

**Report**  
**on War Crimes Trials**  
**in Serbia in 2011**



Humanitarian Law Center

## Summary

In 2011, the Office of the War Crimes Prosecutor (OWCP) indicted a total of nine persons, all for the criminal act of war crimes against civilians, under Article 142, Paragraph 1 of the Criminal Code of the FRY.<sup>1</sup>

Thirteen trials were conducted in 2011 before the Court of Appeal in Belgrade – War Crimes Chamber. In six of them, the War Crimes Chamber convicted 17 defendants and acquitted two of criminal responsibility,<sup>2</sup> while the remaining seven cases are still ongoing.<sup>3</sup>

In 2011, the Court of Appeal in Belgrade – War Crimes Chamber, issued 11 rulings on appeals submitted against judgments of the War Crimes Chamber of the Higher Court in Belgrade,<sup>4</sup> convicting 12 defendants, and quashing the first-instance judgments for 15 defendants, remanding the cases for retrial.<sup>5</sup>

In 2011, before general jurisdiction courts, three trials were conducted for the criminal act of war crimes against civilians, under Article 142, Paragraph 1 of the Criminal Code of the FRY: the *Kusnin/Kushnin* case before the Higher Court in Nis; the *Orahovac/Rahovec* case before the Higher Court in Pozarevac and the *Oto Palinkas et al.* case before the Higher Court in Kraljevo. The Higher Court in Nis also heard a case (the *Emini* case) of ethnically motivated murder, under Article 113 of the FRY Criminal Code.

In 2011, the Humanitarian Law Center (HLC) represented the victims in four cases before the Higher Court in Belgrade – War Crimes Chamber: the *Cuska/Qushk*, *Skocic*, *Zvornik III/IV* and *Lovas*, cases while HLC observers monitored other proceedings conducted before this Court, as well as the trial in the *Kusnin/Kushnin* case.<sup>6</sup>

### 1. Regional cooperation

In 2011, the judicial authorities in Serbia and Croatia continued to exchange evidence and court cases, in what seem like worsening conditions. The circumstances deteriorated after the arrest of Croatian citizen, Tihomir Purda, in Bosnia and Herzegovina on a Serbian arrest warrant; after the Serbian OWCP refused to transfer the indictment and the evidence against the Croatian citizen

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<sup>1</sup> Indicted persons: Zoran Alic and Dragana Djekic (in *Skocic*); Zoran Obradovic, Milojko Nikolic, Ranko Momic and Sinisa Misić (in *Cuska/Qushk*); Dragan Jovic and Alen Ristic (in *Bijeljina*). In 2011, the OWCP issued two indictments against Zoran Djurdjevic for *Skocic* and *Bijeljina*. According to OWCP data, in 2011 the OWCP issued indictments against 55 persons, of which those against 44 persons were included in the indictment previously issued by the JNA Military Prosecutor in *Seks et al.*

<sup>2</sup> *Medak, Prijedor, Licki Osik, Gnjilane group, Rastovac* and *Zvornik III/IV* cases.

<sup>3</sup> *Lovas, Skocic, Beli Manastir, Bijeljina, Medak, Cuska/Qushk* and *Tuzlanska kolona* cases.

<sup>4</sup> *Stara Gradiska, Vukovar, Liski Osik, Prijedor, Tenja, Medak, Zvornik II, Podujevo II, Banski Kovacevac, Suva Reka/Suharekë* and *Gnjilane group* cases.

<sup>5</sup> *Licki Osik, Prijedor, Medak* and *Gnjilane Group* cases.

<sup>6</sup> The Court of Appeal in Nis submitted its judgment in the *Emini* case to the HLC, while the HLC obtained the documentation in *Orahovac/Rahovec* which is being processed before the Higher Court in Pozarevac.

Veljko Maric to the Croatian judiciary; the activation, by the OWCP of the charges first brought by the military Prosecutor's Office of the former Yugoslav National Army (JNA) against 44 citizens of Croatia; and finally after the adoption on November 21, 2011 by the Croatian Parliament of the Law on Invalidation of Certain Legal Acts of the Judicial Bodies of the Former Yugoslav National Army, the former Socialist Federal Republic of Yugoslavia and of the Republic of Serbia. No agreement had been reached on the abolition of parallel investigations and exchange of evidence between Serbia and Bosnia and Herzegovina. Serbia continued to demand the extradition of those indicted for the crimes committed in Dobrovoljacka Street in Sarajevo, irrespective of the legal defeat it suffered before the British Courts, when it requested the extradition of a citizen of Bosnia and Herzegovina, Ejup Ganic.

