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An analysis of the  
OSCE Mission to Serbia's  
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OSCE Mission to Serbia  
Belgrade, 2015



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# Executive summary

After having experienced deep political changes in the early 2000s, Serbia started to confront its legacy of the conflicts that had devastated the territory of the former Yugoslavia during the previous decade in a more systematic manner.

Since the 2003 establishment of its specialized institutions responsible for investigating, prosecuting and adjudicating war crimes cases, Serbia has made progress in establishing accountability for past atrocities. Despite having achieved important results, these institutions have often been the object of criticism by various stakeholders. Human rights organizations have pointed at issues such as the low number of cases, insufficient support given to injured parties and overly lenient sentencing practices. Some Serbian victims' associations and politicians, on the other hand, criticized the scarcity of cases involving non-Serbian defendants. International organizations such as the EU mainly focused their critique on the lack of high-ranking prosecutions and shortcomings in the Serbian system of witness protection.

**The present report** was created in the framework of the EU funded *Support to Monitoring of National War Crimes Trials* project. The findings contained in the report are based on the analysis of a large volume of data collected through monitoring of war crimes proceedings held in Serbia<sup>1</sup> between 2003 and 2014. It is based primarily on legislation, indictments, judgements, and other judicial decisions. In some cases the research was complemented by interviews with judges, prosecutors, police officers, lawyers and representatives from international and civil society organizations. Through careful analysis, the OSCE identified data trends, inconsistencies in case law, incorrect application of legal provisions, violations of fair trial standards, legislative deficiencies and other issues preventing the efficient and independent adjudication of war crimes cases in Serbia. These shortcomings were grouped into eight key areas of concern and addressed in separate chapters, which contain recommended remedial actions for the relevant Serbian authorities.

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1 Unless otherwise specified, all references to Serbia appearing in this report refer to the legal situation and country denomination prevailing at the time, namely the Socialist Federal Republic of Yugoslavia (SFRY) until 1992, the Federal Republic of Yugoslavia (FRY) for the period from 1992 to 2003, the State Union of Serbia and Montenegro for the period from 2003 to 2006, and the Republic of Serbia from 2006 onwards.

\* \* \* \* \*

Between 2003 and 2014, the War Crimes Prosecutor's Office (WCPO) indicted over 160 persons for war crimes against civilians and prisoners of war. While defendants belong to all main ethnic groups, the vast majority of them are Serbs. At the same time, many cases involving Serbian victims resulted in acquittals. Over the years, this has caused prominent Serbian politicians to openly criticize the work of the war crimes institutions and of the WCPO in particular. This may be illustrated by the fact that in 2014 several Serbian politicians made statements and filed criminal complaints that directly or indirectly interfered with the work of the war crimes institutions. It is noteworthy that the War Crimes Prosecutor and judges are elected by the Serbian National Assembly, which is a concern from the perspective of separation of powers; judges of the war crimes departments are assigned to the department by administrative act and not chosen through an open competition. A 2011 survey indicated that nearly one in two Serbian citizens believes that the war crimes institutions are not independent, and that no war crimes trials should take place in Serbia after the end of the mandate of the International Criminal Tribunal for the Former Yugoslavia (ICTY). These shortcomings in the legal framework allow for a **socio-political environment that is not conducive** to the proper investigation and adjudication of war crimes cases. The negative impact of this environment is the OSCE's first and foremost concern with war crimes proceedings in Serbia (Chapter 1).

A second crucial question pertains to the availability of evidence. Most crime scenes and witnesses are located outside of the Serbian authorities' reach, thus making the success of most investigations contingent on assistance received from other jurisdictions. This **dependence on international co-operation** (Chapter 2), a key feature of war crimes prosecutions in Serbia, is not entirely satisfied by legal tools and sufficient political will. The ICTY provided Serbian prosecutors with evidence in two important cases but has long stopped preparing evidence for referral to Serbian authorities. The legal framework for co-operation with Bosnia and Herzegovina (BiH) and Croatia would necessitate amendments in order to ensure that non-judicial considerations, such as the nationality of defendants or victims, played no role in providing legal assistance. Co-operation with the European Union Rule of Law Mission to Kosovo (EULEX) needs to be systematized, as it is presently based solely on informal relations.

With reference to the efficiency of investigations, the OSCE has found that the rate at which new cases are initiated is generally low (approximately one new case per prosecutor every three years), and the **number of investigations is decreasing** (Chapter 3). More precisely, although the number and capacity of human resources increased over the reporting period, new cases prosecuted recently contain on average fewer and lower-ranking defendants, and a smaller number of victims. For instance, in 2014, the eight Prosecutors staffing the WCPO filed indictments only in cases where they had received a complete investigation file from BiH; these indictments (six in total) involved one low-ranking defendant and one isolated incident each. The reasons for this decrease remain unclear. While the adoption of a long-due prosecutorial strategy (underway at the time of writing) may help focus investigative efforts, this process will

need to be supported by a stronger resolve to tackle the many serious crimes that remain unprosecuted. New developments in 2015 (notably, the arrest of eight defendants in relation to the Srebrenica crimes committed in 1995, and the filing of an indictment against five defendants for serious crimes related to Štrpci) fall outside the timeframe of this report, but are welcome indicators of possible improvements in this field.

Another shortcoming identified in several cases is the **unclear charging of modes of liability** (Chapter 4). Indictments and judgements often failed to specify the precise contribution of each defendant to the crime. This not only resulted in a violation of the defendant's right to be informed of the charges and prepare an adequate defence, but also caused some cases to be overturned upon appeal because of the lack of a clear determination of the defendant's conduct.

An additional problem concerning modes of liability is the **responsibility of superiors** (Chapter 5). The concern is that Serbian prosecutors and judges have **failed to take a clear stance** on the applicability of international law rules on command responsibility in Serbia. Similarly, there is no pronouncement on a possible affirmation of superior responsibility through domestic provisions on "commission through omission." Whatever legal solution the Serbian judiciary decides to embrace, a clear stance on this point is long overdue.

A number of indictments and judgements contained an **inaccurate application of international humanitarian law provisions** (Chapter 6). In some cases, prosecutors and judges failed to establish the existence of all legal elements of war crimes. In other cases, they did not apply international law provisions correctly. Lastly, the question of the nature and duration of the armed conflict in Kosovo<sup>2</sup> is still unresolved in Serbian jurisprudence and numerous contradictory decisions exist in this regard.

When it comes to the analysis of sanctions imposed, a **lack of standardization in sentencing practices** was noticed (Chapter 7). In particular, courts generally provided insufficient reasoning on the determination of sentences, especially when it comes to the existence of "particularly mitigating circumstances." Mitigating factors such as the minimal contribution of a defendant to a crime are rarely mentioned, even if they constitute the obvious reason for a reduction of punishment. On the other hand, courts improperly considered certain elements as mitigating circumstances, such as the civil status of the defendant. Lastly, certain factors such as the lapse of time are applied in an inconsistent manner.

The final issue tackled in this report pertains to the field of **protection of witnesses** (Chapter 8). The OSCE's first concern in this regard is that some of the analysed judgements indirectly disclosed the identity of protected witnesses by making reference to the names of relatives or other personal circumstances. The second concern regards

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2 All references to Kosovo in this text, whether to the territory, institutions or population, should be understood in full compliance with United Nations Security Council Resolution 1244.

the doubts cast by several witnesses on the conduct of the police unit tasked with their protection. This problem appears to be specific to witnesses in war crimes cases, and particularly to “insider” witnesses. This is all the more concerning because insiders have proved to be an irreplaceable source of evidence in most serious war crimes cases prosecuted in Serbia.

\* \* \* \* \*

Based on the Report's analysis, the OSCE developed the following key recommendations:

### To the legislature:

- Enact constitutional changes so as to eliminate the role the legislative and executive branches play in the appointment of judges and prosecutors;
- Strengthen the role of the High Judicial Council and State Prosecutorial Council in guaranteeing the independence and autonomy of judges and prosecutors;
- Amend the Law on War Crimes to establish that judges of the War Crimes Departments are appointed by the High Judicial Council.

### To Serbian public officials:

- Refrain from criticizing or otherwise interfering with decisions taken by War Crimes Prosecutor's Office prosecutors or War Crimes Department judges.

### To prosecutors of the War Crimes Prosecutor's Office:

- Adopt a clear case prioritization strategy, which focuses on the most serious cases;
- Increase the number of new cases where an investigation is conducted and an indictment is filed;
- In indictments, clearly specify the material contribution of each accused to each crime charged, and qualify it under the proper mode of liability;
- Take a clear position on the legal basis regarding the criminal responsibility of superiors.

### To judges of the War Crimes Departments:

- Apply the correct body of international humanitarian law depending on the nature of the armed conflict in question;
- Always precisely state what material contribution of each accused has been proved beyond reasonable doubt;

- Limit the use of “particularly mitigating circumstances” to cases featuring circumstances of an exceptionally mitigating nature and refrain from considering family characteristics of defendants (such as marital status) as a mitigating circumstance.

#### To the Judicial Academy:

- Ensure that international humanitarian law is included as part of the standard training curriculum for students, judges and prosecutors.

#### To the Ministry of Justice:

- Ensure that sufficient funding (including through allocation of international project funds) is available to the specialized institutions for war crimes;
- Ensure that all institutional reforms necessary to ensure an efficient and impartial system of investigation, prosecution and adjudication of war crimes cases are adequately covered in the Action Plans for Chapters 23 and 24 and the Action Plan for the National Judicial Reform Strategy.

#### To the Ministry of Interior:

- Ensure the integrity and professionalism of police units dealing with war crimes, including by carefully screening their members to ensure that the Witness Protection Unit and the War Crimes Investigation Service employ no officers who took part in armed conflicts as members of army or police forces.



# Overview of war crimes proceedings in Serbia (2003-2014)

From the start of its operations in November 2003 until the end of 2014, the War Crimes Prosecutor's Office (WCPO) charged 162 **defendants** with war crimes against civilians and prisoners of war. The overwhelming majority (86%) of defendants are former members of Serbian forces. Most members of non-Serbian forces were Albanians indicted in a single case, which resulted in the acquittal of all 17 defendants. Only three defendants belonged to Bosniak or Croatian forces. Almost three quarters of the accused used to be members of the military (including "territorial defence" forces), while police and paramilitary forces account for almost all the remaining ones (23%). A very limited number of defendants (3%) were charged with acting in their capacity as civilian superiors (e.g. politicians, government officials). None of the defendants prosecuted by the WCPO held "high-ranking" positions at the time of the offences, and only a limited number of them (less than 10%) had a position enabling them to issue orders to subordinates ("medium-ranking").

Cases prosecuted so far have covered crimes committed against over 1,100 **victims** of violent crimes,<sup>3</sup> belonging to all of the main national groups (i.e. Albanians, Bosniaks, Croats, Roma, and Serbs). Cases predominantly involve crimes against victims of Croatian (35%) and Bosniak ethnicity (28% of cases). Cases involving Kosovo Albanian victims represent 14% of the total number of cases, but these cases on average involve larger-scale crimes. Fewer cases involve Roma victims (7% of cases). Crimes against Serbian victims comprise up to 16% of the total number of cases.

The scale of the **crimes** prosecuted varied greatly. While most cases involve sporadic incidents (40% of cases involve three victims or less), four cases involve killings of 100 or more persons and another four involve the killing of 50 or more.

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3 For the purpose of this report, only victims of crimes against physical integrity such as murder, torture, rape and beatings will be considered. Crimes such as displacement or destruction of property are not counted, both because of the difficulties in determining their precise number and the comparatively less serious nature of the violations suffered.

The 162 defendants were tried in the course of 49 first instance **trials**. As of 31 December 2014, only 27 trials had been completed with final decisions, resulting in the conviction of less than 60% of the accused.<sup>4</sup> The other 22 trials were still ongoing at different procedural stages: 13 on first instance,<sup>5</sup> five on retrial and four on appeal (either upon trial or retrial). So far the Court of Appeals has ordered 16 retrials, whose outcome for 97% of the accused was identical to the trial outcome.<sup>6</sup>

**Sentences** imposed were in line with the statutory punishment foreseen for war crimes (5 to 15, or 20 years). In the first instance, a considerable number of defendants (25) was sentenced to the statutory maximum of 20 years, and 15 more were sentenced to 15 years. Trial panels also sentenced 11 defendants to punishments below the statutory minimum of five years. The average punishment imposed with final sentences is 11.5 years.

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4 45 defendants were convicted, while 28 were acquitted and one died before the end of the proceeding. The prosecution withdrew the indictment against two defendants.

5 One of these proceedings was suspended indefinitely because of the mental incompetence of the accused to stand trial.

6 Only two out of 64 defendants were acquitted upon retrial after having been found guilty on trial. Additionally, ten defendants had their sentences modified upon retrial.

# CHAPTER ONE

## Socio-political environment

*Serbia has come a long way in the last decade on the path towards accountability for past atrocities. However, the independence of its judiciary is still generally weak, public opinion is unsupportive of war crimes prosecutions and the War Crimes Prosecutor's Office is increasingly subjected to undue interferences by other State organs.*

.....

The break-up of the Socialist Federal Republic of Yugoslavia and the creation of new states in its territory were accompanied by armed conflicts: in Slovenia (1991), Croatia (1991-1995), Bosnia and Herzegovina (1992-1995), the Federal Republic of Yugoslavia,<sup>7</sup> including Kosovo (1998-1999) and the Former Yugoslav Republic of Macedonia (2001). These conflicts claimed around 130,000 human lives and caused countless civilians to be expelled from their homes, illegally detained, tortured, or raped.<sup>8</sup>

By 1993 a multitude of violations of international humanitarian law (IHL)<sup>9</sup> had already been committed. However, countries in the region failed to systematically investigate and try these crimes, mostly because the perpetrators available to them were their own

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7 The Federal Republic of Yugoslavia claimed to be the sole legal successor to the Socialist Federal Republic of Yugoslavia.

8 See Humanitarian Law Center (HLC), *Human losses in the armed conflicts in the former Yugoslavia*, 20 October 2013 (last accessed 31 May 2015 at <http://test.hlc-rdc.org/?p=25006&lang=de>); see also International Center for Transitional Justice, *Transitional Justice in the former Yugoslavia* (last accessed 31 May 2015 at [www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Justice-Facts-2009-English.pdf](http://www.ictj.org/sites/default/files/ICTJ-FormerYugoslavia-Justice-Facts-2009-English.pdf)).

9 **International humanitarian law (IHL)** is a branch of public international law which applies to armed conflicts with the aim of regulating the means and methods of warfare and protecting persons who do not, or no longer, participate in the hostilities. IHL rules are comprised of international conventions and customary international law. The bulk of IHL rules are contained in the four **1949 Geneva Conventions** (Geneva Convention (I) for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field; Geneva Convention (II) for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces at Sea; Geneva Convention (III) relative to the Treatment of Prisoners of War; Geneva Convention (IV) relative to the Protection of Civilian Persons in Time of War) and their two **1977 Additional Protocols** (Protocol Additional (I) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts; Protocol Additional (II) to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of Non-International Armed Conflicts). Serious violations of this body of law are commonly referred to as **war crimes**.

nationals who either occupied positions in the armed forces or government, or were revered as heroes by the public, or both.<sup>10</sup>

In May 1993, the United Nations Security Council established the International Criminal Tribunal for the Former Yugoslavia (ICTY),<sup>11</sup> with intent to remedy impunity for mass crimes in the former Yugoslavia. Between 1994 and 2004, the ICTY indicted 161 defendants, including some of the highest-ranking political leaders and military commanders of the parties to the conflicts, for war crimes, crimes against humanity and genocide. In accordance with its Completion Strategy,<sup>12</sup> in 2004 the ICTY concluded ongoing investigations and announced that it would no longer issue indictments. In 2005, it began transferring cases to national judiciaries for prosecution and trial,<sup>13</sup> thus emphasizing the need for a greater regional capacity to address war crimes cases at the domestic level.

The early 2000s brought about significant changes in the leadership and political climate in the region. Bosnia and Herzegovina (BiH), Croatia and Serbia began addressing war crimes in a more systematic manner. In 2004, under the auspices of the then OSCE Mission to Serbia and Montenegro, judicial and state representatives from BiH, Croatia and Serbia gathered in Palić (Serbia) and discussed for the first time regional co-operation in war crimes proceedings. The meetings that followed, dubbed the “Palić Process”, resulted in a number of bilateral agreements on information and evidence sharing among the prosecutors in the region. As will be shown in more detail in Chapter 2, regional co-operation has proved one of the key tools for successful war crimes prosecutions. War crimes institutions all over the region now exchange information and evidence on a regular basis.

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10 In Croatia, before 2001, most of those prosecuted for war crimes were members of Serb armed forces. Most of these prosecutions were carried out *in absentia* (see Centre for Peace, Non-Violence and Human Rights, *Monitoring of war crimes trials, Annual Report*, 2005, page 9). In BiH there were limited prosecutions until a specialized War Crimes Chamber was created in 2002, a new Code adopted in 2003 and a specialized War Crimes Department established within the Prosecutor's Office in 2005 (see OSCE Mission to BiH, *War Crimes Trials before the Domestic Courts of Bosnia and Herzegovina, Progress and Obstacles*, March 2005). A limited number of war crimes trials have been held in Montenegro. No war crimes trials have been held in FYROM due to the Amnesty Law adopted in 2002 (see Humanitarian Law Centre, *Transitional Justice in Post-Yugoslav Countries, Report for 2010-2011*, last accessed 31 May 2015 at [www.hlc-rdc.org/wp-content/uploads/2013/03/Transitional-Justice-in-Post-Yugoslav-countries-Report-for-2010-2011.pdf](http://www.hlc-rdc.org/wp-content/uploads/2013/03/Transitional-Justice-in-Post-Yugoslav-countries-Report-for-2010-2011.pdf)). Regarding Serbia, see below in Chapter 1, para. A.

11 United Nations Security Council Resolution 827, S/RES/827, 25 May 1993.

12 See United Nations Security Council Resolution 1503, S/RES/1503, 28 August 2003 and United Nations Security Council Resolution 1534, S/RES/1534, 26 March 2004. For more details about the ICTY's Completion Strategy see [www.icty.org/sid/10016](http://www.icty.org/sid/10016) and [www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial\\_status\\_report\\_june2002\\_en.pdf](http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/judicial_status_report_june2002_en.pdf); both last accessed 31 May 2015.

13 See e.g. OSCE Mission to BiH, *The Processing of ICTY Rule 11bis cases in Bosnia and Herzegovina*, 2010, page 8.

## A. The creation of specialized war crimes institutions in Serbia

Between 1991 and 2003, a limited number of war crimes trials took place in Serbia. Only 16 defendants, all members of Serb forces, were indicted for war crimes against the civilian population, in eight separate proceedings before regular courts.<sup>14</sup> Serious concerns as to the proper conduct of these trials have been raised.<sup>15</sup> Military courts in Serbia convicted 17 defendants for war crimes, the majority of whom were members of Croatian forces captured in 1991. The sentences were not executed, pursuant to an agreement on the exchange of prisoners concluded with Croatian authorities in November 1991.<sup>16</sup>

In the early 2000's, like other countries in the region, Serbia experienced deep political changes. In 2000, Slobodan Milošević and his coalition lost elections to Vojislav Koštunica and the opposition coalition. In 2001, the new Serbian government headed by Zoran Đinđić transferred Milošević to the ICTY, where he stood trial on charges of genocide, crimes against humanity and war crimes for events that occurred in BiH, Croatia and Kosovo.<sup>17</sup> In 2002, the Law on Co-operation with the ICTY was adopted, providing *inter alia* rules on legal assistance for the transfer of defendants (including nationals) from Serbia to the ICTY.<sup>18</sup>

In 2003, Serbia adopted the **Law on War Crimes**,<sup>19</sup> which established institutions within the Police, Prosecution and Courts with exclusive jurisdiction to investigate, prosecute and adjudicate war crimes cases. These institutions include the WCPO, the War Crimes Departments (WCDs),<sup>20</sup> and the War Crimes Investigation Service (WCIS).<sup>21</sup> Appointment of officers to these institutions follows the regular procedures foreseen

14 As of 31 December 2014, ten defendants were convicted and one was acquitted. Proceedings against the remaining five are still ongoing. All cases in which an indictment was filed before the entry into force of the Law on War Crimes must be completed before the court where the indictment was filed. See Article 21, The Law on Organization and Competences of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* no. 67/2003, and subsequent amendments.

15 See HLC, *Ten Years of War Crimes Prosecutions in Serbia: contours of justice*. Analysis of the prosecution of war crimes in Serbia 2004-2013, pages 82 and following.

16 See Milan Petrović, *War Crimes trials in Serbia (1991-2014)*, in *War crimes trials before national courts*, Belgrade, 2014, at pages 34-36.

17 ICTY, *Prosecutor v. Slobodan Milošević*, case no. IT-02-54.

18 Law on Cooperation of Serbia and Montenegro with the ICTY, *Official Gazette of FRY* no. 18/2002; *Official Gazette of Serbia and Montenegro* no. 16/2003. The law regulates the following matters: 1) the ICTY's investigative activities in Serbia; 2) transfer of criminal proceedings to the ICTY; 3) transfer of defendants to the ICTY; 4) provision of legal assistance to the ICTY; and 5) enforcement of ICTY decisions in Serbia.

19 The Law on Organization and Competences of Government Authorities in War Crimes Proceedings, *Official Gazette of the Republic of Serbia* no. 67/2003, and subsequent amendments.

20 Before the overall restructuring of the court system in Serbia in 2010, the two specialized sections having exclusive jurisdiction over war crimes cases were placed with Belgrade District Court and the Supreme Court of Serbia and were called War Crimes Chambers (WCCs). For the sake of simplicity, the term "WCDs" will be used in this report to indicate both the WCDs and the WCCs. Likewise, unless otherwise specified, the terms "High Court" and "Court of Appeals" refer only to their WCDs.

21 In addition, the Law also created the Witness Support Service within the District Court (now High Court) in Belgrade and a Special Detention Unit for war crimes suspects. The 2005 Law on the Protection Program for Participants in Criminal Proceedings (*Official Gazette of the Republic of Serbia* no. 85/2005), also led to the creation, in 2006, of the Witness Protection Unit, charged with providing security to witnesses in war crimes and organized crime cases.

by law,<sup>22</sup> although the Law on War Crimes foresees derogations such as higher job requirements,<sup>23</sup> and a higher salary.<sup>24</sup> All of the mentioned specialized institutions are based in Belgrade. This framework is unique in the regional landscape, since no other neighbouring country has centralized institutions dealing exclusively with war crimes cases. Although to the present day no defendants have been charged with crimes against humanity, genocide or aggression, the WCPO and the WCDs have jurisdiction also over these crimes. In addition, they also have jurisdiction to investigate and try defendants suspected of aiding and harbouring persons sought by the ICTY.

The Law on War Crimes was a major shift in addressing the legacy of the violent past and an important signal of Serbia's political will to fight impunity. Only two months after its creation, in December 2003, the WCPO filed its first indictment in what is, to date, the largest war crimes case prosecuted in Serbia.<sup>25</sup>

## B. The fragile independence of the Serbian war crimes institutions

### I. Internal challenges to the independence of the war crimes institutions

The Serbian legislative framework leaves room for undue political influence on the judiciary. The Parliament appoints first-time judges and prosecutors.<sup>26</sup> The Parliament also appoints the War Crimes Prosecutor among candidates nominated by the Government, and at the end of the six-year mandate decides on possible re-appointment.<sup>27</sup>

The **assignment of judges to the WCDs** also lacks full transparency. WCD judges are not selected through a competitive procedure among all judges in Serbia, but are chosen by the presidents of the Court of Appeals and High Court in Belgrade among judges who are already assigned to those courts. The Law on War Crimes foresees that each assignment lasts for a period of six years,<sup>28</sup> to guarantee a minimum level of stability and professionalism of WCD judges and ensure that they are not removed for reasons of political convenience. Despite the presence of some legal guidelines

22 Law on Judges and Law on Public Prosecution (both in *Official Gazette of the Republic of Serbia* no. 116/2008 and subsequent amendments); Law on Police (*Official Gazette of the Republic of Serbia* no. 101/2005 and subsequent amendments).

23 Articles 5, 10 and 10a, Law on War Crimes, *supra*.

24 Article 17, *id*.

25 "Ovčara I" case, District Court in Belgrade, case no. KTRZ 3/03, indictment, 4 December 2003.

26 See Constitution of the Republic of Serbia, *Official Gazette of the Republic of Serbia* no. 98/2006, Article 147.

27 Law on Public Prosecution, *supra*, Articles 74-75.

28 Article 10(4) and 10a(4), Law on War Crimes, *supra*.

on preferential criteria for selection,<sup>29</sup> Court presidents have maximum discretion in assigning judges to the WCDs, which also has considerable financial implications for the judge in question.<sup>30</sup> Moreover, at the end of 2014, the president of the High Court in Belgrade established a **concerning precedent** by replacing an experienced WCD judge who dealt with some high-profile cases with another High Court judge, two years before her six-year assignment expired. The Court of Appeals' president's explanation<sup>31</sup> is that her current appointment had been made for a period of "up to" six years, which, if true, is in plain violation of the letter of the Law on War Crimes.<sup>32</sup> In any case, the High Court President provided no explanation for the need to replace the WCD judge, and why she (and not another WCD judge) was replaced. The judge's complaint to the High Judicial Council against her removal from the WCD is pending at the time of writing.

## II. External challenges to the independence of the war crimes institutions

This lack of full guarantees of independence in appointment and tenure makes judges and prosecutors **more vulnerable** to the influence of other State powers. The European Commission highlighted in all its latest progress reports how political pressure is generally one of the main factors undermining the independence of the judiciary.<sup>33</sup> Freedom House's 2014 report on Serbia described the country's judiciary as "inefficient and vulnerable to political interference."<sup>34</sup> The World Economic Forum's 2014 report ranks Serbia 118th out of 144 countries when it comes to judicial independence.<sup>35</sup>

In 2013, the Parliament adopted a national judicial reform strategy for the period 2013-2018, with the aim of strengthening the High Judicial Council and State Prosecutorial Council and making them accountable, as the bodies mandated by the Constitution to guarantee the independence of the judiciary. However, most Serbian judges and prosecutors, as highlighted in some recent surveys, do not perceive themselves as

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29 Articles 10(4) and 10a(5), *id.*

30 Articles 17 and 18, *id.*

31 As provided by the Belgrade Court of Appeals' president in his decision of 8 December 2014 (case SU no. I-2 217/14), rejecting the appeal filed by the judge in question against the decision on reallocation.

32 Articles 10 and 10a, Law on War Crimes, *supra*.

33 The 2014 Progress Report of the European Commission, for instance, highlighted: "Some judges from higher and appellate courts were confronted with direct attempts to exert political influence over their daily activities without the High Judicial Council properly defending their independence. The practice of publicly commenting on trials and announcing arrests and detentions in the media ahead of court decisions risks being detrimental to the independence of the judiciary and raises serious concern." European Commission, *Serbia Progress Report*, October 2014, page 41.

34 Available at [www.freedomhouse.org/sites/default/files/23.%20NIT14\\_Serbia\\_final.pdf](http://www.freedomhouse.org/sites/default/files/23.%20NIT14_Serbia_final.pdf), last accessed 31 May 2015.

35 Klaus Schwab, World Economic Forum, *The Global Competitiveness Report 2014–2015*, last accessed 31 May 2015 at [www3.weforum.org/docs/WEF\\_GlobalCompetitivenessReport\\_2014-15.pdf](http://www3.weforum.org/docs/WEF_GlobalCompetitivenessReport_2014-15.pdf).

being in a position to administer justice in an independent fashion, and still consider affiliation with a political party as the most powerful factor influencing the judiciary.<sup>36</sup>

The war crimes institutions (the WCPO in particular) have been the object of **political pressure** ever since their establishment. As early as one year after the creation of the specialized institutions, the then Minister of Justice advocated for their closure.<sup>37</sup> Similar statements were made by the Serbian Radical Party (SRS) in 2004.<sup>38</sup>

Since then, no state official has publically called for the suppression of the war crimes institutions. However, public attacks have continued up until the present day,<sup>39</sup> including through the filing of short-lived criminal complaints.<sup>40</sup>

The single most common criticism of Serbian officials regarding the WCPO is that it indicted **mostly Serbian defendants**, and few of its cases involve Serbian victims. This is exemplified by a number of public statements by politicians, such as those of the Minister of Justice on the occasion of the arrest of 15 Serbian war crimes defendants in 2014;<sup>41</sup> the Minister of Interior who sided with the Serbian policemen arrested in 2009 on suspicion of committing crimes in Kosovo;<sup>42</sup> or the majority Member of Parliament who recently accused the WCPO of having deliberately ignored over 10,000 statements taken from Serb victims.<sup>43</sup>

These political statements tap into many Serbian citizens' dissatisfaction with the fact that the vast majority of defendants before the ICTY are former members of Serb forces,<sup>44</sup> and that the crucial ICTY cases involving crimes against Serbs resulted in

36 See Human Rights Center, *Research of professional integrity of public prosecutors and judges*, June 2014, page 5, last accessed 31 May 2015 at [www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf](http://www.chr-nis.org.rs/wp-content/uploads/2014/06/Research-of-professional-integrity-of-public-prosecutors-and-judges-summary.pdf). See also CeSID, *Jačanje Položaja, Nadležnosti i Integriteta Državnog Veća Tužilaca*, Belgrade, March 2015.

