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MISSION IN KOSOVO**

Department of Human Rights and Communities

**KOSOVO'S WAR CRIMES TRIALS:
AN ASSESSMENT TEN YEARS ON
1999 – 2009**

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GLOSSARY

ABA/CEELI	American Bar Association Central and Eastern European Law Initiative
CIVPOL	Civil Police (UNMIK)
CDRC	Criminal Defence Resource Centre
DJA	Department of Judicial Administration
DOJ	Department of Justice (UNMIK)
ECHR	European Convention for the Protection of Human Rights and Fundamental Freedoms
ECtHR	European Court of Human Rights
EJS	Emergency Justice System
EULEX	European Union Rule of Law Mission in Kosovo
FRY	Federal Republic of Yugoslavia
FRY CPC	Federal Republic of Yugoslavia Criminal Procedure Code
ICTY	International Criminal Tribunal for the Former Yugoslavia
KFOR	Kosovo Force (NATO)
KJI	Kosovo Judicial Institute
KPS	Kosovo Police Service
KWECC	Kosovo War and Ethnic Crimes Court
LSMS	OSCE Mission in Kosovo Legal System Monitoring Section
NATO	North Atlantic Treaty Organization
ODIHR	Office for Democratic Institutions and Human Rights
OSCE	Organization for Security and Co-operation in Europe
PCCK	Provisional Criminal Code of Kosovo
PCPCK	Provisional Criminal Procedure Code of Kosovo
SPO	Special Prosecution Office

SFRY CC	Socialist Federal Republic of Yugoslavia Criminal Code
SRSR	Special Representative of the Secretary-General
UN	United Nations
UNMIK	United Nations Interim Administration Mission in Kosovo
WPU	Witness Protection Unit

EXECUTIVE SUMMARY

War crimes, by their nature, are difficult to address in any society in a post-conflict environment. Individuals have just come out of a period marked by violence during which many have been killed, including family members and friends; some have been left injured, physically and/or psychologically; houses and property have been destroyed; basic services have been disrupted; food is scarce; and many are angry and scared. In the midst of all of this is the problem of sorting out which acts that took place during the conflict were “illegal”, and which were “legal” parts of the armed conflict.

The purpose of this report is to review and assess how war crimes matters have been addressed in the criminal justice system in Kosovo during the past ten years, following the conflict of May 1998 - June 1999.¹ Furthermore, it assesses the needs that still exist and recommends ways the system can more effectively adjudicate war crimes cases. This report covers the period from June 1999 to December 2009 in Kosovo. During this time a number of actors have taken part in the criminal justice system, which is a unique and challenging environment for these issues to be addressed. Hence, in order to fairly assess the situation of how the system has handled war crimes cases, the many aspects of the system must be reviewed and considered. The United Nations Interim Administration Mission in Kosovo (UNMIK) was responsible for the administration of justice for the most of this timeframe.² In June 2008, the UN Secretary-General announced the reconfiguration of the structure and profile of the international civil presence in Kosovo.³ As such, the European Union Rule of Law Mission in Kosovo (EULEX) was to “assume responsibilities in the areas of policing, justice and customs, under the overall authority of the United Nations, under a United Nations umbrella headed by [. . .] [the Special Representative of the Secretary-General], and in accordance with resolution 1244 (1999).”⁴ Responsibility

¹ The OSCE’s previous analysis of war crimes reviewed cases involving acts that are alleged or proven to have occurred during this same timeframe. Prosecution for these offenses began on 5 November 1999, when the first indictment was issued. See page 9, OSCE report *Kosovo’s War Crimes Trials: A Review* (2002). Retrieved 23 April 2010. http://www.osce.org/documents/mik/2002/09/857_en.pdf

² United Nations Security Council Resolution 1244, S/RES/1244, 10 June 1999, paragraph 10 “[a]uthorizes the Secretary-General, with the assistance of relevant international organizations, to establish an international civil presence in Kosovo in order to provide an interim administration for Kosovo [. . .].” Retrieved 23 April 2010 from <http://www.un.org/Docs/scres/1999/sc99.htm> and then to Security Council Resolution 1244 (1999).

³ See *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2008/354, 12 June 2008, paragraphs 14-16. Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/sgrep08.htm> and then to the 12 June 2008 report.

⁴ See *Report of the Secretary-General of the United Nations Interim Administration Mission in Kosovo*, S/2008/692, 24 November 2008, paragraph 23. Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/sgrep08.htm> and then to the 24 November 2008 report. The Secretary-General further stated, at paragraph 24, in this report that: “Pursuant to an operational arrangement on access to and disclosure of materials concerning certain criminal investigations and related judicial proceedings, the UNMIK Department of Justice has established guidelines to facilitate access by EULEX prosecutors to the case files handled by international prosecutors and special prosecutors. Access to police material concerning certain criminal investigations is provided to the EULEX police component on the basis of a similar arrangement agreed upon in September.”

has been gradually handed over to local judicial institutions during this period, although not in war crimes matters.

To date, several individuals have been tried, or are still on trial, in the International Criminal Tribunal for the former Yugoslavia (ICTY), for acts which arose, at least partially, from the armed conflict in Kosovo. There were approximately 1,187 acts of suspected war crimes arising from the conflict which UNMIK identified and handed over to EULEX, and an additional 50 cases which were handed over having been referred for indictment.⁵ It should be noted that the Organization for Security and Co-operation in Europe Mission in Kosovo (OSCE) faced difficulties in obtaining reliable statistics of war crimes cases for this ten-year timeframe due to the number of different authorities and institutions engaged in this area, and due to the fact that there is no centralized database for such information.

The findings and concerns of this report can be summarized as follows: there has been a systemic failure to adjudicate war crimes cases. From the beginning, prioritizing war crimes cases has been frequently the focus of public discourse, but it has been a priority in name only. Sufficient resources have never been allocated to this goal. Nor were the decisions made to place war crimes above other priorities. While it is true that there have been many pressing needs in Kosovo from 1999 until now, the facts tell that addressing war crimes has never been chief among them.

As war crimes cases get older, they only become harder to try. Victims, witnesses, and evidence may all become less available or accessible over time. Similarly, the longer a case goes on, the fewer of the original investigators and prosecutors who worked on the case are likely to remain in Kosovo to assist with the proceedings.

In other cases, the accused have fled the jurisdiction and it is unlikely they will return. Handling these cases more expeditiously after the conflict would have helped prevent this problem. As it currently stands, due to the time that has elapsed and the volume of cases that remain, it will be extremely difficult to ensure that all parties concerned receive a fair and just adjudication of all the remaining cases. Furthermore, the high number of cases overturned and sentences changed as cases have been handled by successive actors may call the principle of the finality of judgments or *res judicata* into question. Insufficient regional co-operation in locating witnesses and the accused for trial have also been problematic.

There are a number of recommendations which, if followed, would aid completion of the remaining cases. First, the remaining war crimes cases should be given top priority by EULEX and the justice system in Kosovo. These cases will only become more difficult to try the further in time they are from the events in question. Adequate resources should therefore be allocated to this priority. Without them, the prioritization of war crimes cases will remain a reality only on paper. Second, adequate support and resources from both the Kosovo budget and international donors are needed for meaningful witness protection. Concerned entities should be willing to accept relocation of witnesses who are in danger. Local judges and prosecutors should

⁵ *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2009/149, 17 March 2009, paragraph 19. Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/sgrep09.htm> and then to the 17 March 2009 report.

continue to take part in these cases. As such, they also need protection. Third, judges, prosecutors, defence counsel and investigators still lack overall competence in this specialized area of law. Therefore, training and capacity building needs to be provided for individuals who deal with these cases. Finally, the formation of a specialized chamber or department for serious crimes such as war crimes should remain on the agenda through the passage of the draft law on courts, which includes provisions related to this matter.

War crimes cases are difficult to investigate, prosecute, defend and try. Concern for the political and security ramifications of these cases is also significant. While it is appreciated that these recommendations will not be easy to implement, decisions should be made to finally and fully investigate and try these matters to a just conclusion. All communities in Kosovo have been affected and none will be able to fully close this difficult chapter in their lives and move forward until the remaining war crimes cases have been properly dealt with by the justice system. This is one of the most critical tests any judicial system can face. It has been made even more difficult because of the legal and institutional complexities in Kosovo during this period. However, not to adequately address these matters will reflect poorly on the judicial system in Kosovo. Not to do so will be a grave breach of the trust that the justice system has been given, and it will negatively impact both the history and the future of all communities in Kosovo.

I. INTRODUCTION

When an individual is the victim of a criminal act, he or she feels violated and looks to the criminal justice system to bring justice to the situation, to somehow restore what was lost. When crimes occur on a large scale during an armed conflict, a society feels victimized and violated, individually and collectively, and seeks the same sense of restoration of the balance of justice. The society needs to know that the perpetrators did not act with impunity. This is a step necessary to bring about restoration within a society, and before reconciliation can truly begin.

Handling war crimes is one of the most critical tests of both the credibility and the competence of a justice system. This is partly due to the fact that war crimes, by their very nature, are complex and difficult to be fully addressed. Many factors contribute to this: overlapping investigations performed by multiple organizations, questions of which law is applicable, the intersection of international and domestic law, consideration of local norms and international legal standards, the need for competent and unbiased adjudicators, victim and witness protection and support, protection for members of the judiciary, difficulties in proving complex indictments, and the difficulty of linking the actors to those with command responsibility. Furthermore, the events in question occurred during an armed conflict, which has caused immeasurable upheaval and trauma.

The armed conflict in Kosovo began in 1998 and lasted through June 1999. The Military Technical Agreement between the International Security Forces (KFOR) and the Governments of the Federal Republic of Yugoslavia and the Republic of Serbia was signed on 9 June 1999. Subsequently, many cases of suspected war crimes have been investigated, mostly by international investigators with the ICTY, UNMIK

Civilian Police (CIVPOL), and more recently by EULEX investigators.⁶ The Kosovo Police Service (KPS) was just being created in late 1999 and did not take a leading role in war crimes investigations.⁷ To OSCE's knowledge, by the end of 2009, 37 individuals have been tried for war crimes allegations in Kosovo.⁸

There is a common perception within Kosovo society that the majority of persons suspected of committing war crimes during the conflict have not been held accountable. The feeling that individuals have acted with impunity is disturbing for many reasons, not the least of which is how this impacts the confidence of the population in the establishment of the rule of law in Kosovo. If the police and judicial institutions cannot address these most egregious of cases, then the competence and trustworthiness of the entire system is put in question.