In 2011, the OWCP continued to initiate proceedings against foreign nationals, firm in the belief that it was responsible for protecting the interests of Serb victims in the territory of the former Yugoslavia. In the case of the warrant issued for the arrest of the General of the Army of Bosnia and Herzegovina, Jovan Divjak, the Austrian courts rejected Serbia's request for his extradition on the grounds that he "could not expect a fair trial in Belgrade." In the case of Croatian veteran Tihomir Purda, the OWCP demonstrated a lack of professional distance from the documentation and the cases it had inherited from the Military Prosecutor of the former JNA. The OWCP demanded the extradition of a Croatian citizen from the judiciary of Bosnia and Herzegovina on the basis of an indictment drawn up by the former JNA, which in turn was based on a coerced statement from Tihomir Purda, given during his captivity in Serbia. The OWCP indicted Croatian citizen Veljko Maric, despite the fact that the Croatian Ministry of Justice had requested the transfer of this case in accordance with the Agreement on Cooperation in the Prosecution of War Crimes Perpetrators between Serbia and Croatia from 2006. In November 2011, the OWCP forwarded to the Croatian Ministry of Justice an indictment issued by the former JNA's Military Prosecutor's Office against 44 Croatian citizens for war crimes committed in Vukovar in 1991. Although the adoption of the Law on Invalidation, passed by the Croatian Parliament, works particularly against the interests of the citizens of Croatia, it should be noted that the Serbian OWCP strongly contributed to the adoption of the act. The act threatened to undo the good results achieved by the prosecutors of Croatia and Serbia regarding the exchange of evidence and transfer of war crimes cases.

Additionally, Bosnia and Herzegovina and Serbia have yet to sign the Protocol on Cooperation in the Prosecution of War Crimes Perpetrators which, among other things, prevents parallel investigations. Meddzida Kreso, President of the Court of Bosnia and Herzegovina, finds that the "protocol would bring nothing new concerning the ongoing problem we have with the Serbian OWCP, by which I mean the unconditional transfer of all investigations against our citizens for war crimes committed on the territory of Bosnia and Herzegovina which have been launched on the basis of the complaints originally submitted by the JNA or which have been subsequently submitted by various associations in Bosnia and Herzegovina."<sup>7</sup>

## **2. A handful of defendants**

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<sup>7</sup> *Dnevni Avaz*, 11/26/2011: „Dobro je što ovakav protokol nije potpisan“ (It is a Blessing that this Protocol has not been Signed).

In 2011, the OWCP indicted just nine persons. Of these, only the indictments against three persons in the *Bijeljina* case can be considered new proceedings, while indictments against six other defendants arose from two cases, the main hearings of which had already been conducted before the Chamber of the Higher Court in Belgrade – War Crimes Chamber.<sup>8</sup> However, the *Bijeljina* case is not the result of the OWCP's independent work either. Republika Srpska (Bosnia and Herzegovina) transferred this case to Serbia, in accordance with the Law on Mutual Legal Assistance in Criminal Matters.

The *Lovas*, *Gnjilane group* and *Cuska/Qushk* cases, involve many defendants and many victims. All other cases involve significantly fewer victims and defendants.

### 3. Most cases were transferred

In 2011, 20 cases were heard by the Higher Court in Belgrade – War Crimes Chamber and the Court of Appeal in Belgrade. Of these, seven had been transferred to the OWCP of the Republic of Serbia by the State Attorney's Office of the Republic of Croatia,<sup>9</sup> while two had been transferred from Republika Srpska (Bosnia and Herzegovina).<sup>10</sup>

Information is publicly available about only one investigation request submitted by the OWCP in 2011<sup>11</sup> against two persons suspected of having committed a war crime against civilians under Article 142 Paragraph 1 of the FRY Criminal Code, and a war crime against prisoners of war under article 144 of the FRY Criminal Code in Tenja, Croatia in 1991. This was the only investigation request in 2011, after which, in 2012, at the time this Report was compiled, the OWCP issued an indictment. However, this case is not the result of OWCP's independent work either: the State Attorney's Office of the Republic of Croatia sent this case to the Serbian OWCP in keeping with the Agreement on Cooperation and Prosecution of Perpetrators of war crimes, crimes against humanity and genocide, signed between the AGO and OWCP.<sup>12</sup>

The *Bijeljina* and *Tenja* cases are certainly examples of good cooperation between the judicial authorities of Serbia, Croatia and Bosnia and Herzegovina, but they demonstrate that the OWCP relies heavily on transferred cases, particularly those provided by the State Attorney's Office of the Republic of Croatia, and that pre-trial proceedings remain incomplete and without result.

The OWCP has full access to ICTY's database, which allows for more efficient prosecution of war crimes. However, in 2011 the OWCP did not initiate any proceedings against medium or high-ranking members of the Serb armed forces.

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<sup>8</sup> *Skocic* and *Cuska/Qushk* cases

<sup>9</sup> *Stara Gradiska*, *Vukovar*, *Licki Osik*, *Tenja*, *Medak*, *Banski Kovacevac* and *Beli Manastir* cases.

<sup>10</sup> *Bijeljina* and *Prijedor* cases.

<sup>11</sup> According to the OWCP, in 2011 the OWCP filed investigation requests against 27 persons. However, according to the OWCP, the names of the persons and the particular cases involved in the investigations are not available to the public. Also unavailable is information on how many of these requests are the result of the OWCP's independent work, and how many have been transferred to the OWCP from other countries.

