Higher Court after only four years appointment, without explanation.<sup>2568</sup> WCD judges are paid a salary that is twice that of the District Court judges and benefit from an accelerated pension scheme, where 12 months of work for the WCD is equivalent to 16 months of regular employment.<sup>2569</sup>

The OSCE Mission to Serbia monitors war crimes trials held in Serbia and has noted that the WCD has, on occasion, yielded to political pressure, for instance, pursuing cases involving Serbian victims even in the absence of solid evidence.<sup>2570</sup> The OSCE and the prosecutor's office communicate regularly in order to ensure that OSCE is able to carry out its responsibilities. Other NGOs, both local and international, monitor the trials of the WCC, preparing and disseminating reports that analyze their observations.<sup>2571</sup> The ICTY has also sent representatives to observe the WCD.<sup>2572</sup>

## Notes

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1765. *Ibid.*, 20.
1766. See Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 11, available at: [www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf).
1767. This resolution was important because unlike previous ones, it was the first where the Security Council actually decided that the ICTY "shall be established" and further directed the UN Secretary-General to submit a proposal for constituting the court.
1768. UN Security Council Resolution 827, S/RES/827, May 25, 1993.
1769. See David Rohde, *Endgame: The Betrayal and Fall of Srebrenica, Europe's Worst Massacre Since World War II* (New York: Penguin Books, 2012).
1770. Human Rights Watch, *Former Yugoslavia: War Crimes Trials in the Former Yugoslavia*, Vol. 7, No. 10, June 1995, available at: [hrw.org/legacy/reports/1995/yugoslavia/](http://hrw.org/legacy/reports/1995/yugoslavia/).
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1777. Council of Europe, "Post-war Justice and Durable Peace in the Former Yugoslavia," Issue Paper by the Council of Europe Commissioner for Human Rights, February 2012, 37.
1778. *Ibid.*, 29.
1779. *Ibid.*, 27; and Fischer, *Civil Society in Conflict Transformation*, 300.
1780. UN Security Council Resolution 780, S/RES/780, October 6, 1992, 2.
1781. See Orentlicher, *That Someone Guilty Be Punished*, 11, available at: [ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf). Most notably UN Security Council Resolutions 713, 1991; 764, 1992; 771, 1992; 780, 1992; 808, 1993; and 827, 1993.
1782. Andrea Birdsall, "The International Criminal Tribunal for the Former Yugoslavia: Towards a More Just Order?" *Peace Conflict & Development*, no. 8 (January 2006): 7.
1783. UN Security Council Resolution 808, S/RES/808, February 22, 1993, 2.
1784. UN Security Council Resolution 827, S/RES/827, May 25, 1993.
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1786. Ivan Simonovic, "The Role of the ICTY in the Development of International Criminal Adjudication," *Fordham International Law Journal* 23, no. 2 (1999): 446.
1787. See Payam Akhavan, "Beyond Impunity: Can International Criminal Justice Prevent Future Atrocities," *Am. J. Int'l L.* 95 (2001): 31, and Diane Orentlicher, *Shrinking the Space for Denial: The Impact of the ICTY in Serbia* (New York: Open Society Justice Initiative, 2008).
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1886. See Office of the High Representative, available at: [ohr.int](http://ohr.int).
1887. Human Rights Watch, *Justice for Atrocity Crimes: Lessons of International Support for Trials before the State Court of Bosnia and Herzegovina*, March 2012, 37, available at: [hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia](http://hrw.org/report/2012/03/12/justice-atrocity-crimes/lessons-international-support-trials-state-court-bosnia).
1888. “Bosnian Serb Seeks Court Referendum in Fresh Challenge to Bosnian State,” *Reuters*, July 14, 2015, [reuters.com/article/us-bosnia-court-referendum/bosnian-serb-seeks-court-referendum-in-fresh-challenge-to-bosnian-state-idUSKCN0PO1EL20150714](http://reuters.com/article/us-bosnia-court-referendum/bosnian-serb-seeks-court-referendum-in-fresh-challenge-to-bosnian-state-idUSKCN0PO1EL20150714); and “Serbs Express Outrage at Naser Oric Acquittal,” *Balkan Insight*, October 9, 2017, available at: [balkaninsight.com/en/article/serbs-express-outrage-at-naser-oric-acquittal-10-09-2017](http://balkaninsight.com/en/article/serbs-express-outrage-at-naser-oric-acquittal-10-09-2017).
1889. Lilian A. Barria and Steven D. Roper, “Judicial Capacity Building in Bosnia and Herzegovina: Understanding Legal Reform beyond the Completion Strategy of the ICTY,” *Hum Rights Rev.* (2008): 3. DOI 10.1007/s12142-007-0052-0.