By August 2009, EULEX was "investigating 50 active cases. A further 1,009 cases were inactive. Of these, 158 cases were dismissed for various reasons, such as lack of evidence. The injured parties [. . .] [were to be] informed about the dismissals in due course. In total, 851 of the inactive cases [. . .] [were] to be investigated."⁹ Since EULEX began its operations on 9 December 2008,¹⁰ four war crimes cases have been tried through the end of 2009.¹¹

This is a review and assessment of how the justice system, as a whole, has handled war crimes cases that arose out of the conflict in Kosovo of 1998-1999. The scope of this report covers the period beginning with the establishment of UNMIK in June 1999 through the end of 2009. It looks at what challenges have been faced, what mistakes were made, what needs exist in the justice sector, and offers recommendations on how to improve the system in order to accomplish the goal of bringing a just result to the remaining war crimes cases.

This report does not provide a full case-by-case analysis of all war crimes trials that have been presented to the courts. Rather, it draws on lessons learned from the experience of the justice system in Kosovo since 1999 to offer an overview of the legal, structural and organizational aspects of the justice system related to war crimes

⁶ To this regard, it was not possible for the OSCE to exactly identify how many incidents were investigated in total.

⁷ The Kosovo Police Service School began its first class in September 1999 and graduated the first class of cadets in October 1999. OSCE *Police and Education Development Fact Sheet* (March 2005). Retrieved 23 April 2010. http://www.osce.org/publications/mik/2005/04/14272_323_en.pdf. As the institution-building pillar of UNMIK, the OSCE was tasked with setting up a police school in Vushtrri/Vučitrn, site of the former police academy, and with providing the initial training for future members of the new Kosovo Police Service. By July 1999, the OSCE had "identified a site for establishing a police training academy and preparations to begin training police cadets [. . .] [were] under way." See paragraphs 33 and 79 of *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/1999/779, 12 July 1999. Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/reports/1999/sgrep99.htm> and then to the 12 July 1999 report.

⁸ Numbers gathered from both UNMIK and EULEX sources. This is not an official total.

⁹ *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2009/497, 30 September 2009, Annex I, part 2, "Police". Retrieved 23 April 2010 from <http://www.un.org/Docs/sc/sgrep09.htm> and then to the 30 September 2009 report.

¹⁰ EULEX Justice Component Press Conference fact sheet, 3 June 2009.

¹¹ According to information obtained by OSCE monitors from publicly available case files.

and to identify specific areas of improvement in order to facilitate the efficient processing of the remaining war crimes matters, or at least a critical mass of them.

The OSCE has monitored war crimes cases which arose from the conflict since the courts began hearing them in 1999. Since then, it has periodically published its findings in various public and semi-public reports.¹² During the past decade the OSCE has identified a number of problematic issues related to the system's handling of these cases and highlighted them in various reports. The problems and corresponding recommendations that are still relevant have been included in this report, as the OSCE considers that they still need to be addressed in order to better attend to these critical matters.

War Crimes Definition

Illegal acts which occur during an armed conflict are defined differently in different national or international jurisdictions. However, such acts essentially comprise violations of the Geneva Conventions, their Protocols, or of the laws and customs of war in terms of violations of international humanitarian law, war crimes, crimes against humanity and genocide. In the Socialist Federal Republic of Yugoslavia Criminal Code (SFRY CC)¹³ such crimes were defined according to the Geneva Conventions, as Yugoslavia was a signatory.¹⁴ For purposes of this report the term "war crimes" is used to encompass any and all such violations of international and domestic legal framework which may have occurred during and related to the conflict in Kosovo in 1998-1999. It is for ease of reference that this term is used in this general sense, and not in its more limited definition of one class of crime in this area of law.

Applicable Law

The applicable law in Kosovo in general has been a complex issue over the years.¹⁵ The following is a very brief overview of the law as it relates to war crimes committed in 1998-1999 in Kosovo. In its first year, UNMIK declared that the law in force in Kosovo on March 22, 1989 was the starting point for the applicable law in Kosovo.¹⁶ It would also include regulations promulgated by the Special Representative of the Secretary-General (SRSG) and subsidiary instruments issued thereunder. Therefore, the law relating to war crimes is a combination of both the

¹² See the OSCE report *Kosovo's War Crimes Trials: A Review* (2002). Retrieved 23 April 2010 from http://www.osce.org/documents/mik/2002/09/857_en.pdf

¹³ SFRY CC, Article 142.

¹⁴ See Socialist Federal Republic of Yugoslavia, Law of Ratification of the Geneva Protocols, *Medjunarodni Ugovori*, at 1083, 26 December 1978. This law incorporated the Geneva Conventions and their Protocols into the domestic law of the SFRY.

¹⁵ For a more detailed description see the OSCE *Kosovo's War Crimes Trials: A Review* (2002), Part III, pages 29-33. Retrieved 28 April 2010 from http://www.osce.org/documents/mik/2002/09/857_en.pdf

¹⁶ "If a court of competent jurisdiction or a body or person required to implement a provision of the law, determines that a subject matter or situation is not covered by the laws set out in section 1.1 of the present regulation but is covered by another law in force in Kosovo after 22 March 1989 which is not discriminatory and which complies with section 1.3 of the present regulation, the court, body or person shall, as an exception, apply that law." UNMIK Regulation 1999/24 *On the Law Applicable in Kosovo*, 12 December 1999, Article 1.2. amended by UNMIK Regulation 2000/59, 27 October 2000.

SFRY CC¹⁷ and the Provisional Criminal Code of Kosovo (PCCK) adopted in 2003.¹⁸ Determining which law applies in each situation in this network of laws has been difficult for local and international judges alike.

Within this setting is the challenge of determining how international law can be applied to war crimes cases tried in Kosovo. Customary international law has been accorded different weight by various Kosovo court decisions.¹⁹

Special international criminal tribunals formed over the years have yielded a wealth of jurisprudence in the field of international criminal law.²⁰ This wealth of experience and legal development can help courts in Kosovo deal with war crimes cases. However, to be useful, the relevant materials and records from these tribunals need to be fully translated into local languages so they can be understood and, where appropriate, applied.

II. REVIEW OF THE JUSTICE SYSTEM'S HANDLING OF WAR CRIMES CASES FROM 1999–2009

Development of the Justice System in Kosovo since 1999

In order to assess how war crimes cases have been handled in Kosovo one must consider the development of the justice system itself over this past decade. The brief description which follows establishes the context within which war crimes cases have been dealt with up until present in Kosovo.²¹

Police and justice were a key component of UNMIK when it was established by the United Nations (UN) in 1999. Immediately following the conflict, there were no official authorities operating in Kosovo outside of NATO (KFOR), so UNMIK CIVPOL was quickly established to meet the need for civilian policing. CIVPOL came from many different UN member countries. The KPS began operations in 1999.²² However, KPS officers were not involved in the investigation of war crimes cases. The Emergency Justice System (EJS) began operation in late 1999 and continued through 2000. The EJS was composed of local judges and prosecutors, most of whom had worked as such under the old Yugoslav system. Most of them had not worked since the end of the 1980's as a result of events which transpired during the Milošević regime.

¹⁷ No crimes against humanity were listed in the Geneva Conventions. Therefore crimes against humanity were not included in the law of SFRY, applicable in Kosovo during the time of the conflict.

¹⁸ UNMIK Regulation 2003/25 *On the Provisional Criminal Code of Kosovo* (PCCK), 6 July 2003, with subsequent amendments. The PCCK is applicable, although enacted after the events of the conflict, where its provisions are more favourable to the defendant, such as in potential punishment.

¹⁹ For more on this issue see the *Public Prosecutor v. Latif Gashi, Rrustem Mustafa, Naim Kadriu and Nazif Mehmeti*, Prishtinë/Priština district court, 16 July 2003.

²⁰ Report on *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*, Office for Democratic Institutions and Human Rights (ODIHR), September 2009.

²¹ For more detailed information see the OSCE, *Kosovo's War Crimes Trials: A Review* (2002). Retrieved 28 April 2010 from http://www.osce.org/documents/mik/2002/09/857_en.pdf

²² The first class of the Kosovo Police Service School graduated in November 1999.

With respect to war crimes cases, there were concerns of ethnic bias on the part of the local judiciary and prosecution during the phase of the EJS.²³ Additionally, in response to public unrest and violence in Mitrovicë/Mitrovica in February 2000, the SRSG passed UNMIK Regulation 2000/6, providing for the appointment of an international judge and an international prosecutor to Mitrovicë/Mitrovica.²⁴ On 29 May 2000, following pressure from hunger strikers in Mitrovicë/Mitrovica, the majority of whom were Kosovo Serb detainees being investigated or awaiting trials for war crimes, the SRSG passed UNMIK Regulation 2000/34 extending the power to appoint international judges and prosecutors to the whole territory of Kosovo.²⁵ Since that time, international judges and prosecutors have worked throughout Kosovo on many different kinds of cases, including war crimes.

Meanwhile, from 1999, the establishment the Kosovo War and Ethnic Crimes Court (KWECC), a special tribunal in Kosovo to address war crimes and other serious ethnically motivated crimes, was being considered.²⁶ The primary concerns were the need for competent judges, prosecutors and defence counsels, as well as potential ethnic bias and the need for security for those involved in such cases. It was thought that these issues could only be addressed through a special court. However, as plans grew, so did the budget. Budgetary constraints and the apparent success²⁷ of trying such cases in the local courts with the assistance of international judges and prosecutors contributed to the abandonment of the idea of establishing the KWECC.²⁸ Even though the KWECC did not materialize, the underlying needs for such a specialized court/chamber still exists. It should be understood that trials of this nature place a significant burden upon the capacity of the courts and require special logistical resources and expertise.