37 See the daily newspaper *Kurir*, "Treba ukinuti specijalni sud", 30 March 2004.

38 The National Assembly of the Republic of Serbia, statement of MP Tomislav Nikolić, 13 December 2004, last accessed 31 May 2015 at [www.otvoreniparlament.rs/2004/12/13/](http://www.otvoreniparlament.rs/2004/12/13/).

39 For some recent examples see for instance [www.politika.rs/rubrike/Politika/Nikolic-Stojim-uz-general-a-Dikovica.lt.html](http://www.politika.rs/rubrike/Politika/Nikolic-Stojim-uz-general-a-Dikovica.lt.html); and [www.b92.net/info/vesti/index.php?yyyy=2015&mm=03&dd=03&nav\\_id=964374](http://www.b92.net/info/vesti/index.php?yyyy=2015&mm=03&dd=03&nav_id=964374). Both last accessed 31 May 2015.

40 In 2014, a group of ten members of the Serbian Parliament from the ruling coalition filed a criminal report against members of the State Prosecutorial Council for electing Bruno Vekarić as Deputy War Crimes Prosecutor in 2009, alleging that Vekarić did not fulfil the legal requirements for this office (last accessed 31 May 2015 at [www.rts.rs/page/stories/sr/story/135/Hronika/1777650/Drecun%3A+Krivi%C4%8Dna+prijava+zbog+izbora+Vekari%C4%87a.html](http://www.rts.rs/page/stories/sr/story/135/Hronika/1777650/Drecun%3A+Krivi%C4%8Dna+prijava+zbog+izbora+Vekari%C4%87a.html)); later that year, the same MPs filed a criminal report against War Crimes Prosecutor Vladimir Vukčević and two of his deputies for allegedly revealing official secrets (last accessed 31 May 2015 [www.vesti.rs/Srpska-Napredna-Stranka/Krivicne-prijave-protiv-Vukcevic-a-Vekarica.html](http://www.vesti.rs/Srpska-Napredna-Stranka/Krivicne-prijave-protiv-Vukcevic-a-Vekarica.html)). Both complaints were dismissed (at the time of writing, the dismissal of the first complaint has become final, while an appeal is still possible against the dismissal of the second).

41 While Minister Nikola Selaković welcomed the arrests of former members of Serb forces suspected of committing war crimes against Bosniak civilians, he also stated that he expects such actions to be taken in cases that involve Serb victims, and that such actions currently seem to be missing (Available at [www.blic.rs/Vesti/Politika/516898/Selakovic-Pozdravljam-hapsenje-osumnjicenih-za-ratni-zlocin](http://www.blic.rs/Vesti/Politika/516898/Selakovic-Pozdravljam-hapsenje-osumnjicenih-za-ratni-zlocin)).

42 See daily newspaper *Blic*, "MUP će pružiti pomoć policajcima", 15 March 2009.

43 Talk show "Naša kafa sa Đukom", TV channel *Kopernikus*, 19 November 2014.

44 See more details below, Chapter 3.

the acquittal of high-profile non-Serbian defendants.<sup>45</sup> While this observation on its own is insufficient to prove any ethnic bias by the ICTY, it does create a fertile ground for politicians to criticize the WCPO's work,<sup>46</sup> arguing that enough has been done (internationally and domestically) to prove the responsibility of Serbian defendants, and the WCPO should focus on delivering justice to Serbian victims.

However, these criticisms fail to take into account that war crimes suspects who can be brought to trial in Serbia are for the most part former members of Serb forces who reside in Serbia. The WCPO, unlike their peers in other countries in the region, has so far refrained from instituting **trials in absentia**<sup>47</sup> **against defendants of other ethnicities**,<sup>48</sup> and should not start doing so simply to restore the ethnic balance advocated for by some Serbian politicians.

### III. Possible impact on the war crimes institutions

The above-described political climate, in addition to not being conducive to witnesses coming forward to testify,<sup>49</sup> does not create the preconditions for police, prosecutors and judges to carry out their duties independently. Various stakeholders in the judicial field indeed indicated that they are occasionally reluctant to proceed with cases involving (additional) Serbian defendants.<sup>50</sup> The OSCE is also aware that some prosecutors and judges themselves have expressed their dissatisfaction with investigative authorities' work on the occasion of arrests of Serbian war crimes suspects. All this has undermined the legitimacy and credibility of the work of the war crimes institutions.

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45 ICTY, *Prosecutor v. Haradinaj et al.*, case no. IT-04-84-T); ICTY, *Prosecutor v. Gotovina et al.*, case no. IT-06-90; ICTY, *Prosecutor v. Limaj et al.*, case no. IT-03-66; ICTY, *Prosecutor v. Naser Orić*, case no. IT-03-68.

46 A joint survey by the OSCE and the Belgrade Centre for Human Rights in 2011 showed that 40% of Serbian citizens believe the primary purpose of war crimes trials before the ICTY was to put the blame for war sufferings on Serbs, and 17% to meet the demand of the international community. Moreover, 76% of the interviewees stated that they do not believe the trials before the ICTY were fair and they do not believe in what was established in the judgements. Lastly, 46% believe that no trials for war crimes should take place before domestic courts in Serbia after the ICTY completes its work. The full survey is available at [www.osce.org/serbia/90422?download=true](http://www.osce.org/serbia/90422?download=true), last accessed on 31 May 2015.

47 Both the previous Criminal Procedure Code (*Official Gazette of the Republic of Serbia* no. 70/2001 and subsequent amendments, Article 304) and the current one (hereinafter "CPC", in *Official Gazette of the Republic of Serbia* no. 72/2011 and subsequent amendments, Article 381(1)) foresee the possibility of trying a defendant *in absentia*.

48 The only partial exception is the "Gnjilane group" case, where the WCPO indicted 8 of the 17 defendants *in absentia*. Other countries in the region have adopted a diametrically opposite approach and have filed indictments in a vast number of cases involving only defendants (mostly members of Serbian forces) who were not available and were then tried *in absentia*. In Croatia, from 1991 until 2007, criminal proceedings for war crimes were conducted against 3,827 individuals, and for the most part these proceedings were held *in absentia* (see State Attorney's Office of the Republic of Croatia, *Report on the work of state prosecution offices in 2007*, page 24, last accessed 31 May 2015 at [www.doh.hr/Default.aspx?art=6606#](http://www.doh.hr/Default.aspx?art=6606#)).

49 This is especially true for "insider" witnesses who are left to face not only the hostility of their former and/or present comrades, but also that of the nation's leaders and ultimately society as a whole. See below, Chapter 8.

50 OSCE interviews with representatives of judicial institutions.

Moreover, it would appear that in deciding which investigations to pursue, the WCPO has in some instances yielded to the political pressure above described, and has **pursued cases involving Serbian victims even in the absence of solid evidence.**

This is exemplified, for instance, by the fact that the vast majority of non-Serbian defendants prosecuted by the WCPO were acquitted because of lack of evidence.<sup>51</sup>

Moreover, the two extradition requests against two non-Serbian defendants investigated for crimes against Serbian victims were rejected by courts in the United Kingdom<sup>52</sup> and Austria<sup>53</sup> in 2010 and 2011, respectively. The judge in the former case noted that the evidence against the defendant was largely insufficient and that the charges against him were “politically motivated”.

As a last example, on 4 May 2012, two days before the general elections in Serbia, five ethnic Albanians from Bujanovac were arrested on suspicion of committing war crimes against Serbs during the conflict in South Serbia in the year 2001.<sup>54</sup> All defendants were released from all charges on 29 May 2012, less than a month after their arrest.

The OSCE recalls that the strength of the evidence should be the only criterion to decide which cases should be prosecuted. Prosecutors should be autonomous in deciding which cases to prioritize. Judges should be completely independent in making a determination on the sufficiency of the evidence. Politicians should refrain from interfering in or otherwise influencing these decision-making processes in any way.

## C. Recommendations

### To the legislature:

- Enact constitutional changes so as to eliminate any political interference in the appointment of judges and prosecutors;

51 Of the seven cases against non-Serbian defendants the only two with a final conviction are the “Đakovica” case against Anton Lekaj and the “Rastovac” case against Veljko Marić. Defendants in the “Gnjilane Group” case (17 defendants), the “Čelebići” and “Prizren” cases (one defendant each) were acquitted with final judgements (the latter defendant in 2015). The two remaining cases are still pending: the one defendant in the “Orahovac Group” case was acquitted on first instance and is presently standing retrial, while the “Tuzla convoy” case (one defendant) is under appeal after a conviction on retrial.

52 City of Westminster Magistrates’ Court, *The Government of the Republic of Serbia v. Ejup Ganić*, 27 July 2010.

53 Landesgericht Korneuburg, case no. 406 HR 67/11s, *Jovan Divjak*, 29 July 2011.

54 See more at [www.politika.rs/rubrike/Hronika/Akcija-hapsenja-optuzenih-za-ratne-zlocine-nad-Srbima.lt.html](http://www.politika.rs/rubrike/Hronika/Akcija-hapsenja-optuzenih-za-ratne-zlocine-nad-Srbima.lt.html), last accessed 31 May 2015. On that occasion, the War Crimes Prosecutor stated that, acting upon a police report, the WCPO had heard a witness and concluded that there was reason to believe that the defendants had committed war crimes (available at [www.politika.rs/rubrike/Hronika/Nekad-je-politika-jaca-od-pravde.lt.html](http://www.politika.rs/rubrike/Hronika/Nekad-je-politika-jaca-od-pravde.lt.html), last accessed 31 May 2015).

- Enact legislation strengthening the role of the High Judicial Council and State Prosecutorial Council in guaranteeing the independence and autonomy of judges and prosecutors;
- Amend the Law on War Crimes to establish that judges of the WCDs are appointed by the High Judicial Council after a regular competition among all judges in Serbia; clarify that each appointment of judges to the WCD lasts six years and this cannot be derogated; establish that WCD judges cannot be assigned to another judicial function without their consent before the expiry of each six year mandate.

#### To Serbian public officials:

- Refrain from criticizing or otherwise interfering with decisions taken by WCPO prosecutors or WCD judges.

#### To the High Judicial Council and State Prosecutorial Council:

- Do not hesitate to publically react to undue interferences or pressures against judicial institutions or individual judges or prosecutors.

#### To the WCPO:

- Select and prioritize cases for investigation and prosecution based only on the Constitution and the law; ensure that ethnic balance is not a criterion for prioritizing or prosecuting the case.

#### To the WCDs:

- Ensure that judicial decisions in war crimes cases are given adequate visibility by at least making them available to the public through the Court's web pages.

#### To the MoJ:

- Ensure that all institutional reforms necessary to ensure an efficient and impartial system of investigation, prosecution and adjudication of war crimes cases are adequately covered in the Action Plans for Chapters 23 and 24 and the Action Plan for the National Judicial Reform Strategy.



# CHAPTER TWO

## International co-operation

*Serbian institutions are particularly dependent on international co-operation for war crimes prosecutions. The ICTY provided Serbia with a decisive amount of evidence in only two cases. Regional co-operation (in the form of exchange of evidence and transfer of criminal proceedings) has significantly improved in the last few years. However, a number of key obstacles in the legal framework still persist, and viable investigations are left unprosecuted. Further improvements in this field are needed.*

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### A. Serbia's jurisdiction over war crimes

The **Law on War Crimes** gives Serbia jurisdiction over war crimes committed on the territory of the whole former Yugoslavia, regardless of the nationality of the suspect or the victims, and regardless of the presence of the suspect on the territory of Serbia.<sup>55</sup>

Even **for ordinary crimes**, it is common for States to exercise jurisdiction over crimes committed abroad, when a link to the State is present. Neighbouring countries (such as Croatia or BiH) can also exercise jurisdiction over crimes committed outside of their territory (including war crimes), regardless of the nationality of the defendant or the

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55 Law on War Crimes, *supra*, Article 3.

victims. However, when no other link to the State is present, they require at least the presence of the defendant on their territory.<sup>56</sup>

Under international law, there is no requirement that a war crime defendant is available in order for the prosecuting State to exercise jurisdiction.<sup>57</sup> The international practice of some States who foresaw universal jurisdiction for war crimes (e.g. Belgium, Spain) is to shift away from “pure” universal jurisdiction and introduce some requirement of a “link” to the territory. The International Committee of the Red Cross has acknowledged that State practice is not uniform on whether the principle of universal jurisdiction requires a particular link to the prosecuting State.<sup>58</sup> There is no *acquis communautaire* on the matter.

Despite the above mentioned far-reaching jurisdiction criteria, and unlike other neighbouring countries, so far Serbian authorities have only issued indictments in cases where the defendants were available to them (i.e. mostly former members of Serb forces who reside in Serbia).<sup>59</sup> The challenge in investigating such cases is that most of the underlying crimes were committed in locations that are presently not within the reach of the Serbian authorities. This heavily restricts access of the War Crimes Investigation Service (WCIS) and WCPO to crime scenes, and in many cases also to victims and witnesses.

Conversely, Serbian authorities often have **direct access only to Serb victims** and witnesses in cases where the perpetrators reside outside of their jurisdiction. As countries in the region do not extradite their own nationals for war crimes,<sup>60</sup> this makes nearly inevitable that such cases are not prosecuted in Serbia.

The scenario just described makes a compelling case for international co-operation as the key to successful prosecutions in almost all war crimes cases prosecuted in Serbia. Co-operation means, first and foremost, exchange of information and evidence, but also transfer of case files and prosecution. As will be demonstrated below, even though regional co-operation has significantly improved in the last few years, there is still room for further improvements in this field.

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56 See Article 12 of the 2003 BiH Criminal Code (*Official Gazette of Bosnia and Herzegovina* no. 3/03, and subsequent amendments); Article 12, 16 and 18 of the Croatian Criminal Code (*The People's Newspaper of the Republic of Croatia*, no. 110/97, and subsequent amendments). This is also the solution adopted by the Serbian Criminal Code for serious crimes other than war crimes (see Articles 6-10 of the Serbian Criminal Code, *Official Gazette of the Republic of Serbia* no. 85/2005, and subsequent amendments). The FRY Criminal Code foresaw identical criteria (see Article 104, CCFRY).

57 The Geneva Conventions do not explicitly require such a link. According to the Red Cross, “States have the right to vest universal jurisdiction in their national courts over war crimes.” See International Committee of the Red Cross, *Customary International Humanitarian Law*, ICRC and Cambridge University Press, Vol I, 2005, Rule 157.

58 *Ibid.*

59 See Chapter 1, para. B.II.

60 See e.g. Serbian Law on Mutual Assistance in Criminal Matters of 18 March 2009, *Official Gazette of the Republic of Serbia* no. 20/09, Article 16(1); BiH Law on Mutual Assistance in Criminal Matters of 15 June 2009, *Official Gazette of Bosnia and Herzegovina* No. 53/09, Article 40.

## B. Co-operation with the ICTY

### I. Serbia's assistance to the ICTY

All states have an obligation under international law to co-operate with the ICTY.<sup>61</sup> States in the region have adopted legislation creating the legal framework for this co-operation. In Serbia, this legislation consisted mostly of the Law on Co-operation with the ICTY<sup>62</sup> and the Law on War Crimes. This legislation allowed Serbia to comply with the **ICTY's requests for assistance**, such as locating certain individuals and providing materials, court records, and information regarding possible witnesses or victims. Serbia, in particular, provided the ICTY with a large amount of documents contained in its State archives.

Moreover, in 2006, Serbia established an Action Team, headed by the War Crimes Prosecutor,<sup>63</sup> specifically tasked with **arresting ICTY fugitives**. By 2011, the Team had arrested all six remaining fugitives and transferred them to the ICTY.

Currently, Serbia is reportedly complying expeditiously with all remaining requests for assistance filed by the ICTY in the cases that are still pending.<sup>64</sup>

### II. The ICTY's assistance to Serbia

The ICTY's assistance to domestic prosecutions in the region has become increasingly important over time, especially in light of the Tribunal's Completion Strategy. This form of co-operation, intended to reduce the ICTY's caseload and at the same time strengthen the domestic judiciaries' capacity to deal with war crimes cases, consisted of capacity building activities<sup>65</sup> and the following three forms of legal assistance:

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61 Article 29 of the Statute of the ICTY (Co-operation and judicial assistance): "(1) States shall co-operate with the International Tribunal in the investigation and prosecution of persons accused of committing serious violations of international humanitarian law; (2) States shall comply without undue delay with any request for assistance or an order issued by a Trial Chamber, including, but not limited to: (a) the identification and location of persons; (b) the taking of testimony and the production of evidence; (c) the service of documents; (d) the arrest or detention of persons; (e) the surrender or the transfer of the accused to the International Tribunal."

62 Law on Co-operation of Serbia and Montenegro with the International Criminal Tribunal for the Prosecution of Persons responsible for serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, *Official Gazette of FRY* no. 18/2002; *Official Gazette of Serbia and Montenegro* no. 16/2003.

63 The Team was comprised of four deputy war crimes prosecutors, WCIS officers, and the then president of the National Council for Cooperation with the ICTY, Rasim Ljajić.

64 See ICTY's Annual Reports 2011, 2012, 2013 and 2014.

65 The ICTY has been sharing its expertise with judges, prosecutors and lawyers in the former Yugoslavia through organizing and participating in numerous training programs and study visits. See also the joint ICTY/OSCE-ODIHR/UNICRI project *Supporting the Transfer of Knowledge and Materials of War Crimes Cases from the ICTY to National Jurisdictions*, aimed at assisting national jurisdictions in strengthening their capacities to handle war crimes cases in an effective and fair manner.

**1. Referral of ICTY cases (“Rule 11bis” cases).**<sup>66</sup> This procedure provides for transfer of cases to domestic jurisdictions after an ICTY indictment had been confirmed and prior to the commencement of the trial. Subsequent proceedings in these cases before national courts are conducted in accordance with domestic laws. Since 2005, the ICTY has transferred eight cases involving 13 persons (against mid- and low-level defendants) to courts in the region. Cases transferred to BiH involved ten defendants, and those to Croatia two defendants. Only one case was referred to Serbia, and proceedings were soon discontinued since the only defendant was unfit to stand trial due to medical reasons.<sup>67</sup> Currently, there are no more cases eligible for a Rule 11bis referral since there are no more pending ICTY indictments.

**2. Transfer of ICTY case files.** The ICTY also transferred to national authorities a number of case files containing evidence that did not result in an indictment.<sup>68</sup> A number of these case files went to BiH authorities,<sup>69</sup> but only two to Serbia: the one related to events in the Ovčara farm in Croatia (transferred in 2003, which resulted in trials against 21 defendants)<sup>70</sup> and the one related to crimes in the town of Zvornik, in BiH (transferred in 2004, which resulted in trials against ten defendants).<sup>71</sup> This form of assistance proved extremely effective, since the case materials were almost complete and could quickly be transformed into viable cases. However, the ICTY is unlikely to transfer additional investigative files to Serbian authorities.<sup>72</sup>

**3. Access to ICTY archives.** Lastly, the ICTY has made its documentation available to prosecutors from the region, who have access to evidence collected by the ICTY during a decade of investigations. Prosecution offices from the region have permanent representation at the ICTY’s Office of the Prosecutor through dedicated liaison officers.<sup>73</sup> Access to such evidence is, however, limited by any existing protective measures for witnesses and confidentiality rules.<sup>74</sup> While the ICTY and the Mechanism for

66 Rule 11bis of the Rules of Procedure and Evidence of the ICTY (“Referral of the Indictment to Another Court”).

67 ICTY, *Prosecutor v. Vladimir Kovačević*, case no. IT-01-42/2. The indictment alleges that the defendant, as a battalion commander, committed war crimes while participating in the JNA attack on Dubrovnik, Croatia in 1991.

68 Evidence so obtained can be used before Serbian courts, according to article 14(a) of the Law on War Crimes.

69 These cases transferred to Bosnia and Herzegovina, which related to approximately 45 suspects, are commonly referred to as “Category II cases”.

70 “Ovčara I” case, case no. KTRZ 3/03, indictment, 4 December 2003; “Ovčara II” case, case no. KTRZ 4/03, indictment, 24 May 2005; “Ovčara III” case, case no. KTRZ 4/03, indictment, 17 October 2008; “Ovčara IV” case, case no. KTRZ 6/11, indictment, 18 June 2012.

71 The WCPO further investigated the case in co-operation with their BiH counterparts and filed three indictments: “Zvornik I” case, case no. KTRZ 17/04, indictment, 12 August 2005; “Zvornik II” case, case no. KTRZ 17/04, indictment, 12 August 2005; “Zvornik III” case, KTRZ 8/07, indictment, 14 March 2008.

72 Interview with ICTY officials, November 2014.

73 In 2009, the ICTY’s Office of the Prosecutor (OTP), with financial assistance from the EU Commission, commenced a program in which liaison prosecutors from BiH, Croatia and Serbia work in the OTP’s Transition Team in The Hague. See ICTY, *Annual Outreach Report*, 2012, page 26.

74 Rule 75, ICTY Rules of Procedure and Evidence.

International Criminal Tribunals (MICT)<sup>75</sup> can in certain cases lift such measures,<sup>76</sup> they have not done so save for a few instances. In other instances, the ICTY promised witnesses that their statements would only be used in proceedings before the ICTY. In such cases, the ICTY has to seek the witness's consent for their statement to be handed over to local judiciaries. Another limitation in the access to ICTY databases is the large amount of evidence contained therein, which is not easy to organize and use to generate new cases. In fact, Serbian prosecutors generally use it to look for supplementary evidence in ongoing investigations, not to build new cases.

## C. Regional co-operation

### I. Extradition

Extradition is one of the main avenues for international co-operation in criminal matters. Extraditing war crimes defendants is possible among countries in the region; however, none of these allow the **extradition of their own nationals** for war crimes.<sup>77</sup> This limitation greatly reduces the effectiveness of extradition as a legal co-operation tool, since most war crimes suspects in the region reside in the jurisdiction whose nationality they have.

Where extradition is not an option, the prosecuting authority may decide to assist the State where the defendant resides in prosecuting the case by transferring to that State either the evidence collected in the case, or the entire criminal proceeding. Serbia has in the past years stipulated a number of **bilateral agreements** with neighbouring countries (notably, BiH and Croatia) aimed at facilitating the exchange of evidence (see paragraph II below) and the transfer of entire criminal proceedings (see paragraph III below).

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75 Mechanism for International Criminal Tribunals ("MICT"), United Nations Security Council Resolution 1966, S/RES/1966, 22 December 2010.

76 Rule 75(H)(J), ICTY Rules of Procedure and Evidence. Since 1 July 2012 for requests to the ICTR, and from 1 July 2013 for requests to the ICTY, the MICT will respond to requests for assistance from national authorities (not restricted to Rwanda and the former Yugoslavia) in relation to national investigations, prosecutions and trials. This function comprises the provision of assistance to national courts conducting related proceedings, which includes transferring dossiers, responding to requests for evidence, variation or rescission of protective measures for witnesses and responding to requests to question detained persons. Rule 86(H) of the Rules of Procedure and Evidence of the Mechanism allows victims or witnesses for whom protective measures have been ordered in proceedings before the ICTR, the ICTY, or the Mechanism to seek to rescind, vary, or augment their protective measures by applying to the President. Parties to a proceeding in another jurisdiction authorised by an appropriate judicial authority may also seek variation of protective measures under Rule 86(H).

77 See above, footnote 60.

## II. Exchange of evidence

To assist each other in investigating and prosecuting war crimes cases, prosecution offices in the region regularly exchange information and evidence. Evidence in some cases consists of individual witness statements or documents, while in others it consists of entire investigative files. The legal basis for the exchange of evidence is the Council of Europe's 1959 Convention on Mutual Assistance in Criminal Matters,<sup>78</sup> of which all countries in the region are signatories. Particularly relevant is the Convention's Second Protocol,<sup>79</sup> which allows for **direct exchange** of evidence between judicial authorities (including prosecutors).<sup>80</sup>

To reinforce technical co-operation and further facilitate the exchange of information and evidence in war crimes cases (a procedure already allowed under the European Convention's Second Protocol), in January 2013 the Serbian War Crimes Prosecutor signed a co-operation protocol with the Chief Prosecutor of BiH.<sup>81</sup> Similar protocols had been signed earlier with the Croatian<sup>82</sup> and the Montenegrin Chief Prosecutors.<sup>83</sup> The signature of these agreements prompted more frequent meetings between war crimes prosecutors and the exchange of a higher amount of evidence. **At least 12 WCPO investigations** are based on evidence received from either BiH or Croatia.<sup>84</sup>

This co-operation, however, is not without **shortcomings**.

The first is that countries have shown themselves to be more eager to provide assistance in cases in which their citizens are victims and, conversely, less eager to co-operate when the defendant is their own national. A plain confirmation of this is that none of the 12 investigations mentioned above involves Serbian victims. According to the WCPO, foreign regional authorities process Serbian requests for assistance much more quickly if the case involves victims of their own nationality, whereas if they concern cases with Serbian victims they are processed much more slowly, if at all.<sup>85</sup> Moreover, in 2011 Croatia adopted a law expressly dedicated to co-operation with Serbia on war crimes cases involving Croatian defendants, which made it more difficult for the WCPO

78 European Convention on Mutual Assistance in Criminal Matters (20 April 1959).

79 Second Additional Protocol to the European Convention on Mutual Assistance in Criminal Matters (8 November 2001).

80 This is because according to the declaration filed by the Serbian Government, both prosecutors and judges are "judicial authorities" for the purpose of the above-mentioned Second Additional Protocol.

81 Protocol on Cooperation in Prosecuting Persons Suspected of War Crimes, Crimes against Humanity and Genocide (31 January 2013).

82 Agreement on Cooperation in Prosecuting Perpetrators of War Crimes, Crimes against Humanity and Genocide (13 October 2006).

83 Agreement on Cooperation in Prosecuting Perpetrators of Criminal Offences against Humanity and Other Assets Protected by International Law (2007).

84 More precisely, the Croatian Chief State Prosecutor's Office provided evidence that enabled the WCPO to file indictments in ten cases ("Velika Peratovica", "Sremska Mitrovica", "Sotin", "Slunj", "Stara Gradiška", "Vukovar", "Lički Osik", "Tenja I", "Tenja II", "Medak", "Banski Kovačevac" and "Beli Manastir"). The BiH State Prosecution provided evidence in two cases ("Prijedor" and "Bosanski Petrovac").

85 Various interviews with WCPO officials, 2014.

to obtain legal assistance from Croatian authorities in cases involving crimes against Serbian victims in Croatia.<sup>86</sup>

The **WCPO has actively assisted** BiH authorities in the investigation of cases where Serbs are victims.<sup>87</sup> However, co-operation with BiH was occasionally hampered by a provision contained in the above-mentioned Protocol, which unlike the ones with Croatia and Montenegro, gives the “witnesses/injured parties” the possibility to block the handing over of evidence to a foreign authority by “**explicitly opposing it**”.<sup>88</sup> This *de facto* gives witnesses the power to decide the fate of international legal assistance requests. Moreover, while this provision is only applicable to the transfer of cases from the country where the crime was committed (in this case, mostly BiH) and not *vice versa*, Serbian prosecutors have also invoked it in relation to cases not committed on Serbian territory. This “opposition” mechanism has already resulted in each country refusing to transfer evidence in two cases related to events in and around Srebrenica, thus ultimately hindering progress in the prosecution of serious crimes.

### III. Transfer of criminal proceedings

Another avenue for international co-operation when the defendant is not available is to transfer the entire criminal proceeding to the State where the defendant resides.