<sup>12</sup> See: [http://www.tuzilastvorz.org.rs/html\\_OOWCP/VESTI\\_SAOPSTENJA\\_2011/S\\_2011\\_08\\_11\\_CIR.pdf](http://www.tuzilastvorz.org.rs/html_OOWCP/VESTI_SAOPSTENJA_2011/S_2011_08_11_CIR.pdf) and [http://www.tuzilastvorz.org.rs/html\\_OOWCP/VESTI\\_SAOPSTENJA\\_2012/S\\_2012\\_02\\_10\\_CIR.PDF](http://www.tuzilastvorz.org.rs/html_OOWCP/VESTI_SAOPSTENJA_2012/S_2012_02_10_CIR.PDF)

#### **4. Proceedings before courts of general jurisdiction are seriously flawed**

In the trials before courts of general jurisdiction (the *Orahovac/Rahovec*, *Emini*, *Kusnin/Kushnin*, and *Oto Palinkas et al.* cases) serious deficiencies have been observed from their commencement through to judgment. Characteristic of these proceedings is the unacceptably slow operation of the courts, confirmed by the fact that these proceedings had been on-going for more than ten years. Prosecutors' offices, generally very passive, have greatly contributed to the overall tardiness. Courts have often been seen to favor the defendant; broad interpretation of the statutory rights of the defense has also been recorded. A striking anomaly is the legal qualification of criminal acts committed by the defendant, in the *Emini* case,<sup>13</sup> especially given the time, the place and the context in which the murder for which the defendant was charged, had been committed. Further, in the *Kusnin/Kushnin* case,<sup>14</sup> one piece of written evidence presented at the trial was classified as 'missing'; inappropriate conduct from the defense was not halted; in the *Orahovac/Rahovec* case,<sup>15</sup> the trial was postponed indefinitely; the final decision of the Court of Appeal in Nis in the *Emini* case in which the defendant was acquitted, leaves the impression that the court did not assess the evidence in an impartial manner, nor did it properly establish the facts, and nor was the prosecution sufficiently engaged in proving the charges.

*The Oto Palinkas et al.* case is certainly among the most striking examples of the inability of the courts of general jurisdiction to prosecute war crimes and ethnically motivated crimes. At the same time, this points to insufficient professional training and partly also to bias in the judiciary and the prosecution service and their inadequately professional approach to crimes of such magnitude and seriousness.

In fact, above everything else, the bodies responsible for formulating the legal framework should take into account the fact that such failures and illegal conduct are repeated in almost every trial for war crimes and ethnically motivated crimes in the courts of general jurisdiction. In order to avoid illegal conduct, it is imperative that the procedure for amending and harmonizing the existing legislation be initiated,<sup>16</sup> while on-going proceedings should be transferred to the War Crimes Chambers of the Court of Appeal and the Higher Court in Belgrade.

#### **5. The Court of Appeal in Belgrade acts promptly**

The Court of Appeal in Belgrade issued 11 decisions on appeals against the judgments of the War Crimes Chamber of the Higher Court in Belgrade, which can be characterized as a prompt response.

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<sup>13</sup> See II, Count 18 – *Emini* case.

<sup>14</sup> See II, Count 12 – *Kusnin/Kushnin* case.

<sup>15</sup> See II, Count 13 – *Orahovac/Rahovec* case.

<sup>16</sup> The Law on Organization and Jurisdiction of Government Authorities in Prosecuting War Crimes („Sl.glasnik RS,“ No.67/2003, 135/2004, 61/2005, 101/2007 and 104/2009).

## 6. Decisions of the Court of Appeal in Belgrade are not uniform

Concerning the ruling of the trial court in the *Tenja case*, the Court of Appeal correctly concluded that the trial court had treated the complainant as a prisoner of war, although it was determined beyond doubt that at the time of his capture, the complainant was wounded, and as such had the status of a wounded person. According to the provisions of international humanitarian law, the wounded and the sick are entitled to greater protection during armed conflicts. Neither the trial court Chamber nor the OWCP properly qualified this crime. The provisions of the Criminal Code prevent the Court of Appeal from changing the qualification of this criminal act. However, it remains a positive impression that in its ruling, the Court of Appeal noted the omission of the trial court and the OWCP and emphasized the importance of accurate qualification of the criminal act, both in the indictment and for the proper application of criminal law by the court.

As it did in 2010, the HLC criticizes the Court of Appeal in Belgrade for its practice of confirming the light sentences rendered by the War Crimes Chamber of the Higher Court in Belgrade.<sup>17</sup> An example of such bad practice is certainly the prison sentences given to Milorad Lazic (3 years), Nikola Konjevic (3 years) and Mirko Marunic (2 years) in the *Medak case*.<sup>18</sup> It remains entirely unclear what prompted the court to accept the mitigating circumstances in this case; it is equally questionable whether it is appropriate in such cases to render sentences less than the statutory minimum. Certainly the most disturbing example is the *Zvornik II case*, in which Branko Popovic was sentenced to 15 years, and Branko Grujic to 6 years in prison. Bearing in mind that at the time of the crime, both men, as holders of civil and military authority in the municipality of Zvornik, were the most responsible persons given the nature of their official functions; that they were active participants in implementing the plan and perhaps even the organizers of the persecution of the Muslim population from the municipality of Zvornik;<sup>19</sup> that this is just one of five proceedings initiated and conducted for war crimes committed in the Zvornik municipality; and finally, that the crimes for which other proceedings have been initiated were committed as a consequence of the circumstances and conditions created by the action of Grujic and Popovic – their sentences should be deemed extremely inappropriate.