1890. For a comprehensive assessment of domestic prosecution of war crimes at the local level prior to the WCC, see OSCE, *War Crimes Trials before the Courts of Bosnia and Herzegovina: Progress and Obstacles*, March 2005.
1891. Alejandro Chehtman, “Developing Bosnia & Herzegovina’s Capacity to Process War Crimes Cases: Critical Notes on a ‘Success Story,’” *J. Int’l Crim. Just.* 9 (2011): 563–64; Human Rights Watch, *Justice at Risk: War Crimes Trials in Croatia, Bosnia and Herzegovina, and Serbia and Montenegro*, vol. 16, no. 7(D), October 2004; Human Rights Watch, *Justice for Atrocity Crimes*, 9.
1892. Diane F. Orentlicher, *That Someone Guilty Be Punished: The Impact of the ICTY in Bosnia* (New York: Open Society Institute, 2010), 109, available at: [www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Someone-Guilty-2010-English.pdf).
1893. OSCE Mission of Bosnia and Herzegovina, *Delivering Justice in Bosnia and Herzegovina: An Overview of War Crimes Processing From 2005-2010*, May 2011, 12–13.
1894. See Martina Fisher, *Peacebuilding and Civil Society in Bosnia-Herzegovina: Ten Years after Dayton*, Berghof Foundation, 2006; Bedrudin Brljavac, “Civil Society in Bosnia: Obstacle or Opportunity?” *Transconflict*, November 4, 2011, available at: [transconflict.com/2011/11/civil-society-in-bosnia-obstacle-opportunity-411/](http://transconflict.com/2011/11/civil-society-in-bosnia-obstacle-opportunity-411/).
1895. Bogdan Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina: From Hybrid to Domestic Court*, International Center for Transitional Justice, 2008, 6.
1896. Speech of the Court of BiH President Meddzida Kreso at the inauguration of the War Crimes Chamber, Sarajevo, March 9, 2005; Refik Hodžik, “Bosnia and Herzegovina: Legitimacy in Transition Expert Paper,” Paper for the Building a Future on Peace and Justice Nuremberg, June 25–27, 2007, Workshop. See the advisory report: *The Future of Domestic War Crimes Prosecutions in Bosnia and Herzegovina*, a consultants’ report to the OHR, submitted by John Ralston, Peter Bach, Kjell Björnberg, and Almir Rodrigues, May 2002.
1897. The agreement was endorsed by the United Nations Security Council and the Peace Implementation Council (an international body mandated to implement the Dayton Peace Agreement), and adopted into law by Bosnia. See Human Rights Watch, *Justice for Atrocity Crimes*, 9.
1898. See Criminal Code of the Federation of Bosnia and Herzegovina (2003), and Criminal Procedure Code of the Federation of Bosnia and Herzegovina (2003), available at: [legislationline.org/documents/section/criminal-codes/country/40](http://legislationline.org/documents/section/criminal-codes/country/40).
1899. See High Representative Decision on Law Establishing the State Court of Bosnia and Herzegovina No. 50/00, *Official Gazette of Bosnia and Herzegovina*, November 29, 2000; and High Representative Decision Enacting the Law on Amendments to the Law on Court of Bosnia and Herzegovina No. 13/02, *Official Gazette of Bosnia and Herzegovina*, August 29, 2002, available at the OHR website: [ohr.int/?page\\_id=68243](http://ohr.int/?page_id=68243); and Law on the Prosecutor’s Office of Bosnia and Herzegovina, *Official Gazette of Bosnia and Herzegovina*, No. 24/02, 3/03, 37/03, 42/03, 9/04, 35/04, and 61/04, available at: [advokat-prnjavorac.com/legislation/Law-on-The-Prosecutors-Office-of-BH.pdf](http://advokat-prnjavorac.com/legislation/Law-on-The-Prosecutors-Office-of-BH.pdf).
1900. Olga Martin-Ortega, “Prosecuting War Crimes at Home: Lessons from the War Crimes Chamber in the State Court of Bosnia and Herzegovina,” *Int’l Crim. L. Rev.* 12 (2012): 590.
1901. Human Rights Watch, *Justice for Atrocity Crimes*. See the Court of Bosnia and Herzegovina, Judges, available at: [sudbih.gov.ba/sudija/svi/1](http://sudbih.gov.ba/sudija/svi/1).
1902. See OSCE Mission to BiH, *Trial Monitoring Report on the Implementation of the New Criminal Procedure Code in the Courts of Bosnia and Herzegovina*, December 2004.