²³ OSCE *First Review of the Kosovo Criminal Justice System* (1 February 2000 – 31 July 2000), and the *Momcilović Case: Interim Report*.

²⁴ UNMIK Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and Prosecutors*, 15 February 2000.

²⁵ UNMIK Regulation 2000/34 *Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors*, 29 May 2000.

²⁶ In September 1999, the Technical Advisory Committee on Judiciary and Prosecution Service (the TAC) was established to advise the SRSG on the structure and administration of the judiciary and prosecution service in Kosovo. See UNMIK Regulation 1999/6 *On Recommendations for the Structure and Administration of the Judiciary and Prosecution Service*, promulgated 7 September 1999. As per this regulation, the TAC was composed of “ten local and five international members, chosen for their integrity, professional skills and experience.” See Section 2, *id*. In its final report, dated 13 December 1999, the TAC recommended, amongst other things, the establishment of an extraordinary domestic tribunal with jurisdiction over war crimes and other serious violations of international humanitarian law and serious ethnically motivated crimes. See the OSCE report *Kosovo: A Review of the Criminal Justice System, 1 February 2000 – 31 July 2000*, pages 75-76 for a further history of the idea of the KWECC.

²⁷ Success in that war crimes cases could actually be tried in a local court without serious breaches of security.

²⁸ The OSCE previously reported that “[t]he establishment of the KWECC was significantly delayed by, amongst other things, finding a suitable premises and raising a budget. [. . .] On 11 September 2000 the DOJ stated that the KWECC project would not be pursued and that efforts would be concentrated on providing international judges and prosecutors to the domestic courts.” See the OSCE report *Kosovo: A Review of the Criminal Justice System, 1 February 2000 – 31 July 2000*, page 76.

Defence Counsel in War Crimes Cases

While the merits of the KWECC were being discussed, it became apparent that support would also be needed for defence counsel representing those accused of war crimes.²⁹ In order to have true equality of arms, prosecution and defence counsel should be equally well equipped in order to provide competent representation of the accused.³⁰ Immediately following the conflict, local lawyers in Kosovo had no experience in defending war crimes allegations. International lawyers were not allowed to practice law in Kosovo without being a local resident and having passed the bar exam.³¹

Two concrete institutional steps were taken to provide support for those defence counsel representing individuals accused of war crimes. First, the Kosovo Chamber of Advocates, the local bar association, received funding and support from various donors to enhance its ability to provide support and networking for local lawyers. Second, the Criminal Defence Resource Centre (CDRC) was established in 2001³² The CDRC provided direct case assistance to lawyers representing those accused of war crimes, including bringing in lawyers from other jurisdictions who lent their expertise and assistance to local lawyers, while not directly representing defendants. They also provided training for lawyers in this area of law, in association with the Chamber of Advocates.³³

International Criminal Tribunal for the Former Yugoslavia

The ICTY is mandated to prosecute persons responsible for serious violations of international humanitarian law committed in the territory of the Former Yugoslavia since 1991³⁴. On 29 September 1999 the chief prosecutor for the ICTY outlined the

²⁹ Two different models were discussed, that of a public defender's office attached to the KWECC and that of a support office for defence counsel appointed by the court. The latter was chosen, partly due to the fact that a system of court-appointed counsel was already in place, partly due to questions regarding funding a public defender's office, and finally due to the demise of the KWECC.

³⁰ Article 6 (3) (c) ECHR, and Article 12 (2) of the Provisional Criminal Procedure Code of Kosovo, promulgated by UNMIK Regulation No. 2003/26, 6 July 2003, with subsequent amendments (PCPCK). See also *Neumeister v. Austria*, ECtHR Judgment, 27 June 1968, paragraph 22, which states that equality of arms is "included in the notion of fair trial (procès équitable) mentioned in Article 6 (1)." The principle of equality of arms "requires each party to be given a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage vis-à-vis his opponent." *Kress v. France*, ECtHR Judgment, 7 June 2001, paragraph 72.

³¹ See Articles 35-36, Law on Advocacy and Other Legal Assistance, No. 011-69/79 in Official Gazette of the Socialist Autonomous Province of Kosovo No. 79/48, of 24 December 1979. See also Article 6, Law on the Bar No. 03/L-117, Official Gazette of Kosovo No.49, 20 November 2008. As is provided in Article 39, paragraph 1.7 of the Law on the Bar, the Kosovo Chamber of Advocates, issued a "Regulation on Licensing the Foreign Advocates" on 9 September 2009.

³² The OSCE and the Kosovo Bar Association [Kosovo Chamber of Advocates] were the founding members of the CDRC. See Statute of the Criminal Defense Resource Center (16 March 2001), Article 1, paragraph 1.3.

³³ After its funding was exhausted, the CDRC was merged with the Chamber of Advocates, which has continued to occasionally offer trainings in war crimes for defence counsel, occasionally with other organizations. The CDRC currently functions with only one staff member. See the OSCE/ODHIR report *Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer, Final Report*, September 2009, page 86. Retrieved on 29 April 2010 from http://www.icty.org/x/file/About/Reports%20and%20Publications/report_supporting_transition_en.pdf

³⁴ See preambular paragraph and Article 1 of the Statute of the ICTY, adopted on 25 May 1993 by the UN Security Council Resolution 827, amended on 13 May 1998 by UN Security Council Resolution 1166, amended on 30 November 2000 by UN Security Council Resolution 1329.

role and responsibilities the ICTY would undertake with regard to the events in Kosovo.³⁵ The prosecutor also indicated that the tribunal's investigative resources would be applied, *inter alia*, to other "high level civilian, police and military leaders, of whichever party to the conflict who may be held responsible for crimes committed during the armed conflict in Kosovo."³⁶

As of the end of 2009, several individuals have been tried, or are still on trial, in the ICTY for acts which arose, at least partially, from the events in Kosovo: Milošević, Milutinović, Šainović, Ojdanić, Pavković, Lazarević, Lukić (Milutinović *et alia*); Limaj, Musliu, Bala (Limaj *et alia*); Haradinaj, Balaj, Brahimaj (Haradinaj *et alia*). The case against Milošević was discontinued due to his death during trial.³⁷ In the Milutinović *et alia* case, five out of six defendants were found guilty at the trial stage; only Milutinović was found not guilty.³⁸ The case against Šainović, Ojdanić, Pavković, Lazarević and Lukić is currently on appeal. In the Haradinaj *et alia* case Brahimaj was found guilty; Haradinaj and Balaj were found not guilty.³⁹ The cases against all three accused are currently pending before the Appeals Chamber. In the Limaj *et alia* case, Balaj was found guilty; Limaj and Musliu were found not guilty.⁴⁰ The case against Đorđević is currently ongoing.⁴¹ According to the ICTY Outreach

³⁵ See paragraph 4, statement by Carla Del Ponte, Chief Prosecutor of the International Criminal Tribunal for the Former Yugoslavia on the Investigation and Prosecution of Crimes Committed in Kosovo, The Hague, 29 September 1999, at <http://www.icty.org>.

³⁶ Beyond this, the prosecutor stated that investigations may, on a case by case basis, be conducted in relation to other individuals who may have committed "particularly serious crimes [including sexual violence] during the course of the armed conflict." See *id.*

³⁷ See United Nations International Criminal Tribunal for the Former Yugoslavia, Case No. IT-02-54-T, *Prosecutor v. Slobodan Milosevic*, 14 March 2006 Order Terminating the Proceedings. Retrieved 23 April 2010 from http://www.icty.org/x/cases/slobodan_milosevic/tord/en/060314.htm

³⁸ See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-05-87-T, *Prosecutor v Milutinović et alia*, 26 February 2009 judgment paragraphs 1206-1213. Retrieved on 23 April 2010 from <http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>

³⁹ See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-04-84-T, *Prosecutor v Haradinaj, Balaj, and Brahimaj*, 03 April 2008 judgment paragraphs 502-505. Retrieved on 23 April 2010 from <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>

⁴⁰ See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-03-66-T, *Prosecutor v Limaj, Balaj and Musliu*, 30 November 2005 judgment paragraphs 738-743. Retrieved on 23 April 2010 from <http://www.icty.org/x/cases/limaj/tjug/en/lim-tj051130-e.pdf>. For the appeal, see United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-03-66-A, *Prosecutor v Limaj, Bala, and Musliu*, 27 September 2007 judgment Part Seven, Disposition. Retrieved on 23 April 2010 from <http://www.icty.org/x/cases/limaj/acjug/en/Lima-Jug-070927.pdf>

⁴¹ See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-05-87/1, *Prosecutor v Dordevic*. Retrieved on 28 April 2010 from <http://www.icty.org/case/djordjevic/4#ind>

Office in Kosovo there are no additional cases that will be tried in the Tribunal arising from the Kosovo conflict, as the ICTY's conclusion is planned for the near future.⁴²

European Union Rule of Law Mission in Kosovo

EULEX officially began operations in Kosovo on 9 December 2008 and announced it was fully operational in April 2009. Its stated mission is to monitor, mentor and advise, retaining limited executive powers in the area of rule of law.⁴³ EULEX works under the general framework of United Nations Security Council Resolution 1244, primarily with justice, police and the customs service.

Part of EULEX's stated mandate is, *inter alia*, to "ensure that cases of war crimes [. . .] and other serious crimes are properly investigated, prosecuted, adjudicated and enforced, according to the applicable law, including, where appropriate, by international investigators, prosecutors and judges jointly with Kosovo investigators, prosecutors and judges or independently" and to take measure to ensure "as appropriate, the creation of cooperation and coordination structures between police and prosecution authorities."⁴⁴ There are more than 40 international judges currently working for EULEX;⁴⁵ however none of them is dedicated exclusively to hearing war crimes cases.⁴⁶ The panels convened for war crimes trials normally consist of two international judges and one local judge.⁴⁷ Prosecutors working on war crimes, described below, do not work with local prosecutors.