*Zvornik II* is only one of a number of cases brought before the national courts (in the past or currently) for war crimes committed in the municipality of Zvornik. What makes this case special and the subject of greatest attention, are the status and responsibilities of the convicted men, who through their acts or omissions created the conditions for the commission of crimes by other persons, leading to the severance of the criminal proceeding in trials for war crimes committed in the municipality of Zvornik. The role of the convicted men has been best described by the witness Milorad Davidovic, the former brigade commander of the Secretariat of Internal Affairs (SUP), who explained that the policy of the Serbian Democratic Party (SDS), whose president in the municipality of Zvornik was Branko Grujic, “was that Muslims be removed in an organized, planned and systematic manner from the territory of Republika Srpska,” and that “the alpha and omega” of all events in Zvornik was Branko Popovic, the former commander of the Territorial Defence Force of Zvornik.

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<sup>17</sup> *War Crimes Trials and Trials for Ethnically Motivated Crimes in Serbia in 2010*, HLC Report, p. 7.

<sup>18</sup> See II, Count 6 – *Medak case*.

<sup>19</sup> In addition, proceedings have been completed in the *Zvornik I case*, while the proceedings in the *Zvornik III* and *IV*, and the *Skocic case* are underway.

The gravest problems in this case are the decisions on the prison sentences for the convicted, Branko Grujic and Branko Popovic. Not only will the penalties not achieve their purpose, but the social role of the court as an institution will not have been fulfilled either. In the current social, historical and political moment, when acts of this magnitude are not accompanied by adequate social and moral condemnation, the Court of Appeal ought to have been aware that its decisions are not merely a manifestation of the attitudes and perceptions of each Chamber judge, but that they also send a strong message to society as a whole, which places a value judgment and creates distance from what is the most serious form of crime – war crime.

## **7. Defense**

While the courts strive to create an atmosphere that encourages and promotes the full protection of the rights of the defendants in accordance with international standards, most defense attorneys abuse this right through various obstructions, delays and, above all, by attempting to present the criminal proceedings as political. Also, some defense attorneys use the trials for public displays of their 'patriotic' convictions. Only a few defense attorneys are familiar with, and actually use, the practices of the ICTY in the defense of their clients.

## **8. Protected witnesses**

At a meeting of the Sub-committee on Crime and Anti-Terrorism, held on October 28, 2011 in Belgrade, the Special Rapporteur of the Council of Europe for the Protection of Witnesses, Jean-Charles Gardetto, said that witness protection should be improved in Serbia. He recommended transferring the Witness Protection Unit (WPU) to the Ministry of Justice; better protection of identity of protected witnesses; and the creation of a political climate in which 'insider' witnesses would be encouraged to testify.

The HLC notes that the two police officers, former protected witnesses, who publicly testified to the HLC, in the media and at the regional conference on war crimes, held in Belgrade on September 16, 2011, were actively discouraged them from testifying against the suspected members of the 37<sup>th</sup> PJP Detachment by the OWCP and that members of the WPU threatened to harm them if they continued to disclose the names of police officers who had committed war crimes. In one case the witness's status as a protected witness was revoked (on October 29, 2009) without any explanation, while in the second, the witness left the protection program on July 4, 2011 because he could not endure the psychological torture from the OWCP and WPU.

In the case of the witness who was told that his protection had been terminated, he learned of the fact only when members of the WPU came to his apartment and ordered him to pack his bags as he was shortly to be taken back home.<sup>20</sup> The OWCP said<sup>21</sup> that the witness had pressured the prosecutor Dragoljub Stankovic to provide him with paid employment in the Prosecutor's Office.

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<sup>20</sup> *Extended Report on Irregularities in War Crimes Proceedings in the Republic of Serbia*, HLC, September 2011.

<sup>21</sup> OOWCP RS, *Objections to Reports Submitted by the Humanitarian Law Center*, November 14, 2011, in Serbian: [http://www.tuzilastvorz.org.rs/html\\_OOWCP/VESTI\\_SAOPSTENJA\\_2011/S\\_2011\\_11\\_14\\_CIR.pdf](http://www.tuzilastvorz.org.rs/html_OOWCP/VESTI_SAOPSTENJA_2011/S_2011_11_14_CIR.pdf); in English: [http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2011/S\\_2011\\_11\\_14\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2011/S_2011_11_14_ENG.pdf)

When the prosecutor refused to do so, the witness “expressed his discontent by launching false accusations.” The second witness, according to the OWCP, “continuously blackmailed the acting prosecutor [Stankovic], and refused to testify unless the prosecutor offered him re-employment in the police (...) That's why during the investigation, the witness did not respond to a number of summonses by an investigating judge to testify, and in the end refused to testify about anything.”<sup>22</sup>