Transfer of criminal proceedings occurs at the court level and is processed through diplomatic channels (typically, their Ministries of Justice). The legal basis for this procedure is contained in bilateral agreements that Serbia has signed with neighbouring countries on mutual legal assistance.<sup>89</sup> Although improperly cited in all decisions concerning the transfer of criminal proceedings, the Serbian Law on Mutual Assistance in Criminal Matters is not applicable, because the matter is regulated by international treaties.<sup>90</sup>

So far, Serbian authorities have taken over nine cases under this procedure. All of them originate from BiH and all involve relatively low-profile defendants. Transfers occurred

86 Law on invalidity of certain legal acts of the judiciary bodies of the former JNA, the former SFRY and the Republic of Serbia; in *The People's Newspaper of the Republic of Croatia* no. 124/11, 21 October 2011. The law also declares null and void all legal acts of the JNA, the SFRY and the Republic of Serbia relating the war in Croatia in the 1990s in proceedings where Croatian citizens are defendants.

87 For example, based on evidence exchanged under the Protocol, BiH authorities filed an indictment against two former members of the BiH Army for a war crime against Serb civilians in the area of Bihac in 1994. This case is one of 43 war crimes cases in which the Serbian and BiH Prosecutor's Offices claim to have exchanged information and data since January 2013. See more at [www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2014/VS\\_2014\\_12\\_11\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_12_11_ENG.pdf), last accessed 31 May 2015.

88 Article 10, Protocol on Cooperation in Prosecuting Persons Suspected of War Crimes, Crimes against Humanity and Genocide, *supra*.

89 Agreement on Legal Assistance in Civil and Criminal Matters with Croatia (15 September 1997), Article 28; Agreement on Legal Assistance in Civil and Criminal Matters with BiH (24 February 2005), Article 39; Agreement on Legal Assistance in Civil and Criminal Matters with Montenegro (29 May 2009), Article 44.

90 Article 1, Law on Mutual Assistance in Criminal Matters, *supra*.

on a piecemeal, *ad hoc* basis rather than a planned, organized one. So far there have been no cases transferred from Croatia.

Although the exact number is not known at the moment, it is believed that many more war crimes proceedings pending before the BiH and Croatian authorities could be transferred to Serbia in the near future. A memorandum of understanding between these countries on the modalities and timing for the possible transfer of war crimes proceedings to Serbia would enable better planning and allocation of resources to promptly tackle these cases in a manner that is compatible with other priorities.

The WCPO has so far made no attempts to transfer to other jurisdictions cases investigated in Serbia. This tool could prove an efficient way to bring to justice defendants who are not available to the Serbian authorities, including perpetrators of crimes against Serbian victims.

#### IV. Other co-operation tools

In 2014, with the support of the OSCE Mission to Serbia and the Dutch embassy in Belgrade, the WCPO obtained funds for the initiation of a project on the exchange of **regional liaison officers** to further strengthen direct access to information and evidence in war crimes cases. The purpose of the project is to facilitate access to and exchange of information in ongoing investigations through a semi-permanent representative in other prosecution offices in the region.

Another co-operation tool available to Serbian authorities in war crimes cases is that of **joint investigation teams**.<sup>91</sup> So far, the OSCE is aware of at least two cases which the WCPO has investigated jointly with BiH authorities: the already cited “Zvornik” case,<sup>92</sup> and a recent case (“Štrpci”) which led to a joint police arrest operation. These cases are good examples of how effective regional co-operation can lead to meaningful results.

#### D. Co-operation with UNMIK/EULEX

Serbian authorities have been productively co-operating with international rule of law institutions present in Kosovo (UNMIK and, since 2008, EULEX) on crucial issues related to the prosecution of war crimes cases, including missing persons.

91 The legal basis for such co-operation is found in the 1978 Second Protocol of the 1959 Convention on Mutual Assistance in Criminal Matters, Article 20.

92 See above, Chapter 2, para. B.II.

The European Union Rule of Law Mission in Kosovo (EULEX) has been assisting Serbian prosecutors in locating and interviewing witnesses in Kosovo, and ensuring the presence of a number of Kosovo Albanian witnesses at trials held before the High Court in Belgrade. The WCPO has also assisted EULEX by facilitating contacts with witnesses residing in Serbia.

Despite the **absence of a formal protocol** between the two offices regulating the transfer of criminal proceedings or evidence (similar to those with BiH or Croatia), Serbian Prosecutors have informally exchanged a considerable amount of evidence and information with EULEX Prosecutors from the Special Prosecution Office. EULEX has also informally delivered to the WCPO several complete investigative files involving suspects residing in Serbia. Devising a formal framework for this co-operation would not only make it possible to follow up on the actions taken by each party on the evidence transferred, but would also ensure co-operation between the Special Prosecution Office of Kosovo and the WCPO beyond the (imminent) end of EULEX's executive mandate (currently foreseen for June 2016).<sup>93</sup>

The WCPO also assists the European Union's Special Task Force mandated with investigating the allegations contained in the Council of Europe's report on organ trafficking.<sup>94</sup>

## E. Police co-operation

The WCIS' work, as noted, is also heavily dependent on international co-operation with other police services. WCIS management reported a lack of co-operation with Croatia and BiH, although co-operation is reportedly productive with police of the Republika Srpska. Co-operation with EULEX Police is regulated under a protocol signed between EULEX police and Serbian Police. The WCIS, however, mostly uses the WCPO as a channel for its co-operation requests directed to EULEX Police. As a result, the WCIS' investigative work is largely based on analysis of existing material, rather than the collection of new evidence.<sup>95</sup>

A major hindrance to police co-operation in the region is the possibility for each country to impede the issuance of **Interpol** wanted notices against its own nationals wanted for

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93 Council Decision 2014/349/CFSP of 12 June 2014 amending Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo; *Official Journal*, L 174; 13 June 2014.

94 Council of Europe, Committee on Legal Affairs and Human Rights, *Inhuman treatment of people and illicit trafficking in human organs in Kosovo*, Rapporteur Dick Marty, 12 December 2010.

95 See more in detail below, Chapter 3, para. G.

war crimes.<sup>96</sup> This, for instance, has resulted in the refusal of the Serbian request to have an international arrest warrant issued against Naser Orić, a BiH citizen wanted by Serbian authorities for crimes committed against Serbian civilians in and around Srebrenica.<sup>97</sup>

## F. Recommendations

### To the WCPO:

- In negotiation with the BiH prosecution office, revise or abrogate the provision in the protocol on mutual co-operation foreseeing the possibility for individual witnesses to hinder the transfer of evidence;
- Initiate procedures under the existing international treaties for transferring viable cases to the jurisdiction where the defendant resides (e.g. BiH, Croatia), where the defendant is not available to Serbian authorities;
- Obtain from BiH and Croatian authorities an estimated number of cases which are likely to be transferred to Serbia and devise a timeline for their transfer;
- Seek guidance from the ICTY's Office of the Prosecutor on the most relevant pieces of evidence which are available in the ICTY's archives;
- Pursue further attempts to obtain from the ICTY the lifting of witness protective measures, especially where witnesses did not testify at trial and/or agree to have their statements revealed;
- Sign a memorandum of understanding with the Special Prosecution Office of Kosovo on the exchange of information and evidence. Such memorandum should include a timeline for prosecution of any cases where complete investigative files were informally transferred.

### To the Ministry of Interior:

- Endeavour to sign memorandums of understanding between the WCIS and their counterparts in Croatia and BiH to ensure the prompt exchange of intelligence and evidence.

96 According to an Interpol General Assembly Resolution adopted in 2010, each country can "protest" within 30 days against the issuance of an Interpol wanted notice for one of its citizens on charges of war crimes (Interpol AG-2010-RES-10, 79th Assembly session, 8-10 November 2010). The Resolution was adopted as a remedy against the proliferation of requests for international arrest warrants for war crimes requested against foreign nationals.

97 See more at [www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=3993&langTag=en-US](http://www.mpr.gov.ba/aktuelnosti/vijesti/default.aspx?id=3993&langTag=en-US). Last accessed 31 May 2015.

# CHAPTER THREE

## Investigations

*To date, the vast majority of war crime defendants prosecuted in Serbia are low-ranking perpetrators of isolated crimes. The importance of the cases in which indictments were filed has decreased in recent years. Each year, cases have contained on average fewer victims and fewer, lower-ranking defendants. The lack of a case prioritization strategy may in part explain this phenomenon, but the reasons for it remain mostly unclear and a stronger resolve to tackle the many unprosecuted cases is needed.*

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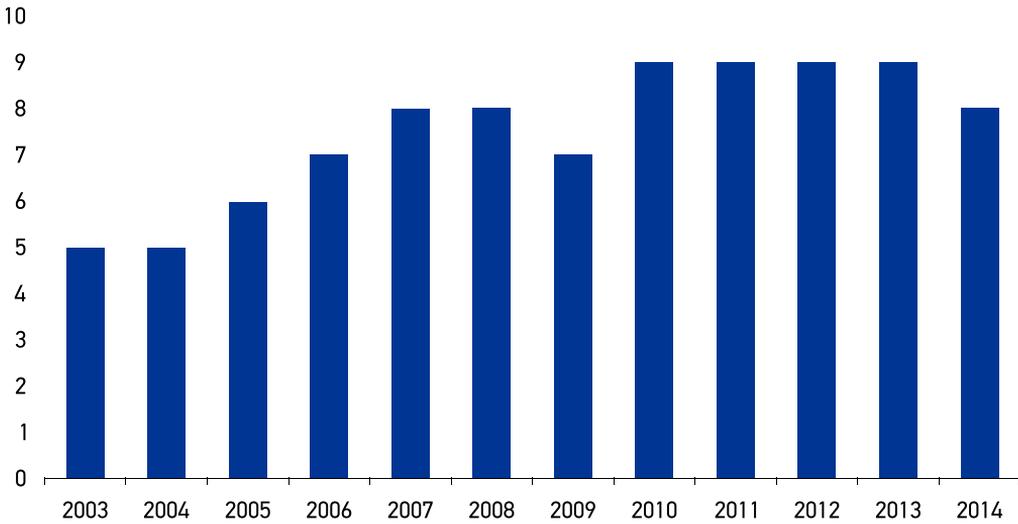
### A. The institutions responsible for investigating war crimes in Serbia

Investigations into war crimes in Serbia have been conducted under two different institutional models over the years: inquisitorial until 2011, and mostly adversarial from January 2012 onwards. Under both, the prosecutor is the driving force of the investigation.

The **WCPO** has been staffed with a number of prosecutors (the War Crimes Prosecutor and his Deputies), which progressively grew from five in 2003 to nine in 2010. Chart 1 displays the staffing levels of the WCPO over time. On average, the number of prosecutors staffing the office has been 7.5.

The number of legal assistants and support staff assisting Deputy Prosecutors in investigations and trials has always been limited. From June 2010 until the end of 2011, the OSCE Mission to Serbia financed the employment of five legal assistants, three analysts and four outreach support/analysis assistants to Deputy War Crimes Prosecutors. At the time of writing, there are only four assistants and three investigators. No military analysts or other experts are employed on a permanent basis.

Chart 1 – WCPO staff (Prosecutor and Deputies)



Within the Serbian Ministry of the Interior (MoI), the War Crimes Investigation Service (**WCIS**) has exclusive jurisdiction over war crimes cases. In the overall structure of the MoI, the WCIS is placed under the Criminal Police Directorate (CPD) which forms part of the General Police Directorate as the larger organizational unit within the MoI. The WCIS is organized into a department for criminal investigations and missing persons, and a department that deals with co-operation with the ICTY, analytical and intelligence affairs, and documentation. In addition, the WCIS is in charge of executing all arrests in war crimes cases. In co-operation with the WCPO, it was also in charge of the apprehension of the remaining ICTY fugitives. Currently, the WCIS has 49 employees, 16 of whom are investigators, ten of whom are document and operative analysts, and nine of whom are officers in charge of international legal assistance requests coming from the ICTY (seven officers) or other countries (two officers).<sup>98</sup>

## B. Number of investigations and indictments

According to the information provided by the WCPO, there are currently 23 cases that are formally at the investigation stage. It is not known if and when these investigations will result in viable cases.

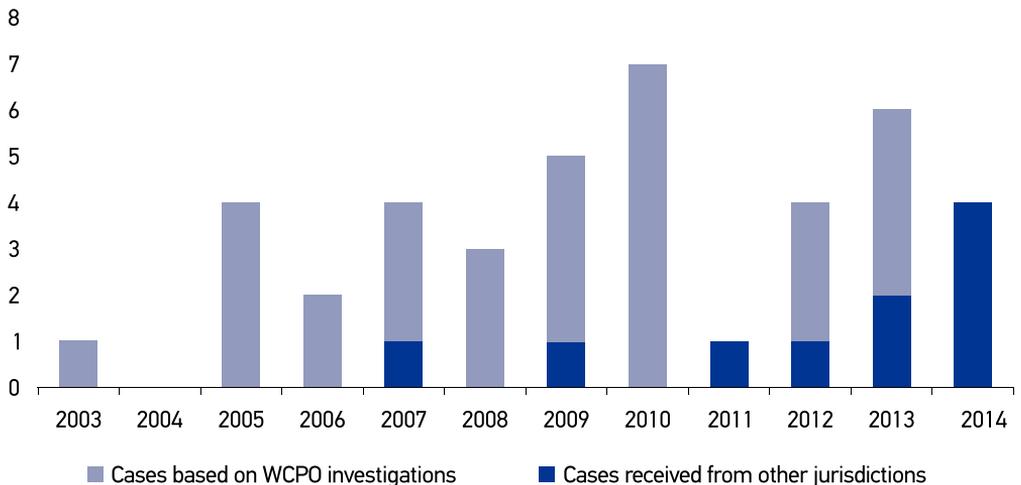
<sup>98</sup> The remaining are administrative and management positions.

Moreover, over 1,000 cases are at the pre-investigation stage. No comprehensive review of these cases has been done to date. It is therefore unclear at present how many of these cases contain solid evidence and should be prosecuted, and how many instead need to be dismissed.

From the start of its operations in November 2003 until the end of 2014, the WCPO filed 60 indictments charging 162 defendants with war crimes.<sup>99</sup> 19 indictments involve co-defendants charged in separate indictments for the same crime. These accused were then tried either jointly or separately in cases which, from a substantive point of view, are joint cases. By applying this standard, there were **41 war crimes cases** prosecuted since 2003.

Ten of these cases were transferred from other jurisdictions: nine from BiH courts (under the already mentioned 2005 Agreement on Legal Assistance),<sup>100</sup> and one from the ICTY (under the mentioned Rule 11 *bis*).<sup>101</sup> These ten transferred cases had been fully investigated before being transferred to Serbia.<sup>102</sup> While this is an indicator of good international cooperation, it also shows that only 31 war crimes cases out of 41 originate from investigations conducted by Serbian institutions. Chart 2 displays the breakdown of these cases.

**Chart 2 – New war crimes cases in which an indictment was filed**



99 This figure includes only war crimes indictments that the Court subsequently confirmed. It does not include indictments that were returned to the prosecution for further investigation. It also does not include the four additional indictments against ten accused charged with providing assistance to ICTY fugitives.

100 "Bihać", "Bijeljina", "Čanković", "Dragišić", "Ključ", "Luka camp", "Sanski Most", "Šinik", "Stari Majdan".

101 "Dubrovnik" case. See above Chapter 2, para. B.II.

102 The ten transferred cases were undemanding in terms of additional investigative work needed: as the WCPO received complete criminal proceedings where an indictment has been filed and confirmed, it could limit itself to redrafting the indictment in compliance with the Serbian Criminal Procedure Code before bringing the case to court.

This means that the WCPO effectively generated **less than three investigations per year** that resulted in trials,<sup>103</sup> and that each WCPO prosecutor generated approximately **one new investigation resulting in a trial every three years**.<sup>104</sup> Of note, these figures also include the already mentioned 14 cases where the ICTY, BiH and Croatian authorities provided a substantive amount of evidence to Serbian authorities.<sup>105</sup>

There has not been a consistent trend in the number of war crimes cases in which indictments were filed each year. The WCPO generated 27 new cases (approximately three per year) when it conducted investigations under the old Criminal Procedure Code (2003-2011). The entry into force of the new CPC in January 2012 resulted, on average, in a higher output of indictments (14 new cases, approximately five per year). However, when considering only cases based on WCPO investigations, the output has actually decreased. As Chart 2 shows, half of the cases in which indictments were filed under the new Code are transfers of criminal proceedings from BiH.

## C. Defendants: number and characteristics

As Chart 3 illustrates, 86% of the defendants charged by the WCPO with war crimes are former members of **Serbian forces**.<sup>106</sup> Most members of non-Serbian forces were Albanians indicted in a single case, which of note resulted in the eventual acquittal of all 17 defendants.<sup>107</sup> Only three defendants belonged to Bosniak or Croatian forces and only one of them stands convicted by final judgement. Only one Albanian defendant stands convicted by final judgement.

Almost three quarters of all defendants used to be members of the military (including “territorial defence” forces), while former police members account for almost all the remaining ones. A very limited number of defendants allegedly acted in their capacity as civilian superiors (e.g. politicians, central/local government).

As Chart 4 shows, the **total number of defendants indicted** per year reached its maximum in 2009 and 2010, when 25 defendants were indicted each year. This figure rapidly decreased in subsequent years. In 2014, only six defendants were indicted.

103 Over a period of 12 years a total of 31 investigations that resulted in trials were generated in Serbia. This corresponds to an average of 2.58 cases investigated per year.

104 On average 2.6 WCPO indictments originated from investigations in Serbia per year. Considering that an average of 7.5 prosecutors were working in the WCPO during a period of 12 years, 0.34 indictments were issued per prosecutor per year.

105 See above, Chapter 2, paras. B.II and C.II.

106 For the purpose of this report the notion of “Serbian forces” includes military personnel operating in regular armed forces such as the JNA (Jugoslovenska Narodna Armija – Yugoslav People’s Army), the VJ (Vojska Jugoslavije – Army of Yugoslavia), the SVK (Srpska Vojska Krajine – Serb Army of Krajina) and the VRS (Vojska Republike Srpske – Army of Republika Srpska); personnel of the so-called “territorial defence” forces; police officers, including reserve police; and civilian authorities.

107 “Gnjilane Group” case, Court of Appeals in Belgrade, case no. Kž1 Po2 2/13, judgement, 13 November 2013.

Chart 3 – Defendants' ethnicity

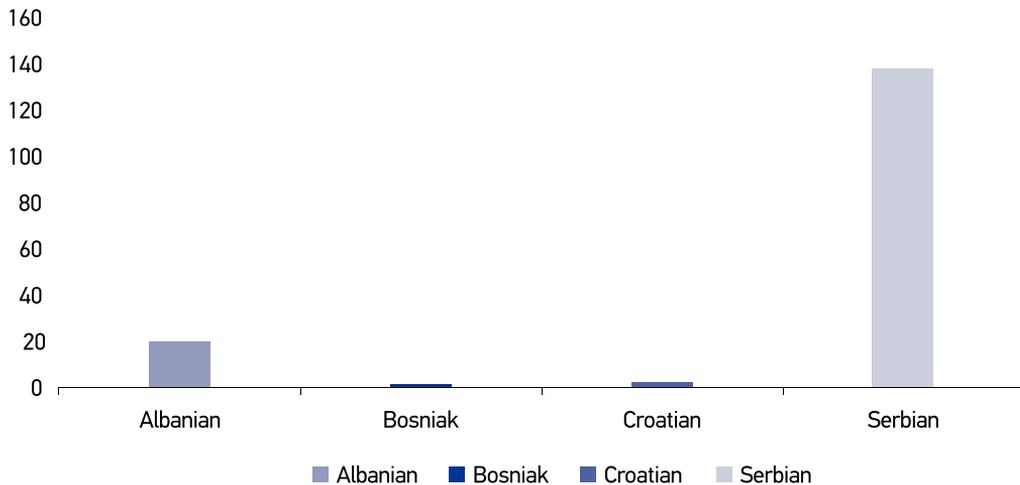
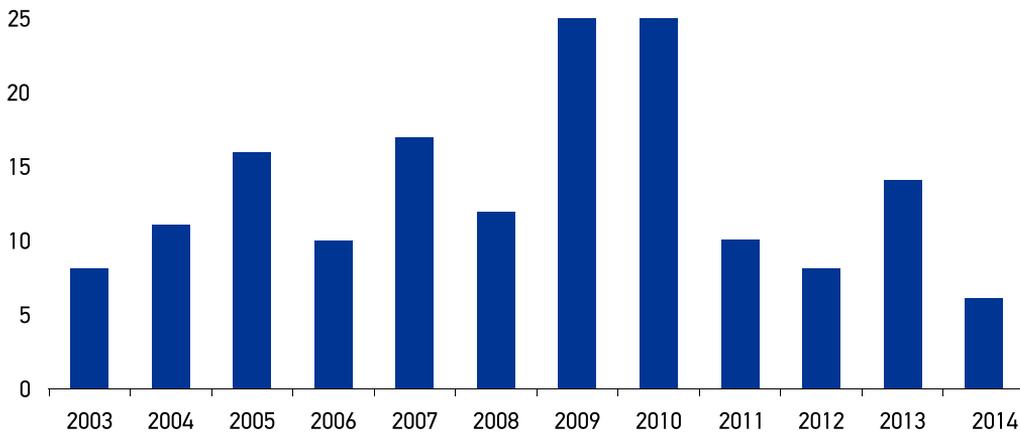


Chart 4 – Number of defendants indicted

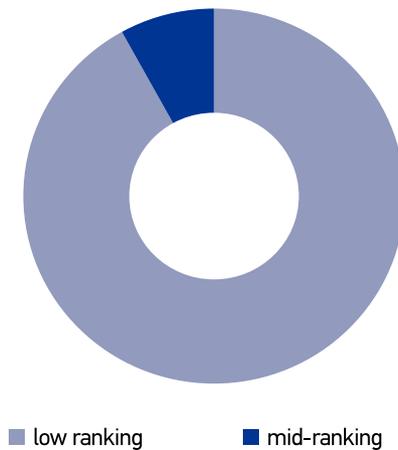


This is a direct result of the fact that, on average, cases in which an indictment was filed in subsequent years contained fewer co-defendants. The **number of defendants per case**<sup>108</sup> dropped from an average of over four defendants per case in 2009 to an average of one defendant per case in 2014.<sup>109</sup> The above figures indicate that in recent years not only are there fewer indictments, but also that cases were focused on isolated perpetrators rather than organized groups.

New developments in 2015 – notably, the arrest of eight defendants in relation to the crimes in Srebrenica in 1995, and the filing of an indictment against five more for serious crimes committed in and around Štrpci – fall outside the timeframe of this report, but are welcome indicators of possible improvements in this field.

## D. Defendants: rank

Chart 5 – Defendants' hierarchical level



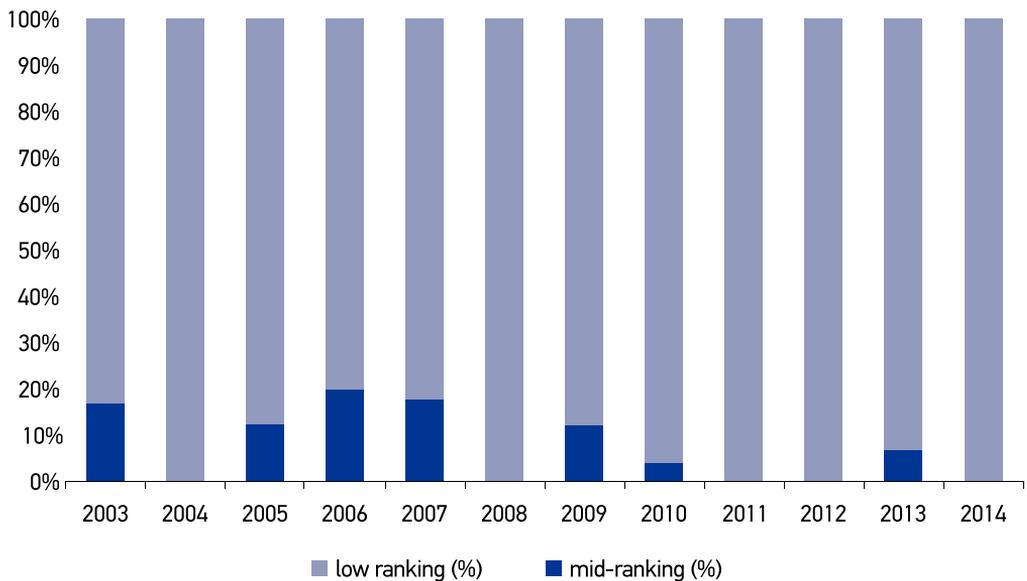
While the ICTY decided to focus its prosecutions on persons who held some of the highest civilian, police and military offices during the conflicts, domestic prosecutions

108 This analysis considers both the cases investigated by the WCPO and the proceedings transferred from other jurisdictions.  
 109 As a term of comparison, between 2012 and 2014, the nine prosecutors who, on average, staffed the WCPO in this period charged a total of 29 defendants, an average of just above three each. The 30 prosecutors who, on average, staffed the State Prosecution Office of BiH in the same period indicted 210 defendants, an average of seven each.

in Serbia so far have focused on defendants of a **low hierarchical level**.<sup>110</sup> As Chart 5 shows, none of the defendants prosecuted by the WCPO held “high-ranking” positions at the time of the offences (brigade commander or civilian police equivalent), while only a limited number of them (less than 10%) had a position enabling them to issue orders to subordinates (“medium-ranking”).

Moreover, as Chart 6 shows, most mid-ranking prosecutions in Serbia occurred in the first few years of the work of the war crimes institutions. Up until 2009, an average of 10-15% of the defendants indicted each year bore a mid-level type of responsibility. In recent years, almost no mid-ranking defendant was indicted: in fact, **all defendants indicted in 2011, 2012 and 2014 were low ranking ones**. Thus, in recent years not only has the average number of defendants per case decreased, but their rank has also decreased.

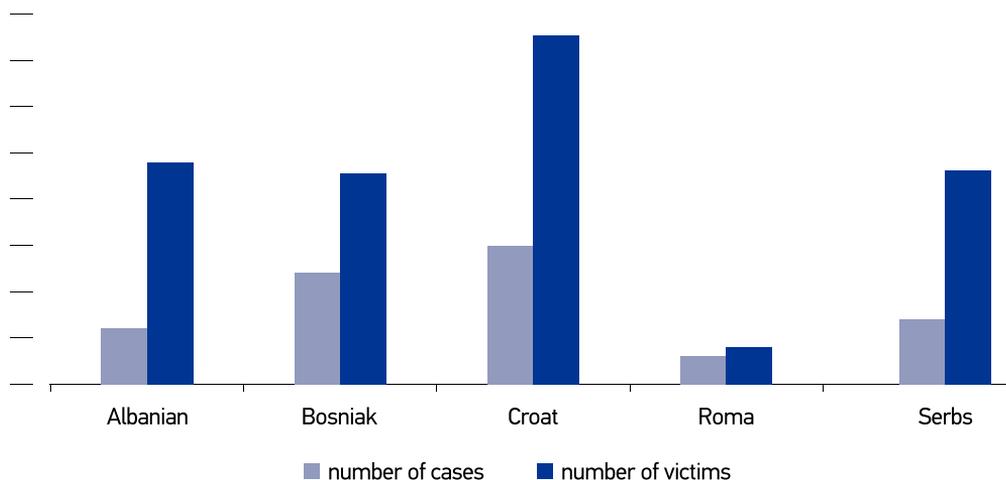
Chart 6 – Defendants' rank per year



110 While the ICTY and domestic courts have concurrent jurisdiction (see Article 9 of the ICTY Statute), since at least 2002 the ICTY specifically decided to “concentrate on the highest-ranking political, military and paramilitary leaders” (see letter of the Secretary-General to the Security Council of 19 June 2002 (S/2002/678)), while at the same time referring cases against mid-level perpetrators to domestic courts (notably, those of BiH).

## E. Victims: number and characteristics

Chart 7 – Number of victims and cases per ethnicity



The cases prosecuted in Serbia so far have covered crimes committed against over 1,100 **victims of violent crimes**,<sup>111</sup> belonging to all main national groups (i.e. Albanians, Bosniaks, Croats, Roma, and Serbs). As Chart 7 displays, there is a predominance of cases involving crimes against victims of Croatian (35% of the cases and 34% of the total number of victims) and Bosniak ethnicity (28% of the cases and 20% of the victims). There are many fewer cases involving Kosovo Albanian victims (14% of the total number of cases) but these cases on average involve larger-scale crimes, so that Kosovo Albanians make up to 22% of the total number of victims. There are even fewer cases involving Roma victims (7% of the cases, and 3% of the victims). Cases involving crimes against **Serbian victims** are 16% of the total number of cases and involve 21% of the total number of victims.