1903. Criminal Code of BiH, Articles 171–83.
1904. *Ibid.*, Article 180.
1905. European Court of Human Rights, *Maktouf and Damjanović v. Bosnia and Herzegovina*, Judgment, July 18, 2013, available at: [hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716#{"itemid":\["001-122716"\]}](http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-122716#{).
1906. *Ibid.*, para. 55.
1907. Law on the Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings before the Courts in BiH, *Official Gazette of BiH* 61/04 (hereinafter: Law on the Transfer of Cases).
1908. Law on the Transfer of Cases, Article 2(1).
1909. *Ibid.*, Article 2(2).
1910. *Ibid.*, Article 2(6), as amended.
1911. Decision of the High Representative Enacting the Law on Protection of Witnesses under Threat and Vulnerable Witnesses, January 24, 2003. The BiH parliament subsequently adopted the law on June 27, 2003, available at: [ohr.int/?p=65967](http://ohr.int/?p=65967).
1912. Law on Protection of Witnesses, Article 5.
1913. BiH CPC, Article 267.
1914. Law on Protection of Witnesses, Article 9.
1915. *Ibid.*, Article 10.
1916. *Ibid.*, Article 12.
1917. *Ibid.*, Article 24.
1918. BiH CC, Article 240, as amended.
1919. BiH CPC, Article 264(1).
1920. Law on Protection of Witnesses, Article 8(1).
1921. *Ibid.*, Article 8(2).
1922. *Ibid.*, Article 3(1).
1923. *Ibid.*, Article 4(1).
1924. *Ibid.*, Article 7.
1925. The Association of Women Victims of War: Sarajevo, *Follow-up Report on the Implementation by Bosnia and Herzegovina’s of the Recommendations Issued by the Committee on the Elimination of Discrimination against Women in July 2013*, July 26, 2015; also see report of the UN Office of the High Commissioner for Human Rights, May 13, 2016, available at: [tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BIH/INT\\_CEDAW\\_FUL\\_BIH\\_23895\\_E.pdf](http://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/BIH/INT_CEDAW_FUL_BIH_23895_E.pdf).
1926. The strategy was drawn up by a working group comprising representatives of the State Court, the HJPC, the Bosnian justice ministry, and representatives from the justice and finance ministries from the Federation and Republika Srpska. Ministry of Justice, *National Strategy for Processing of War Crimes Cases Adopted*, December 2008, available at: [mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US](http://mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=573&langTag=en-US).
1927. Law on Witness Protection Program in Bosnia and Herzegovina, *Official Gazette of BiH*, No. 36/14.
1928. Ten cantonal courts in the Federation entity of Bosnia and Herzegovina, five district courts in the Republic of Srpska entity, and a district court in Brčko.

1929. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 30: “In practice the [State Court of BiH] is not a superior jurisdiction to the courts in the Federation of BiH and Republika Srpska, and its jurisprudence is not binding on the cantonal and district courts. The three systems have acted independently of one another and differ in important ways, particularly in terms of the applicable law.” The State Court uses the 2003 Criminal Code and Procedure; the entity courts apply the SFRY Criminal Code.
1930. This institutional gap means that district courts “have little incentive to even read the key decisions by the Court of BiH, let alone to use them as grounds for their own decisions.” Chehtman, “Developing Bosnia and Herzegovina’s Capacity,” 563–64; see also Human Rights Watch, *Justice for Atrocity Crimes*, 43.
1931. David Tolbert and Aleksandar Kontic, *Final Report of the ICLS Experts on the Sustainable Transition of the Registry and International Donor Support to the Court of Bosnia and Herzegovina and the Prosecutor’s Office of Bosnia and Herzegovina in 2009* (ICLS, December 2008), 29; See also OSCE, *Reasoning in War Crimes Judgements in Bosnia and Herzegovina: Challenges and Good Practices*, December 2009, 30–32. Dissenting opinions are placed in a sealed envelope in case the judgment is reviewed on appeal.
1932. See National Strategy for War Crimes Processing, adopted by the BiH Council of Ministers on December 29, 2008; in local language, *Državna Strategija za Rad na Predmetima Ratnih Zlocina*, available at: [oscebih.org/documents/osce\\_bih\\_doc\\_2010122314375593bos.pdf](http://oscebih.org/documents/osce_bih_doc_2010122314375593bos.pdf); and in English, [adh-geneva.ch/RULAC/pdf\\_state/War-Crimes-Strategy-f-18-12-08.pdf](http://adh-geneva.ch/RULAC/pdf_state/War-Crimes-Strategy-f-18-12-08.pdf); quoted in OSCE, *Delivering Justice in Bosnia and Herzegovina*, 25.
1933. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 25.
1934. *Ibid.*, 20.
1935. *Ibid.*, 21.
1936. “Bosnian War Crimes Case Strategy ‘Failing,’” *Balkan Insight*, January 29, 2016, <http://www.balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016>.
1937. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 20.
1938. *Ibid.*, 8.
1939. *Ibid.*, 34.
1940. The Criminal Division for the State Court contains Section I for War Crimes, Section II for Organized Crime, and Section III for General Crimes. The Appellate Division is similarly structured. See [sudbih.gov.ba/](http://sudbih.gov.ba/). Most WCC analyses do not fully situate their recommendations or discussion of the court in the broader context of these other chambers. An exception is a report by ICLS experts conducted on behalf of the court, which assessed the transition strategy of the State Court as a whole, focusing on the War Crimes Section and the Organized Crimes Section. See Tolbert and Kontic, *Final Report of the ICLS Experts*. Since national prosecutions of war crimes often exist alongside other specialized chambers for complex crimes, such analyses yield useful insights as to structure, design, and impact.
1941. Orentlicher, *That Someone Guilty Be Punished*, 124, noting that in 2009 three of the international judges at the WCC were previously ICTY prosecutors, and one international judge was previously a judge at the ICTY.
1942. Human Rights Watch, *Justice for Atrocity Crimes*, 11: “Given that many of the crimes during the war were committed along ethnic lines, the presence of international judges