This pattern of dramatically poor protection and treatment of insider witnesses has been repeated in the *Cuska/Qushk* case. During the testimony at the main hearing on January 25, 2012, the protected witness Zoran Raskovic, a former member of the 177<sup>th</sup> Military Territorial Detachment of the Yugoslav Army VJ, requested protection from the court chamber, pointing out that he had no one else to turn to, that he felt insecure, that he had been insulted and threatened even by the police officers responsible for his safety, that members of his family had been harassed and put under pressure by the police, and that he had received no assistance, other than the verbal support of the OWCP. He demanded to be told whether society was indeed ready to hear a testimony like his – as he did not wish to “disappear” as some other protected witnesses had.<sup>23</sup>

## 9. Limiting criticism

The existing legislation of the Republic of Serbia severely limits any form of criticism of the prosecution of war crimes. The Criminal Code of the Republic of Serbia prescribes a prison sentence (six months) and a monetary fine for anyone “who during court proceedings and before the final court decision, with an intent to injure the presumption of innocence and independence of the court, provides public statements to the media.”<sup>24</sup>

The Civil Procedure Code limits access to justice for individuals, organizations, independent bodies, associations and media. By imposing high fines, Articles 499 and 500 discourage anyone from expressing critical views on matters of public concern.<sup>25</sup>

The new Criminal Procedure Code establishes a monopoly of attorneys in representing the interests of victims of crime and quashes a victim’s right to select a representative unless that representative is an attorney.<sup>26</sup> Human rights experts are thus prohibited from representing the victims in war crimes cases, unless they are attorneys.

## 10. The application of international criminal law

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<sup>22</sup> The reference is to the protected witness K-79, who testified in two trials before the ICTY – in case No. IT-02-54, *Prosecutor v. Slobodan Milosevic*, and in case No. IT-05-87/1, *Prosecutor v. Vlastimir Djordjevic*.

In the judgment in *Prosecutor v. Vlastimir Djordjevic* case, the Trial Chamber noted that it relied on the testimony of this witness, which it evaluated as very reliable.

In a statement given to the HLC, the witness claimed that he was deterred by prosecutor Stankovic from testifying.

<sup>23</sup> See II, Count 22 – *Cuska/Qushk* case.

<sup>24</sup> The Criminal Code of the Republic of Serbia, Article 336a.

<sup>25</sup> The Civil Procedure Code (Sl. glasnik RS, No. 72/2011) came into effect on February 1, 2012.

<sup>26</sup> The Law on Criminal Procedure, Article 50, Paragraph 1, Count 3 (Sl. glasnik RS, No. 72/2011). In proceedings for offenses of organized crime and war crimes, this Code is applicable as of January 15, 2012.

A striking characteristic in the practice of domestic courts is their resistance to the wider application of international criminal law and greater reliance on the practice of the ICTY. As the rules of customary international law, according to the Constitution of the Republic of Serbia, constitute an integral part of the country's internal legal order,<sup>27</sup> there are no legal barriers to their implementation. However, even those who adhere to the view that obstacles do exist for the application of particular institutes of international criminal law, must nevertheless always take them into consideration, especially when imposing criminal sanctions.

## II Cases

Thirteen trials were conducted in 2011 before the Higher Court in Belgrade – War Crimes Chamber. In 2011, the Court of Appeal in Belgrade issued 11 decisions on appeals submitted on judgments of the Higher Court in Belgrade – War Crimes Chamber.<sup>28</sup> In 2011, before general jurisdiction courts, three trials were conducted for the criminal act of war crimes against civilians, under Article 142, Paragraph 1 of the Criminal Code of the FRY: the *Kusnin/Kushnin* case before the Higher Court in Nis; the *Orahovac/Rahovec* case before the Higher Court in Pozarevac and the *Oto Palinkas et al.* case before the Higher Court in Kraljevo. The Higher Court in Nis also heard a case (the *Emini* case) of ethnically motivated murder.

### 1. *The Stara Gradiska Case*

On June 25, 2011, the Higher Court in Belgrade – War Crimes Chamber, with Vinka Berah-Nikcevic as presiding judge, rendered a judgment sentencing Milan Spanovic to five (5) years in prison for the commission of a war crime against the civilian population, under Article 142, Paragraph 1 of the Criminal Code of the FRY.

On January 24, 2011, the Court of Appeal in Belgrade rendered a final judgment, which confirmed the first-instance judgment, sentencing the defendant Spanovic to five (5) years in prison.

I The court found that in the course of the armed conflict in Croatia, on an unknown date between the first half of October 1991 and the end of January 1992, in the prison in Stara Gradiska, the defendant Spanovic ordered Djuro Bogunovic to take off his shoes and stand on tiptoes with his head turned to the wall. Spanovic then began to scrape the victim's head against the wall, pulling it up and down, after which he pushed his hand into the victim's mouth, pulling his teeth and gums, smashing several of Bogunovic's lower teeth, and kicking his body. It was determined that on October 18, 1991, the defendant Spanovic, together with an unidentified man, ordered Luka Filipovic to put his hands behind his back, stand on tiptoes and stand facing the wall, after which the defendant began beating him with a chain, while the unidentified person

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<sup>27</sup> The Constitution of the Republic of Serbia, Article 16, Paragraphs 142 and 194.