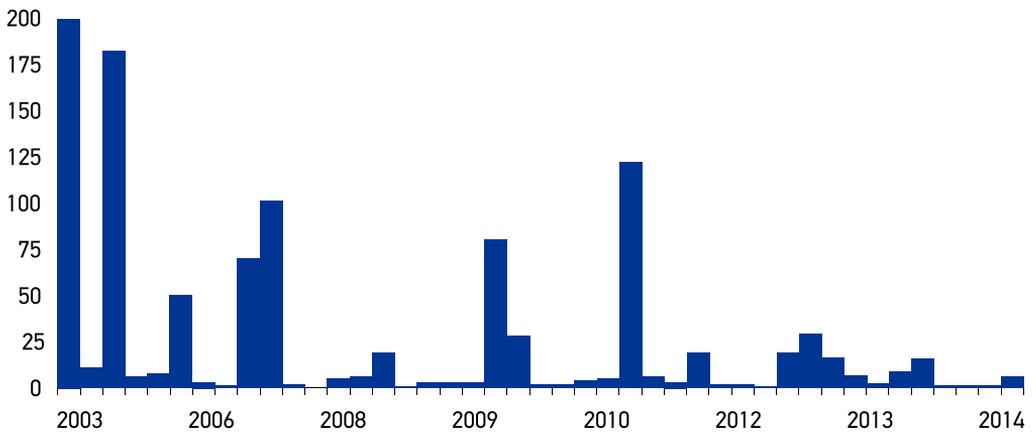
Victims in the vast majority of cases are civilians. All remaining cases, with one exception,<sup>112</sup> concern crimes committed against prisoners of war.

111 This statistic considers all victims listed in indictments filed and confirmed. Only victims of crimes against physical integrity (such as murder, torture, rape, beatings) are considered. Of note, the overall number of victims is considered only with regard to the year when the first indictment was filed in a case. For example, the 122 victims of the “Čuška” case are considered only for the year 2010, when the first indictment in the case was issued.

112 “Tuzla convoy” case, High Court in Belgrade, case no. K - Po2 53/10.

As Chart 8 demonstrates, the number of victims was highest in the cases in which the WCPO issued indictments in the period 2003-2010. The **average number of victims** has been **decreasing** since then. For instance, in 2005 an average case of the WCPO contained 50 victims; in 2007 it contained 40 victims; in 2010, 20 victims. This downward trend reached its nadir in 2014, when on average each new case in which an indictment was filed included only just over two victims.<sup>113</sup> Cases concerning crimes of a smaller scale also diverted limited WCPO resources from more serious cases, which should have been given priority.

Chart 8 – Number of victims per case



## F. WCPO's staffing shortages and prosecutorial duties

As seen in the previous paragraphs, the experience, knowledge and evidence accumulated in over ten years of operations surprisingly resulted in a lower, rather than higher, productivity of the WCPO.

One problem that adversely impacts productivity is WCPO's available **staffing and resources**. On the one hand, as already highlighted, the WCPO has always lacked support staff (advisers, legal officers, analysts). Vacancies in the WCPO are not always

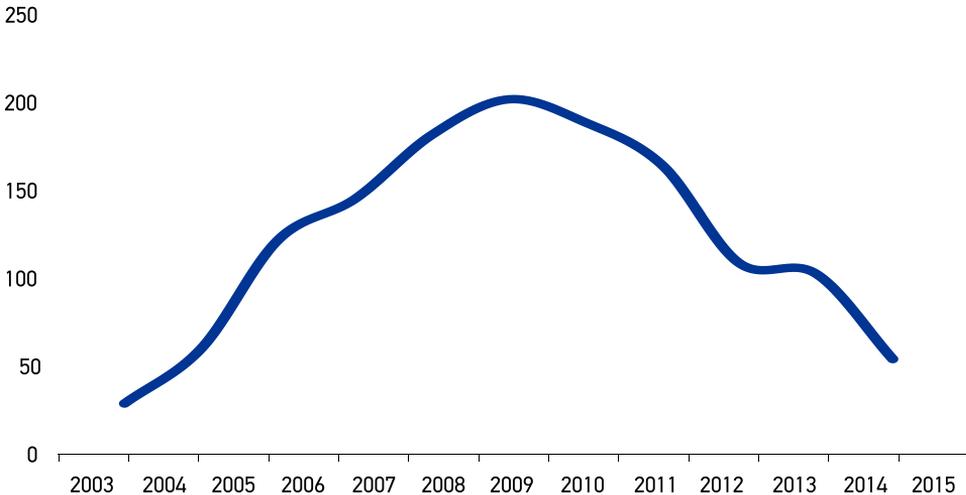
<sup>113</sup> In fact, three out of four cases included only one victim each.

filled promptly. There are two Deputy Prosecutor positions and two advisor positions that are foreseen in the WCPO's staffing table and are currently vacant.<sup>114</sup> The WCPO's staffing table and financial resources are reportedly identical, despite its enhanced role in investigations under the new CPC.

At the same time, prosecutorial resources are not allocated entirely to working on cases. Prosecutor Vukčević manages the office, while entirely delegating responsibility for investigations and trials to his deputies. On the other hand, one of the Deputy Prosecutors, employed in the WCPO since the beginning, is permanently based in another city in Serbia, and comes to the WCPO premises only when his presence is needed for investigative work or court commitments. Another Deputy who joined the WCPO more recently is effectively carrying out the functions of a spokesperson, and this severely affects the amount of time he is able to devote to investigations and trials. All these factors effectively reduce the efficiency of the WCPO's workforce.

Other non-investigative activities that engaged WCPO resources were the apprehension of ICTY fugitives and the four additional criminal proceedings against ten accused charged with **providing assistance** to ICTY fugitives. The first task came to an end by mid-2011, when the last two fugitives were arrested; the second one was relatively undemanding, as all four proceedings were adjudicated through guilty plea agreements. Neither factor is able to account for the decreased output of new cases since 2011.

Chart 9 – Number of court days in war crimes trials



114 According to the WCPO staffing table, there are nine other administrative positions, in addition to the four already mentioned, which are vacant in the WCPO, for a total of 13 vacant positions out of a total of 48 positions foreseen in the staffing table.

WCPO prosecutors are also involved in trial activities. Unlike other prosecutors, they represent their Office both in first and second instance cases.<sup>115</sup> The 49 separate war crimes trials and the 16 retrials often involved a **large number of hearings**, but the significant decrease in court activities since 2009 has not resulted in a higher output in terms of new indictments, thus showing that the time absorbed by in-court activities does not explain the decreased productivity. Chart 9 shows the number of court days in war crimes trials per year.

Conclusively, there seems to be no external factor able to adversely impact the WCPO's work so as to justify the decrease in terms of indictments, and the lowering of the average number of victims and defendants per case in which an indictment was filed.

## G. WCIS's resources and activities

As seen previously,<sup>116</sup> WCIS's and WCPO's investigations encounter some inherent limitations due to the limited number of witnesses and other evidence directly available to Serbian authorities; in most cases their successes are based on international co-operation more than on evidence collected through their own investigations.

Moreover, other evidence made directly available by the WCIS (such as police and military documents) was destroyed during the 1999 bombing campaign that targeted, *inter alia*, premises of the Ministries of Interior and Defence. Considerable quantities of other documents were transferred to the ICTY for the purpose of their investigations; the originals were never returned. The WCIS does not have direct access to ICTY documents transferred back to Serbia, except through the WCPO.

A considerable component of the WCIS's work is therefore analytical (reviewing existing information and evidence) rather than investigative (collecting new evidence). In recent years, the WCIS invested approximately 50% of its manpower in creating an investigative tool called a **geographical-informational system (GIS)**. This consists of a map of the former Yugoslavia pinpointed with dots that represent crime sites. Witnesses' statements and other documents related to the particular crime site are linked to each dot on the map.<sup>117</sup> So far a limited amount of viable criminal reports appear to have been generated based on information extrapolated from the GIS.

115 Law on Public Prosecution, *supra*, Article 30(3).

116 See Chapter 2 above.

117 In 2009, the Committee on gathering information on war crimes in the Federal Republic of Yugoslavia forwarded to the WCPO witness statements it had taken primarily from Serb victims and witnesses from BiH, Croatia and Kosovo. In 2011, the WCPO forwarded these statements and documents to the WCIS. Since then, WCIS staff has been inputting this material into the GIS. WCPO staff have access to the GIS only through the WCIS.

Another issue with the WCIS's work relates to the profile and motivation of the officers working for the unit. Officers investigate sensitive cases, some of which involve high-profile defendants and colleagues. Reportedly, police officers generally prefer "quieter" departments and, on some occasions, have been assigned to the WCIS against their will.

The Law on War Crimes foresaw the possibility of providing WCIS staff with economic incentives to compensate the above-mentioned disadvantages and to attract motivated officers.<sup>118</sup> However, while the employees of the WCPO, the WCDs, and the Special Detention Unit receive a salary that is twice that of their peers, the envisioned incentives for WCIS staff were never translated into practice.

Moreover, reportedly, no WCIS employees have been promoted within the police ranks, and they are rarely invited for trainings and seminars organized by the MoI.<sup>119</sup> There are also no high-ranking MoI officials whose portfolio of activities includes war crimes investigations.

For all the above reasons, experienced police officers with a reputation for high professional standards are reluctant to work in the WCIS and would rather work within other police units.<sup>120</sup> This can lead to a decrease in the WCIS's efficiency.

## H. The need for a coherent prosecutorial strategy

It is unclear what criteria the WCPO has been employing to determine which cases to investigate and prosecute. Cases in which indictments have been filed so far are very diverse in terms of crimes charged (from one victim of a mistreatment, to the mass murder of over 200 prisoners of war), number of defendants (from a single perpetrator to up to 18 co-defendants), and defendants' position and rank (from ground perpetrators to civilian and military commanders). The number and scale of cases prosecuted in recent years has progressively decreased, thus making the case for a **refocusing of prosecutorial resources** an even more compelling one. Prosecutorial resources should focus on investigating cases that are of high significance due to the large number of victims involved. The absence of predetermined criteria to identify cases for prosecution also introduces the risk of **arbitrariness**. In the absence of such criteria, given two cases, one of which is clearly more serious than the other, the rationale for why the less serious of the two cases is prosecuted cannot be evaluated objectively.

118 Law on War Crimes, *supra*, Article 17.

119 To the OSCE's knowledge, they were not rewarded for Police Day in the 2011, even though the last two remaining ICTY fugitives, Ratko Mladić and Goran Hadžić, had been arrested that year, largely thanks to WCIS' decisive contribution.

120 Until 2010, more than half of the operatives employed in the WCIS had not been engaged in criminal investigations prior to their employment in the WCIS.

Based on publicly available information contained in ICTY judgements, the OSCE identified a number of **large scale massacres** committed during the Kosovo conflict, which were not the object of prosecution, by either Serbian authorities or UNMIK/EULEX. For the mere sake of example, three cases are listed:

1. Meja and Korenica villages, 27 April 1999. Around 300 people killed;<sup>121</sup>
2. Izbica village, 28 March 1999. Over 100 people killed;<sup>122</sup>
3. Pusto Selo village, 31 March 1999. Over 100 people killed.<sup>123</sup>

The WCPO and the WCIS are under an **obligation** to investigate these cases and, if there is sufficient evidence, prosecute those responsible. The WCPO prosecuted a number of large-scale cases in its first years of operation, showing that it has the capacity to deal with such cases. The reasons why its productivity dropped in recent years remain unclear.

## I. Recommendations

### To the WCPO:

- Adopt a clear case prioritization strategy with a focus on the most serious and viable cases, in order to: (a) ensure that all the most serious war crimes cases are investigated; and (b) avoid the risk of arbitrariness in choosing which case to prosecute;
- Carry out as a matter of priority an assessment of all pending cases which are at the pre-investigation or investigation stage;
- Formally terminate as soon as possible all open investigations which clearly have no prospect of viable prosecution;
- Increase the output of new cases investigated and prosecuted;
- Ensure prompt prosecution of cases that have already been investigated and are indictment-ready.

121 ICTY, *Prosecutor v. Đorđević* (IT-05-87/1-A), appeals judgement, 27 January 2014, para. 772.

122 ICTY, *Prosecutor v. Šainović et al.*, (IT-05-87-T), Trial Chamber judgement, 26 February 2009, para. 685; ICTY, *Prosecutor v. Đorđević* (IT-05-87/1-T), Trial Chamber judgement, 23 February 2011, para. 1630.

123 ICTY, *Prosecutor v. Đorđević* (IT-05-87/1-T), Trial Chamber judgement, 23 February 2011, para. 541.

### To the WCPO and the WCIS:

- Establish joint investigation teams with a clear division of labour and clear investigative tasks;
- Ensure that no consideration of the nationality of victims/defendants plays any role in determining whether a case should be prosecuted.

### To the WCIS:

- Ensure that all available resources are focused on generating viable criminal reports and supporting the WCPO in ongoing investigations. Refrain from investing resources in activities that do not have a prospect of resulting in viable investigations.

### To the Mol:

- Ensure that appropriate incentives are in place for officers working for the WCIS;
- Consider moving the WCIS from the Criminal Police Directorate to the General Police Directorate.

### To the Moj:

- Ensure that sufficient funding (including through allocation of international project funds) is available to the specialized institutions for war crimes.

### To the State Prosecutorial Council:

- Ensure that vacant positions within the WCPO are promptly filled.

## CHAPTER FOUR

# Modes of liability

*All defendants have the right to be informed of the charges against them in a clear and detailed manner. This implies that in cases where a crime was allegedly committed by more than one person, each co-defendant's conduct and mode of liability must be clearly specified. However, WCPO indictments and WCD judgements do not always comply with these principles. As a result, a number of judgements have been quashed on appeal and returned for retrial.*

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### A. Modes of liability in Serbian criminal law

According to the general provisions of the Criminal Code of the Federal Republic of Yugoslavia (CCFRY), a criminal offence can be committed by perpetration (when the offence is committed by one person)<sup>124</sup> or by complicity (when the offence is committed by two or more persons, as is often the case in war crimes). The latter has three forms: (a) co-perpetration; (b) incitement; and (c) aiding and abetting.

The Code defines **co-perpetration** in a very broad manner: “several persons jointly commit[ting] a criminal act by participating in the act of commission or in some other way.”<sup>125</sup> Co-perpetration has a material element (undertaking the act of commission of the offence or the act closely linked to it) and a mental element (knowledge of joint

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124 Perpetration is not defined in the CCFRY. Serbian legal theory has accepted the narrowest interpretation of the concept of perpetrator, i.e. a person who, acting alone, commits a criminal offence. See e.g. Zoran Stojanović, *Krivično pravo, opšti deo*, Belgrade, 2013, page 258.

125 Article 22 of the Criminal Code of the FRY (*Official Gazette of SFRY*, no. 44/76-1329, and subsequent amendments).

commission of the offence).<sup>126</sup> Co-perpetration is by far the most commonly charged form of complicity in war crimes cases involving multiple defendants.

The CCFRY does not define **incitement**.<sup>127</sup> It only prescribes that when someone intentionally incites another to commit a criminal act, he shall be punished as if he himself has committed it.<sup>128</sup> In the case of serious crimes such as war crimes, the act of incitement is punishable even if the crime was not attempted.<sup>129</sup>

**Aiding and abetting** is set out in the CCFRY in a sufficiently clear manner:

*“aid[ing] another in the commission of a criminal act” in particular by “giving of instructions or advice about how to commit a criminal act, supplying the tools and resources for the crime, removing obstacles to the commission of a crime, as well as promising, prior to the commission of the act, to conceal the existence of the criminal act, to hide the offender, the means to commit the crime, its traces, or goods gained acquired by the commission of a criminal act.”*<sup>130</sup>

There are two significant differences between the three forms of complicity. First, incitement and aiding and abetting can only be committed through intent, while co-perpetration can also be committed by negligence.<sup>131</sup> Second, the CCFRY itself expressly prescribes the possibility for the reduction of punishment for the aider and abettor,<sup>132</sup> whereas this possibility is not expressly foreseen for the co-perpetrator or the inciter. Their punishments can also be reduced but through the application of general rules on the reduction of punishment.

The CCFRY provides for three specific modalities by which war crimes can be committed.

The first is **ordering**.<sup>133</sup> The WCD has clarified that the order can be issued in various ways, as long as it is clear and unambiguous.<sup>134</sup> The WCD further held that criminal responsibility arises from the act of ordering *per se*, regardless of whether or not the order was actually executed.<sup>135</sup> Moreover, the order to commit a war crime does not relieve the subordinate who executes it from criminal responsibility.<sup>136</sup>

126 See [www.sirius.rs/praksa/7108](http://www.sirius.rs/praksa/7108), last accessed 31 May 2015.

127 The legal theory and jurisprudence define incitement as intentionally inducing and/or strengthening someone else's decision to commit a criminal offence. See [www.sirius.rs/praksa/1089](http://www.sirius.rs/praksa/1089), last accessed 31 May 2015. See also the already cited Stojanović, *Krivično pravo*, *supra*, page 271.

128 See Article 23(1), CCFRY, *supra*.

129 See Article 23(2), CCFRY, *supra*. In this case, the inciter is punished more leniently.

130 Article 24, CCFRY, *supra*.

131 The CCFRY uses the term “intentionally” for aiding and abetting and incitement, but not for co-perpetration.

132 See Article 24(1) read in conjunction with Article 42(2), CCFRY, *supra*.

133 See Articles 141-144; 146(3); 147; and 150(a), CCFRY, *supra*.

134 “Suva Reka” case, Court of Appeals, case no. Kž1 Po2 4/2010, judgement, 30 June 2010, page 30.

135 “Suva Reka” case, District Court in Belgrade, case no. KV 2/2006, judgement, 23 April 2009, page 186.

136 Article 239, CCFRY, *supra*.

Similar modes of commission, for which so far no defendant was indicted, are to **call on or instigate** the perpetration of war crimes.<sup>137</sup> Criminal responsibility in these cases also stems from the calling on or the instigation *per se*, regardless of the subsequent commission of any crime.

An additional modality that was not foreseen in the CCFRY is **command responsibility**, whose application in the Serbian legal system is controversial and which will be discussed in a dedicated chapter.<sup>138</sup>

Lastly, the CCFRY also makes it a separate criminal offence to **organize or participate in a group** whose purpose is to commit war crimes.<sup>139</sup>

## B. Unclear charging in indictments and unclear adjudication in judgements

Whatever the conduct of the defendant, the prosecution must clearly set out the mode of participation in the crime. According to the CPC, the indictment must contain “[...] a description of the factual aspects of the act which constitute the elements of the definition of the criminal offense, the time and the place of the commission of the criminal offense, the object upon which and instrument by means of which the criminal offense was committed”.<sup>140</sup>

The indictment must specify these elements for each defendant, in order to put them in a position to know exactly the charge against them and to prepare an adequate defence.<sup>141</sup> However, some indictments **failed to describe the exact contribution** of a defendant to the commission of a criminal offence.

For example, the indictment in the “Lovas” case so described the conduct of one of the defendants: *“instead of establishing firm and resolute command and preventing any attack on civilian population and individual civilians, does not do that, but in certain situations ordered, directly undertook and allowed that individuals from his armed group, without any*

137 See Article 145(4), CCFRY, *supra*. The absence of case law on the point makes it difficult to discern the difference in the Serbian legal system between “calling on”, “instigation” and “incitement” (Art. 23(1), CCFRY. See above).

138 See below, Chapter 5.

139 Article 145(1) and (2), CCFRY.

140 See Article 352(1), no. 2, CPC, and the identical wording of Article 266(1) no. 2, of the old CPC.

141 The ECtHR has clarified that, under Article 6 of the ECHR (European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR), 87 UNTS 103, ETS 5; adopted by the Council of Europe 4 November 1950, entry into force 3 September 1953), the suspect must be provided with sufficient information as is necessary “to understand fully the extent of the charges against him with a view to preparing an adequate defence”. Article 6(3)(a) of the ECHR states that everyone charged with a criminal offence must “be informed promptly, in a language which he understands and in detail, of the nature and cause of the accusation against him”. See ECtHR, *Mattochia v Italy*, case no. 23969/94, judgement, 25 July 2000, para. 60; See also ECtHR, *Pélissier and Sassi v. France*, case no. 25444/94, judgement, 25 March 1999, paras. 51-54.

*military justification, [to] undertake the following acts: Uncontrolled and random open fire from infantry weapons on civilian objects, what he was also doing or ordered to be done; [...] Taking civilians out of houses during the attack and taking them with themselves, which in certain cases he was also doing.*"<sup>142</sup>

The High Court convicted the defendant, finding that the defendant "[f]ailed to take all necessary measures to prevent attack against civilian population, and he also participated in the attack by ordering, directly committing and allowing members of his group [...] to attack civilian objects and individual civilians."<sup>143</sup>

Upon appeal, the Court of Appeals found that the High Court had failed to explain the defendant's mode of commission of the crime. In particular, the judgement did not specify whether he ordered the crimes, directly committed them, or if he is liable under another mode of liability. The Court of Appeals also noted that in some instances, the High Court found that the defendant committed two acts in relation to the same crime ("ordered and allowed"), which are in contradiction with one another.<sup>144</sup> Before the retrial, the WCPO amended the indictment to better specify the defendants' involvement in the crime.

In recent years, the WCD Court of Appeals highlighted that a number of indictments and first-instance judgements either failed to properly differentiate acts with which the defendants were charged, or failed to subsume these acts under the correct mode of liability. For instance, in the "Skočić" case, the Court of Appeals quashed the first-instance judgement *inter alia* because it found that the High Court panel failed to differentiate the precise contribution of the defendants to some crimes.<sup>145</sup> The Court of Appeals added that unclear charges or enacting clauses prevent defendants from developing an efficient defence since they must know at every stage of the proceedings the factual and legal charges against them.<sup>146</sup>

142 Case no. KTRZ 7/07, indictment, 28 December 2011. Among others, also the initial indictment in the "Gnjilane Group" case contained charges which failed to specify the conduct of some of the accused (case no. K-Po2 33/2010, indictment, 11 August 2009).

143 Case no. K-Po2 22/2010, High Court in Belgrade, judgement, 26 June 2012, page 5.

144 Case no. Kž1 Po2 3/2013, Court of Appeals in Belgrade, ruling, 9 December 2013, page 11.

145 Case no. Kž1 Po2 6/2013, Court of Appeals in Belgrade, judgement, 14 May 2014, para. 26.

146 See e.g. case no. Kž1 Po2 6/2013, Court of Appeals in Belgrade, judgement, 14 May 2014, para. 26; case no. Kž1 Po2 3/2013, Court of Appeals in Belgrade, ruling, 9 December 2013, paras. 15-16.

## C. Recommendations

### To the WCPO:

- Clearly specify in indictments the material contribution of each accused to each crime charged, and qualify it under the proper mode of liability.

### To the High Court's WCD:

- Endeavour to establish the factual situation in relation to the conduct of each accused through the evidence heard at the trial;
- Ensure that, if it finds that one or more charges are not sufficiently precise, the court returns the indictment to the prosecution for amendments before the start of the trial, in accordance with Article 333(2), CPC;
- Ensure that first instance judgements precisely state whether the material contribution of each accused has been proved beyond reasonable doubt.



# CHAPTER FIVE

## Superiors' responsibility

*Serbian courts have adjudicated few cases involving responsibility of superiors. However, they have failed to take a clear position on the legal basis for this type of criminal responsibility.*

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### A. The definition of command responsibility under international law

Command responsibility is a type of individual criminal responsibility of superiors (either military or civilian) for war crimes committed by their subordinates. Superiors have an affirmative duty under international law to prevent persons under their effective control from violating international humanitarian law rules, or to punish them if violations have already occurred. Failure to discharge this duty is what entails the superior's criminal responsibility. The 1977 Additional Protocol I to the Geneva Conventions<sup>147</sup> was the first international treaty to positively affirm the commander's duty to act.<sup>148</sup>

The ICTY and the ICTR, whose Statutes were the first international normative instruments to foresee command responsibility as a mode of criminal liability, articulated the stance

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147 Protocol Additional to the Geneva Conventions of 12 August 1949, and relating to the Protection of Victims of International Armed Conflicts ('Additional Protocol I'), 8 June 1977.

148 Article 86(2) of Additional Protocol I provides: "The fact that a breach of the Conventions or of this Protocol was committed by a subordinate does not absolve his superiors from penal or disciplinary responsibility, as the case may be, if they knew, or had information which should have enabled them to conclude in the circumstances at the time, that he was committing or was going to commit such a breach and if they did not take all feasible measures within their power to prevent or repress the breach". Article 87 further elaborates on the duty of commanders.

of international law on the matter by identifying three key elements of command responsibility.<sup>149</sup>

The first element is the **superior/subordinate relationship**. It is not necessary that a formal, *de jure* subordination exists: effective control over the subordinates is a necessary and sufficient condition. Effective control presupposes a *de facto* capability to prevent or punish the criminal acts of the subordinate.<sup>150</sup> In this respect, a military hierarchy is not required.<sup>151</sup> The doctrine of command responsibility applies not only to military commanders, but also to political leaders and other civilian superiors vested with authority.<sup>152</sup>

The second requirement is the **mental element**. The superior must have known or had information that should have enabled him to conclude<sup>153</sup> that his subordinates committed or were about to commit criminal acts.

The third prerequisite for command responsibility is the **failure to act**. The superior must have failed to take necessary and reasonable measures to prevent or punish the commission of the criminal acts by his subordinates.<sup>154</sup> The duty to punish includes at least an obligation to investigate the crimes, to establish the facts and to report them to the competent authorities, if the superior does not have the power to sanction himself.<sup>155</sup>

149 Article 7(3) of the ICTY Statute and Article 6(3) of the ICTR Statute include identical provisions on command responsibility. The fact that any of the crimes in the jurisdiction of the Tribunals was committed by a subordinate "does not relieve his superior of criminal responsibility if he knew or had reason to know that the subordinate was about to commit such acts or had done so and the superior failed to take the necessary and reasonable measures to prevent such acts or to punish the perpetrators thereof".

150 ICTY, *Prosecutor v. Mucić et al.* (IT-96-21) hereinafter "*Čelebići Camp*", appeals judgement, 20 February 2001, para. 195; ICTR, *Prosecutor v. Juvenal Kajelijeli* (98-44-A-A), appeals judgement, 23 May 2005, para. 85; SCSL, *Prosecutor v. Brima et al.* (SCSL-04-16-T), judgement, 20 June 2007, para. 784.

151 In addition to the cases cited in the previous footnote, see ICTY, *Prosecutor v. Zlatko Aleksovski* (IT-95-14/1-A), appeals judgement, 24 March 2000, para. 76; ICTR, *Prosecutor v. Baglishema* (ICTR-95-1A-A), judgement, 3 July 2002, para. 51.

152 Article 28 of the Statute of the International Criminal Court explicitly states, for the first time in a statutory instrument, that command responsibility applies not only to military commanders, but also to civilian superiors.

153 This is the wording of the Geneva Convention Protocol I. The ICTY Statute reads "*knew or had reason to know*", which gave rise to conflicting interpretations in some ICTY cases (see e.g. the already cited "*Čelebići Camp*" case, and ICTY, *Prosecutor v. Tihomir Blaškić*, case no. IT-95-14). The Statute of the International Criminal Court sets a yet different standard: "*knew or, owing to the circumstances at the time should have known*" (for military commanders) and "*knew, or consciously disregarded information which clearly indicated*" that the subordinates were committing or were about to commit crimes (Article 28).

154 A superior is obliged to undertake feasible actions to prevent or punish the crimes; he needs to take measures that are within his power. However, he is also obliged to take measures that fall out of his formal authority if such measures are feasible *de facto*.

155 ICTY, *Prosecutor v. Mario Čerkez and Dario Kordić* (IT-95-14/2-T), judgement, 26 February 2001, para. 446. Military commanders will only usually have the power to start an investigation (see ICRC Commentary to Additional Protocol I, para. 3562).