and prosecutors has proven to be important to support the institution's actual and perceived impartiality." ICTJ notes that "the perceived or real flaws in the work of the [WCC] and the Prosecutor's Office may not reflect ethnic bias. The predominance of cases concerning crimes against Bosniaks mirrors the fact that Bosniaks constituted the majority of victims during the war." Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 34.

1943. Human Rights Watch, *Justice for Atrocity Crimes*, 1.
1944. Chehtman, "Developing Bosnia & Herzegovina's Capacity," 565.
1945. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 13.
1946. As discussed in this annex, these included the establishment of a National Strategy for War Crimes prosecutions, the compilation of war crimes database/registry for war crimes, and the implementation of stronger witness protection rules.
1947. See OSCE, *Delivering Justice in Bosnia and Herzegovina*; and EU *Bosnia and Herzegovina Progress Report 2005-2016*, available at: [ec.europa.eu/neighbourhood-enlargement/countries/package\\_en](http://ec.europa.eu/neighbourhood-enlargement/countries/package_en).
1948. Guidelines for the exit plan were contained in a 2006 agreement between the OHR and the Bosnian authorities, and overseen by a Transition Council, comprising WCC officials, state ministers, representatives of the High Judicial and Prosecutorial Council, and donor country representatives. The Registry's separate "Transition Strategy," was evaluated and amended after review by the International Criminal Law Services in late 2008. Tolbert and Kontic, *Final Report of the ICLS Experts*, 8. See Decision on Ratification of the Agreement Between the High Representative for Bosnia and Herzegovina and Bosnia and Herzegovina on the Registry for Section I for War Crimes and Section II for Organised Crime, Economic Crime and Corruption, of the Criminal and Appellate Divisions of the Court of Bosnia and Herzegovina and for the Special Department for War Crimes and the Special Department for Organised Crime, Economic Crime and Corruption of the Prosecutor's Office of Bosnia and Herzegovina as well as on the Creation of the Transition Council, Replacing the Registry Agreement of 1 December 2004 and the Annex Thereto, *Official Gazette of Bosnia and Herzegovina*, International Agreements 3/07, April 11, 2007 ("Second Registry Agreement").
1949. Martin-Ortega, "Prosecuting War Crimes at Home," 595.
1950. *Ibid.*, and Human Rights Watch, *Justice for Atrocity Crimes*, 32.
1951. Human Rights Watch, *Justice for Atrocity Crimes*, 34.
1952. Chehtman, "Developing Bosnia and Herzegovina's Capacity," 568; Human Rights Watch, *Justice for Atrocity Crimes*, 11 and 33.
1953. Human Rights Watch, *Justice for Atrocity Crimes*, 12.
1954. *Ibid.*, 13.
1955. The Prosecutor's Office of Bosnia and Herzegovina, Department I (Special Department for War Crimes, available at: [tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e](http://tuzilastvobih.gov.ba/?opcija=sadrzaj&kat=2&id=4&jezik=e)).
1956. Human Rights Watch, *Justice for Atrocity Crimes*, 26: "This approach encourages prosecutors [to] look broadly at situations that occurred during the Bosnian war and then examine more narrowly events that took place within a situation to identify criminal acts and actors."
1957. *Ibid.*, 25.