<sup>28</sup> Cases: *Stara Gradiska*, *Vukovar*, *Liski Osik*, *Prijedor*, *Tenja*, *Medak*, *Zvornik II*, *Podujevo II*, *Banski Kovacevac*, *Suva Reka/Suharekë* and *Gnjilane group*.

beat him with a baton; after the defendant slapped Filipovic, both men grabbed his head and repeatedly hit it against the wall. On two days, between early October and mid December 1991, the defendant and the same unidentified man ordered to Josip Kvocic to put his hands behind his back, stand on tiptoes and rest his head against a wall; the men then kicked his body until he fell, after which they began to step on him, and when he did not stand up when ordered, they continued to beat him – he fell twice and twice got up. By his actions defendant Spanovic inflicted great suffering and bodily injury, damaging the health of the three victims.

The State Attorney's Office of the Republic of Croatia transferred the case against Milan Spanovic to the Office of the Serbian Office of the War Crimes Prosecutor (OWCP) under the Agreement on Cooperation in the Prosecution of War Crimes Perpetrators. On June 3, 2009, the WCP issued an indictment. The trial commenced on September 17, 2009.<sup>29</sup>

The defendant, Spanovic pleaded not guilty. The court properly established the facts. Carefully assessing the testimonies of victims and other witnesses, the court found that in the period in question, the victims Bogunovic, Kvocic and Filipovic, all Croatian civilians, were arrested and held in the prison in Stara Gradiska. The Court held that the victims' statements corroborated each other, that they provided an objective picture of the events, and that they were more credible than the defendant's statements.<sup>30</sup> The victims, Bogunovic, Kvocic and Filipovic described in detail how and in what positions they were beaten by the defendant Spanovic. Their statements were clear and convincing to the extent that they left no doubt as to the actions committed by the defendant. The Court found that some discrepancies and inconsistencies in their statements had to do with the fact that 19 years had passed since the events and the traumas experienced by the victims during the period in question and concluded that this should not be sufficient reason for the entire testimony of the victims to be regarded as unreliable.

The victims' allegations were confirmed by the testimony of witnesses Zeljko Grgic and Zeljko Knezevic, who testified that during the period in question they saw the defendant Spanovic, that they knew, based on indirect knowledge, that the defendant went to the prison in Stara Gradiska, they knew the victims, and they knew that they were tortured in the prison in Stara Gradiska. The status of the defendant Spanovic as member of the territorial defense force of the SAO Krajina during the period covered by the indictment has been established beyond doubt.

**II** The Court of Appeal in Belgrade rejected as unfounded an appeal by Spanovic's defense attorney and fully confirmed the judgment of the trial court.<sup>31</sup> In its explanation of its decision, the court stated that in the first instance decision, the lower court had not significantly violated

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<sup>29</sup> Six trial days were held, in which seven witnesses and two experts were heard. Due to age and health issues, witness-victims Djuro Bogunovic, Josip Kvocic and Ivan Filipovic, were unable to reach the County Court in Zagreb and testified by video link. They were therefore examined through a letter rogatory by the investigating judge of the County Court in Sisak.

<sup>30</sup> In his defense, the defendant claimed that on the premises of the Dom Stara Gradiska Correctional Facility, he was ordered by an unknown officer to identify the prisoners from his village and that on that occasion he recognized Luka Filipovic, Djuro Bogunovic and Josip Kvocic, but that he did not abuse them. At the main hearing on September 17, 2009, the defendant changed his defense and accepted that he had hit the victims, Filipovic, Bogunovic and Kvocic, on their bodies, only to claim a little later that he had pushed them once or twice in the shoulder or on the back, while it had been the soldiers in SNB uniforms, who were unknown to him, who began to beat them.

<sup>31</sup> The OWCP did not appeal the first-instance decision.

procedures, and that it properly applied the law to the properly and fully established facts; the sentence was likewise appropriate and sufficient to achieve its purpose. A five (5) year prison sentence was handed down, which took into account the mitigating circumstances – no previous criminal record and the unfavorable financial situation of the defendant due to unemployment – as well as the aggravating ones – that the defendant Spanovic demonstrated persistence and ruthlessness while inflicting great physical and mental pain, and that his motives were revenge for the murder of his brother, and the nationality of the victims.

Considering the defendant Spanovic's conduct during the trial, and the fact that he showed no remorse, the minimum penalty for these war crimes committed against the three civilians does not fully achieve the purpose of punishment.

## **2. *The Vukovar Case***

Stanko Vujanovic was convicted before the Higher Court in Belgrade – War Crimes Chamber on November 1, 2010 to nine (9) years in prison for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY. As the defendant Vujanovic was also convicted in the *Ovcara* case for the criminal act of war crimes against prisoners of war and sentenced to 20 years,<sup>32</sup> the Trial Chamber of the Higher Court, presided over by Snezana Nikolic-Garotic, rendered a single sentence of 20 years in prison.<sup>33</sup>

On April 27, 2011, the Court of Appeal in Belgrade upheld the trial court's judgment and sentenced the defendant Vujanovic to a single prison term of 20 years.