Lastly, ICTY jurisprudence reached the conclusion that command responsibility applies to both international and non-international armed conflicts as a part of customary international law.<sup>156</sup>

## B. Command responsibility in the Serbian legal system

The CCFRY did not contain any provision on command responsibility. The concept was first explicitly introduced in Serbia with Article 384 of the 2006 Criminal Code.<sup>157</sup>

Unlike international law, Article 384 limits command responsibility to the military or civilian superior who **knew** that that forces under his command or control are preparing or have commenced committing crimes, and failed to take the measures that he could have taken and was obliged to take to prevent the commission of crime. The crime can also be committed by negligence, although Serbian case law will have to clarify whether this provision also criminalizes the commander who *did not know* but “should have known”, or only the commander who *knew* but negligently failed to discharge his duties. Article 384 foresees command responsibility as a standalone criminal offence, rather than a mode of liability for war crimes. A separate provision in the 2006 Criminal Code also criminalizes the commander’s failure to refer for prosecution subordinates who commit war crimes.<sup>158</sup>

Serbian judges and prosecutors point out the absence of a relevant provision in the CCFRY as the reason why there are no prosecutions for command responsibility or indictments against high-level defendants at all in Serbia.<sup>159</sup> However, **BiH and Croatia**, in whose territories the Yugoslav Criminal Code was also in force at the time of the crimes, managed to overcome this legal gap and prosecuted senior officials for crimes committed by subordinates. BiH judges are of the view that command responsibility was foreseen

156 ICTY, *Prosecutor v. Enver Hadžihasanović et al.* (IT-01-47-AR72), Decision on Interlocutory Appeal Challenging Jurisdiction in Relation to Command Responsibility, 16 July 2003, para. 29. The Appeals Chamber held that command responsibility was part of customary international law relating to international armed conflicts before the adoption of Protocol I. Therefore, Articles 86 and 87 of Protocol I were in this respect only declaring the existing position, and not constituting it. In a similar manner, the non-reference in Protocol II to command responsibility in relation to internal armed conflicts did not necessarily affect the question whether command responsibility previously existed as part of customary international law relating to internal armed conflicts. The Appeals Chamber found that at the time relevant to the indictment in this case command responsibility was part of international customary law in internal armed conflicts too.

157 See Article 384(1), Criminal Code, *supra*: ‘A military commander or person who in practise is discharging such function, knowing that forces under his command or control are preparing or have commenced committing offences specified in Article 370 through 374, Article 376, Articles 378 through 381 and Article 383 hereof fails to undertake measures that he could have taken and was obliged to take to prevent commission of such crimes, and this results in actual commission of that crime, shall be punished by the penalty prescribed for such offence.’

158 Article 332, Criminal Code, *supra*.

159 Meeting with WCPO representatives, March 2014.

in international law at the time of the crimes,<sup>160</sup> while Croatian judges held superiors responsible under alternative modes of liability such as responsibility by omission.<sup>161</sup>

The two models will be analysed in turn. As it will be shown, Serbian courts also made limited attempts to follow both of them.

## I. Application of command responsibility through rules of international law

Although the principle *nullum crimen sine lege* bars prosecution for an act that was not explicitly foreseen as a crime when it was committed, an express derogation from this prohibition is foreseen both in the ECHR and the ICCPR<sup>162</sup> for acts which are universally recognized as international crimes.<sup>163</sup>

The 1992 Constitution of the FRY explicitly recognized customary international law as an integral part of the internal legal order, thus making a stronger case for the “accessibility and foreseeability” of the customary provisions on command responsibility.

So far, however, the **WCPO has not formally charged any defendants with command responsibility**. In a recent publication one of the current WCPO Deputy Prosecutors has in fact stated that, according to the WCPO, international rules on command responsibility cannot be applied in Serbia.<sup>164</sup>

However, in 2008 the WCPO issued a request for investigation that seems in contradiction with the above position:

160 Defendants in BiH cases are charged under Article 180 of the 2003 BiH Criminal Code, which the Court applies also to crimes committed in the 1990's. The Court found that the conditions of “accessibility and foreseeability” were met in the case of command responsibility because it had been sufficiently defined under customary international law since long before 1992 (see e.g. *Rašević et al.*, Court of Bosnia and Herzegovina, case no. X-KR-06/275, judgement, 28 February 2008, paras. 117-118).

161 In the landmark judgement in the *Ademi and Norac* case, the County Court in Zagreb Panel held that war crimes can be committed by omission. The Court found that all commanders have a “guarantee obligation” towards their subordinates, which entails an obligation to prevent them from committing crimes. A violation of this obligation makes the “supervisor” personally responsible. County Court in Zagreb, case no. II K-rz-1/06, judgement, 29 May 2008. See also *Branimir Glavaš et al.*, County Court in Zagreb, case no. X K-rz 1/07, judgement, 7 May 2009; *Stojan Živković et al.*, County Court in Osijek, case no. K-104/94-123, judgement, 6 July 2001.

162 International Covenant on Civil and Political Rights (ICCPR), adopted by UN General Assembly Resolution 2200A (XXI), of 16 December 1966.

163 Article 7(2) of the ECHR foresees: “This Article shall not prejudice the trial and punishment of any person for any act or omission which, at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations.” See the case of *Streletz, Kessler and Krentz against Germany* (applications no. 34044/96, 35532/97 and 44801/98), para. 105; Article 15(2) of the ICCPR of 16 December 1966 includes an almost identical provision. Both treaties were ratified by the SFRY and its successor states.

164 Milan Petrović, “War crimes trials in Serbia 1991-2014”, in *War Crimes Trials Before National Courts*, Belgrade, 2014, pages 27-50, especially pages 42-45.

In the case against the late Peter Egner, the WCPO had requested the investigating judge to conduct an investigation for organizing and instigating the commission of genocide and war crimes during the Second World War, although no legal provision in force at the time of the alleged crimes existed in domestic law criminalizing war crimes or genocide.<sup>165</sup> Both the investigating judge<sup>166</sup> and a WCD panel<sup>167</sup> approved this decision. The judges found that the request did not violate the principle of legality or the Constitution, even though it charged Egner with crimes committed over thirty years before the enactment of the Yugoslav Criminal Code.

If customary international law can be directly applied to criminalize genocide or war crimes before their criminalization in domestic legislation, the same principle should apply to international provisions on command responsibility.

## II. Responsibility through commission by omission

Article 30 of the CCFRY provides that a criminal offence can also be committed by omission “if the offender abstained from performing an act which he was obligated to perform”.<sup>168</sup> The existence of such **positive obligation, and the failure to discharge it**, is the key to the criminal responsibility for an act carried out by another person. Although not labelled “command responsibility”, this could effectively ensure accountability of superiors for acts committed by their subordinates.

The WCDs resorted to the theory of commission by omission in at least one war crimes case.

In the “Zvornik II” case, the WCD convicted a military commander for aiding and abetting beatings and murders of captive civilians whose detention he had personally ordered. The defendant did not take part in any of the crimes, which were perpetrated by his subordinates. However, the Court found that the defendant had willingly put the victims in a state of helplessness by ordering their detention, and so assumed an obligation for their protection. According to the Court, this obligation triggers responsibility by omission both under the CCFRY and under customary international law.<sup>169</sup>

165 The concept of “genocide” came into being after Second World War, and precisely in 1948 with the Convention on the Prevention and Punishment of the Crime of Genocide, adopted by UN General Assembly Resolution 260 (III) A, of 9 December 1948.

166 Case no. Ki V 8/2008, District Court in Belgrade, ruling, 26 September 2008.

167 Case no. Ki V 23/09, District Court in Belgrade, ruling, 24 March 2009. A panel of the War Crimes Chamber of the then District Court in Belgrade decided on the appeal filed by the defendant against the investigating judge’s decision.

168 Article 30 of the CCFRY: “(1) A criminal act may be committed by a positive act or by an omission. (2) A criminal act is committed by omission if the offender abstained from performing an act which he was obligated to perform.”

169 Speaking of the defendant’s duty to act, the Court reasons: “In theory and jurisprudence of international criminal law this duty exists based upon legal act or previous act of a guarantor which created a dangerous state, specifically detention of civilians which imposes an obligation for their protection and establishes responsibility of general nature, which is not even limited to the control of units under his direct command. [...] In this case, the defendant committed crimes by omission by consciously abstaining to issue the order and take actions to protect the lives and bodily integrity of prisoners in the facilities where they were held captive and to the guards that were guarding them, murders and violating bodily integrity occurred due to omission and he consented to those consequences.”

The “Zvornik II” case refers only to responsibility deriving from a position of guarantee towards prisoners. Nevertheless, it represents an important opening of Serbian case law to the possibility of convicting superiors based exclusively on domestic law provisions in force at the time when the crimes were committed.

### III. The need for a clear legal stance

Unlike their peers in Croatia and BiH, Serbian prosecutors and judges have not taken a position on whether or not superiors can be held liable for war crimes committed by their subordinates, and through which legal mechanism. The WCPO and the WCDs have so far not embraced or discarded the applicability of command responsibility within the Serbian domestic criminal legal system. There have been limited instances in which the commission by omission theory was entertained.

A clear position on the entire subject of the responsibility of superiors is now overdue, *inter alia*, to ensure legal certainty in the criminal justice system and the coherence of judicial decisions.

Superior responsibility at present remains a crucial, open question in Serbian war crimes jurisprudence.

## C. Recommendations

### To the WCDs and the WCPO:

- Take a clear stance on the legal framework for responsibility of superiors stemming from crimes committed by subordinates, either through command responsibility or commission by omission.

# CHAPTER SIX

## Application of IHL provisions

*The law applicable to war crimes requires determining whether the acts charged are prohibited under both domestic and international law. However, the application of some international humanitarian law rules has been inconsistent, thus generating legal uncertainty.*

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### A. War crimes in Serbian criminal law

War crimes against the civilian population and war crimes against prisoners of war are the two most commonly charged crimes under international humanitarian law (IHL) in WCPO indictments. With one exception,<sup>170</sup> all defendants who were convicted for war crimes before the WCD have been found guilty of either one or the other.

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<sup>170</sup> One case is the “Tuzla convoy” (case no. K Po2 53/10). In this case, the defendant was charged with the criminal offense of use of illegal combat means (Article 148(2), CCFRY).

Defendants are charged with offences under the Criminal Code of the Federal Republic of Yugoslavia (CCFRY), which was the law in force during the 1990's and is generally recognized as more favourable.<sup>171</sup>

The CCFRY requires that an act be in violation of international law in order to be qualified as a war crime. For the sake of example, the offence of war crimes against the civilian population (Article 142) will be considered: “**Whoever in violation of rules of international law effective at the time of war, armed conflict or occupation, orders that civilian population be subject to killings, torture, inhuman treatment, [...] or who commits one of the foregoing acts, shall be punished [...].**”

The reference to international law obliges the judge to verify whether the act charged (a) is one of the acts prohibited by Article 142; and (b) is illegal under international law.<sup>172</sup> In order to do so, WCD judges have often resorted to the interpretation of international law (especially customary international law) made by international tribunals and the ICTY in particular.

Customary international law requires a series of **elements** for an act to be considered a war crime: (a) there must be an armed conflict; (b) the act committed must be prohibited; (c) there must be a “nexus” between the conflict and the crime; (d) the victim must belong to a protected category. An additional principle is that (e) the official capacity of the perpetrator is irrelevant.

As will be shown in the next paragraphs, the OSCE noted a series of misinterpretations of the requirements (a), (c) and (e) above.

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171 The 1976 Criminal Code of the Socialist Federal Republic of Yugoslavia (CCSFRY) and the 1993 Criminal Code of the Federal Republic of Yugoslavia (CCFRY) are almost identical codes. Articles 142 (War Crimes against Civilian Population) and 144 (War Crimes against Prisoners of War) of the Criminal Code of the Socialist Federal Republic of Yugoslavia adopted in 1976 each foresaw a punishment of “at least 5 years, or the death penalty”. Article 38(1) of the CCSFRY establishes that, when not otherwise prescribed, a term of imprisonment cannot be longer than 15 years. The same Article 38, in its para. 2, foresees that the court can also impose a punishment of 20 years for crimes “eligible for the death penalty.” The 1992 Constitution of the Federal Republic of Yugoslavia abolished the death penalty for federal crimes (including war crimes). In 1993, legislative amendments formally abolished the death penalty from the Criminal Code (Article 37), and provided that instead imprisonment of 20 years can be imposed for the most serious offenses (Article 38(2)). As a result, the 1993 Criminal Code of the Federal Republic of Yugoslavia foresees a punishment for war crimes from 5 to 15 years of imprisonment, or a fixed term of 20 years of imprisonment.

172 An act listed as prohibited in the provision (e.g. killing) is not always illegal under international law. For instance, the killing of a civilian as “collateral damage” of a legitimate attack may not be illegal according to the present IHL rules.

## B. Existence of an armed conflict

As the ICTY's Appeals Chamber held, "*International humanitarian law governs the conduct of both internal and international armed conflicts. [...] [F]or there to be a violation of this body of law, there must be an armed conflict.*"<sup>173</sup> According to the widely accepted definition of "armed conflict" given by the ICTY, "*An armed conflict exists whenever there is a resort to armed force between States or protracted armed violence between governmental authorities and organized armed groups or between such groups within a State.*"<sup>174</sup>

### I. The nature of the conflict and the applicable IHL rules

IHL differentiates between international armed conflicts and non-international armed conflicts.<sup>175</sup> The distinction is of crucial importance, because protected persons enjoy more statutory guarantees in international armed conflicts (the four Geneva Conventions and their Additional Protocol I), than in non-international armed conflicts (Article 3 common to the four Geneva Conventions and Additional Protocol II).<sup>176</sup>

Even though they have **not always applied the appropriate body of IHL rules**,<sup>177</sup> WCD judges consistently held that the conflicts in BiH (at least starting from June 1992)<sup>178</sup> and Croatia (at least until the end of 1991)<sup>179</sup> were non-international armed conflicts.

173 ICTY, *Prosecutor v. Duško Tadić* (IT-94-1-A), *Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction*, 2 October 1995 ("Tadić interlocutory appeal"), para. 67.

174 *See id.*, para. 70.

175 The ICTY stated that an international armed conflict exists "*whenever there is a resort to armed force between States.*" A non-international armed conflict exists "*whenever there is [...] protracted armed violence between governmental authorities and organised armed groups or between such groups within a State.*" *Ibid.*

176 The ICTY's position, however, is that most of the guarantees of the four Geneva Conventions also apply to non-international armed conflict, as they have become part of international customary law.

177 For instance, in the "Lički Osik" case (High Court in Belgrade, case no. K-Po2 17/2011, judgement, 16 March 2012, pages 2-3) the trial panel invoked the provisions of Common Article 3 (which is applicable to non-international conflicts) alongside Article 4 of the Geneva Convention IV (which is only applicable to international armed conflicts). A similar shortcoming can be found in the "Stara Gradiška" case (High Court in Belgrade, case no. K-Po2 32/2010, judgement, 25 June 2010, page 2). It could be argued that some Geneva Conventions provisions can be applied both to international and non-international armed conflicts because they have become part of international customary law; however, the Court should provide an adequate legal reasoning supporting this conclusion (see International Committee for the Red Cross, *Customary International Humanitarian Law, Volume I: Rules*, available in Serbian, last accessed 31 May 2015 at [www.redcross.org.rs/slika\\_1108\\_Customary\\_IHL.pdf](http://www.redcross.org.rs/slika_1108_Customary_IHL.pdf)).

178 One case related to events in BiH is considered as part of an international armed conflict. It is the "Tuzla convoy" case, where the court held that perfidy was used against JNA soldiers retreating to Serbia on 15 May 1992. Perfidy is only forbidden in international armed conflicts (see Article 37(1), Additional Protocol I).

179 Of note, all Croatian cases before the WCD concern crimes committed before the end of 1991. No WCD decision decided the nature of the conflict in Croatia from 1992 onwards. Croatian courts consider this conflict as an international armed conflict.

On the other hand, determining whether the 1998-1999 conflict in **Kosovo** was international or non-international in nature proved to be a problematic matter in Serbian jurisprudence.

According to ICTY case law, fighting between the Kosovo Liberation Army (KLA) and Serbian forces escalated to a full-fledged armed conflict as of spring of 1998. Starting 24 March 1999, a third actor, NATO, also intervened in the hostilities through a bombing campaign.

So far, all final cases before the WCDs related to the Kosovo conflict concerned crimes committed after 24 March 1999. In all these cases, the WCDs established that there existed an armed conflict between KLA members and Serbian armed forces on one side, and that simultaneously there was an armed conflict between the latter and NATO. The Court never openly qualified either conflict as international or non-international.

While it is possible that more than one conflict exists at the same time on one territory (such as Kosovo), the actions of a defendant can be committed in the context of **one and only one conflict**, which can only be either international or non-international. For example, cases involving crimes by Serbian forces against Kosovo Albanian civilians are clearly committed in the context of the non-international conflict between the KLA and Serbian forces. Consequently, civilian victims enjoy the guarantees of Common Article 3 and Additional Protocol II as persons taking no part in the hostilities between Serbian forces and the KLA. The same civilians as citizens of the then FRY could not be afforded any protection by Geneva Convention IV, not only because the conflict of which they are victims is not international, but also because that Convention only protects civilians who are citizens of another contracting party.<sup>180</sup>

WCPO prosecutors and WCD judges should strive to decide, on a case-by-case basis, whether crimes in Kosovo were committed in the context of the international armed conflict between NATO and Serbian forces, or the non-international one between the latter and the KLA, and apply the corresponding legal provisions accordingly.

## II. The end date of the Kosovo conflict

The Geneva Conventions, save for some limited exceptions,<sup>181</sup> prescribe that international humanitarian law applies until the “general close of military operations.” Therefore, in principle, when the conflict ends, so does the application of IHL. The ICTY has clarified in this respect that “[i]nternational humanitarian law applies from the initiation of such

180 Unless, as mentioned above, it is argued that most provisions of the Geneva Conventions are also applicable to non-international armed conflicts as customary international law, in which case the judge should provide legal arguments supporting this theory.

181 There are some exceptions to this rule regarding the obligation to repatriate persons protected under Geneva Convention III and IV and the obligations imposed upon occupying powers by Convention IV.

*armed conflicts and extends beyond the cessation of hostilities until a general conclusion of peace is reached; or, in the case of internal conflicts, a peaceful settlement is achieved*".<sup>182</sup>

In this respect, a specific interpretative problem that emerged in WCD jurisprudence is the **end date** of the non-international conflict in Kosovo.

ICTY case law established that the international conflict between Serbia and NATO ended "in June 1999".<sup>183</sup> The two most relevant dates to this end are the signature of the so-called "Kumanovo agreement" (9 June 1999) and the date when its implementation was finalized (20 June 1999, when Serbian forces completed their withdrawal from the territory of Kosovo and NATO officially terminated the air campaign).

Serbian courts have so far been divided on this point.

The majority position is the one adopted by the High Court in three cases, where it held that both armed conflicts in Kosovo ended on **20 June 1999**.<sup>184</sup> The Court of Appeals consistently held that both conflicts in Kosovo ended with the signing of the Kumanovo agreement on 9 June 1999. The Court did not exclude that in some areas in Kosovo a conflict may have existed also after that date,<sup>185</sup> but certainly not after 20 June 1999, since from that moment on there was only one party to the conflict. Of note, this is also the consistent opinion of EULEX panels in Kosovo, who stated that the armed conflict ended with the withdrawal of the Serbian forces from the territory of Kosovo by 20 June 1999.<sup>186</sup>

Some decisions of the High Court departed from the above-mentioned positions. In one case, it held that the conflict ended on **10 June 1999**,<sup>187</sup> while in another case that it ended on **25 June 1999**.<sup>188</sup> The most notable exception is the case known as "Gnjilane Group",<sup>189</sup> in which a WCD trial panel held that the armed conflict in Kosovo lasted **until the end of 1999**. The indictment charged 17 former KLA members with a large number of serious crimes committed mostly against Serbian civilians starting from June 1999

182 ICTY, *Tadić interlocutory appeal*, *supra*, para. 70.

183 In *Milutinović et al.*, the Trial Chamber held that "an armed conflict existed on the territory of Kosovo at all times relevant to the indictment period, starting in 1998 and continuing into 1999 and ending with the cessation of the NATO bombing campaign" (ICTY, *Prosecutor v. Milan Milutinović et al.* (IT-05-87), judgement, 26 February 2009, Volume 1 of 4, para. 1217). In the *Đorđević* case, the Trial Chamber reached very similar findings (ICTY, *Prosecutor v. Vlastimir Đorđević* (IT-05-87/1-T), judgement, 23 February 2011, paras. 1579-1580).

184 "Đakovica" case, District Court in Belgrade, case no. K.V 4/05, judgement, 18 September 2006; "Prizren" case, High Court in Belgrade, case no. K-Po2 3/12, judgement, 19 November 2012; "Bytyqi brothers" case, District Court in Belgrade, case no. K.V 3/2006, judgement, 22 September 2009.

185 More precisely, the Court stated: "any claim on the existence of the armed conflict after the mentioned date has to be corroborated with clear and sufficient evidence." See "Prizren" case, Court of Appeals in Belgrade, case no. KŽ1 Po2 1/13, ruling, 8 March 2013, pages 3-4; "Gnjilane Group" case, Court of Appeals in Belgrade, case no. KŽ1 Po2 2/13, judgement, 13 November 2013, page. 10.

186 See the "Fahredin Gashi" case, District Court of Pristina, case no. PPS 09/10, judgement, 23 November 2011; see also "Geci et al" case, Basic Court of Mitrovica, case no P. 14/2013, judgement, 12 September 2013.

187 "Čuška" case, High Court in Belgrade, case no. K-Po2 48/10, judgement, 11 February 2014.

188 See the "Suva Reka" case, in which the Court also held that the international armed conflict lasted until 9 June 1999 (District Court in Belgrade, case no. K.V. 2/2006, judgement, 8 April 2009).

189 "Gnjilane Group" case, High Court in Belgrade, case no. K-Po2 33/2010, judgement, 21 January 2011.

until the end of 1999. The Court considered that all the crimes could be qualified as war crimes. To justify this interpretation, the Court held that the KLA took advantage of the retreat of the Serbian armed forces and committed a number of crimes after the latter left the territory of Kosovo. Therefore, events after 20 June 1999 and for the entire period covered by the indictment constituted an extension of the armed conflict.

The Court of Appeals overturned this interpretation and reaffirmed its consolidated jurisprudence that the conflict ended in June 1999.<sup>190</sup> All the defendants were eventually acquitted.

However, acting upon a request filed by the WCPO, on 24 May 2013 the Supreme Court of Cassation (SCC)<sup>191</sup> issued a legal opinion<sup>192</sup> that concurred with the first-instance verdict, finding that the non-international armed conflict in Kosovo continued **at least until the end of December 1999**. The SCC, through a dubious interpretation of IHL rules, held that the “continuous attacks on civilians” by the KLA, until its disarmament at the end of 1999, met the threshold for a non-international armed conflict.

On 5 December 2014, the SCC issued a further ruling in the “Gnjilane Group” case and on the same matter, granting a Prosecution’s petition for protection of legality.<sup>193</sup> The SCC held that the High Court and the Court of Appeals had committed substantive violations of criminal procedure law because they failed to consider whether the KLA’s crimes against Serbian civilians after 20 June 1999 had a close connection with the internal armed conflict.

Since the time of the SCC’s pronouncements, the debate over the end date of the Kosovo conflict has remained unresolved within the Serbian legal system. Whatever interpretation prevails in future jurisprudence, it will need to be based exclusively on a legal interpretation of the relevant IHL rules, and not be guided by the possible consequences that such an interpretation may have on the indictment in a specific case.

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190 Court of Appeals in Belgrade case no. Kž1 Po2 8/11, decision, 7 December 2011. Upon retrial the WCD High Court conformed its decision to the pronouncement of the Court of Appeals.

191 The Supreme Court of Cassation is the court of highest instance in the Republic of Serbia (see Article 12 of the Law on Organization of Courts, *Official Gazette of the Republic of Serbia* no. 116/08 and 104/2009); within its jurisdiction outside trial, the SCC *inter alia* has the authority to determine general legal views in order to ensure uniform application of law by courts; review the application of law and other regulations, and the work of courts (see Article 31, Law on Organization of Courts).

192 SCC, Legal conclusion, 24 May 2013.

193 “Gnjilane Group” case, Supreme Court of Cassation, case no. Kzz RZ 1/2014, judgement, 5 December 2014.

## C. The “nexus”

For an act to be qualified as a war crime, the acts of the accused must be **sufficiently related to the armed conflict**. As the Appeals Chamber of the ICTY put it, “*what ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed*”.<sup>194</sup> This link between the crime and the armed conflict is the so called “nexus”, which ICTY case law has identified as an essential element of war crimes.<sup>195</sup>

The ICTY clarified that the “nexus” requirement is met when the armed conflict has “*played a substantial part in the perpetrator’s ability to commit [the crime], his decision to commit it, the manner in which it was committed or the purpose for which it was committed*”.<sup>196</sup>

However, the OSCE has noted some war crimes judgements where the WCD **failed to mention the nexus** as one of the essential elements of the criminal offence of war crimes:

For instance, in the judgement in the “Stari Majdan” case, the court stated that the only two elements required for a crime to be qualified as a war crime are the existence of an armed conflict and the protected status of the victims.<sup>197</sup> The WCD also failed to mention the nexus among the legal elements in the “Zvornik I” case. Instead, it simply noted that the victims were men “*of Muslim ethnicity, previously separated from women and children because of reasons related to the armed conflict*”.<sup>198</sup> The court did not explain however whether or not these elements established a sufficient connection between the defendants’ conduct and the armed conflict.

In other cases, the court did mention the nexus among the legal elements that need to be established, but then failed to show how the evidence collected proved its existence:

In the judgement in the “Prijedor” case, for instance, the court stated that a connection between the defendant’s acts and the armed conflict must be proven for an offence to be qualified as a war crime. However, in the ensuing reasoning, it omitted analysis of the evidence in the case against this legal standard.<sup>199</sup> This shortcoming was one of the

194 ICTY, *Prosecutor v. Dragoljub Kunarac et al.* (IT-96-23/1-A), appeals judgement, 12 June 2002, para. 58.

195 ICTY, *Prosecutor v. Duško Tadić* (IT-94-1-T), appeals judgement, 7 May 1997, para. 573.

196 ICTY, *Prosecutor v. Dragoljub Kunarac et al.* (IT-96-23/1-A), appeals judgement, 12 June 2002, paras. 58-59: “*What ultimately distinguishes a war crime from a purely domestic offence is that a war crime is shaped by or dependent upon the environment – the armed conflict – in which it is committed. It need not have been planned or supported by some form of policy. The armed conflict need not have been causal to the commission of the crime [...]*. The ICTY also pointed out some clear indicators of the existence of the nexus such as “*the fact that the victim is a non-combatant; the fact that the victim is a member of the opposing party; the fact that the act may be said to serve the ultimate goal of a military campaign; and the fact that the crime is committed as part of or in the context of the perpetrator’s official duties*” (*ibid.*, para. 59).

197 “Stari Majdan” case, District Court of Belgrade, case no. K.V. 3/2009, judgement, 7 December 2009, page 31.

198 “Zvornik I” case, District Court in Belgrade, case no. K.V.5/2005, judgement, 12 June 2008, page 180.

199 “Prijedor” case, High Court in Belgrade, case no. K-Po2 37/2010, judgement, 30 September 2010, pages 27-28.

main reasons why the Court of Appeals quashed the judgement and returned the case for retrial.<sup>200</sup>

While in some cases the link between the crimes and the armed conflict is self-evident, this does not absolve the court from its duty of establishing whether every element of the criminal offence of “war crime”, including the nexus, has been proven.

## D. Irrelevance of the perpetrator’s capacity

International criminal tribunals clarified that, under IHL, war crimes can be committed by anyone, **including civilians**.<sup>201</sup> In other words, the perpetrator need not have a relationship with one party to the conflict. The only requirement, as seen above, is that the crime is sufficiently linked to the conflict (“nexus”). The wording of Article 142 of the CCFRY (“*whoever*” orders or commits) also suggests that the capacity of the perpetrator is irrelevant under domestic law.

In two cases WCD judges explicitly stated otherwise.