1958. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 89. For example, in 2008 the prosecutor distributed a pamphlet to local communities explaining the case selection criteria, which noted the number of victims by ethnic categories, but mistakenly omitted Bosnian Muslims as a category.
1959. National mapping exercises were conducted in 2008 and again in 2010. See Human Rights Watch, *Justice for Atrocity Crimes*, 27. To compare assessments carried out by national and international institutions, see HJPC, *Capability Assessment Analysis of the Prosecutors' Offices, Courts and Police Bodies in BiH for Processing War Crimes Cases*, June 2006; and UNDP, *Solving War Crimes Cases in Bosnia and Herzegovina: Report on the Capacities of Courts and Prosecutor Offices within Bosnia and Herzegovina to Investigate, Prosecute and Try War Crimes Cases*, 2008.
1960. Morten Bergsmo, Kjetil Helvig, Ilia Utmelidze, and Gorana Zagovec, *The Backlog of Core International Crimes Case Files in Bosnia and Herzegovina* (FICHL, 2009).
1961. Plea bargaining at the WCC often has taken the form of “charge bargaining.” OSCE, *Delivering Justice in Bosnia and Herzegovina*, 55: “The current practice in plea agreements would certainly benefit, in terms of transparency and clarity of the law, from an amendment to the current provisions.” Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 14: “The trial proceedings have demonstrated uncertainty and the risk of inconsistency in application of the law and procedure in the use of plea agreements.” Plea bargaining was used in two of the Rule 11bis cases handled by the WCC—*Mejakić et al.* and *Pasko Ljubicic*. Agreements in both cases were offered more than a year into the main trial. OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina: Reflections on Findings from Five Years of OSCE Monitoring*, January 2010, 22–24.
1962. Court of Bosnia and Herzegovina, Registry Office, available at: [sudbih.gov.ba/stranica/47/pregled](http://sudbih.gov.ba/stranica/47/pregled).
1963. Human Rights Watch, *Looking for Justice: The War Crimes Chamber in Bosnia and Herzegovina*, February 2006.
1964. *Ibid.*
1965. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 89.
1966. SIPA signed an MoU with the WCC Registry in March 2005 determining that, in the absence of sufficient resources for witness protection within SIPA, the Registry would be temporarily taking over the assistance mandate of SIPA. See Human Rights Watch, *Looking for Justice*.
1967. *Ibid.*
1968. *Ibid.*
1969. Amnesty International, *Bosnia and Herzegovina: Submission to the United Nations Committee Against Torture, 62nd Session, 6 November–6 December 2017*, 4n3, available at: [amnesty.org/download/Documents/EUR6372192017ENGLISH.PDF](http://amnesty.org/download/Documents/EUR6372192017ENGLISH.PDF).
1970. Human Rights Watch, *Justice for Atrocity Crimes*, 14–15.
1971. Human Rights Watch, *Looking for Justice*.
1972. Human Rights Watch, *Justice for Atrocity Crimes*, 15.
1973. “War Crime Verdicts Map,” *Balkan Insight*, available at: [balkaninsight.com/en/page/war-crimes-verdict-map#content12\\_2710](http://balkaninsight.com/en/page/war-crimes-verdict-map#content12_2710).
1974. OSCE, *War Crimes Processing Project Fact Sheet* (May 8, 2013), available at: [osce.org/bih/106868](http://osce.org/bih/106868). According to the information contained in the fact sheet, as of March 2013,