**I** In its judgment, the Trial Chamber of the Higher Court in Belgrade – War Crimes Chamber, found that on the afternoon of September 14, 1991, Stanko Vujanovic, then a member of the Petrova Gora Territorial Defense (TO) force, under the command of the Sremska Mitrovica Brigade of the Yugoslav National Army (JNA), in his uniform and armed, together with a second armed and unknown person, entered the basement of the home of the Croat Sever family at 32, Second Congress Street. Threatening them with weapons, he took Ivan Sever and Adam Luketic from the basement, while ordering the unidentified person to guard the entrance to the basement and not let Blazenka Sever, Roza Luketic and Marija Kotreba, also Croats, who were hiding in the basement together with Ivan Sever and Adam Luketic, out. The defendant Vujanovic then led Ivan Sever and Adam Luketic to the basement of the garage where he shot them dead. When Blazenka Sever heard gunshots, she tried to leave the basement, at which point the unidentified man threw a hand grenade into the basement. The explosion killed Roza Luketic and Marija Kotreba, while Blazenka Sever suffered serious life-threatening injuries.

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<sup>32</sup> The judgment of the Court of Appeal in Belgrade – War Crimes Chamber, June 23, 2010.

<sup>33</sup> The sentence was determined in accordance with Art. 49 of the Criminal Code of the FRY, which stipulates that if the convicted person is tried for an offense committed before he/she begins to serve a previous sentence, or for an offense committed while serving a prison or juvenile detention, the court shall impose a punishment for all offenses jointly, taking the rendered sentence as an already determined one.

Pursuant to the Agreement on cooperation in the prosecution of war criminals, the State Attorney's Office of the Republic of Croatia transferred this case in 2008 to the Office of the Serbian War Crimes Prosecutor (OWCP). The OWCP issued an indictment on March 31, 2010.<sup>34</sup>

Defendant Vujanovic did not plead guilty to the charges in the indictment.

Based on the evidence, the court found that on September 14, 1991, the JNA barracks in Vukovar were under siege from Croatian forces and there was fighting between the Petrova Gora Territorial Defense Force of the JNA on one side and the Croatian police, the National Guard and [Croat] volunteers, on the other. In order to establish control, Serb forces began 'cleansing the terrain,' which meant entering every house and checking whether any Croat soldiers were in them. The cleansing included the 'Second Congress of the Communist Party of Yugoslavia' residential area. Stanko Vujanovic was among members of the Territorial Defense Force that entered Second Congress of the Communist Party of Yugoslavia Street. Roza Luketic, Blazenka Sever, Marija Kotreba, Adam Luketic and Ivan Sever were hiding in the basement of house No. 32. The court placed its faith in the testimony of the witness, Blazenka Sever, who described in detail how the defendant, who was armed on the day in question, took her husband Ivan Sever and Adam Luketic out from the basement. She remembered his voice when he ordered the unknown person not to let her leave the basement. She had known Vujanovic since childhood; they were neighbors and she worked with his parents. During the confrontation with the defendant, the witness was convincing and firmly reiterated what she had stated previously. The court assessed her statement as honest, consistent and convincing. In addition, the court accepted as authentic the witness statements of Dusan Jaksic, Commander of the Petrova Gora Territorial Defense Force, who stated that during the seige of the JNA barracks, members of the Territorial Defense Force entered the village and the residential area of Second Congress of the Communist Party of Yugoslavia, and he concluded that the part of Vujanovic's defense<sup>35</sup> in which claimed that he had not been in the residential area, was unfounded and calculated to avoid criminal accountability. On the basis of the findings and the opinion of expert witness Dr. Djordje Alempijevic, it was found that the death of Adam Luketic and Ivan Sever was violent and caused by head injuries – possibly inflicted by shots from a firearm.

Having qualified the defendant's actions as war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, the court correctly applied the substantive law to the facts established. Although it was found that victim Ivan Sever was a member of the Croatian National Guard (ZNG), on the day in question he had no weapons in the house, was not on duty and had no uniform, and hence should have enjoyed all the rights conferred on persons not participating in hostilities, in accordance with the common Article 3 of the Geneva conventions. The status of all other persons was indisputable – they were all civilians.

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<sup>34</sup> The main trial began on May 20, 2010. In four days, four witnesses and one expert-witness were examined. The victim-witness Mira Patkovic Mira and witness Slobodan Zagrecki were examined by video conference from the County Court in Vukovar, while victim-witness Blazenka Sever and witness Dusan Jaksic were examined by the Trial Chamber in Belgrade.

<sup>35</sup> The defendant Vujanovic defended himself by claiming that on the day in question he had taken part in the seige of the JNA barracks in Vukovar, and that he did not enter the Second Congress of the Communist Party of Yugoslavia residential area which, he said, was not on his route on the day in question. He had not seen members of the Luketic and Sever families. He said he did not know Blazenka Sever, that he had never seen her, and did not know why the witness was accusing him.