There are approximately 20 international prosecutors working for EULEX. However, there are only two full time prosecutors dedicated to war crimes,⁴⁸ who are part of the Special Prosecution Office.⁴⁹ In addition, these two prosecutors are supported by one

⁴² Estimates as of summer 2009 suggest that all but three of the ICTY's trials will conclude in 2010, two more in early 2011, and the final trial, that of Karadžić, in early 2012. Most appellate work is scheduled to be completed by the end of 2012, with a small number of cases running into the first half of 2013. See *Assessment and report of Judge Patrick Robinson, President of the International Criminal Tribunal for the Former Yugoslavia, provided to the Security Council pursuant to paragraph 6 of Council resolution 1534 (2004)*, covering the period from 15 May to 15 November 2009, S/2009/589/. Retrieved on 28 April 2010 from http://www.icty.org/x/file/About/Reports%20and%20Publications/CompletionStrategy/completion_strategy_13nov2009_en.pdf

⁴³ European Council Joint Action 2008/124/CFSP on the European Union Rule of Law Mission in Kosovo, EULEX Kosovo, 4 February 2008, Article 2.

⁴⁴ *Id.* at Article 3(d).

⁴⁵ EULEX Kosovo justice component. Retrieved on 28 April 2010 from <http://www.eulex-kosovo.eu/?id=10>

⁴⁶ According to information obtained by OSCE monitors.

⁴⁷ UNMIK Regulation 2003/26 *On the Provisional Criminal Procedure Code of Kosovo* and UNMIK Regulation 2000/64 *On the Assignment of International Judges/Prosecutors and/or Change of Venue*.

⁴⁸ Interview with EULEX official, 29 April 2010.

⁴⁹ The Special Prosecution Office (SPO) was established as a permanent and specialized prosecutorial office operating within the Office of the Kosovo Prosecutor in 2008. See Law No. 03/L-052 *On the Special Prosecution Office*, 13 March 2008, Official Gazette of Kosovo 27/2008. Article 5 of the law states that the SPO "[...] will have exclusive competence to investigate and prosecute the following crimes, also in the forms of attempt, and the various forms of collaboration to the crimes of: [...] genocide [...]; crimes Against Humanity [...]; war Crimes in Grave Breach of the Geneva Conventions [...]; War Crimes in Serious Violation of Laws and Customs Applicable in International Armed Conflict [...], War Crimes in Serious Violation of Article 3 Common to the Geneva Conventions [...], War Crimes in Serious Violation of Laws and Customs Applicable in Armed Conflict not of an International Character [...]; attacks in Armed Conflict not of an

legal officer, one local legal advisor and one administrative assistant. However, the support staff is also tasked with working on other types of cases. The War Crimes Investigation Unit has a staffing table of 35; however, it has yet to reach that target.

Through the end of 2009, EULEX prosecution has tried four war crimes cases, with a total of eight defendants being tried. Of these, seven defendants were convicted and one died during the proceedings.⁵⁰

Delays

One of the chronic problems with addressing war crimes cases in Kosovo has been that of delays in bringing these cases to full adjudication. Violations of both the legal framework in Kosovo and international human rights law may occur when criminal proceedings and trials last unreasonably long. Further, according to international human rights law, everyone arrested or detained is “entitled to trial within a reasonable time or to release pending trial.”⁵¹

Delays may occur at many stages of the proceedings, including: the police investigation stage, the prosecution investigation stage, the trial stage, and the appeal stage. Below is an analysis of the problems and irregularities which may and have occurred at each of these stages.

Delays in the police investigation stage

Some cases have taken years to be investigated and have either never reached the prosecutor’s office or only years after the alleged criminal acts took place. Most cases of suspected war crimes were originally investigated by CIVPOL officers and ICTY investigators. KPS officers were essentially not involved in investigation of war crimes cases in the early days after the conflict, other than occasionally assisting, such as interviewing a witness. While ICTY investigative personnel were fairly consistent, most CIVPOL officers rotated every six months to a year, usually with no handover between predecessor and successor.⁵² This rotation of international investigators in

International Character Against Installations containing dangerous forces [...]; conscription or Enlisting of Persons between the Age of Fifteen and Eighteen years in Armed Conflict [...]; employment of Prohibited means or methods of Warfare [...]; organization of Groups to Commit Genocide, Crimes Against Humanity and War Crimes [...], endangering Internationally Protected Persons [...]; unlawful Appropriation, use, transfer and disposal of nuclear material [...]; all crimes listed in Articles 141-155 of the CCFRY.” Furthermore, Article 5.2 of the law states that the SPO “will also have exclusive competence in the investigation and prosecution, in accordance with the applicable law in force prior to the entry into force of the PCCK, of the following crimes, also in the form of attempt, and of the various forms of collaboration to the crimes of: [...]; all crimes listed in Articles 141-155 of the CCFRY.”

⁵⁰ EULEX Kosovo justice component. Retrieved on 23 April 2010 from <http://www.eulex-kosovo.eu/?id=10&j=52>

⁵¹ Article 5(3) ECHR. Release may be conditioned by guarantees to appear for trial.

⁵² See *Management audit of United Nations Police Operations*, part of the *Review of the efficiency of the administrative and financial functioning of the United Nations*, Report of the Secretary-General on the activities of the Office of Internal Oversight Services. A/55/812, Fifty-fifth session of the United Nations General Assembly, Agenda items 116 and 126, 1 March 2001. Retrieved on 29 April 2010 from http://www.un.org/Depts/oios/reports/a55_812.pdf. Paragraph 63 states that “[t]he institutional memory of a mission’s civilian police component is lost each time key members rotate at the end of their assignments, as critical information regarding the complexity of a mission is

and out of Kosovo resulted in slow or non-existent completion of investigations. Many incoming officers were not experienced in war crimes investigations, while incoming officers assigned to investigate these cases did not necessarily receive specialized training in this area. Furthermore, adjusting to working in Kosovo and establishing networks constituted a time cost which was replicated with each new arrival. The rotation of international investigators also meant that these investigators were often no longer available in Kosovo to testify when needed in hearings.

Delays in the prosecution investigation stage

The OSCE has noted frequent delays between the filing of indictments by prosecutors and their confirmation by courts.⁵³ The legal framework in Kosovo foresees that the judge shall immediately schedule the confirmation hearing after he or she is satisfied that the indictment is drawn up correctly.⁵⁴ However, in many war crimes cases the indictments were filed with considerable delay by the prosecutor. This was primarily because files were received from the investigator long after the events in question, and many times the files were incomplete, necessitating further investigation by the prosecutor. Prosecutors in many cases had to reconfirm much of the evidence and/or review additional evidence where gaps existed. Further delays occurred when case files were transferred from local to UNMIK prosecutors,⁵⁵ or between international prosecutors. Translation of the case file when cases were handed over from local to international actors also took time, and loss or misplacement of records occurred during translation when some case files did not include an index of the documents contained therein. Additionally, when the investigative judge was removed from the court system⁵⁶ that work fell to the prosecutor. However, no additional prosecutors were assigned, so the same number of prosecutors had more work to do. Due to both of these factors, many war crimes indictments took months before finally being confirmed. For example:

War crimes related offences were committed by a Kosovo Albanian on 12 July 1998. However, the criminal denouncement was submitted in November 2006,

often not documented or handed over when there is a change in leadership. [...] The Civilian Police Unit does not gather any data on civilian police experiences nor suggestions for improvement. This results in considerable loss of institutional memory and in mission experiences not being recorded before the individual police officers return to their countries [...]" Paragraph 66 states that "[c]ivilian police tours of duty range from six months to one year, depending on the policy of the contributing country [...]"

⁵³ This is true for cases handled after the Provisional Criminal Code and Criminal Procedure Code of Kosovo (PCCK and PCCPK) were adopted in 2003. Prior to that time the procedure was different, as the investigative judge was responsible for approving or disapproving the indictment.

⁵⁴ See Article 309(1), PCPCK. In order for the judge to schedule the confirmation hearing, the indictment must be drawn up according to the requirements of Article 305.

⁵⁵ UNMIK Regulation 2000/64 *On Assignment of International Judges/Prosecutors and/or Change of Venue*, which came into effect on 15 December 2000, granted competent prosecutors, the accused, or defence counsel the right to petition the UNMIK Administrative Department of Justice (ADoJ) for assignment of international judges and prosecutors where "necessary to ensure the independence and impartiality of the judiciary or the proper administration of justice." In the absence of a petition, the ADoJ could also act by its own motion. Following a petition, the ADoJ was empowered to review a petition and make recommendations to the SRSG for final approval or rejection. Where a petition was approved, a panel could be convened consisting of an international prosecutor, an international investigating judge and/or panel composed of three judges, including at least two international judges.

⁵⁶ Due to the entry of the PCPCK into force in 2004.

i.e. eight years after the commission of alleged offences. The indictment was filed a year later, on 14 November 2007. The main trial started on 3 February 2009 and the judgement was announced on 3 March 2009.⁵⁷ The defendant was found guilty and sentenced to 17 years of imprisonment. From the commission of the acts in question to the judgement took almost eleven years.

In some other cases, pre-confirmation hearing investigations have been delayed because, even though the suspects entered the justice system, no adequate measures were applied to secure their presence during the proceedings. The following examples illustrate that concern:

In a war crimes case before the Prizren district court, a Kosovo Serb defendant was suspected of allegedly committing crimes against humanity⁵⁸ during 1998 and 1999 and threat⁵⁹ in August 2009. The defendant was assigned to detention on remand and the case was transferred from the Prizren Public Prosecutor's Office to the Special Public Prosecutor's Office in Prishtinë/Priština for further investigation. The measure of detention on remand was modified to reporting to the police station. However, once released from the detention on remand, the defendant escaped the jurisdiction and currently remains at large.⁶⁰

On 12 March 2008, an internally displaced Kosovo Serb was participating in a go and see visit⁶¹ in the village of Vitomicë/Vitimirica, Pejë/Peć municipality. On the same day the person was arrested by UNMIK War Crimes Unit on suspicion of commission of war crimes against a civilian population committed in May 1999. On 14 March 2008 an international public prosecutor took over the initiation of investigations and proposed detention on remand for the suspect. On 15 March 2008 an international pre-trial judge imposed house detention against the defendant, to take place in the house of a Kosovo Serb resident from village Brestovik, Pejë/Peć municipality.⁶² On 28 July 2008, the house detention measure was lifted and the suspect was obliged

⁵⁷ The *Public Prosecutor v. Gani Gashi*.