- it was anticipated that it would take a further three years to complete the more serious and complex trials, while all outstanding war crimes cases would be processed within 10 years. Also see BIRN, *Time for Truth: Review of the Work of the War Crimes Chamber of the Court of BiH 2005-2010* (Sarajevo, 2010), available at: [detektor.ba/en/birn-publications/](http://detektor.ba/en/birn-publications/).
1975. OSCE, *BiH War Crimes Case Map*, available at: [warcrimesmap.ba/](http://warcrimesmap.ba/). The database provides an overview of both first-instance and second-instance cases, and lists information on acquittal, conviction, and sentencing.
1976. ICTY, *Status of Transferred Cases*, available at: [icty.org/en/cases/transfer-of-cases/status-of-transferred-cases](http://icty.org/en/cases/transfer-of-cases/status-of-transferred-cases). Also see Tolbert and Kontic, *Final Report of the ICLS Experts*, 6. Rule 11bis of the ICTY Rules of Procedure and Evidence provided conditions for transfers. The ICTY retained the power to withdraw the cases from the national jurisdiction if the trial was not proceeding in a fair and diligent manner. Under an agreement with the ICTY, the OSCE was tasked with monitoring and reporting on trials, and submitted a total of 55 periodic case reports to the ICTY. The OSCE most frequently identified concerns in 10 areas: “The transfer and processing of Rule 11bis cases; custody; witness protection and support; transparency of proceedings; injured party compensation claims; plea bargaining; use of evidence from the ICTY; effectiveness of defence; clarity of judgments; and methodology of training and knowledge transfer.” OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, 12.
1977. Claire Garbett, “Localising Criminal Justice: An Overview of National Prosecutions at the War Crimes Chamber of the Court of Bosnia and Herzegovina,” *Hum. Rts. L. Rev.* 10 (2010): 567.
1978. OSCE, *Combating Impunity for Conflict-Related Sexual Violence in Bosnia and Herzegovina: Progress and Challenges: An Analysis of Criminal Proceedings before the Courts of the Federation of Bosnia and Herzegovina, 2004-2014*, 5.
1979. See Amnesty International, *We Need Support, Not Pity: Last Chance for Justice for Bosnia’s Wartime Rape Survivors*, September 12, 2017, available at: [amnesty.org/en/documents/eur63/6679/2017/en/](http://amnesty.org/en/documents/eur63/6679/2017/en/).
1980. “Bosnian War Crimes Case Strategy ‘Failing,’” *Balkan Insight*, January 29, 2016, [balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016](http://balkaninsight.com/en/article/bosnia-drowning-in-war-crimes-backlog-01-29-2016); and Marija Tausan, *Huge War Crimes Case Backlog Overwhelms Bosnia*, BIRN BiH, October 23, 2015, available at: [justice-report.com/en/articles/huge-war-crimes-case-backlog-overwhelms-bosnia](http://justice-report.com/en/articles/huge-war-crimes-case-backlog-overwhelms-bosnia).
1981. Orentlicher, *That Someone Guilty Be Punished*, 118. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 118.
1982. Human Rights Watch, *Justice for Atrocity Crimes*, 1.
1983. For an early report on public perception, see Prism Research, *Public Perception of the Work of the Court and Prosecutor’s Office of B&H*, Sarajevo, July 2008, available at: [prismresearch.ba](http://prismresearch.ba). In public opinion surveys conducted by OSCE in 2007, 2008, and 2009, a representative sample of BiH citizens had an alarmingly negative perception of the institutions carrying out war crimes prosecutions: “On average, nearly 60% of all respondents did not have any faith in the Court of BiH to try the war crimes and produce a fair and just result. The Serb respondents expressed particularly low confidence in the Court of BiH, with only 25% of respondents indicating they had ‘some trust’ in its impartiality. Respondents across all ethnic groups had slightly higher

- confidence in the entity courts, but the trends were still disappointingly low.” OSCE, *Delivering Justice in Bosnia and Herzegovina*, 90.
1984. In comparison to the confidence in the work of the ICTY (23.4 percent in 2013 and 27.3 percent in 2015), the Bosnian Courts scored higher. See United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2015, available at: [undp.org/content/dam/unct/bih/PDFs/Prism%20Research%20for%20UN%20RCO\\_Report.pdf](http://undp.org/content/dam/unct/bih/PDFs/Prism%20Research%20for%20UN%20RCO_Report.pdf).
1985. United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2013, available at: [media.ba/sites/default/files/prism\\_research\\_for\\_un\\_rco\\_statistical\\_report\\_1.pdf](http://media.ba/sites/default/files/prism_research_for_un_rco_statistical_report_1.pdf).
1986. Refik Hodzik, “Living the Legacy of Mass Atrocities,” *J. Int’l Crim. Just.* 8 (2010): 133.
1987. United Nations Resident Coordinator Office in Bosnia and Herzegovina, *Public Opinion Polls Results Analytical Report*, 2013.
1988. Orentlicher, *That Someone Guilty Be Punished*, 40.
1989. “Balkan War Crime Suspects Maintain Political Influence,” *Balkan Insight*, December 7, 2016, available at: [balkaninsight.com/en/article/balkan-war-crime-suspects-maintain-political-influence-12-02-2016](http://balkaninsight.com/en/article/balkan-war-crime-suspects-maintain-political-influence-12-02-2016); also see Orentlicher, *That Someone Guilty Be Punished*, 19.
1990. Dzevad Mahmutovic and Vedad Gurda, “The Effects of War Crime Processing before Domestic Courts on the Reconciliation Process in Bosnia and Herzegovina,” *Soc. Persp.—J. Legal Theory & Prac.* 1 (2014): 28.
1991. Janine Natalya Clark, “The State Court of Bosnia and Hercegovina: A Path to Reconciliation?” *Cont. Justice Review* 13 (October 15, 2010).
1992. Nuhanovic Foundation, *War Reparations and Litigation: The Case of Bosnia*, 2014, available at: [http://www.nuhanovicfoundation.org/user/file/war\\_reparation\\_and\\_litigation\\_-\\_bosnia-report\\_version\\_5\\_march\\_2015.pdf](http://www.nuhanovicfoundation.org/user/file/war_reparation_and_litigation_-_bosnia-report_version_5_march_2015.pdf).
1993. “Bosnia Rape Victims May Claim Compensation for First Time,” *The Guardian*, June 30, 2015, available at: [theguardian.com/world/2015/jun/30/bosnia-victims-compensation-landmark-ruling](http://theguardian.com/world/2015/jun/30/bosnia-victims-compensation-landmark-ruling).
1994. See BiH Law on Transfer of Cases from the ICTY to the Prosecutor’s Office of BiH and the Use of Evidence Collected by ICTY in Proceedings Before the Courts of BiH, 61/04, 46/06, 53/06, 76/06 (“Law on Transfer”). The evidentiary alignment between the ICTY and national systems was not without complications, especially language/translation issues (ICTY evidence is in English or French). Further, the introduction of ICTY evidence has been hindered by the “lack of domestic experience in applying the doctrine of judicial notice,” including by other courts within Bosnia. While the WCC has usually recognized ICTY adjudicated facts, the entity courts rarely do, except for “notorious” facts such as the existence of armed conflict. A major project by international organizations facilitated the translation of English-language evidence from the ICTY to national courts in local languages in 2010–2011 (OSCE-ODIHR/ICTY/UNICRI). OSCE, *The Processing of ICTY Rule 11bis Cases in Bosnia and Herzegovina*, 25–27.
1995. See William W. Burke-White, “The Domestic Influence of International Criminal Tribunals: The International Criminal Tribunal for the Former Yugoslavia and the Creation of the State Court of Bosnia and Herzegovina,” *Colum. J. Transnat’l L.* 46 (2008).
1996. Chehtman, *Developing Bosnia and Herzegovina’s Capacity*, 565: “The perception was that the local traditions were regarded with contempt by international institutions,