In the “Scorpions” case, the first instance court held that the perpetrator of a war crime “*can only be a member of military, political or administrative organization of a party to the conflict, as well as every person in its service*”.<sup>202</sup> In the “Stari Majdan” case, the court reached the same conclusion: “*The perpetrator of this offence can only be a member of a military, political or administrative organization of a party to the conflict, as well as every person in its service*”.<sup>203</sup>

Still, in most cases, WCD judges correctly stated that any person could commit a war crime.<sup>204</sup> Over the years, WCD panels have convicted several civilian defendants for war crimes.<sup>205</sup>

200 “Prijedor” case, Court of Appeals in Belgrade, case no. Kž1 PO2-11/2010, ruling, 28 February 2011, page 3.

201 See ICTR, *Prosecutor v. Jean Paul Akayesu* (ICTR-96-4-A), appeals judgement, 1 June 2001, paras. 443-445; see also ICTY, *Prosecutor v. Milomir Stakić* (IT-97-24-A), appeals judgement, 22 March 2006, para. 347: “The Appellant’s contention that there was not a sufficient connection shown between himself and the police, who were the direct perpetrators of many of the crimes for which he was found guilty as a co-perpetrator, is also unconvincing. The relevant question is whether the Appellant’s acts were connected to the armed conflict – not to a particular group.”

202 “Scorpions” case, District Court in Belgrade, case no. K.V.6/2005, judgement, 15 April 2007, page 97.

203 “Stari Majdan” case, District Court in Belgrade, case no. K.V. 3/2009, judgement, 7 December 2009, page 30. This interpretation was also used in the Montenegro “Deportation” case (High Court in Podgorica, case no. Ks 6/12, judgement, 22 November 2012, page 214) where the mistake led to the eventual acquittal of the defendants.

204 “Ovčara” case, District Court in Belgrade, case no. K.V.4/2006, judgement, 12 March 2009, page 241.

205 See for instance, “Ovčara” case, Court of Appeals in Belgrade, case no. Kž PO2-1/2010, judgement, 14 June 2010, pages 45-46.

## E. Recommendations

### To the WCPO and the WCDs:

- Clearly state in indictments and judgements whether war crimes charged are committed in the context of armed conflicts of an international or a non-international nature. Refrain from qualifying an armed conflict as both international and non-international;
- Apply the correct body of IHL depending on the nature of the armed conflict in question;
- Take a uniform stance on the issue of the end date of the Kosovo conflict, based exclusively on an interpretation of the applicable IHL rules;
- Always explain and demonstrate the existence of a “nexus” between the crime and the conflict;
- Never consider the capacity of the defendant as one of the elements necessary for war crimes.

### To the Judicial Academy:

- Ensure that international humanitarian law is included as part of the training curriculum for students, judges and prosecutors.



# CHAPTER SEVEN

## Lack of consistency in sentencing practices

*The maximum imprisonment term applicable to war crimes, 20 years, is the single most imposed punishment. However, courts also sentenced a number of defendants to punishments below the legal minimum of five years, according to criteria that are not always clear, often stereotypical and sometimes contradictory.*

.....

Under the present Criminal Code of Serbia, the **statutory punishment** for War Crimes against the Civilian Population and War Crimes against Prisoners of War<sup>206</sup> is 5 to 40 years of imprisonment. However, since the offences charged occurred at a time when the Yugoslav Criminal Code was in force, the punishment **5 to 15, or 20** years of imprisonment<sup>207</sup> foreseen by the latter is applied, as it is more favourable to the defendant.<sup>208</sup>

While the WCDs have often received criticism over the years for their lenient sentencing practices,<sup>209</sup> an analysis of the punishments imposed shows that a considerable number of defendants (25) were sentenced to the statutory maximum of 20 years, and 15 more were sentenced to 15 years. In fact, as Chart 10 illustrates, 20 years is the most frequent sentence imposed in the first instance. The average punishment imposed is 11.7 years (11.5 years when considering only final judgements).

Concerning **aggravating and mitigating circumstances**, the CCFRY foresees that, when determining sentencing, the court must take into consideration “all the

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206 As already mentioned, only one case before the WCDs involved a crime other than these two (see Chapter 6, para. A).

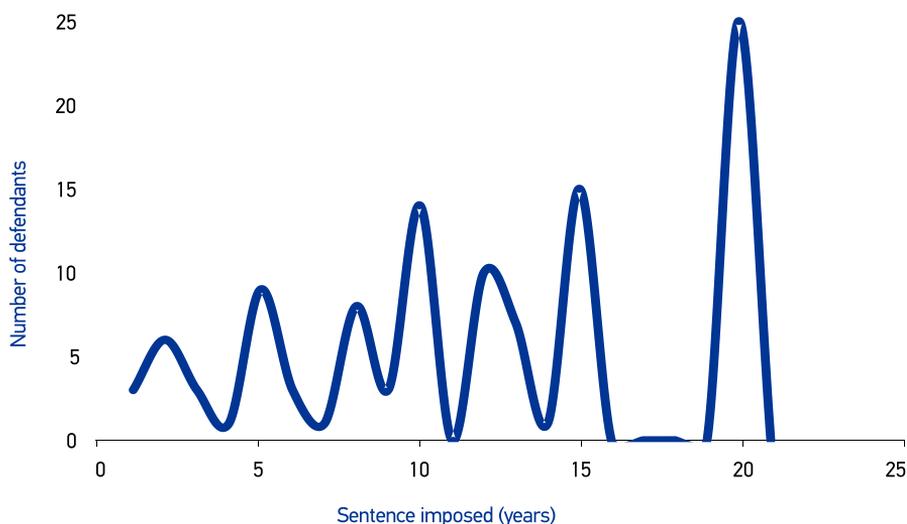
207 Prison terms higher than 15 but lower than 20 years are not statutory punishments and cannot be imposed. See also footnote 171.

208 Article 5(2), CC, *supra*.

209 See the European Commission's progress report for Serbia for 2014, page 42 and 2013, page 12. See also the HLC reports “Ten Years of War Crimes Prosecutions in Serbia: contours of justice: analysis of the prosecution of war crimes in Serbia 2004-2013”, and “Report on war crime trials in Serbia” for 2011, 2012 and 2013.

circumstances” which may have an impact on the level of punishment.<sup>210</sup> The CCFRY lists some factors which the Court should take into particular consideration,<sup>211</sup> but does not foresee an exhaustive list and does not distinguish between aggravating and mitigating circumstances. The Code also does not provide guidelines on the impact or weight that circumstances may have on the determination of the punishment. In other words, the Court can always **freely assess** factors that it believes to be aggravating and/or mitigating circumstances<sup>212</sup> and determine the sentencing within the limits of the statutory minimum and maximum.<sup>213</sup>

Chart 10 – Sentencing on first instance



210 Article 41, CCFRY, *supra*.

211 The degree of criminal responsibility, the motives from which the act was committed, the degree of danger or injury to the protected object, the circumstances in which the act was committed, the past conduct of the offender, his personal situation and his conduct after the commission of the criminal act, as well as other circumstances relating to the personality of the offender.

212 The mitigating circumstances that the WCD most commonly considered are family status of the accused i.e. marital status, children and their age; poor material means, weak health condition, absence of criminal record, age at the time of the crime, mental incompetence, remorse and apology. Regarding aggravating circumstances, the WCD mainly placed importance to circumstances related to the manner of committing the crime: the number of acts, ruthlessness and persistence in committing the crimes, high number of victims, specific characteristics of victims and those who suffered such crimes (old and helpless persons, faint persons, women, children etc.), whether serious bodily harm and mental suffering were inflicted on victims, the lasting consequences, motive for committing crimes, behaviour during and after committing them, position and function that the accused held at the moment of committing the crime.

213 Article 41(1), CCFRY, *supra*.

## A. The use of “particularly mitigating” circumstances

The CCFRY foresees that the Court may reduce punishment below the statutory minimum,<sup>214</sup> or impose a milder type of punishment, in the following two exceptional situations:<sup>215</sup>

1. When the law expressly provides that the punishment may be reduced<sup>216</sup> (e.g. when the crime was only attempted, or the offender had a significantly reduced mental capacity);<sup>217</sup>
2. When the Court “finds that such **particularly mitigating circumstances** exist which indicate that the aims of punishment<sup>218</sup> can be attained by a lesser punishment.”<sup>219</sup>

The Code does not define what “particularly mitigating” circumstances are. The plain wording (“particularly” mitigating) suggests that such circumstances must be unusually significant, so as to justify an extraordinary reduction of punishment under the minimum. The exceptional nature of the rule also suggests that it should be resorted to only in rare cases.<sup>220</sup> Situations where the law otherwise foresees the possibility of sentencing under the minimum are indeed exceptional such as, as mentioned above, when the crime was merely attempted.

WCD panels relied on the presence of “particularly mitigating” circumstances to impose sentences below the statutory minimum against 11 defendants.<sup>221</sup> When doing so, however, WCD judges did not point out circumstances that were of an exceptional or extraordinary nature. Instead, they considered the **cumulative value of (otherwise non-exceptional) circumstances** to be “particularly mitigating”.

In the “Beli Manastir” case, the High Court found one of the defendants responsible for the inhumane treatment he inflicted on nine Croatian civilians.<sup>222</sup> Despite the egregiousness

214 In war crimes cases, the Court can impose a sentence as low as one year of imprisonment. See Article 43(1), no. 1, CCFRY, *supra*.

215 Article 42, CCFRY, *supra*.

216 Article 42(1), *id*.

217 *Ibid.*, with reference to Article 19(2) and 12(2) CCFRY.

218 According to Article 5, CCFRY, the general purpose of drafting and imposing the criminal sanctions is to suppress the socially dangerous activities which violate or jeopardize the social values protected by the criminal code. Article 33 further specifies that the purposes of punishment are (1) preventing the offender from committing criminal acts and his rehabilitation; (2) rehabilitative influence on others not to commit criminal acts; (3) strengthening the morale and influence on the development of citizens' social responsibility and discipline.

219 Article 42(2), CCFRY, *supra*.

220 Zoran Stojanović, *Commentary of Criminal Code (2nd revised edition)*, Official Gazette, 2007, page 211.

221 “Beli Manastir” case (Velimir Bertić); “Čuška” case (Slaviša Kastratović, Boban Bogičević); “Lovas” case (Radisav Josipović); “Medak” case (Milorad Lazić, Mirko Marunić, Nikola Konjević, Perica Đaković); “Prizren” case (Mark Kašnjeti); “Skočić” case (Damir Bogdanović); “Zvornik I” case (Siniša Filipović); “Zvornik III” case (Goran Savić).

222 “Beli Manastir” case, High Court in Belgrade, case no. K Po2 45/2010, judgement, 19 June 2012.

of the crime, the panel sentenced him to only 18 months of imprisonment. The Court found that the absence of prior convictions, the fact that he is married and has children, his “young” age at the time of the crime (22 years), and the time passed since the offence constituted “particularly mitigating circumstances”, without providing further reasoning.

In other cases the Court found circumstances to be “particularly mitigating” even though they co-existed with **aggravating ones**.

In the “Medak” case,<sup>223</sup> one of the defendants was found guilty of inhumane treatment and torture of a prisoner of war. The Court found that the mere absence of prior convictions constituted per se a “particularly mitigating circumstance” and sentenced him to three years of imprisonment. The Court imposed an even more lenient sentence on a co-defendant and co-perpetrator, although it considered his two prior convictions as aggravating circumstances. In this case, the Court found that the defendant’s family situation (married, no job, father of two children) constituted “particularly mitigating” circumstances.

A number of cases alleging “particularly mitigating” circumstances concern defendants who had a minor, sometimes minimal, **responsibility for the crime**. The latter is a crucial factor that has a significant bearing on the punishment. The law expressly foresees the “degree of danger or injury to the protected object” and the “degree of criminal responsibility” as circumstances of the crime. If the Court finds that a defendant had such a minimal degree of participation in the crime that he should be sentenced under the minimum, it should state this clearly and possibly re-qualify the mode of participation to **aiding and abetting** instead of co-perpetration. Standard formulations such as “the nature and circumstances under which the offense was committed”, found in some cases,<sup>224</sup> do not sufficiently explain the defendant’s contribution or the reason for imposing a punishment under the minimum.

## B. The use of standardized “family-related” mitigating circumstances

WCD panels often resorted to standardized formulations when indicating mitigating circumstances. **Family-related circumstances** (marital status, children, etc.) are very often cited as mitigating factors, even though their application to the overwhelming majority of defendants makes them lose their character of specificity. In other words, such circumstances become standard considerations, applicable to every accused.

223 “Medak” case, Court of Appeals in Belgrade, case no. Kž1 Po2 9/10, judgement, 19 January 2011.

224 See for instance the “Zvornik III” case, High Court in Belgrade, case no. K Po2 23/2010, judgement, 8 December 2011, page 124.

Moreover, the reason why the defendant should receive a lower punishment for being married or unemployed is never explained.

These factors should play no role in the determination of the punishment. First, the law does not foresee the **family** situation as a circumstance, but the “**personal**” situation of the defendant. Second, there may be a multitude of reasons why a person is married or not, or has children or not (including sexual orientation, religious beliefs, health conditions, personal convictions, or others). Whatever these reasons are, they have nothing to do with the crime committed, the social damage created, or the purpose of the punishment (retribution, and special and general prevention). To hold otherwise, one would have to reach the conclusion that two persons who commit the exact same crime should receive different punishments simply because one is married and/or has children, and the other is not.

## C. The contradictory use of “lapse of time”

A recurring mitigating factor mentioned in a number of WCD judgements is the time elapsed between the crime and the adjudication of the case.

*Prima facie*, the time it took for the State authorities to sentence a defendant seems an **irrelevant** factor for the purpose of determining the amount of punishment, especially in the case of serious crimes which are not subject to a statute of limitations, such as war crimes.<sup>225</sup>

It can, however, be argued that the **significance of a punishment** imposed shortly after a crime is committed is not the same as one imposed long after the commission of the crime itself. When years or even decades have passed, the social disturbance caused by the crime may have diminished, the consequences of the crime partly mitigated, or the offender may have atoned for his actions. All this should be reflected in the severity of the punishment imposed.

In either case, the Court should (a) provide adequate reasoning when it considers lapse of time as a mitigating factor; and (b) be consistent in its application.

WCD panels, on the one hand, generally failed to provide reasons for considering lapse of time as a mitigating factor, while on the other, they sometimes applied this factor in a **contradictory manner**. In particular, judges considered the lapse of time as a

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225 See HLC, *Ten Years of War Crimes Prosecutions in Serbia*; HLC, *Report on war crime trials in Serbia in 2011*; HLC, *Report on war crime trials in Serbia in 2012*.

mitigating factor irrespectively of the actual amount of time passed between the crime and the judgement.

For example, the WCD considered lapse of time as a mitigating factor in three cases related to crimes committed in Zvornik,<sup>226</sup> when between 16 and 19 years had elapsed in the interim. However, the same court (and sometimes even the same trial panel) did not consider lapse of time to be a mitigating factor in a number of cases where an identical amount of time had passed.<sup>227</sup> Even more concerning is that in another case<sup>228</sup> the Court considered as a mitigating factor the fact that a period of just seven years from the crime had passed.

The Court of Appeals has not expressed its opinion on the matter up until now. When confirming or modifying the sentences, it always limited itself to establishing that the High Court had placed an excessive weight on aggravating or mitigating circumstances, without entering into the merits of each circumstance,<sup>229</sup> including the lapse of time. The Court of Appeals, however, should clearly state whether or not, in its opinion, lapse of time is a legitimate consideration for the purpose of determination of punishment.

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226 "Zvornik I" case, District Court in Belgrade, case no. K.V. 5/2005, judgement, 12 June 2008; "Zvornik II" case, High Court in Belgrade, case no. K Po2 28/2010, judgement, 22 November 2010; "Zvornik III" case, High Court in Belgrade, case no. K Po2 23/2010, judgement, 8 December 2011.

227 "Slunj" case, 17 years; "Grubišino Polje" case, 18 years; "Stari Majdan", "Stara Gradiška" and "Vukovar" cases: 19 years each.

228 "Đakovica" case, District Court in Belgrade, case no. K.V. 4/05, judgement, 18 September 2006.

229 For an analysis of Serbian courts' practice in assessing mitigating and aggravating circumstances, see the "Jurisprudence Bulletin" of the Supreme Court of Serbia, pages 85-91, last accessed 31 May 2015 at [www.vk.sud.rs/sites/default/files/files/Bilteni/VrhovniSud/bilten%202004-3.pdf](http://www.vk.sud.rs/sites/default/files/files/Bilteni/VrhovniSud/bilten%202004-3.pdf).

## D. Recommendations

### To the WCDs:

- Ensure the consistent application of mitigating circumstances and consequent reduction of punishment;
- Always explain the specific weight of each mitigating and aggravating circumstance;
- Limit the use of “particularly mitigating circumstances” to cases featuring circumstances of an exceptionally mitigating nature, and avoid invoking the application of “particularly mitigating circumstances” to defendants and cases presenting ordinary features;
- When applying “particularly mitigating circumstances”, always provide adequate reasoning, especially when aggravating circumstances are also present;
- Avoid standard formulations when assessing mitigating circumstances;
- Refrain from considering family characteristics of defendants (such as marital status) as mitigating circumstances;
- Re-qualify the mode of participation of the defendant to “aiding and abetting” in cases where the defendant’s contribution was minimal, instead of invoking “particularly mitigating circumstances”;
- Take a consistent stance on whether the lapse of time should be considered a mitigating circumstance, and ensure its application in a coherent manner if invoked.



# CHAPTER EIGHT

## Protection of witnesses

*Efficient witness protection measures are essential to ensure that more witnesses safely co-operate with the investigating authorities. However, in some cases, witnesses' names were indirectly revealed despite the procedural measures afforded to them. Moreover, concerns persist as to the ability of the Witness Protection Unit to adequately protect witnesses, especially insiders, out of court.*

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### A. In-court protection

Procedural protection of witnesses is an essential tool to avoid witnesses being put at risk as a result of their giving testimony publicly.

The current CPC, albeit in a somehow uncoordinated manner,<sup>230</sup> foresees a series of measures that the judge can apply to ensure that the **witness's identity is not revealed to the public**. These include excluding the public from the courtroom,<sup>231</sup> examination of the witness from a separate room,<sup>232</sup> face and/or voice distortion.<sup>233</sup> Although the Code does not state this specifically, it seems clear that the Court can order any combination of the above-mentioned measures in order to ensure that the witness's identity is kept confidential. The Code also foresees special cautions and interviewing modalities for

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230 There are a series of contradictions and overlaps among the provisions of Articles 105(2), 106(1), and 108(2) of the CPC, *supra*.

231 Article 106(1), CPC, *supra*.

232 Article 108(2), CPC, *supra*.

233 *Ibid*.

protected witnesses.<sup>234</sup> The CPC in force until 2011 foresaw similar protective measures, as well as the physical security of the witness during the proceedings if needed.<sup>235</sup>

Under the current CPC, protected witnesses are always given a pseudonym,<sup>236</sup> but the defence is in any case entitled to know their identity at the latest 15 days before the start of the trial.<sup>237</sup> Although **erasure of personal data** from all records is listed as one of the possible measures, it would seem that the Court must order it, at least in all cases where the protective measures are permanent.<sup>238</sup> Clearly, leaving personal data of the witness in the records would frustrate the purpose of the entire system of in-court protection. Erasure of data refers not only to personal data of the protected witness him/herself, but also to any circumstances that could indirectly reveal the witness's identity.<sup>239</sup>

WCD judges resorted<sup>240</sup> to all measures listed above to address potential risks to the safety of sensitive witnesses. However, in some cases judges **published information** that could lead to the disclosure of the identity of some witnesses.

In the “Gnjilane Group” case, for example, the first instance judgement mentions the full names of close relatives of a protected witness, so that the protected witness's identity could easily be inferred.<sup>241</sup> A similar shortcoming can be found in the “Zvornik I” case.<sup>242</sup>

The OSCE recalls that protection of witnesses' names from public disclosure is particularly important in war crimes cases, where witness testimony can, on some occasions create turmoil in the public at large. Exposure of protected witnesses' names unnecessarily exposes them to additional danger and distress, thus ultimately deterring other potential witnesses from coming forward to testify.

234 Article 109, CPC, *supra*.

235 Article 109a, of the old CPC, *supra*.

236 This rule is implicitly stated in Article 108(2) and (6), CPC, *supra*.

237 See Article 106(2) and (3), CPC, *supra*. More precisely, if certain conditions are met, the Court can order that the witness's name is withheld from the defence, but it must reveal it no later than 15 days before the commencement of the trial.

238 The only case where erasure of the name from the records is not automatically ordered could be, for instance, where the Court orders a protective measure for a limited duration of time (which it is entitled to do under Article 108(2), CPC, *supra*).

239 The CPC in force until 2011 was clear and specific as to the data that had to be erased: Article 109 v (3) stated that when a witness was assigned protective measures, the Court would give a code-name to replace the witness's real name, and ordered to erase from the files *the witness's name and other data from which his identity could be established*. In addition, the court would also establish the manner in which the questioning will be undertaken, and the measures required to prevent disclosure of the identity of the witness, his abode or residence, and those of persons close to him. The current CPC is more ambiguous: when it comes to erasure of data from records, the Code only refers to “data on the identity of the witness” (Article 108(2), CPC, *supra*). Article 110 CPC however states that the Court must put under seal “data on the identity of the protected witness and persons close to him and *other circumstances which may lead to the exposure of their identity*”. A thorough interpretation of the system leads to the conclusion that all data which may lead to the witness's identification should be erased from the records; clearly, it would be paradoxical to have the same data under seal which is openly available and in public trial records.

240 By the end of 2013, the WCD High Court in Belgrade granted 54 witnesses such protection measures (see HLC's *Ten Years of War Crimes Prosecutions in Serbia*, page 64).

241 “Gnjilane group” case, High Court in Belgrade, case no. K-Po2 18/11, judgement, 19 September 2012.

242 “Zvornik I” case, District Court in Belgrade, case no. K.V. 5/2005, judgement, 29 May 2008.

## B. Out-of-court protection

Serbia has a **specialized Witness Protection Unit (WPU)** within the Ministry of Interior, which is tasked with ensuring the physical safety of particularly sensitive witnesses (including, where needed, through measures of 24/7 surveillance, change of identity and relocation) in war crimes, organized crime and other serious cases.<sup>243</sup> The Unit's focus is on the so-called "insider" witnesses who often represent the key evidence against higher-ranking perpetrators. Indeed, convictions in at least four of the most significant WCD cases were based on statements given by one or more insiders.<sup>244</sup>

The WPU's *modus operandi* foresees **four types of measures**: physical protection of person and property, relocation, concealing identity and information about ownership, and change of identity. The first three measures can be applied as emergency measures, which is not the case with the change of identity.<sup>245</sup> The latter has never been applied since its application requires adoption of several bylaws, which different ministries have not adopted. Relocation to another country or to another location inside Serbia is often unavoidable, in order to give the witness the prospect of a new life and to free police resources which are otherwise devoted to the physical protection of the witness.

However, several war crimes witnesses assigned to the protection of the WPU publicly complained to various degrees about **improper behaviour by the WPU's members**.

In 2012, an insider witness in the "Ćuška" case, publicly stated that he received threats from one high-ranking MoI official and members of the WPU.<sup>246</sup>

In 2011, three former members of the Special Police Forces, who were supposed to testify against their colleagues for crimes committed in Kosovo in 1999, harshly accused the WPU.<sup>247</sup> One of them publicly alleged that members of the WPU were threatening and blackmailing him in order to make him "give up on his testimony against his former comrades".<sup>248</sup>

In recent years, a number of entities raised concerns as to the **WPU's reliability, professionalism and even impartiality**. In 2011, a Council of Europe's Special

243 See Law on the Protection Program for Participants in Criminal Proceedings (*Official Gazette of the Republic of Serbia* no. 85/2005), Article 5.

244 See e.g. "Ćuška" case, High Court in Belgrade, case no. K-Po2 48/2010, judgement, 11 February 2014; "Gnjilane group" case, High Court in Belgrade, case no. K-Po2 18/2011, judgement, 19 September 2012; "Ovčara" case, High Court in Belgrade, case no. K.V. 4/2006, judgement, 12 March 2009.

245 Law on the Protection Program for Participants in Criminal Proceedings, *supra*, Article 14(3).

246 See more at [www.blic.rs/Vesti/Hronika/303442/Zasticeni-svedok-Sakali-prete-meni-i-porodici](http://www.blic.rs/Vesti/Hronika/303442/Zasticeni-svedok-Sakali-prete-meni-i-porodici), last accessed on 31 May 2015.

247 *Politika*, Article "Zaštićeni policajci tvrde da su učtkani da ne bi svedočili" (full text available at <http://www.politika.rs/rubrike/Hronika/Zasticeni-policajci-tvrde-da-su-ucutkani-da-ne-bi-svedocili.lt.html>), last accessed on 31 May 2015).

248 *Danas*, Article "Štitili su me oni protiv kojih je trebalo da svedočim" (full text available at [www.danas.rs/dodaci/vikend/stitili\\_su\\_me\\_oni\\_protiv\\_kojih\\_je\\_trebalo\\_da\\_svedocim.26.html?news\\_id=222837#sthash.01TxSY3f.dpuf](http://www.danas.rs/dodaci/vikend/stitili_su_me_oni_protiv_kojih_je_trebalo_da_svedocim.26.html?news_id=222837#sthash.01TxSY3f.dpuf)), last accessed on 31 May 2015).

Rapporteur highlighted that “inappropriate behaviour by members of the WPU towards witnesses has sometimes resulted in the witnesses either changing their testimony or simply deciding not to testify at all.”<sup>249</sup> In 2012, the European Parliament similarly pointed out “serious deficiencies in the functioning of the witness protection programme regarding cases of war crimes, which have resulted in a number of witnesses voluntarily opting out of the programme after being systematically intimidated.”<sup>250</sup> Similarly, the European Commission has repeatedly highlighted deficiencies in Serbia's witness protection programme in its progress reports.<sup>251</sup>

WCPO Prosecutor Vladimir Vukčević publicly pointed at shortcomings in the Unit's management.<sup>252</sup>

However, according to stakeholders the OSCE interviewed, it appears that at least some of the problems highlighted above are attributable to a **poor working relationship** between the previous WPU head and the WCPO management. Opinions collected from other WCPO prosecutors are not homogeneous as to the working relations between the WCPO and the WPU. Prosecutors of the Organized Crime Prosecution Office (which also closely co-operates with the WPU) did not report experiencing any difficulties with the Unit's work. No witness who testified in organized crime cases publicly complained about the WPU's behaviour, or left the witness protection program. The OSCE also heard allegations from the WPU that in some cases WCPO prosecutors made promises to witnesses which the WPU could not keep, thus straining the relationship between WPU and the witnesses.

The replacement of the WPU head in June 2014 may have brought about a change for the better in the working relations between WCPO and WPU. Concrete findings on this matter would be premature. However, the OSCE will continue to monitor the matter closely.

Whatever the causes of the problem may be, the result of the situation described above is that there is a **perception** in Serbia that witnesses cannot be properly protected, especially in war crimes cases. Regardless of the actual Unit's willingness and ability to ensure the safety of witnesses under its protection, witnesses are likely to refuse the WPU's assistance if they do not perceive that they will be safe. Similarly, if a Unit's reputation is compromised, so is the likelihood that foreign witness protection units will co-operate with it. For this reason, it may be necessary to think of a strategic reform plan to restore the Unit's reputation and credibility, both in Serbia and abroad. A first essential measure is to ensure that none of the Unit's staff took part in the conflicts in BiH, Croatia or Kosovo as members of army or police forces.

249 Council of Europe, Rapporteur Jean-Charles Gardetto, *The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans* (Doc. 12440 rev.), 12 January 2011.

250 European Parliament, Resolution on the European integration process of Serbia (2011/2886(RSP)), 29 March 2012.

251 See e.g. European Commission, Serbia 2013 Progress Report, 16 October 2013, page 12.

252 Večernje Novosti, Article “Vukčević: We will not allow for the victims to get killed” from 19 January 2012 (full text available at [www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:362686-Vukcevic-Ne-damo-da-ubiju-zrtve](http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:362686-Vukcevic-Ne-damo-da-ubiju-zrtve), last accessed on 31 May 2015).

## C. Recommendations

### To the WCPO and the WCDs:

- Always advise witnesses on the possibility of receiving procedural protection during war crimes criminal proceedings (Article 111, CPC);
- Pay particular attention to not inadvertently disclosing names or other personal data which could reveal the identity of a protected witness.

### To the WCPO:

- Refrain from making any decisions or promises in matters related to witness protection and related measures.