⁵⁸ Article 117(1)(1) and (4) of the PCCK. Allegedly, the defendant as member of the Yugoslav Army was involved in long systematic attacks toward civil population, participated in killings of unprotected Albanian population; in deportation and forced expulsion of population and burning of their houses in village Reti and Gornje Sellë/Gornje Selo, and also participated in the burning of the Prizren League building in Prizren.

⁵⁹ Article 161(1) PCCK.

⁶⁰ The *Public Prosecutor v. Goran Vucković* case.

⁶¹ According to the July 2006 *Revised Manual for Sustainable Return*, a go and see visit is "an IDP and refugee driven activity which should assist displaced men and women to make a free and informed decision on a preferred durable solution whether to return or integrate in the place of displacement and that is consistent with the overall context of promoting the creation of conditions conducive to voluntary return in safety and in dignity. The objectives of the go and see visits include the provision of the opportunity for the displaced persons to gather first-hand information on conditions in their place of origin and creation of the conditions for inter-ethnic dialogue to take place between IDPs, refugees and majority community." See *id.* at pages 32-34.

⁶² This measure is contrary to the terms of the law, which only foresees the imposition of the house detention measure in the permanent or current residence of the detainee or in a care institution or place where the detainee may receive public treatment, if need be. See Article 278(3) PCCK. Although the decision indicates the place where the defendant will be hosted, this place is still not his "permanent or current residence" as the law prescribes, but the domicile of a family, not related to the accused, who accepted to host the detainee.

to regularly report to the police station. Currently, there is an indictment pending confirmation against the suspect. The suspect breached the court's alternative measure, escaped the jurisdiction and currently remains at large.⁶³

Delays in the trial stage

Although some war crimes cases have gone to trial quickly once filed with the court, in most instances, they have remained on the docket for years and not been scheduled for trial. According to the law, the presiding judge shall schedule the main trial as soon as the indictment becomes final.⁶⁴ One of the reasons for delay in this kind of cases is that both witnesses and defendants (who were not in detention) regularly did not appear for trial. However, in practice, the only consequence of the non-attendance of a witness at trial has been to reschedule the hearing, even though the law permits the imposition of some sanctions. Ultimately, it is the responsibility of the presiding judge to ensure that the main trial is scheduled in a timely manner. Below is just one example of undue delay between finalization of the indictment and scheduling of the first trial session.

In one case a Kosovo Albanian defendant was charged with commission of the criminal offence of war crimes against a civilian population by committing, ordering, aiding, committing by omission, acting in complicity with others, and participating in a joint criminal design, for the purpose of committing war crimes.⁶⁵ The indictment became final on 8 April 2005, and the first session was scheduled on 29 September 2005. More than five months passed from the time the indictment became final to the first session.⁶⁶

Delays in the appeal stage

Once cases have been completed at the trial stage, they are frequently appealed to the Supreme Court. The OSCE has monitored many instances of delay in this stage of appellate proceedings. According to Article 408 of the PCPCK, the court of first instance shall serve a copy of the appeal to the opposing side⁶⁷ who may file a response to the appeal with the court within eight days of service. The court of first instance shall send the appeal, the response and the related files to the court of second instance. However, in many cases monitored, the prosecution did not abide by the eight-day timeframe for submission of the response. The presence at times of only one international prosecutor to answer all criminal appeals, not just appeals in war crimes cases, may have contributed to delays, and is another example of the failure to provide adequate resources. Additionally, on several occasions OSCE monitors observed that some submissions, namely prosecutors' opinions on appeal,⁶⁸ were delivered to the defence only minutes before the start of the hearing, depriving the defence of the

⁶³ The *Public Prosecutor v. Momčilo Jovanović* case.

⁶⁴ Article 319 (2) PCPCK.

⁶⁵ Article 142 FRY CC, as read with Articles 24, 30, 22 and 26 FRY CC.

⁶⁶ The *Public Prosecutor v. Selim Krasniqi et alia*.

⁶⁷ Articles 127 and 128 PCPCK.

⁶⁸ The *Public Prosecutor v. Momčilo Trajković* case, Supreme Court hearing 30 November 2000. The 50-page prosecutor's opinion was delivered to the defence few minutes before of the start of the hearing. The *Public Prosecutor v. Miroslav Vucković* case, Supreme Court hearing 31 August 2001. The 40-page prosecutor's opinion was delivered to the Serb defence counsel some minutes before the start of the hearing, in English only, not translated.

opportunity for sufficient time to fully prepare their case or reply to the points from the opinion on appeal.⁶⁹

In addition, there have been notable delays in the Supreme Court both in scheduling cases to be heard and then in rendering a decision. Once a decision was finally reached, there have been considerable delays in the issuance of the written verdict, which once again stalled the process. The Supreme Court has remanded many war crimes cases back to the lower courts for retrial, at which point the entire process starts over again.⁷⁰

The cases below serve as examples of the delays frequently observed at the appellate stage of war crimes cases.

On 30 September 2005 an investigation was initiated against a Kosovo Albanian, suspected for commission of the criminal offence of war crimes against a civilian population.⁷¹ The indictment against the defendant was rendered on 8 February 2007. A panel of international judges in the Pejë/Peć district court found the defendant guilty on 22 June 2007 and sentenced him to 15 years of imprisonment. The defence counsel filed an appeal of the verdict on 19 and 22 August 2007. The Kosovo Public Prosecutor's Office provided replies to these appeals after 17 months, namely on 16 January 2009. The Supreme Court, brought a decision to refer the case to the district court for retrial on 2 June 2009.⁷²

In another war crimes case, a Kosovo Albanian defendant was charged with commission of the criminal offence of war crimes against a civilian population, committed on 12 July 1998. The criminal report was filed, eight years after, in November 2006, and the indictment was rendered on 14 November 2007. The main trial started on 3 February 2009, and the verdict was announced on 3 March 2009. The defendant was found guilty and sentenced to 17 years of imprisonment. Within a legally prescribed timeframe, defence counsel of the accused filed appeals with the Supreme Court on 28 April 2009 and 7 May 2009, against the first instance court (Prishtinë/Priština district court) decision. The reply of EULEX Public Prosecutor was filed on 02 November 2009, six months after the defence appeals were filed. The Supreme Court confirmed the first instance verdict and reduced the sentence to 15 years of imprisonment.⁷³

The above instances point out why so many cases have taken years to work through the various stages of the process. This delay amounts to a violation of the right of the

⁶⁹ Articles 6 (1) and 6 (3) (a) (b); Article 15 PCPCK. The right to an adversarial trial “means in principle the opportunity for the parties [. . .] to have knowledge of and comment on all evidence adduced or observations filed [. . .] with a view to influencing the court’s decision.” *Vermeulen v. Belgium*, ECtHR judgment, 20 February 1996, paragraph 33. Furthermore, “prosecution authorities should disclose to the defence all material evidence in their possession for or against the accused.” *Edwards and Lewis v. the United Kingdom*, ECtHR Judgment , 27 October 2004, paragraph 46.

⁷⁰ The right to a final judgment, which may be called into question by these retrials, is discussed in Chapter II of this report.

⁷¹ Article 142 FRY CC.

⁷² The *Public Prosecutor v. Idriz Gashi*.

⁷³ The *Public Prosecutor v. Gani Gashi*.

defendant to have her/his case heard within a reasonable timeframe.⁷⁴ Because in many war crimes cases the defendant is being held in detention, these cases should be processed in as expeditious manner as possible.⁷⁵ But the record shows that they have not.⁷⁶ Proper prioritization of war crimes cases is all the more critical if competing against a backlog of day to day cases. As cases which address incidents that had the greatest impact on the population, war crimes cases should have priority.

A final example of how slowly cases are moving through the justice system is the case of the *Public Prosecutor vs. Latif Gashi, et alia*.⁷⁷ In this matter an indictment was filed on 19 November 2002, alleging crimes occurring in 1998 and 1999. The main trial began on 20 February 2003 and the verdict was announced on 16 July 2003, while the written verdict was not issued until 11 November 2003. However, Article 356 (1) of the FRY CPC states that “in complicated cases and as an exception” the general rule of presenting the written verdict after 8 days of its announcement can be postponed until 15 days. The FRY CPC gives wide discretionary power to the president of the court when it states that “the president of the court shall take all the necessary steps to have the verdict prepared in writing as soon as possible.” In this particular case, it took almost five months to deliver the written verdict. Afterwards, appeals were filed with the Supreme Court, which on 25 July 2005 struck down several counts of the indictment and remanded the case for retrial. The retrial did not start until 7 July 2009. On 2 October 2009, the trial panel announced the verdict of guilty for all defendants in this case. The written verdict is still pending. According to Article 356(1) FRY CPC, the exceptional extension of deadline for 15 days has already been breached. Counsel for the defendants have already indicated their intention to appeal, therefore this case, which has lasted for seven years so far, will very likely continue longer.

Lack of continuity in judicial personnel

An additional problem that has been noted in the current arrangement is the aspect of international judges and prosecutors leaving Kosovo during the adjudication of a case. This is due to the relatively short-term contracts and secondments of international judges and prosecutors working in Kosovo. Many of these judges and prosecutors retain positions in their home jurisdictions and can only stay in Kosovo for a set period, sometimes no more than one or two years. However, trials can take years, and as described above, cases can take many years before they are finally completed. When judges leave the jurisdiction before a trial is fully completed, and therefore the

⁷⁴ Article 5(3) ECHR and Article 14(2) PCPCK.

⁷⁵ The ECtHR has repeatedly stated that the right to liberty, along with the right to life, freedom from torture and ill-treatment, and freedom of movement, is “in the first rank of the fundamental rights that protect the physical security of an individual [...] and as such its importance is paramount.” See, *inter alia*, *Musuc v. Moldova*, ECtHR Judgment, 6 November 2007, paragraph 37.