and not properly understood. Put differently, the main problem with the new criminal procedure code was what has been termed the ‘blueprint’ approach to capacity development, that is, capacities were presented as coming from the outside and applied a set ‘fix’ to solve certain problems instead of trying to work within local rules.” As a counter, the Council of Europe hired local practitioners trained in the continental system to draft the commentaries for the criminal procedure code.

1997. Chehtman, *Developing Bosnia and Herzegovina’s Capacity*, 555.
1998. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 15.
1999. Ibid. For instance, it is controversial as to whether the SFRY Criminal Code foresees the application of command responsibility.
2000. Ivanišević, *The War Crimes Chamber in Bosnia and Herzegovina*, 31.
2001. OSCE, *Delivering Justice in Bosnia and Herzegovina*, 62. Major areas of OSCE review at the entity level include inconsistent progress at the entity level, lack of cooperation with SIPA witness protection services, lack of investigative and prosecutorial resources and cooperation with the WCC, problems in applying IHL law, and equality-of arms issues.
2002. Martin-Ortega, “Prosecuting War Crimes at Home,” 625.
2003. See European Commission, *Bosnia and Herzegovina 2015 Report*, November 10, 2015; and European Commission, *Bosnia and Herzegovina 2016 Report*, November 9, 2016.
2004. Orentlicher, *That Someone Guilty Be Punished*, 123.
2005. Chehtman, *Developing Bosnia and Herzegovina’s Capacity to Process War Crimes Cases*, 553.
2006. Orentlicher, *That Someone Guilty Be Punished*, 123.
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2144. International staff would be provided by donor countries and national staff would be seconded from the Department of Judicial Affairs.
2145. UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and Prosecutors*, February 15, 2000; UNMIK Regulation 2000/34 Amending UNMIK Regulation 2000/6, *On the Appointment and Removal from Office of International Judges and International Prosecutors*, May 29, 2000. International judges appointed by the SRSG under 2000/6 were limited to Mitrovica District and had the authority to “select and take responsibility for new and pending” criminal cases. UNMIK/REG/2000/6, para. 1.2.
2146. Day, “No Exit without Judiciary,” 188.
2147. UNMIK Regulation 2000/64, *On the Assignment of International Judges/Prosecutors and/or Change of Venue*, December 15, 2000, 15. The regulation was initially enacted for a 12-month period and was subsequently extended by UNMIK Regulations 2001/34 and 2002/20. The UNMIK “Administrative Department of Justice” could also request an international panel on its own accord.