### To the MoI:

- Ensure the WPU's integrity and professionalism, including by carefully screening its members;
- Ensure that the WPU employs no officers who took part in armed conflicts as members of army or police forces;
- Spare no efforts to restore the Unit's reputation.

### To the Government of the Republic of Serbia:

- Ensure that the relevant Ministries adopt all bylaws that are necessary for the successful implementation of the measure of change of identity.



# List of acronyms used

BiH	(Bosnia and Herzegovina)
CCFRY	(Criminal Code of the Federal Republic of Yugoslavia)
CCSFRY	(Criminal Code of the Socialist Federal Republic of Yugoslavia)
CPC	(Criminal Procedure Code)
CPD	(Criminal Police Directorate)
CSO	(Civil Society Organization)
ECHR	(European Convention for the Protection of Human Rights and Fundamental Freedoms)
ECtHR	(European Court of Human Rights)
EU	(European Union)
EULEX	(European Union Rule of Law Mission in Kosovo)
FRY	(Federal Republic of Yugoslavia)
GIS	(Geographical-informational system)
HLC	(Humanitarian Law Centre)
ICCPR	(International Covenant on Civil and Political Rights)
ICTR	(International Criminal Tribunal for Rwanda)
ICTY	(International Criminal Tribunal for the Former Yugoslavia)
IHL	(International Humanitarian Law)
JNA	(Jugoslovenska narodna armija – Yugoslav People’s Army)
KLA	(Kosovo Liberation Army)
MICT	(Mechanism for International Criminal Tribunals)
MoI	(Ministry of Interior)
MP	(Member of Parliament)
NATO	(North Atlantic Treaty Organization)
NGO	(Non-Governmental Organization)
OSCE	(Organization for Security and Co-operation in Europe)
OTP	(ICTY’s Office of the Prosecutor)
POW	(Prisoner of War)
SCC	(Supreme Court of Cassation)
SFRY	(Socialist Federative Republic of Yugoslavia)
SRS	(Srpska radikalna stranka – Serbian Radical Party)
UK	(United Kingdom)
UN	(United Nations)
UNMIK	(United Nations Interim Administration Mission in Kosovo)
UNSC	(United Nations Security Council)

US (United States)  
VRS (Vojska Republike Srpske – Army of Republika Srpska)  
WCC (War Crimes Chamber)  
WCD (War Crimes Department)<sup>253</sup>  
WCIS (War Crimes Investigation Service)  
WCPO (War Crimes Prosecutor's Office)  
WPU (Witness Protection Unit)

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253 This term is used to indicate specialized chambers in Serbia with exclusive jurisdiction to adjudicate war crimes cases. Before the overall restructuring of the court network in Serbia, which occurred in 2010, the two WCDs were placed with Belgrade District Court and the Supreme Court of Serbia, respectively. At that time they were called War Crimes Chambers (WCCs).

# Annex

Facts and figures of war crimes  
proceedings before the WCDs  
(2003-2014)

Case name	“Banski Kovačevac”	“Beli Manastir”	“Bihać I”
Case number	KŽ1 Po2 8/10	K Po2 9/13	KŽ1 Po2 4/14
Number of defendants	2 (Pane Bulat, Rade Vranešević)	4 (Velimir Bertić, Branko Hrnjak, Zoran Vukšić, Slobodan Strigić)	1 (Đuro Tadić)
Number of victims	6	30	19
Hierarchy level of defendants	Pane Bulat: mid military rank Rade Vranešević: low military rank	Low police rank	Low military rank
Indictment filed	16/04/2008	23/06/2010	08/04/2013
Stage of the proceeding	Final	Final for Velimir Bertić, retrial for others	Final
Duration of the proceeding since start of first trial	2 years and 5 months	4 years and 2 months	1 year and 8 months
Number of witnesses heard at trial	49	68	26
First instance judgement date and outcome	<b>15 March 2010</b> Pane Bulat: 15 years Rade Vranešević: 12 years	<b>19 June 2012</b> Zoran Vukšić: 20 years Slobodan Strigić: 10 years Branko Hrnjak: 5 years Velimir Bertić: 1 year 6 months	<b>6 February 2014</b> Conviction: 10 years
Appeals decision date and outcome	<b>14 February 2011</b> Pane Bulat: 20 years Rade Vranešević: 13 years	<b>29 March 2013</b> Zoran Vukšić, Slobodan Strigić and Branko Hrnjak: annulled and retrial Velimir Bertić: confirmed	<b>12 December 2014</b> Sentence increased: 13 years
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/

Case name	“Banski Kovačevac”	“Beli Manastir”	“Bihać I”
Factual background	<p>The Court established that between 19 and 23 March 1992 the two defendants killed six Croatian civilians from Banski Kovačevac (Croatia) and threw their bodies into a well. Both defendants were members of the Army of Republic of Srpska Krajina. Bulat was an assistant security commander, while Vranešević was a simple soldier.</p>	<p>The indictment alleges that between August and December 1991 the defendants Zoran Vukšić and Velimir Bertić, former members of Serbian Krajina Special Police Units, tortured and treated inhumanely a number of Croatian civilians detained in a detention centre located in the town of Beli Manastir, Republic of Croatia. Three defendants (Zoran Vukšić, Slobodan Strigić and Branko Hrnjak) are also charged with murdering four Croatian civilians. Zoran Vukšić is also charged with the murder of another Croatian civilian and the serious wounding of two others.</p>	<p>The Court established that on 23 September 1992 the defendant, together with other soldiers belonging to the Army of Republika Srpska, participated in the killing of 18 Bosnian Muslim civilians in the town of Duljci (Bihać, BiH). The defendants shot and stabbed the victims and then set the bodies on fire. One of the civilians survived but suffered serious permanent injuries.</p>
Procedural notes	<p>The evidence in the case was transferred by the State’s Attorney’s Office of the Republic of Croatia to the WCPO.</p>	<p>The evidence in the case was transferred by the State’s Attorney’s Office of the Republic of Croatia to the WCPO.</p>	<p>Four co-perpetrators were convicted in separate proceedings before the Cantonal Court in Bihać (BiH) after pleading guilty to the crime charged. Two additional suspects are deceased. The Bihać Court had also initiated proceedings against Đuro Tadić but, due to his unavailability, transferred the case to the WCPO. The last co-perpetrator is currently on trial in Belgrade (see “Bihać II” case synopsis).</p>

Case name	“Bihać II”	“Bijeljina I”	“Bijeljina II”
Case number	K Po2 12/14	KŽ1 Po2 6/12	K Po2 10/14
Number of defendants	1 (Svetko Tadić)	3 (Zoran Đurđević, Dragan Jović, Alen Ristić)	1 (Miodrag Živković)
Number of victims	24	3	3
Hierarchy level of defendants	Low military rank	Low military rank	Low military rank
Indictment filed	09/10/2014	05/06/2011	04/06/2014
Stage of the proceeding	Pending trial start	Final	Pending trial start
Duration of the proceeding since start of first trial	/	1 year and 9 months	/
Number of witnesses heard at trial	None	10	None
First instance judgement date and outcome	/	<b>4 June 2012</b> Dragan Jović: 15 years Zoran Đurđević: 13 years Alen Ristić: 12 years	/
Appeals decision date and outcome	/	<b>25 February 2013</b> Dragan Jović: 20 years Alen Ristić: 10 years Zoran Đurđević: confirmed	/
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/

Case name	“Bihać II”	“Bijeljina I”	“Bijeljina II”
Factual background	<p>The indictment alleges that the defendant took part in the same crime as the defendant in the “Bihać I” case (see related case synopsis). Additionally, the indictment charges the defendant with the killing of five Bosnian Muslim civilians in nearby villages that same day.</p>	<p>The Court established that on 14 June 1992 the defendants, in their capacity as members of a Serbian volunteer unit, entered the house of a Muslim civilian Ramo Avdić in Bijeljina (BiH). Dragan Jović shot and killed Avdić. The defendants stole money, jewellery and a car from the victims’ family and their neighbour. Thereafter, the defendants repeatedly raped Avdić’s daughter and daughter-in-law, first in the house and then in a place called Ljeljenča on the Bijeljina-Brčko road, before releasing them.</p>	<p>The indictment alleges that the defendant participated in the same crime for which other co-perpetrators were already convicted in the “Bijeljina I” case (see related synopsis).</p>
Procedural notes	<p>Four co-perpetrators were convicted in separate proceedings before the Cantonal Court in Bihać (BiH) after pleading guilty to the crime charged. Two additional suspects are deceased. The Bihać Court had initiated proceedings also against Svetko Tadić but, due to his unavailability to the BiH authorities, transferred the case to the WCPO. The defendant’s brother was sentenced by the High Court in Belgrade to 13 years of imprisonment for the same crime (see “Bihać I” case synopsis).</p>	<p>BiH authorities transferred the criminal proceedings to the WCPO. An additional co-perpetrator (Danilo Spasojević) was sentenced to five years of imprisonment in BiH. A last alleged co-perpetrator is standing trial in Belgrade (see “Bijeljina II” case synopsis).</p>	<p>/</p>

Case name	“Bosanski Petrovac”	“Bytyqi brothers”	“Čelebići”
Case number	K Po2 12/13	Kž1 Po2 5/12	Kž1 Po2 3/14
Number of defendants	2 (Nedeljko Sovilj, Rajko Vekić)	2 (Sreten Popović, Miloš Stojanović)	1 (Samir Hondo)
Number of victims	1	3	31
Hierarchy level of defendants	Low military rank	Low police rank	Low military rank
Indictment filed	06/08/2012	23/08/2006	17/5/2013
Stage of the proceeding	Retrial ongoing	Final	Final
Duration of the proceeding since start of first trial	2 years and 2 months	6 years and 3 months	10 months
Number of witnesses heard at trial	8	130	11
First instance judgement date and outcome	<b>11 March 2013</b> Nedeljko Sovilj and Rajko Vekić: 8 years	<b>22 September 2009</b> Acquittal	<b>22 November 2013</b> Acquittal
Appeals decision date and outcome	<b>4 November 2013</b> Annulled and retrial	<b>1 November 2010</b> Annulled and retrial	<b>9 June 2014</b> Acquittal
Retrial judgement date and outcome	/	<b>9 May 2012</b> Acquittal	/
Second appeal date and outcome	/	<b>18 January 2013</b> Confirmed	/

Case name	“Bosanski Petrovac”	“Bytyqi brothers”	“Čelebići”
Factual background	<p>The indictment alleges that the defendants, members of the Army of Republika Srpska, on 21 December 1992 came across civilians Mile Vukelić and Mehmed Hrkić on a local road near Bosanski Petrovac (BiH). They allegedly ordered Vukelić to continue on and held Mehmed Hrkić back, took him deeper into the forest and killed him with multiple firearm shots.</p>	<p>The defendants, former members of Serbian Police, faced charges of illegal detention and deprivation of the right to a fair trial allegedly committed in July 1999 against three US citizens of Albanian ethnicity. At the time of the crime, the victims were members of the “Atlantic brigade” of the Kosovo Liberation Army. The indictment further alleged that the victims were arrested for illegally crossing the border and then taken to a police facility in Petrovo Selo (Serbia). The victims’ bodies were discovered in July 2001 in a mass grave in Petrovo Selo (Serbia).</p>	<p>The defendant faced charges related to his involvement as a prison guard in the Čelebići camp (BiH). The defendant was accused of having repeatedly ill-treated a Serbian civilian inmate (including by beating him up with various tools and kicking him with military boots) and participating with other prison guards in the torture of other Serbian civilian inmates, who were locked for a full day inside a sewage pit without enough air.</p>
Procedural notes	<p>The defendants were indicted by BiH authorities on 31 October 2011. Since they were unavailable to the BiH authorities, the latter formally transferred the case to the WCPO.</p>	<p>The defendants were acquitted of all charges.</p>	<p>The defendant was acquitted of all charges.</p>

Case name	“Ćuška”	“Đakovica”	“Dragišić”
Case number	K Po2 6/14	Kž1 r.z. 3/06	K Po2 13/14
Number of defendants	14 (Radoslav Brnović, Boban Bogičević, Dejan Bulatović, Zvonimir Cvetković, Slaviša Kastratović, Veljko Korićanin, Vidoje Korićanin, Toplica Miladinović, Siniša Mišić, Ranko Momić, Milojko Nikolić, Zoran Obradović, Srećko Popović, Abdulah Sokić)	1 (Anton Lekaj)	1 (Milan Dragišić)
Number of victims	138	11	5
Hierarchy level of defendants	Mid military rank (Miladinović); low military rank (all others)	Low military rank	Low military rank
Indictment filed	10/09/2010; 01/04/2011; 27/04/2011; 31/05/2011; 07/11/2011; 26/09/2012	07/07/2005	10/10/2014
Stage of the proceeding	Appeal	Final	Pending trial start
Duration of the proceeding since start of first trial	4 years	1 year and 6 months	/
Number of witnesses heard at trial	132	23	None
First instance judgement date and outcome	<b>11 February 2014</b> Toplica Miladinović, Milojko Nikolić, Dejan Bulatović: 20 years Ranko Momić: 15 years Abdulah Sokić: 12 years Srećko Popović: 10 years Siniša Mišić: 5 years Slaviša Kastratović, Boban Bogičević: 2 years Veljko Korićanin, Radoslav Brnović: acquittal Zvonimir Cvetković, Vidoje Korićanin, Zoran Obradović: indictment withdrawn	<b>18 September 2006</b> 13 years	/

Case name	“Ćuška”	“Đakovica”	“Dragišić”
Appeals decision date and outcome	/	<b>6 April 2007</b> Confirmed	/
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/
Factual background	<p>The indictment charges 14 former members of the 177th Military Territorial Detachment of the Yugoslav Army (known as the “Jackals” unit) with a series of massacres committed against Kosovo Albanian civilians in the villages of Ćuška, Zahać, Pavljan and Ljubenić in Kosovo in April and May of 1999. The defendants participated in killings, committed rapes, destroyed and plundered the victims’ houses. Most of the survivors then left their homes and fled to Albania. The former leader of the “Jackals” Nebojša Minić, also known as “The Dead”, passed away in Argentina in 2005.</p>	<p>The Court established that Anton Lekaj, a former member of the Kosovo Liberation Army (KLA), in the period from 12-16 June 1999 in Đakovica (Kosovo) together with two other identified KLA members, detained and subsequently committed serious crimes (including tortures, rapes, and murders) against a number of civilians who during the armed conflict in Kosovo were allegedly loyal to the Serbian forces.</p>	<p>The indictment alleges that on 20 September 1992 the defendant, in his capacity as a member of the Army of Republika Srpska, murdered three Muslim civilians and attempted to kill two more in Bosanski Petrovac, BiH.</p>
Procedural notes	<p>The key evidence in the case is the testimony of two former members of the “Jackals”. The WCPO carried out the investigation in the case in close cooperation with the European Union Rule of Law Mission in Kosovo (EULEX).</p>	<p>The two alleged co-perpetrators mentioned in the indictment were not charged (one is deceased; the other is not available to the Serbian authorities).</p>	/

Case name	“Dubrovnik”	“Gnjilane Group”
Case number	K. TRZ 5/07	KŽ1 Po2 2/2013
Number of defendants	1 (Vladimir Kovačević)	17 (Fazli Ajdari, Idriz Aliju, Redžep Aliju, Sadik Aliju, Burim Fazliju, Faton Hajdari, Ferat Hajdari, Samet Hajdari, Ramadan Halimi, Ahmet Hasani, Nazif Hasani, Aguš Memiši, Šefket Musliju, Šemsi Nuhiju, Šaćir Šaćiri, Selimon Sadik, Kamber Sahiti)
Number of victims	5	80
Hierarchy level of defendants	Mid military rank	Mid military rank (Fazli Ajdari); low military rank (all others)
Indictment filed	26/07/2007	11/08/2009
Stage of the proceeding	Suspended indefinitely	Final
Duration of the proceeding since start of first trial	3 months	4 years and 3 months
Number of witnesses heard at trial	/	82
First instance judgement date and outcome	<b>5 December 2007</b> Trial suspended indefinitely	<b>21 January 2011</b> Aguš Memiši, Samet Hajdari, Selimon Sadik: 15 years Faton Hajdari, Ahmet Hasani, Nazif Hasani, Burim Fazliju: 10 years Ferat Hajdari, Kamber Sahiti: 8 years
Appeals decision date and outcome	/	<b>7 December 2011</b> Annulled and retrial
Retrial judgement date and outcome	/	<b>19 September 2012</b> Samet Hajdari: 15 years Ahmet Hasani, Nazif Hasani: 13 years Burim Fazliju: 12 years Aguš Memiši, Selimon Sadik, Faton Hajdari: 10 years Sadik Aliju, Ferat Hajdari, Kamber Sahiti: 8 years Šefket Musliju: 5 years Fazli Ajdari, Redžep Aliju, Šaćir Šaćiri, Idriz Aliju, Šemsi Nuhiju, Ramadan Halimi (all tried <i>in absentia</i> ): acquittal
Second appeal date and outcome	/	<b>13 November 2013</b> Acquittal for all defendants

Case name	“Dubrovnik”	“Gnjilane Group”
Factual background	<p>The indictment alleges that the defendant, in his capacity as commander of the 3. Battalion of 472. Motorized Brigade of the JNA, ordered and participated in the attack on the Old Town of Dubrovnik (Croatia). The attack resulted in the death of two civilians, the wounding of three more, and the destruction of six UNESCO world heritage buildings.</p>	<p>The indictment charged the 17 defendants, all ethnic Albanians from the Preševo/Bujanovac region and former members of the Kosovo Liberation Army (KLA), with the murder of 80 civilians, and the illegal detention of an unspecified number of victims who were then subjected to ill-treatment, torture or rape. The victims were mostly Serbs, but also included some Roma and Albanian civilians perceived as disloyal to the KLA. All the crimes allegedly occurred from mid-June to the end of 1999 in the so-called Karadak operational zone in Kosovo (municipalities of Gnjilane, Vitina, Kosovska Kamenica, and Novo Brdo).</p>
Procedural notes	<p>The case is the only one which the ICTY transferred to Serbia under Rule 11 bis of the Rules of Procedure and Evidence. Proceedings against the defendant were indefinitely suspended shortly after the case was transferred because of the defendant's unfitness to stand trial due to a mental illness.</p>	<p>The initial indictment charged 17 defendants. Eight of them were not available to Serbian authorities and proceedings against them were suspended. Two of them were arrested before the start of the retrial. The seven remaining ones were tried <i>in absentia</i> for the first time during the retrial, and acquitted of all charges. After the end of the proceedings, on 5 December 2014, the Supreme Court of Cassation (SCC) granted Prosecution's petition for protection of legality. The SCC held that the decisions of the High Court and the Court of Appeals in the case had substantively violated provisions of criminal procedure. The SCC's ruling, however, had no impact on the outcome of the trial, since a decision on the protection of legality cannot go to the detriment of the accused.</p>

Case name	“Ključ”	“Lički Osik”	“Ljubenić”
Case number	KTO 4/13	KŽ1 Po2 3/2012	K Po2 11/13
Number of defendants	1 (Milan Škrbić)	4 (Milan Bogunović, Čeda Budisavljević, Bogdan Gruičić, Mirko Malinović)	3 (Milan Ivanović, Vladan Krstović, Lazar Pavlović)
Number of victims	2	5	57
Hierarchy level of defendants	Low military rank	Low military rank	Low military rank
Indictment filed	23/02/2012	25/06/2010	22/11/2013
Stage of the proceeding	Final	Final	Trial ongoing
Duration of the proceeding since start of first trial	/	2 years and 5 months	4 months
Number of witnesses heard at trial	/	14	None
First instance judgement date and outcome	<b>13 September 2013</b> 7 years	<b>14 March 2011</b> Milan Bogunović, Čeda Budisavljević, Bogdan Gruičić, Mirko Malinović: 12 years	/
Appeals decision date and outcome	/	<b>9 November 2011</b> Annulled and retrial	/
Retrial judgement date and outcome	/	<b>16 March 2012</b> Čeda Budisavljević, Mirko Malinović: 12 years Milan Bogunović, Bogdan Gruičić: 10 years	/
Second appeal date and outcome	/	<b>13 March 2013</b> Milan Bogunović, Mirko Malinović: confirmed Čeda Budisavljević: sentence modified 13 years Bogdan Gruičić: sentence modified – 8 years	/

Case name	“Ključ”	“Lički Osik”	“Ljubenić”
Factual background	<p>The defendant confessed that, in his capacity as a member of Army of Republika Srpska, he murdered two Muslim civilians in Ključ (BiH) on 26 June 1992.</p>	<p>The court established that around 25 October 1991 the defendants, in their capacity as members of the police forces of the Serbian autonomous region of Krajina and Territorial Defence, murdered four members of the Rakić family in Lički Osik (Croatia), who were suspected of collaborating with Croatian armed forces. Three of the defendants (Milan Bogunović, Mirko Malinović and Čeda Budisavljević) also killed a fifth family member who was residing in a nearby village.</p>	<p>The indictment alleges that on 1 April 1999 the defendants, in their capacity as members of the 177th Military Territorial Detachment of the Yugoslav Army (known as the “Jackals” unit) carried out an attack against Kosovo Albanian civilians in the village of Ljubenić, which resulted in the murder of 46 Kosovo Albanian civilians and serious bodily injuries to 11 more. The population of the village was then displaced. The bodies of 34 victims were later found in a mass grave in Batajnica, near Belgrade.</p>
Procedural notes	<p>The proceedings were completed through a plea bargain concluded between the defendant and the Prosecution.</p>	<p>The evidence in the case was transferred by the State’s Attorney’s Office of the Republic of Croatia to the WCPO.</p>	<p>14 other alleged members of the “Jackals” unit were charged <i>inter alia</i> in relation to their involvement in the events in Ljubenić (see “Čuška” case synopsis)</p>

Case name	“Lovas”	“Luka camp”	“Medak”	“Orahovac Group”
Case number	K Po2 22/2010	K Po2 5/14	KŽ1 Po2 9/11	KŽ1 r.z. 1/08
Number of defendants	14 (Dragan Bačić, Ljuban Devetak, Milan Devčić, Jovan Dimitrijević, Miodrag Dimitrijević, Radisav Josipović, Zoran Kosijer, Željko Krnjajić, Aleksandar Nikolaidis, Darko Perić, Milan Radojčić, Petronije Stevanović, Saša Stojanović, Radovan Vlajković)	1 (Boban Pop Kostić)	5 (Perica Đaković; Nikola Konjević; Milorad Lazić; Mirko Marunić; Nikola Vujnović)	1 (Sinan Morina)
Number of victims	70	1	1	8
Hierarchy level of defendants	Mid military rank (Dimitrijević), low military/police rank (all others)	Low military rank	Low military rank	Low military rank
Indictment filed	28/11/2007	31/03/2014	06/10/2009	13/07/2005
Stage of the proceeding	Retrial ongoing	Trial ongoing	Final	Retrial
Duration of the proceeding since start of first trial	6 years and 8 months	8 months	2 years	7 years and 2 months
Number of witnesses heard at trial	194	2	14	29
First instance judgement date and outcome	<b>26 June 2012</b> Ljuban Devetak: 20 years; Petronije Stevanović: 14 years; Milan Radojčić: 13 years; Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević: 10 years; Zoran Kosijer: 9 years; Jovan Dimitrijević, Saša Stojanović: 8 years; Dragan Bačić, Aleksandar Nikolaidis: 6 years; Darko Perić, Radovan Vlajković: 5 years; Radisav Josipović: 4 years	/	<b>23 June 2010</b> Nikola Konjević, Milorad Lazić: 3 years Mirko Marunić: 2 years Perica Đaković: acquittal Nikola Vujnović: indictment withdrawn	<b>20 December 2007</b> Acquittal
Appeals decision date and outcome	<b>9 December 2013</b> Annulled and retrial	/	<b>19 January 2011</b> Nikola Konjević, Milorad Lazić, Mirko Marunić: confirmed Perica Đaković: annulled and retrial	<b>25 August 2009</b> Annulled and retrial

Case name	“Lovas”	“Luka camp”	“Medak”	“Orahovac Group”
Retrial judgement date and outcome	/	/	<b>1 July 2011</b> Perica Đaković: acquittal	/
Second appeal date and outcome	/	/	<b>11 January 2012</b> Perica Đaković: 1 year 26 October 2012* Perica Đaković: acquittal	/
Factual background	The indictment alleges that on 10 October 1991 Yugoslav People’s Army (JNA) troops commanded by defendant Željko Krnjajić launched an attack on the village of Lovas (Croatia) and killed 20 Croatian civilians. Subsequently, at the orders of heads of the provisional government Ljuban Devetak, Milan Radojčić and Milan Devčić, several defendants in the case committed a series of crimes against Croatian civilians (including using them as human shields and forcing them to walk into a mine field).	The indictment alleges that the defendant, in his capacity as a member of Army of Republika Srpska (VRS), served as a guard at a detention camp known as “Luka”, located in Brčko (BiH) and that on 10 May 1992 he tortured a Bosniak civilian prisoner detained in the camp, by inflicting on him severe psychological harassment and repeated beatings.	The court established that between 3 and 8 September 1991 Milorad Lazić, Mirko Marunić and Nikola Konjević, in their capacity as members of Territorial Defence and reserve police forces in Gospić municipality (Croatia), tortured and ill-treated a member of the Croatian police who had laid down his weapons. * The defendant Perica Đaković was found guilty for the first time on appeal and had therefore the right to lodge an additional appeal (see Article 463 of the CPC)	The indictment alleges that in July 1998, Sinan Morina, as a member of the Kosovo Liberation Army – unit commanded by Haljit Duljaku, together with 34 other members of the same unit, participated in the destruction of property and religious objects, expulsion, illegal detention, torture, violation of bodily integrity, rape and murder of 8 Serb civilians in Orahovac municipality (Kosovo).
Procedural notes	/	/	The defendants were tried and convicted <i>in absentia</i> in Croatia and sentenced to prison sentences ranging from 6 to 8 years. Subsequently, the State Attorney’s Office of the Republic of Croatia transferred the evidence in the case to the WCPO.	The retrial has not commenced due to unavailability of the defendant to the Serbian authorities.