⁷⁶ The OSCE has previously expressed concern that inadequate application of the Kosovo legal framework and international human rights standards results in frequent violations of defendants’ right to liberty in criminal cases. See, *inter alia*, the OSCE 2009 report on *The Use of Detention in Criminal Proceedings in Kosovo: Comprehensive Review and Analysis of Residual Concerns, Part I*.

⁷⁷ *The Public Prosecutor v. Latif Gashi, Rrustem Mustafa, Naim Kadriu and Nazif Mehmeti*.

trial panel is not of the same composition as it was in the first trial, the main trial must start from the beginning, which may include re-administration of evidence.⁷⁸

III. FINDINGS AND CONCERNS

A review of war crimes cases in Kosovo reveals several concerns. During the reporting period, there has been a lack of prioritization of war crimes cases within the judicial system. Adequate resources have never been fully allocated to investigating, prosecuting and hearing war crimes cases in Kosovo. Throughout the former Yugoslavia, as well as in other conflict zones around the world, war crimes cases have always proven to be difficult cases to fully investigate and try. Consequently, the need for allocation of sufficient resources for this purpose in Kosovo after the conflict was foreseeable. However, there has also been a regular routine throughout the last decade of allowing day to day cases take precedence over the longer-term job of tackling war crimes cases.

These cases only become more difficult to resolve the further in time they are from the events in question. Some victims and witnesses have passed away, some have moved from Kosovo and others' memories have faded over time. Evidence has been misplaced or destroyed, partly by the many handovers from various generations of actors involved in these cases. Most investigators, the vast majority of which were international, have long since left the jurisdiction and are not able to attend the trial in order to prove up evidence and as well as to testify to their own role in the investigation.

Allowing more and more time to pass following a conflict only harms the effort to address war crimes cases. In Kosovo, there have been cases where witnesses have been murdered, moved away, recanted their previous testimony or simply refused to testify altogether.⁷⁹

In many cases the accused have fled the jurisdiction and it is highly unlikely they will return. Since trials *in absentia* are not allowed in war crimes cases in Kosovo,⁸⁰ the cases are suspended indefinitely. If these cases would have been handled immediately after the conflict, many of the above-mentioned problems would have been alleviated, including securing the accused persons' presence at trial. As it currently stands, it will be extremely difficult to adjudicate all the remaining cases.

⁷⁸ See Article 345 (1) and 345 (3) PCPCK: "(1) When the composition of the trial panel has changed, the adjourned main trial shall start from the beginning. However, after hearing the parties, the trial panel may in this case decide not to examine the witnesses and expert witnesses again and not to conduct a new site inspection, but rather to read the testimony of the witnesses and the expert witnesses given at the previous main trial or the record of the site inspection. [. . .] (3) If the main trial has been adjourned for more than three months or if it is held before a new presiding judge, the main trial shall recommence from the beginning and all the evidence shall be examined again."

⁷⁹ For instance, testimony given to investigators and/or in a previous court proceeding. See a discussion and specific examples of this monitored by the OSCE in *Kosovo's War Crimes Trials: A Review*. Retrieved 23 April 2010. http://www.osce.org/documents/mik/2002/09/857_en.pdf

⁸⁰ UNMIK Regulation 2001/1 *On the Prohibition of Trials in Absentia for Serious Violations of International Humanitarian Law*, promulgated on 12 January 2001.

Insufficient regional co-operation has also hampered the process of trying war crimes cases. It is possible that some persons accused of war crimes have fled Kosovo and can be tried in another jurisdiction. However, in order to broaden this process and try the suspects who have fled Kosovo, prosecutors and investigators outside of Kosovo would need access to witnesses and evidence in Kosovo. That would require official co-operation between officials inside and outside Kosovo, which does not currently exist.⁸¹ Cross-jurisdictional co-operation is needed throughout the region on issues such as locating the accused and witnesses for trial.

Finality of judgments

Another issue that arose during this assessment is that of finality of judgments. According to the principle of *res judicata*, as articulated by the jurisprudence of the ECtHR, “where the courts have finally determined an issue, their ruling should not be called into question.”⁸² In the early days after the conflict a number of judgments were issued by judicial panels, established according to UNMIK Regulations.⁸³ This included one international judge, while the majority of the panel still consisted of local judges, usually with a composition of two local professional judges, two local lay judges and one international judge. Later, after UNMIK Regulation 2001/64 was promulgated⁸⁴, the composition of the panels was changed so that a majority of the panel members would be international judges. The Supreme Court of Kosovo overturned most of the previously-tried cases and sent them back for retrial. The so called “64 panels”⁸⁵ hearing the retrials, for the most part, issued different verdicts. The Supreme Court has overturned a second round of war crimes cases, sending them back for yet another retrial by panels composed of a majority of EULEX judges.

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

In a case before the Mitrovicë/Mitrovica district court, a Kosovo Serb defendant was charged with commission of the criminal offence of genocide.⁸⁶ On 18 January 2001, the Mitrovicë/Mitrovica district court sentenced him to 14 years imprisonment. Deciding on appeal, the Supreme Court of Kosovo, sent the case back to the first instance court for retrial on 31 August 2001. The Mitrovicë/Mitrovica district court with a composition of only international

⁸¹ The Humanitarian Law Centre has assisted in this process for years in such things as providing transportation for witnesses who reside in Kosovo and are needed for war crimes trials in Belgrade.

⁸² See *Brumarescu v. Romania*, ECtHR Judgment, 28 October 1999, paragraph 61.

⁸³ See *inter alia* UNMIK Regulation 2000/6 *On the Appointment and Removal from Office of International Judges and Prosecutors*, 15 February 2000; UNMIK Regulation 2000/34 *Amending UNMIK Regulation 2000/6 On the Appointment and Removal from Office of International Judges and International Prosecutors*, 29 May 2000.

⁸⁴ UNMIK Regulation 2000/64 *On the Assignment of International Judges/Prosecutors and/or Change of Venue* amended by Regulations No. 2001/34, 2005/50, 2006/60 and 2007/21.

⁸⁵ “64 panels” were commonly so-called because of the number of the UNMIK Regulation (2001/64) which provided for their establishment.

⁸⁶ Article 141 in conjunction with Article 22 of the FRY CC

judges, found the defendant guilty of commission of the criminal offence of crimes against a civilian population on 25 October 2002 and convicted him to 12 years of imprisonment. On appeal, the Supreme Court of Kosovo again sent the case back to the first instance court for retrial on 15 July 2004. The Mitrovicë/Mitrovica district court, in a panel of international judges, held a retrial which lasted from 16 August 2007 to 22 May 2008, and again sentenced the defendant, this time to eight years of imprisonment. Deciding on appeal, the Supreme Court, with an all-EULEX panel of judges, acquitted the defendant of all charges on 7 October 2009.⁸⁷

The validity of a legal system is diminished when verdicts of validly established courts are later found suspect and largely overturned. If there are legal defects with previous verdicts and/or sentences, then they should be reviewed upon appeal by the appropriate court of second instance and either reversed and returned for retrial or have a final decision made in the appellate court.

Another concern is how justice can be served in cases that have gone back and forth through the system several times. A characteristic example is the Llapi case,⁸⁸ which has been moving through the justice system for seven years now, from 2002 to 2009.⁸⁹ The victims and witnesses of such cases are being re-traumatised every time the case has to be tried again. Since the law requires that defendants have the right to have their innocence or guilt decided fully and fairly in a timely manner,⁹⁰ the defendants' rights must therefore be taken into high consideration.

Expertise in judicial proceedings involving war crimes

In order to properly address war crimes cases, judges, prosecutors, defence counsel, and investigators should possess sufficient qualifications and competence to address these complex cases. The pressing need for such qualifications and competence would be one of the primary justifications for the establishment of a specialised court chamber to deal with serious offences such as war crimes. While it is understandable that most individuals working in the judicial sector do not have much, if any, training or experience in war crimes cases, it is nevertheless important that those who have been assigned to these cases do. It was apparent, even before the conflict formally ended, that issues of war crimes would need to be addressed in Kosovo. Relevant actors and organizations in Kosovo should have better anticipated and prepared for this need. Individuals experienced in handling war crimes matters should have been identified and brought in to Kosovo from the beginning to address these cases. While there was a lack of training and experience among local justice sector actors, this should have been provided in sufficient manner in order to develop local competence in this area. In fact, throughout the reporting period there has been a lack of expertise in dealing with war crimes cases on the part of judges, prosecutors, defence counsel and investigators assigned to handle these cases. It appears that despite the fact that some EULEX judges and prosecutors have such experience, others to whom these war crime cases have been assigned might have little or no experience on these cases.

⁸⁷ *The Public Prosecutor v. Miroslav Vucković.*

⁸⁸ *The Public Prosecutor v. Latif Gashi, Rrustem Mustafa, Naim Kadriu and Nazif Mehmeti.*

⁸⁹ This is in addition to the fact that the events in question are alleged to have occurred in 1998-1999.

⁹⁰ Article 5(3) ECHR and Article 14 (2) PCPCK.

A recent example of this occurred in the Llapi Group case.⁹¹ The judicial panel consisted of two international judges and one local judge. The local member was a civil judge assigned to the panel by the president of the district court. He had no background in dealing with war crimes cases and thus did not possess the competence to sit on such a case. After the verdict was announced, this judge, as part of his denouncement of the verdict, complained that he is a civil judge with no experience in criminal cases, much less war crimes cases, and as such should not have been assigned to the case.

These types of public statements do not build public confidence in the judiciary. The public needs to know that the judicial officials who handle specific cases are competent in that area of law in order to have confidence in the system.

Yet, there have been efforts to address this lack of expertise. For example, the KJI has provided a number of trainings in war crimes and study visits to the International Criminal Tribunal for the Former Yugoslavia.⁹² For the most part only local judges and prosecutors attended such trainings. Other organizations have provided war crimes trainings too, but usually only short, one-day seminars. It is unrealistic to expect anyone to learn a new and very complex area of the law in occasional one-day training event. However, if some of these events occur in a series, the judge or prosecutor may or may not be able to attend each successive training.