2148. The regulation stipulated that a 64 Panel had to be in place before a trial started, which meant that the 64 Panels were “easily circumvented by bringing a case quickly in front of a local set of judges. According the regulation, a 64 Panel had to be in place before the trial started. Therefore, failure to provide notice to the parties, or abandonment of the case before an International Judge or Prosecutor was selected, would make it make it impossible to resurrect the possibility of a 64 Panel.” Day, “No Exit without Judiciary,” 185.
2149. UNMIK/REG/2001/2, Amending UNMIK Regulation No. 2000/6, as amended, on the Appointment and Removal From office of International Judges and International Prosecutors, January 12, 2001.
2150. See *Report of the Secretary-General of the United Nations Interim Administration Mission in Kosovo*, S/2008/692, November 24, 2008, para. 23; see also OSCE, *Kosovo’s War Crimes Trials*. EULEX officially began operations in December 2008 but was not fully operational until April 2009.
2151. See Day, “No Exit without Judiciary,” 185–87, noting that this was part of wider criticism levied against UNMIK in the administration of the legal system. See also, David Marshall and Shelley Inglis, “The Disempowerment of Human Rights-Based Justice in the United Nations Mission in Kosovo,” *Harv. Hum Rts. J.* 16 (2003): 96, writing that “critical laws that introduced international judges and prosecutors and expanded domestic law were not adequately explained to local legal actors, and once promulgated, no attempt was made to engage the local population with the reasoning behind such decisions.”
2152. Dickinson, “The Relationship Between Hybrid Courts and International Courts,” 1063.
2153. OSCE, *Kosovo’s War Crimes Trials*, 9.
2154. The Supreme Court has sent some of the Regulation 64 Panels cases for retrial by panels composed of majority EULEX judges. OSCE, *Kosovo’s War Crimes Trials*, 22.
2155. UNMIK Regulation 2003/25, *Provisional Criminal Code of Kosovo*, July 6, 2003, available at: [unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003\\_25\\_CCintranet.pdf](http://unmikonline.org/regulations/unmikgazette/02english/E2003regs/RE2003_25_CCintranet.pdf).
2156. Criminal Code of the Socialist Federal Republic of Yugoslavia, July 1, 1977, available at: [refworld.org/docid/3ae6b5feo.html](http://refworld.org/docid/3ae6b5feo.html).
2157. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 22.
2158. *Ibid.*, 29.
2159. *Ibid.*, 17–18.
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2161. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 14.
2162. Andrew Hudson and Alexandra W. Taylor, “The International Commission against Impunity in Guatemala: A New Model for International Criminal Justice Mechanisms,” *J. Int’l. Crim. J.* 8 (2010): 53, noting similar problems with ad hoc approaches to case selection and jurisdiction at other hybrid mechanisms.
2163. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 14.
2164. OSCE, *Kosovo’s War Crimes Trials*, 21. Also see quarterly reports of the Secretary-General on the United Nations Interim Administration Mission in Kosovo.

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2166. *Ibid.*, 21.
2167. *Ibid.*, 24–25.
2168. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 17–22.
2169. See ICTY, *Outreach: 15 Years of Outreach at the ICTY*, 2016; and the ICTY website, Outreach Program, available at [icty.org/en/outreach/outreach-programme](http://icty.org/en/outreach/outreach-programme).
2170. OSCE, *Kosovo's War Crimes Trials*, 23. In the *Llapi* group case, the local judge on a majority, three-judge panel, was a civil judge with “no background in dealing with war crimes cases and thus did not possess the competence to sit on such a case.” While some war crimes training was provided, including study visits to the ICTY, OSCE noted that the larger failure was the lack of a “long-term intensive war crimes training strategy.” OSCE, *Kosovo's War Crimes Trials*, 24.
2171. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 19.
2172. *Ibid.*, 22.
2173. OSCE (2012), p. 8.
2174. Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, 2012, 12.
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2176. OSCE, *Kosovo's War Crimes Trials*, 16.
2177. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*.
2178. Amnesty International, *UNMIK's Legacy: The Failure to Deliver Justice and Reparation to the Relatives of the Abducted*, 2013, 9.
2179. *Ibid.*, 10.
2180. Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, 16.
2181. OSCE, *Kosovo's War Crimes Trials*, 6.
2182. See Sylvia de Betodano, “Current Developments in Internationalized Courts,” *J. Int'l Crim. Just.* 1 (2003).
2183. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 32.
2184. Higonnnet, “Restructuring Hybrid Courts,” 383–84.
2185. Perriello and Wierda, *Lessons from the Deployment of International Judges and Prosecutors in Kosovo*, 28.
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2187. OSCE, *Trial Monitoring: A Reference Manual for Practitioners*, 2012, Legal System Monitoring Section (LSMS), 220.
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  2191. See *Letter dated Oct. 7, 2005, from the Secretary-General addressed to the President of the Security Council, S/2005/635*, appending “A Comprehensive Review of the Situation in Kosovo,” paras. 35, 40.
  2192. Amnesty International, *Kosovo: Time for EULEX to Prioritize War Crimes*, 15.
  2193. Council Joint Action 2008/124/CFSP, on the European Union Rule of Law Mission in Kosovo, February 4, 2008, para. 7, available at: [eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX\\_EN.pdf](http://eulex-kosovo.eu/eul/repository/docs/WEJointActionEULEX_EN.pdf).
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  2196. Council Joint Action, 2008, Article 3(d).
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