Case name	<b>“Ovčara I”</b>
Case number	KŽ1 Po2 1/10
Number of defendants	18
Number of victims	200
Hierarchy level of defendants	Mid military rank (Vujović), low military rank (all others)
Indictment filed	04/12/2003, 25/04/2004, 13/04/2005, 08/04/2008
Stage of the proceeding	New appellate proceedings
Duration of the proceeding since start of first trial	10 years and 10 months
Number of witnesses heard at trial	122
First instance judgement date and outcome	<b>12 December 2005</b> Miroљub Vujović, Stanko Vujanović, Ivan Atanasijević, Milan Lančuzanin, Predrag Milojević, Đorđe Šošić, Miroslav Đanković and Predrag Dragović: 20 years Jovica Perić, Milan Vojnović and Vujo Zlatar: 15 years Predrag Madžarac: 12 years Nada Kalaba: 9 years Goran Mugoša: 5 years Marko Ljuboja, Slobodan Katić: acquittal
Appeals decision date and outcome	<b>14 December 2006</b> Annulled and retrial
Retrial judgement date and outcome	<b>12 March 2009</b> Miroљub Vujović, Stanko Vujanović, Ivan Atanasijević, Predrag Milojević, Đorđe Šošić, Miroslav Đanković, Saša Radak: 20 years Milan Vojnović: 15 years Jovica Perić: 13 years Nada Kalaba: 9 years Milan Lančuzanin: 6 years Goran Mugoša, Predrag Dragović: 5 years Predrag Madžarac, Marko Ljuboja, Vujo Zlatar, Slobodan Katić and Milorad Pejić: acquittal
Second appeal date and outcome	<b>14 September 2010 - NOT FINAL (see Procedural notes)</b> Miroљub Vujović, Stanko Vujanović, Jovica Perić, Predrag Madžarac, Milan Vojnović, Milan Lančuzanin, Marko Ljuboja, Predrag Milojević, Vujo Zlatar, Goran Mugoša, Đorđe Šošić, Miroslav Đanković, Slobodan Katić, Predrag Dragović, Saša Radak, Milorad Pejić: confirmed Ivan Atanasijević: 15 years Nada Kalaba: 11 years

Case name	<b>“Ovčara I”</b>
Factual background	<p>The defendants, Mirosljub Vujović and others, in their capacity as members of the Vukovar Territorial Defence and a volunteers unit Leva Supoderica are charged with committing a war crime against the prisoners of war on 20/21 November 1991, on the Ovčara farm, near Vukovar, Croatia. The indictment charges the defendants with murder, violating bodily integrity, inhumane treatment in a way which outrages personal dignity of prisoners of war, members of the Croatian armed forces who laid down their weapons and were taken from the Vukovar hospital on the morning of 20 November 1991. The prisoners were taken from the hospital by members of the JNA and later put under control of the members of Vukovar Territorial Defence and volunteers unit Leva Supoderica, who were beating the prisoners at a hangar in Ovčara and later took them divided in groups to a place called Grabovo, near Ovčara farm, where they were killed by firing squads. As a result, 200 people were killed and buried into a mass grave, including two women, one of which was visibly pregnant. 193 victims have been identified so far.</p>
Procedural notes	<p>Saša Radak, one of the defendants in the “Ovčara” case, filed a constitutional appeal against the appellate decision on 15 October 2010. Three years after receiving the constitutional appeal, the Constitutional Court issued a decision where it found that the Court of Appeals violated the fundamental right of the accused to an impartial court, as a part of the right to a fair trial. The Constitutional Court stated that the effects of its decision extend to other co-accused in the same case who suffered the same violation. Deciding on the appeal filed by Radak, the Constitutional Court ordered for the case to be remanded back to Court of Appeals for a new decision, but did not formally annul the Court of Appeals’ judgement. Even though the decision of the Constitutional Court applies to other co – defendants in the “Ovčara” case, as they were in the same legal situation as Radak, four other defendants in this case have filed a constitutional appeal on the same grounds. The defendants in the “Ovčara” case have recently filed request for protection of legality to be decided on by the Supreme Court of Cassation (SCC). On 19 June 2014, deciding on the ensuing defence request for protection of legality, the SCC returned the entire case to the Court of Appeals for a new adjudication of the case. On 1 December 2014, the Court of Appeals opened a new appellate procedure in the “Ovčara” case.</p>

Case name	“Ovčara II”	“Ovčara III”	“Ovčara IV”
Case number	K.V. 2/2005	KŽ1 Po2 /10	KŽ1 Po2 8/13
Number of defendants	1 (Milan Bulić)	1 (Damir Sireta)	1 (Petar Ćirić)
Number of victims	200	200	200
Hierarchy level of defendants	Low military rank	Low military rank	Low military rank
Indictment filed	24/5/2005	17/10/2008	18/6/2012
Stage of the proceeding	Final	Final	Final
Duration of the proceeding since start of first trial	2 years and 8 months	1 years and 6 months	2 years
Number of witnesses heard at trial	122	7	7
First instance judgement date and outcome	<b>30 January 2006</b> 8 years	<b>23 June 2009</b> 20 years	<b>1 July 2013</b> 20 years
Appeals decision date and outcome	<b>1 March 2007</b> 2 years	<b>24 June 2010</b> 15 years	<b>3 November 2014</b> 15 years
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/
Factual background	The court established that the defendant, in his capacity as a member of Vukovar Territorial Defence, took part in the ill-treatment and murder of around 200 Croatian prisoners of war in the Ovčara farm, near Vukovar (Croatia). See “Ovčara I” case synopsis.	The court established that the defendant, in his capacity as a member of Vukovar Territorial Defence, was a member of the firing squads who murdered around 200 Croatian prisoners of war in the Ovčara farm, near Vukovar (Croatia). See “Ovčara I” case synopsis.	The court established that the defendant, in his capacity as a member of Vukovar Territorial Defence, was a member of the firing squads who murdered around 200 Croatian prisoners of war in the Ovčara farm, near Vukovar (Croatia). See “Ovčara I” case synopsis.

Case name	“Ovčara II”	“Ovčara III”	“Ovčara IV”
Procedural notes	/	The defendant was tried <i>in absentia</i> by the Osijek court (Croatia) and sentenced to 12 years of imprisonment. Following an international arrest warrant, the defendant was subsequently arrested in Norway and extradited to Serbia.	/

Case name	“Podujevo II”	“Prijeđor”	“Prizren”	“Rastovac”
Case number	KŽ1 Po2 2/11 and KŽ1 Po2 3/10	KŽ1 Po2 1/12	KŽ1 Po2 7/13	KŽ1 Po2 10/11
Number of defendants	4 (Dragan Borojević, Željko Đukić, Dragan Medić, Miodrag Šolaja)	1 (Duško Kesar)	1 (Mark Kašnjeti)	1 (Veljko Marić)
Number of victims	19	3	2	1
Hierarchy level of defendants	Low military rank	Low police rank	Low military rank	Low military rank
Indictment filed	14/4/2008	11/12/2009	11/05/2012	12/08/2010
Stage of the proceeding	Final	Final	Appeal upon retrial	Final
Duration of the proceeding since start of first trial	1 years and 9 months; 2 years and 5 months for Željko Đukić	2 years and 9 months	2 years and 4 months	1 year and 5 months
Number of witnesses heard at trial	36	13	13	11
First instance judgement date and outcome	<b>18 June 2009</b> Željko Đukić, Dragan Medić, Dragan Borojević: 20 years Miodrag Šolaja: 15 years	<b>30 September 2010</b> Conviction: 15 years	<b>19 November 2012</b> Conviction: 2 years	<b>23 September 2011</b> Conviction: 12 years
Appeals decision date and outcome	<b>25 May 2010</b> Annulled and retrial for Željko Đukić, confirmed for all others	<b>28 February 2011</b> Annulled and retrial	<b>8 March 2013</b> Annulled and retrial	<b>5 March 2012</b> Confirmed
Retrial judgement date and outcome	<b>22 September 2010</b> Željko Đukić: 20 years	<b>28 November 2011</b> Conviction: 15 years	<b>21 June 2013</b> Conviction: 2 years	/
Second appeal date and outcome	<b>11 February 2011</b> Confirmed	<b>30 November 2012</b> Acquittal	/	/

Case name	“Podujevo II”	“Prijedor”	“Prizren”	“Rastovac”
Factual background	<p>The defendants, members of the paramilitary unit called the “Scorpions”, were found guilty of committing a war crime against civilians. Defendants shot and murdered 14 Albanian civilians and wounded five more, all women and children in Podujevo (Kosovo) on 28 March 1999.</p>	<p>The indictment charged the defendant of having participated, in March 1994, in the killing of three Bosniak Muslims in Prijedor, (BiH), in co-perpetration with three other suspects. More precisely the defendant, as a member of the Republic of Srpska Reserve Police units, threw a grenade inside the victims’ house and then entered the house and killed those who were still alive.</p>	<p>The indictment alleges that on 14 June 1999, in Prizren (Kosovo), the defendant, in his capacity as a member of the Kosovo Liberation Army (KLA), illegally detained two Serb civilians and hit one of them with the rifle’s gunstock. That same day, Kašnjeti and another KLA member released these two civilians, along with another Serb civilian who had been detained by KLA, and ordered them to go to Serbia.</p>	<p>The court established that on 31 October 1991 the defendant, in his capacity as a member of the Croatian armed forces, during the “ethnic cleansing” of the village of Rastovac (Croatia), murdered a Croatian civilian of Serbian ethnicity in his house.</p>
Procedural notes	/	<p>Three persons mentioned in the indictment as co-perpetrators of the crime were tried in BiH and sentenced to imprisonment terms ranging from 10 to 20 years. Since Duško Kesar had obtained citizenship of the Republic of Serbia and was inaccessible to the BiH judicial authorities, the latter provided the evidence in the case to the WCPO, which then investigated and indicted the case.</p>	/	/

Case name	“Sanski Most”	“Sanski Most – Kijevo”	“Šinik”	“Skočič”
Case number	K Po2 4/13	K Po2 7/14	K Po2 6/14	K Po2 11/2014
Number of defendants	1 (Miroslav Gvozden)	1 (Mitar Čanković)	1 (Goran Šinik)	8 (Zoran Alić, Damir Bogdanović, Sima Bogdanović, Dragana Đekić, Zoran Đurđević, Tomislav Gavrić, Đorđe Šević, Zoran Stojanović)
Number of victims	7	1	1	28
Hierarchy level of defendants	Low military rank	Low military rank	Low military rank	Low paramilitary rank
Indictment filed	02/04/2013	9/4/2014	08/04/2014	30/04/2010
Stage of the proceeding	Trial ongoing	Trial ongoing	Trial ongoing	Retrial ongoing
Duration of the proceeding since start of first trial	1 year and 7 months	7 months	7 months	4 years and 4 months
Number of witnesses heard at trial	9	None	None	41
First instance judgement date and outcome	/	/	/	<b>22 February 2013</b> Zoran Stojanović, Zoran Đurđević: 20 years Tomislav Gavrić, Zoran Alić: 10 years Đorđe Šević, Dragana Đekić: 5 years Damir Bogdanović: 2 years Sima Bogdanović died before the end of the trial
Appeals decision date and outcome	/	/	/	<b>14 May 2015</b> Annulled and retrial Zoran Stojanovic died before the end of the appeal proceedings

Case name	“Sanski Most”	“Sanski Most – Kijevo”	“Šinik“	“Skočić”
Retrial judgement date and outcome	/	/	/	/
Second appeal date and outcome	/	/	/	/
Factual background	<p>According to the indictment, on 5 December 1992 the defendant Miroslav Gvozden, together with four other members of the Army of Republika Srpska participated in the attack on the villages of Sasine and Tomašica, municipality Sanski Most (BiH). On this occasion six civilians were murdered and one was severely wounded.</p>	<p>The indictment alleges that on 19 September 1995 the defendant, in his capacity as a member of Army of Republika Srpska (VRS), participated in a VRS operation of arrest and detention of civilians from Kijevo (Sanski Most municipality, BiH). On this occasion, the defendant allegedly separated one civilian from the group, confiscated his personal belongings, and killed him with firearm shots.</p>	<p>The indictment alleges that the defendant, as a member of the Army of Republika Srpska (VRS), killed a Croatian civilian in Gradiška (BiH) on 2 September 1992. The defendant pulled the victim from the bus, and together with two other men drove him to a nearby village. After the two latter men returned to Gradiška, the defendant allegedly killed the civilian. There are no eye witnesses to the event.</p>	<p>The indictment alleges that all defendants belonged to a paramilitary formation known as “Sima’s Chetniks” which had strong ties with the Bosnian Serb Army, and was composed entirely of ethnic Serbs from Serbia and BiH. On 12 July 1992 some of the defendants alongside other unit members entered the village of Skočić (Zvornik, BiH), destroyed the local mosque and executed 27 Roma Muslim civilians, mostly women and children (one child survived the execution). Some of the defendants subsequently held three young Roma women captive and subjected them to rapes and other inhumane treatment for the subsequent seven months.</p>
Procedural notes	<p>The Cantonal Court in Bihać (BiH) transferred the case to the WCPO.</p>	/	<p>The District court of Banja Luka (BiH) transferred the case to the WCPO.</p>	/

Case name	“Scorpions I”	“Slunj”	“Sotin”	“Sremska Mitrovica”
Case number	KŽ1 r.z. 2/07	KŽ1 r.z. 2/08	K Po2 2/14	K Po2 2/13
Number of defendants	5 (Aleksandar Medić, Branislav Medić, Slobodan Medić, Pera Petrašević, Aleksandar Vukov)	1 (Zdravko Pašić)	5 (Dragan Lončar, Miroslav Malinković, Žarko Milošević, Dragan Mitrović, Mirko Opačić)	1 (Marko Crevar)
Number of victims	6	1	16	2
Hierarchy level of defendants	Low military rank	Low military rank	Low military rank	Low police rank
Indictment filed	07/10/2005	07/11/2007	21/12/2013	5/03/2013
Stage of the proceeding	Final	Final	Trial ongoing	Trial ongoing
Duration of the proceeding since start of first trial	Aleksandar Medić: 3 years and 10 months All other defendants: 2 years and 6 months	1 year	4 months	3 months
Number of witnesses heard at trial	35	11	None	None
First instance judgement date and outcome	<b>5 April 2007</b> Slobodan Medić, Branislav Medić: 20 years Pera Petrašević: 13 years Aleksandar Medić: 5 years Aleksandar Vukov: acquittal	<b>8 July 2008</b> Conviction: 8 years	/	/
Appeals decision date and outcome	<b>13 June 2008</b> Slobodan Medić, Pera Petrašević, Aleksandar Vukov: confirmed Branislav Medić: 15 years Aleksandar Medić: annulled and retrial	<b>19 February 2009</b> Sentence modified: 10 years	/	/
Retrial judgement date and outcome	<b>28 January 2009</b> Aleksandar Medić: 5 years	/	/	/

Case name	“Scorpions I”	“Slunj”	“Sotin”	“Sremska Mitrovica”
Second appeal date and outcome	<b>23 November 2009</b> Confirmed	/	/	/
Factual background	The court established that the defendants, in their capacity as members of the paramilitary unit known as “Scorpions”, in co-perpetration with other unidentified members of the same unit, executed six Bosnian Muslim civilians near Tmovo (BiH), in July 1995. The key evidence in the case was a video footage of the executions filmed by one of the members of the “Scorpions.”	The court established that the defendant, in his capacity as member of the armed forces of the Republic of Srpska Krajina, and in co-perpetration with another fellow soldier, killed a Croatian civilian (a medical doctor) in the night between 22 and 23 December 1991 near Slunj (Croatia), by firing multiple firearm shots at him.	The indictment alleges that the defendants, former members of the territorial defence, local police in Sotin and the Yugoslav People’s Army (JNA), in the period from October until the end of December 1991 murdered 16 Croatian civilians in Sotin, near Vukovar (Croatia). The body remains of 13 victims were discovered in a mass grave near Sotin in April 2013.	The indictment alleges that on 27 February 1992 the defendant, in his capacity as member of the police of the Republic of Srpska Krajina, violated the bodily integrity and tortured two Croatian prisoners of war in a detention facility in Sremska Mitrovica in order to extort information and a confession from them.
Procedural notes	/	The county court in Karlovac (Croatia) tried Zdravko Pašić <i>in absentia</i> and sentenced him to 12 years of imprisonment. The same Court also convicted the other co-perpetrator of the murder (Milan Grubješić). As Pašić was not available to the Croatian authorities, the State’s Attorney’s Office of the Republic of Croatia transferred the evidence in the case to the WCPO.	The indictment in the case is largely based on the statements given by a cooperating defendant who concluded an agreement on testifying with the Prosecution in July 2013. The High Court accepted the agreement in full, including the proposed sentence of nine years of imprisonment. The defendant is still formally on trial together with the other accused.	/

Case name	“Stara Gradiška”	“Stari Majdan”	“Suva Reka”
Case number	KŽ1 Po2 10/2010	KŽ1 Po2 6/10	KŽ1 Po2 4/10
Number of defendants	1 (Milan Španović)	1 (Nenad Malić)	8 (Sladan Čukarić, Nenad Jovanović, Radoslav Mitrović, Milorad Nišavić, Ramiz Papić, Miroslav Petković, Zoran Petković, Radojko Repanović)
Number of victims	3	3	51
Hierarchy level of defendants	Low military rank	Low military rank	Mid police rank (Radojko Repanović and Radoslav Mitrović); low police rank (all others)
Indictment filed	07/11/2007	08/07/2010	25/04/2006
Stage of the proceeding	Final	Final	Final
Duration of the proceeding since start of first trial	1 year and 4 months	6 months	Radojko Repanović: 4 years and 8 months All other defendants: 4 years
Number of witnesses heard at trial	9	9	146
First instance judgement date and outcome	<b>25 June 2010</b> Conviction: 5 years	<b>7 December 2009</b> Conviction: 13 years	<b>23 April 2009</b> Sladan Čukarić, Radojko Repanović: 20 years Miroslav Petković: 15 years Milorad Nišavić: 13 years Radoslav Mitrović, Nenad Jovanović, Zoran Petković: acquittal Ramiz Papić: indictment withdrawn
Appeals decision date and outcome	<b>24 January 2011</b> Confirmed	<b>26 March 2010</b> Confirmed	<b>12 October 2010</b> Radojko Repanović: annulled and retrial Confirmed for all other defendants
Retrial judgement date and outcome	/	/	<b>15 December 2010</b> Radojko Repanović: 20 years
Second appeal date and outcome	/	/	<b>6 June 2011</b> Confirmed

Case name	“Stara Gradiška”	“Stari Majdan”	“Suva Reka”
Factual background	<p>The court established that on an unknown date between the first half of October 1991 and the end of January 1992, the defendant, in his capacity as a member of the territorial defence of the Republic of Srpska Krajina, ill-treated and tortured three Croatian civilians detained in the prison in Stara Gradiška (Croatia).</p>	<p>The court established that the defendant, in his capacity as a soldier of the Army of Republika Srpska, on 21 December 1992 murdered two Bosniak Muslim civilians in Stari Majdan, Sanski Most municipality (BiH). More precisely, the defendant took three civilians out of a bar, killed two on the spot and wounded the third, who managed to escape. The court also determined that the defendant was intoxicated when he committed the crime.</p>	<p>The court established that on 26 March 1999 Radojko Repanović, in his capacity as commander of police in Suva Reka, ordered an attack against civilian households in Suva Reka (Kosovo), which was carried out by Sladan Ćukarić, Miroslav Petković and Milorad Nišavić in co-perpetration with other police, territorial defence and State security forces. The attack resulted in the destruction of property, the forceful displacement of civilians, and the death of 51 Kosovo Albanian civilians, mostly belonging to the Beriša family. Radoslav Mitrović, commander of 37th detachment of the Special Police Units, and Nenad Jovanović, assistant police commander in Suva Reka, were acquitted of all charges. Police officers Ramiz Papić and Zoran Petković were also acquitted.</p>
Procedural notes	<p>The State Attorney's Office of the Republic of Croatia transferred evidence in the case to the WCPO.</p>	<p>The investigation in the case was initially conducted in front of the investigative judge of the Banja Luka military court and completed by the Cantonal Court in Bihać (BiH), where the defendant was later indicted. Due to the latter's unavailability to the BiH authorities, the Bihać court initiated the legal procedure for the transfer of the case to the WCPO.</p>	/

Case name	"Tenja I"	"Tenja II"	"Trnje"
Case number	KŽ1 Po2 3/11	K Po2 01/12	K Po2 10/13
Number of defendants	1 (Darko Radivoj)	2 (Žarko Čubrilo, Božo Vidaković)	2 (Pavle Gavrilović, Rajko Kozlina)
Number of victims	1	19	29
Hierarchy level of defendants	Low police rank	Low military rank	Mid military rank (Gavrilović) Low military rank (Kozlina)
Indictment filed	11/03/2010	22/06/2012	04/11/2013
Stage of the proceeding	Final	Trial ongoing	Trial ongoing
Duration of the proceeding since start of first trial	11 months	2 years and 2 months	8 months
Number of witnesses heard at trial	7	43	None
First instance judgement date and outcome	<b>17 November 2010</b> Conviction: 10 years	/	/
Appeals decision date and outcome	<b>11 April 2011</b> Conviction: 12 years	/	/
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/

Case name	“Tenja I”	“Tenja II”	“Trnje”
Factual background	<p>The court established that on 20 November 1991 the defendant, in his capacity as a Serbian police officer and in cooperation with another police officer, murdered a wounded Croatian prisoner of war near Tenja, Croatia. The two took the wounded victim out of an ambulance, put him on a vehicle, and then executed him along the road.</p>	<p>The indictment alleges that on 7 July 1991 the defendant Božo Vidaković, in his capacity as commander of the Fourth Company of the Territorial Defense forces in Tenja (Croatia), murdered a prisoner of war, member of the Croatian police, in Tenja. The indictment also alleges that he illegally detained seven Croatian civilians in July and August 1991, whom he subsequently handed over to unidentified persons who murdered them. The indictment further alleges that Žarko Čubrilo, in his capacity as a member of the Territorial Defense forces in Tenja, first illegally detained eleven Croatian civilians in an improvised facility in Tenja and then in mid-July, with the assistance of two other Territorial Defense members, took them to a location near Tenja and murdered them.</p>	<p>The indictment alleges that the defendants, in their capacity as members of the Yugoslav Army (VJ), on 25 March 1999 participated in an attack on the village of Trnje, municipality of Suva Reka (Kosovo). The order to attack the village was allegedly issued by Gavrilović, at the time commander of the Logistics Battalion of the 549th Motorized Brigade of the Yugoslav Army, who assembled his subordinate commanders, including Kozlina, and gave them instructions to kill civilians saying “There must be no survivors.” Kozlina and other commanders organized their troops and then launched an attack on the village, which resulted in the killing of at least 27 Kosovo Albanian civilians and the wounding of two more.</p>
Procedural notes	<p>The State’s Attorney’s Office of the Republic of Croatia transferred the evidence in the case to the WCPO.</p>	<p>Proceedings against Božo Vidaković were severed on 17 April 2014 as the defendant failed to appear in court on several occasions because of medical reasons. The State’s Attorney’s Office of the Republic of Croatia transferred the evidence in the case to the WCPO.</p>	<p>This is the first WCPO indictment against members of the Serbian Army currently in office. Gavrilović went into retirement after the start of the trial. In 2008, Gavrilović was called by the defence to testify about the events in Trnje at the ICTY trial against Milan Milutinović and others. Two other former members of Gavrilović’s unit testified regarding the same events as prosecution witnesses in the “Milutinović” and “Milošević” cases as protected witnesses.</p>

Case name	“Tuzla convoy”	“Velika Peratovica”	“Vukovar”
Case number	KŽ1 Po2 5/14	KŽ1 rz 2/09	KŽ1 Po2 1/11
Number of defendants	1 (Ilija Jurišić)	1 (Boro Trbojević)	1 (Stanko Vujanović)
Number of victims	101	13	5
Hierarchy level of defendants	Mid police rank	Low paramilitary rank	Low military rank
Indictment filed	09/11/2007	21/05/2008	31/03/2010
Stage of the proceeding	Appeal upon retrial	Final	Final
Duration of the proceeding since start of first trial	6 years and 10 months	1 year and 9 months	10 months
Number of witnesses heard at trial	110	26	4
First instance judgement date and outcome	<b>28 September 2009</b> 12 years	<b>27 May 2009</b> 10 years	<b>1 November 2010</b> 9 years
Appeals decision date and outcome	<b>11 October 2010</b> Annulled and retrial	<b>4 December 2009</b> Confirmed	<b>19 March 2011</b> Confirmed
Retrial judgement date and outcome	<b>02 December 2013</b> Conviction: 12 years	/	/
Second appeal date and outcome	/	/	/

Case name	“Tuzla convoy”	“Velika Peratovica”	“Vukovar”
Factual background	<p>The indictment relates to an attack carried out against Yugoslav People’s Army (JNA) forces which were retreating from the town of Tuzla (BiH) on 15 May 1992. It is alleged that there existed an agreement between BiH forces and the JNA to allow the latter to retreat peacefully from Tuzla in a convoy. Ilija Jurišić, as a member of the BiH forces, allegedly received an order from his superior officer to attack the JNA convoy and personally passed on the order over the radio. The attack resulted in the killing of 51 JNA members and the wounding of at least 50 more.</p>	<p>The Court established that between 13 August and 31 October 1991 the defendant, in his capacity as a member of a self-organized armed group known as “Bilogorski Detachment”, took part in the arrest and detention of eight Croatian civilians for the purpose of using them as hostages. The body of one of the detainees was later found in a mass grave and two of them were subsequently exchanged with Serbian prisoners detained by Croatian forces. The defendant was also found responsible for killing five Croatian civilians in an elementary school in Velika Peratovica, in the territory of the Grubišno Polje municipality (Croatia).</p>	<p>The court established that on 14 September 1991 Stanko Vujanović, a member of the Vukovar Territorial Defence, together with another soldier, entered the basement of a house in Vukovar (Croatia) where a number of Croatian civilians were hiding. The defendant took two men out of the basement and murdered them. Subsequently, the unidentified soldier who accompanied the defendant exploded a hand grenade in the basement, killing two women and inflicting severe bodily injuries to another civilian.</p>
Procedural notes	<p>This case was transferred to the WCPO in 2004 by the Office of the Military Prosecutor in Belgrade.</p>	<p>The defendant was tried <i>in absentia</i> by the Bjelovar County Court in Croatia in 1993, and sentenced to 20 years in prison. In 2007 the State’s Attorney’s Office of Croatia transferred the evidence in the case to the WCPO.</p>	<p>The defendant had been previously sentenced to 20 years in prison in the “Ovčara I” case (see related case synopsis). The court sentenced the defendant to a unified sentence of 20 years of imprisonment.</p>

Case name	“Zvornik I”	“Zvornik II”	“Zvornik III”
Case number	KŽ1 r.z. 3/08	KŽ1 Po2 6/11	KŽ1 Po2 2/12
Number of defendants	5 (Dragutin Dragičević, Siniša Filipović, Ivan Korać, Dragan Slavković, Duško Vučković)	2 (Branko Grujić, Branko Popović)	3 (Saša Čilerdžić, Darko Janković, Goran Savić)
Number of victims	182	182	14
Hierarchy level of defendants	Low military rank	Mid civilian rank (Branko Grujić) and mid military rank (Branko Popović)	Low military rank
Indictment filed	12/08/2005	12/08/2005	14/03/2008
Stage of the proceeding	Final	Final	Final
Duration of the proceeding since start of first trial	2 years and 6 months	5 years	3 years and 3 months
Number of witnesses heard at trial	160	226	38
First instance judgement date and outcome	<b>12 June 2008</b> Dragan Slavković: 15 years Ivan Korać: 5 years Siniša Filipović: 3 years Dragutin Dragičević: acquittal Duško Vučković died before the end of the trial	<b>22 November 2010</b> Branko Popović: 15 years Branko Grujić: 6 years	<b>16 December 2011</b> Darko Janković: 15 years Goran Savić: 1 year 6 months Saša Čilerdžić: acquittal
Appeals decision date and outcome	<b>4 September 2009</b> Dragan Slavković: 12 years Ivan Korać: 9 years Siniša Filipović, Dragutin Dragičević: confirmed	<b>3 October 2011</b> confirmed	<b>2 November 2012</b> Darko Janković: 20 years Goran Savić: 3 years Saša Čilerdžić: confirmed
Retrial judgement date and outcome	/	/	/
Second appeal date and outcome	/	/	/

Case name	“Zvornik I”	“Zvornik II”	“Zvornik III”
Factual background	<p>The court established that in June 1992 Dragan Slavković, Ivan Korać and Siniša Filipović, in their capacity as members of Territorial Defence in Zvornik (BiH), treated inhumanely a number of Bosniak civilians detained in the Čelopek Culture home near Zvornik. The court also found that Slavković and Korać tortured, violated bodily integrity and murdered some of the detainees. Additionally, between 5 and 12 May 1992, Slavković and Korać ill-treated and in some cases tortured Bosniak civilians detained in the “Ekonomija” farm and the “Ciglana” factory near Zvornik.</p>	<p>The court established that defendants Grujić and Popović took 874 Bosniak civilians hostage on two occasions in May and June 1992 in villages around the city of Zvornik and forcibly displaced Bosniak civilian population of the village Kozluk near Zvornik. Defendant Popović was also found guilty of inhumane treatment and deprivation of fair trial rights of Bosniak civilians detained in a prison in Zvornik, as well as aiding and abetting the murder of one civilian. The Court also convicted Popović, commander of Zvornik Territorial Defence, for aiding and abetting murder and violation of bodily integrity of Bosniak civilians which were committed by his subordinates, defendants in the Zvornik I case.</p>	<p>The court established that between May and July 1992, two of the defendants, in their capacity as members of a Serbian territorial defence unit, treated inhumanely, tortured and in some cases murdered a number of Bosniak civilians detained in the “Čelopek”, “Ekonomija” and “Ciglana” facilities (see “Zvornik I” case synopsis).</p>
Procedural notes	<p>The ICTY transferred a substantive amount of evidence in this case to the WCPO. Serbian authorities completed the investigation jointly with BiH through the creation of a joint investigation team.</p>	<p>The two defendants were indicted and tried in the Zvornik I case (see case synopsis). On 26 May 2008, shortly before the end of the trial, the panel upheld a prosecution’s motion to sever the proceedings against them in order to collect additional evidence regarding their superior responsibility in the crimes charged. Moreover, the prosecution amended the indictment to include an additional charge against the two defendants. The prosecution also sought (unsuccessfully) the extradition from Australia of former president of Zvornik municipality, Jovo Mijatović.</p>	/