Rather, what is needed is a long-term intensive war crimes training strategy, which includes courses offered by experts through the KJI. Judges and prosecutors assigned to war crimes cases need to have the requisite time in order to be able to complete the course to become fully educated in this area. It will be a short-term sacrifice in order to develop long-term competence. An alternative could be for judges and prosecutors to attend a long-term study/work visit to the ICTY to shadow a counterpart for a given period of time.⁹³ Both of these suggestions would likely need donor funding to become a reality.⁹⁴

The same training need exists for defence lawyers who represent those charged with war crimes. In order to have true equality of arms, defence counsel must be equally qualified to represent the accused. The Kosovo Chamber of Advocates still facilitates some short training seminars. However these are normally one-day trainings with little or no follow up. It is recognized that it is problematic for defence counsel in general to attend weeks-long training, due to the fact that they each have a private practice of law which requires their daily attention. An *ad hoc* solution, such as longer-term courses held once per week for a period of months, will in total equalize the training provided to judges and prosecutors to that of lawyers.

⁹¹ The *Public Prosecutor v. Latif Gashi, Rrustem Mustafa, Naim Kadriu and Nazif Mehmeti*.

⁹² Past KJI courses have included, *inter alia*: roundtable discussion with international magistrates in Kosovo, FRY law on criminal procedure, war crimes (7 March 2001, in collaboration with the Council of Europe); seminar on serious violations of international humanitarian law: experience of the International Criminal Tribunal for the former Yugoslavia (ICTY) and related issues in Kosovo (10-12 May 2002); and a war crimes seminar (7-8 June 2005).

⁹³ Ideally this would be for a period of at least one month, rather than a week, as has been commonly done.

⁹⁴ For other practical suggestions of increasing capacity and transferring knowledge see ODIHR report “*Supporting the Transition Process: Lessons Learned and Best Practices in Knowledge Transfer*”, September 2009.

Building the capacity of local judges and prosecutors

An intrinsic part of the overall role of the international community in the justice sector is to help build a sustainable justice system. As such, local judges and prosecutors should be included, side-by-side with international counterparts, in each type of case which is present in the system. This way, competence can be developed while working together. International judges and prosecutors need to continue to increase their mentoring activities with respect to local counterparts.

The OSCE considers it is advisable to continue to include local judges in the panels even in war crimes cases, as has been the practice. War crimes cases will very likely still be in the system when the international judges leave Kosovo. Charges of war crimes have no statute of limitations, so a war crimes case can be prosecuted now or at any time in the future. An additional benefit outside of war crimes cases specifically is that similar skills are needed and similar challenges, such as intimidation of judicial personnel and witness protection, exist in other types of serious cases such as organized crime and serious ethnically motivated crimes. In this light, it will be good to find a way in the future to include more local judges and prosecutors in the process in order to further enhance their capacity in this area of law. Similar dynamics should be considered regarding international and local prosecutors working together on war crimes cases so that knowledge transfer can occur and experience can be gained.⁹⁵

Perception of bias

One of the main reasons for introducing international judges and prosecutors into the local judicial system in Kosovo was the concern of bias within the local judiciary, especially in war crimes and ethnically motivated crimes. The independence and impartiality of a tribunal is essential to a fair trial.⁹⁶ Furthermore, independence and impartiality have an objective as well as a subjective component. That is, not only must justice be done, but it must also be seen to be done. A “legitimate reason to fear a lack of impartiality” of a judge is enough to require his or her withdrawal from the case.⁹⁷ The perception among some has been that local judges would be biased in deciding war crimes cases due to their own personal experience during the conflict. In addition to any personal feelings there is also the issue of societal pressure to uphold the cause of their respective community. For example, if a judge of one ethnicity is asked to hear a case where a defendant was of the other ethnicity involved in a conflict, the judge may feel a strong bias to find the defendant guilty. On the other hand, if this same judge was hearing a case with a defendant of his/her own ethnicity, then there may be tremendous pressure to acquit the defendant as a defender of the cause. This is typical in a post-conflict environment where different ethnicities are involved. Defendants might not be able to receive a fair trial in such circumstances. This supports the idea, that at least for the foreseeable future, international judges and prosecutors should remain in Kosovo to work on these cases.⁹⁸

⁹⁵ Ibid.

⁹⁶ Article 6(1), ECHR.

⁹⁷ *Hauschildt v. Denmark*, ECtHR Judgment, 24 May 1989, paragraph 48. In later jurisprudence, the court elaborated: “[w]hat is at stake is the confidence which a court in a democratic society must inspire in the public and, above all, as far as criminal proceedings are concerned, in the accused.” *Fey v. Austria*, ECtHR judgment, 24 February 1993, paragraph 30.

⁹⁸ See Section 6, OSCE *First Review on the Kosovo Criminal Justice System*, 1 February 2000 – 31 July 2000.

Threats against the judiciary

Another issue is that of protection of local judges in war crimes cases. The OSCE has previously reported on the lack of security arrangements for local justice system actors.⁹⁹ Numerous concerns have been raised by members of the local judiciary regarding threats of violence to them and their families while serving on such panels. These can manifest in the form of direct as well as indirect pressure for the purpose of intimidation, such as from the public at large or other officials utilizing political pressure. Local judges do not have the same level of close protection as international judges. As such, some members of the local judiciary have confided that they are thankful not to serve on war crimes panels because of this threat. This is another reason to continue the practice of appointing international judges to war crimes cases. It is reasonable to begin identifying resources needed to help ensure the protection of the local judges, and in some cases even for their families, as they are already sitting in war crimes panels.¹⁰⁰

UNMIK had a “Threat Assessment Committee”, which individually assessed the threats or perceived threats against members of the judiciary and prosecution. If the committee determined that sufficient danger existed, close protection was assigned to the judge or prosecutor. However, this was only applicable for international members and left the local judges and prosecutors with the only option of informing KPS of their concerns, which normally did not result in an increased level of protection. EULEX has a similar mechanism in place to determine the level of threats against any of its international judges or prosecutors. Local judges and prosecutors who handle war crimes case will need protection.

Witness Protection

A related concern is the need for witness protection. This issue has undermined prosecution of war crimes cases perhaps more than any other single issue. This topic has been addressed at length in other reports, such as the joint US Department of Justice and OSCE Assessment published in November 2007, so it will be addressed briefly here.¹⁰¹ However, the gravity of the problem and the great challenge in solving it cannot be overstated. Witnesses, who in many cases are crucial to linking defendants to the crimes for which they are accused, are becoming more reluctant to testify before institutions, be it police, prosecutors and/or judges in courts. Society in Kosovo is based on an extended family structure, which makes witnesses even more vulnerable to threats and intimidation. Kosovo is also relatively small, so people know one another throughout the society. Thus, even if witnesses were willing to testify in the face of threats to their personal safety, they may yet succumb to threats toward family members.

⁹⁹ OSCE Review on the Criminal Justice System “*Protection of Witnesses in the Criminal Justice System*”, March 2002-April 2003, page 12.

¹⁰⁰ In the Llapi Group case mentioned above, the local judge in the panel stated publicly, as he distanced himself from the final verdict, that he had been threatened and intimidated. This may have been his motivation for denouncing the verdict, which of course is contrary to the judicial code of conduct.

¹⁰¹ OSCE reports. *Review of the Criminal Justice System* (March 2002 – April 2003). Retrieved on 23 April 2010 from http://www.osce.org/documents/mik/2003/05/859_en.pdf and *Witness Security and Protection in Kosovo: Assessment and Recommendations* (November 2007). Retrieved on 23 April 2010 from http://www.osce.org/documents/cio/2007/11/27752_en.pdf.

The ICTY worked to address the issue of witness protection in their cases which arose out of the events of the Kosovo conflict. However, even with all of their resources and expertise they faced great difficulties in this area as well, as was evidenced in the comments in the verdict of Haradinaj *et alia*.¹⁰² In fact, this is the focus of the appeal of the prosecution case. To address these problems UNMIK established a Witness and Victim's Protection Unit in 2001, which experienced limited effectiveness largely due to the great scope and complexity of the problem. While many efforts have been made to attend this issue, it persists. EULEX has continued the work of witness protection with its own Witness Security Unit.

A draft law on witness protection has been in the works for several years, yet it is still not promulgated. The final version should include measures to address the above issues. However, the law is only one step in the process. Implementation of it will determine the effectiveness of witness protection in Kosovo.

Further, witness relocation is a vital part of an overall witness protection programme. It is also the most difficult to implement. Many countries are reluctant to accept witnesses from post-conflict regions. Witnesses from Kosovo are no exception. However, in such a close environment, sometimes the only way to ensure the safety of witnesses and their families is to move them outside of Kosovo. Therefore, those authorities outside Kosovo who have an interest in seeing justice established need to be more willing to accept those requiring relocation in order to make trying difficult war crimes cases possible.

Witnesses support is an additional aspect that needs to be better addressed. Trying war crimes cases takes a toll on all involved, especially victims and witnesses. Therefore, support is needed in order to help avoid re-traumatising the victims. Psychological services are needed for victims, witnesses, and their families, who are experiencing emotional difficulties while reliving the events of the conflict. These services may be needed during all phases of the trial. Support is also needed for such practical issues as providing secure transportation to and from all court proceedings for which witness are required to appear. Many witnesses do not have the means to get to the court where the case is being heard, as they may live elsewhere. Keeping witnesses in a safe location during the trial proceedings is also important. In too many cases witnesses are kept in the halls of the courthouse waiting their turn to testify, alongside relatives, friends and associates of the defendant on trial. Moreover, when the court takes breaks during the trial day, the defendants many times see the witnesses in the common areas of the courthouse providing the opportunity for intimidation.

Special war crimes chamber

Issues related to sufficient judicial personnel, competence of judicial actors, bias, protection for judges, prosecutors, victims and witnesses, could all be addressed with the formation of a special court or chamber to hear war crimes matters. This area of law requires such a high level of understanding of its complexities that specialized

¹⁰² See United Nations International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 Case No. IT-04-84-T, *Prosecutor v Haradinaj, Balaj, and Brahimaj*, 03 April 2008 paragraphs 22-28. Retrieved on 23 April 2010 from <http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf>.

training and experience should be required for those assigned to prosecute, defend and adjudicate such cases. Furthermore, these cases normally require increased protection of judges, prosecutors, victims and witnesses. Witnesses many times need specific support. The creation of a special court/chamber would allow the court to focus exclusively on war crimes, thus providing the needed prioritization of these cases. For this to work adequate resources are needed, and ones that could not be diverted to other cases, no matter how urgent they seem. Otherwise none of the above-mentioned benefits would be realized over the current situation.

Some have proposed that such a court/chamber should also handle other serious crimes with similar dynamics, such as organized crime cases, where extra protection would also be required. Others have argued against such a court/chamber as unnecessary and have expressed the concern that this would drain resources away from the regular courts which are over-burdened. Furthermore, some argue it has been ten years since the end of the conflict and too much time has passed to warrant the establishment of a new court/chamber.

The OSCE understands the concerns surrounding this debate. However, it considers that the establishment of a special court or chamber to deal with serious cases such as war crimes cases is needed. Alternately, a special war crimes component could be created by EULEX as part of its extraordinary role in the justice sector. Although EULEX currently has two international prosecutors assigned to war crimes cases,¹⁰³ the problem has been, and still is, that judicial personnel are routinely pulled away to work on other cases. This has the effect of undermining any effort to prioritize war crimes cases. Furthermore, the issue of sufficient competence of the actors involved in such cases can be better addressed if the actors are focussed on this issue only, rather than one of many. Finally, concentrating resources into a specialized chamber would have the benefit of providing better and more specialized protection for judges, prosecutors, victims and witnesses. While the argument about the time elapsed since the conflict raises an interesting question, the case of the establishment of the War Crimes Chamber of the State Court of Bosnia and Herzegovina in January 2005 should be considered. It was established ten years after the conclusion of the conflict and signing of the Dayton Peace Accords, because it was believed that there were still sufficient grounds for its existence.

War crimes caseload management

The sheer volume of war crimes cases that have been identified is quite large. A United Nations Security Council 6 April 2010 report states that “[t]he EULEX War Crimes Investigation Unit completed a comprehensive review of the 888 cases for which the Prosecutor of the Special Prosecution Office of Kosovo issued a request for investigation in 2009”.¹⁰⁴ These will necessarily include multiple defendants and/or multiple count indictments, making the actual number of incidents and suspects investigated large indeed. EULEX investigators and prosecution will therefore need to complete the process of mapping, selection and prioritization of war crimes cases in order to have a more coherent approach towards handling war crimes cases. This

¹⁰³ Interview with EULEX official, 29 April 2010.

¹⁰⁴ *Report of the Secretary-General on the United Nations Interim Administration Mission in Kosovo*, S/2010/169, 6 April 2010, Annex I, Section 2, Police. Retrieved 25 May 2010 from <http://www.un.org/Docs/sc/sgrep10.htm> and then to the 6 April 2010 report

process is necessary for the prosecution of priority cases and will also lead to a better handover of these cases to local actors in the future. Mapping is also good for historical, educational, reconciliatory and public awareness raising purposes once it becomes public record. Experience, lessons learned and best practices from the ICTY and others working in the region would be useful for these purposes.

Public outreach regarding handling of war crimes cases

Outreach is a necessary but frequently overlooked component of handling war crimes matters. Outreach is not simply issuing a press statement about a verdict in a particular case. It goes much further, as it has to do with the affirmative steps taken to inform and educate the public about what is happening with war crimes generally, in addition to announcing the outcome of specific cases. This serves to further the process of coming to grips with what occurred during the conflict, let the public know what is being done about it, and thus combat the perception that war criminals acted with impunity, which in turn can help towards reconciliation among communities.

There has not been adequate outreach with regard to what has happened with ICTY cases related to the Kosovo conflict. The ICTY established an Outreach Office in Prishtinë/Priština¹⁰⁵ in February 2001 which continues to operate. In 2009 the office visited local high schools to educate students about war crimes. In the past, students from Kosovo have gone to visit the ICTY in the Hague.

Other Needs

There are a number of practical resources which are still needed to further aid the Kosovo justice sector. For transparency purposes final verdicts of war crimes cases from the Kosovo courts should be available on the internet. This is also helpful to all those working on such cases to have a better understanding of key legal issues. Furthermore, commentaries and all relevant ICTY materials should be translated into all regional languages and made available on the internet. However, not all judges and prosecutors in Kosovo have internet connection or computers. This should be regarded as a matter of urgency. Finally, the Supreme Court needs a larger courtroom to handle the number of people necessary for complex cases with multiple parties.

IV. CONCLUSION

More than ten years after the end of the conflict, the justice system in Kosovo continues to fail to adequately prioritize the adjudication of war crimes cases. This failure runs counter to the expectations of the public and to the interests of justice and reconciliation. War crimes cases, due to their nature, gravity and importance to the reconciliation process, were not regarded with due consideration by the judicial institutions. The timely delivery of justice in war crimes cases is of special importance because it alleviates the perception of impunity in these cases. International law defines impunity as “a failure [...] to meet [...] obligations to investigate violations; to take appropriate measures in respect of the perpetrators, particularly in the area of justice, by ensuring that those suspected of criminal responsibility are prosecuted, tried and duly punished; to provide victims with effective remedies and to ensure that

¹⁰⁵ See ICTY press release LM/P.I.S./579e, 23 March 2001. Retrieved on 4 May 2010 from <http://www.icty.org/sid/8001>.

they receive reparation for the injuries suffered; to ensure the inalienable right to know the truth about violations; and to take other necessary steps to prevent a recurrence of violations”¹⁰⁶

The OSCE also notes with concern that for the relatively small number of war crimes cases that have made it into the justice system, there have been repeated delays at each stage of criminal proceedings. One important factor which has contributed to these delays is that many of the suspects in these cases have fled the jurisdiction and are un-reachable by Kosovo judicial institutions. Many cases are stalled due to the absence of the defendants in the criminal process.¹⁰⁷ Therefore, enhanced regional judicial cooperation is required to adequately address this concern.

Another issue that hampers the resolution of war crimes cases is the lack of a witness protection program. The lack of such programme is a major obstacle to collecting relevant evidence. The OSCE welcomes the efforts by institutions to address this situation in the form of the draft law on witness protection.¹⁰⁸ However, the OSCE nonetheless urges institutions to enhance public confidence in its ability to provide witnesses with adequate protection, especially in war crimes cases, through passage and implementation of the draft law.

Regarding the establishment of a specialised court chamber to deal with serious offences such as war crimes, the OSCE welcomes the inclusion of provisions on a special department on serious crimes¹⁰⁹ into the draft law on courts¹¹⁰, expected to be adopted and promulgated in 2010.

The prosecution and trial of war crimes cases is an important function of the justice system in post-conflict societies. Adequate prioritization of war crimes cases by the justice system in Kosovo is important to “[...] promote possibilities for peace, reconciliation and democracy”¹¹¹, determine responsibility and ensure justice for victims and the public.

¹⁰⁶ Principle 1 of the UN *Updated Set of principles for the protection and action to combat impunity*, which was recommended by the former UN Commission on Human Rights in its Resolution 2005/81. The Updated Principles were published in UN Document E/CN.4/2005/102/Add.1.

¹⁰⁷ UNMIK Regulation 2001/1 *On the Prohibition of Trials In Absentia for Serious Violations of International Humanitarian Law*, promulgated on 12 January 2001.

¹⁰⁸ The drafting of the law on witness protection is foreseen by the Legislative Strategy 2010.

¹⁰⁹ Article 14 and Article 19 of the draft law on courts.

¹¹⁰ The drafting of the law on courts is foreseen by the Legislative Strategy 2010. The first reading of the draft law on courts by the Kosovo Assembly took place on 15 April 2010.

¹¹¹ International Center for Transitional Justice, *What is Transitional Justice*, December 2008. <http://www.ictj.org/en/tj/>

V. RECOMMENDATIONS

In light of the above, the OSCE offers the following recommendations.

To the Kosovo institutions:

- Kosovo judges and prosecutors should ensure that the remaining war crimes cases are processed by the justice system as priority cases.
- The Kosovo Judicial Institute (KJI) should provide long-term, specialized war crimes training, testing and certification for the judges who are assigned to handle war crimes cases.
- The Kosovo Chamber of Advocates should facilitate training for defence lawyers on war crimes cases. It should work with international organizations and donors to help ensure a long-term commitment to funding such training.
- The Kosovo police should enhance the specialized training programme offered for police officers assigned to the war crimes investigation unit. They should work closely with the EULEX war crimes investigation unit in anticipation of a future handover of all war crimes case investigations. Kosovo police should also provide officers with specialized training in how to protect witnesses and the families of witnesses involved in war crimes cases.

To the international community and institutions:

- EULEX judges and prosecutors should ensure that the remaining war crimes cases are processed by the justice system as priority cases.
- Due to complexity of the subject matter, specialized training in war crimes cases should be provided also to international judges assigned to handle war crimes cases who do not have sufficient expertise in this area of law.
- The International Criminal Tribunal for the former Yugoslavia (ICTY) should fulfil its commitment to provide direct and secure access to the evidence collected from investigating war crimes allegations in Kosovo to EULEX offices of investigation and prosecution. The ICTY should continue to fully translate all relevant materials generated from the investigation, prosecution and trials of war crimes cases into relevant official languages in Kosovo.
- The international donor community and institutions are encouraged to provide support in the following areas: in association with KJI, fund the training of judges and prosecutors in war crimes cases; in association with the Chamber of Advocates, fund the training for defence lawyers in war crimes cases; in association with international and relevant bodies in Kosovo, fund the witness protection system. For the witness protection system to succeed, there needs to be a willingness to accept victims, witnesses and their families to locations outside of Kosovo on a long-term basis.