In determining sentence, the Trial Chamber assessed as mitigating the following circumstances: the defendant's family status – he was married and had two children; the remorse he expressed for the suffering of the people of all nationalities in Vukovar and his disbelief at how far things had gone. As aggravating circumstances, the Trial Chamber noted the killing of two persons and the defendant's prior criminal record. Although a single sentence of 20 years is the legal maximum, taking into account the circumstances and manner in which the crime was committed, as well as the fact that the motive of the murder was the different ethnicity of the victims, the sentence of nine years in prison, to which Vujanovic was convicted in this case, certainly does not match the severity of the crime.

**II** On April 27, 2011, the Court of Appeal in Belgrade confirmed the first instance judgment and sentenced Vujanovic to a single sentence of 20 years in prison. The Court stated that in the first instance decision, the lower court had not significantly violated the criminal procedure, that it had properly and fully established the facts, that it had properly applied the law and that the decision was appropriate and sufficient to achieve the purpose of punishment.

### ***3. The Licki Osik Case***

On March 14, 2011 The Higher Court in Belgrade – War Crimes Chamber delivered a judgment convicting Ceda Budisavljevic, Mirko Malinovic, Milan Bogunovic and Bogdan Gruicic each to 12 years in prison for the criminal offense of war crimes against civilians under Article 142 of the Criminal Code of the FRY, and under Article 22 of the Criminal Code of the FRY.

After deliberation on November 9 and 10, 2011, the Court of Appeal in Belgrade issued a decision overturning the first instance judgment and sent the case for retrial.

**I** In its first instance judgment, the Court found that Mane Rakic, his sons Dragan and Milovan, and daughter Radmila were arrested in October 1991, in the area of the municipality of Teslingrad (Licki Osik) in the Republic of Croatia, on suspicion of being in possession a radio transmitter and of having cooperated with Croatian armed formations. The Court also found that on the night of October 21, 1991, in agreement with his co-defendants, Malinovic and Bogunovic, Budisavljevic went to Siroka Kula, where Lucia Rakic, Mane Rakic's wife, lived in a cottage. Budisavljevic entered the cottage, and shot and killed Lucija Rakic, while Malinovic and Bogunovic, both armed, kept watch outside. The three men then burned Lucija Rakic's body and the cottage. A few days later, in late October 1991, following their decision to kill other members of the Rakic family, defendants, Budisavljevic, Malinovic, Bogunovic, Gruicic and Goran Novakovic, who will be tried separately, took Dragan, Milovan and Radmila Rakic from the police station in Teslingrad Mane, tied them up, put them in a *TAM* vehicle which Gruicic then drove to the Golubnjaca pits, where they were killed by shots from a firearm and then thrown into the pit.

The State Attorney's Office of the Republic of Croatia transferred the case to the Office of the Serbian Office of War Crimes Prosecutor, in keeping with the Agreement on cooperation in the

prosecution of perpetrators of war crimes. The indictment against the defendants Budisavljevic, Malinovic, Bogunovic and Gruicic was issued on June 25, 2010.<sup>36</sup>

Budisavljevic pleaded guilty to the crimes he was charged with. He claimed to have been ordered by Dusan Orlovic, the former director of the State Security Services of the SAO Krajina, to liquidate the members of the Rakic family. Orlovic, he said, told him that evidence had been found in the Rakic's possession (radio, codes and plans for reporting to the Croatian forces). On October 20 or 21, 1991, together with the defendants Bogunovic and Malinovic, Budisavljevic went to the Rakic family house. There he saw Lucija Rakic. While Bogunovic and Malinovic kept watch in front of the house, Budisavljevic entered the house, and killed Lucija with his *Scorpion* submachine gun. The three men then set fire to the house. Several days later, Budisavljevic met up with Malinovic, Bogunovic, Gruicic and Goran Novakovic, and informed them of their orders. They took Mane Rakic and his children, Dragan, Milovan and Radmila, from the prison where they were being held, and took them to the Golubnjaca pits, where they were shot. All five men were involved in the execution. The defendants Gruicic and Bogunovic then threw the bodies of Mane and Milovan into the pits. Malinovic, Bogunovic and Gruicic all denied any involvement in the commission of the crime.

While monitoring the first instance trial, HLC observers were left with the distinct impression of defendant Budisavljevic's arrogance, especially visible in the way the questions were asked and his general tone. Budisavljevic said he was sorry for the Rakic family members as human beings, but he justified his conduct with claims that the Rakic's were traitors, by the circumstances of the war, by the fact that he had received an order which he had to carry out, and by saying that he had no other choice. When asked by the President of the Trial Chamber whether there could have been another way, other than murder, to solve the problem, Budisavljevic replied: "There was, and I say this clearly - the only thing I did wrong is that I did not set up a court martial, and that I did not take them before it at noon in Licki Osik, and shoot them with a written order, so that when you bring me here now and ask me why, I could show you the piece of paper and say - this is why."

Under examination, witnesses Dragan Miscevic, at the time a member of the Territorial Defense Force of Licki Osik, Marko Dragicevic, Chief of Police in Gracac, and Milorad Strbac, a member of a unit known as Martic's Militia on the territory of Licki Osik, seemed insincere and unwilling to tell everything they knew about the event. Upon entering the courtroom, the witness Strbac gave a friendly handshake to the defendants, something he repeated upon leaving the courtroom, when he also winked at the defendant Bogunovic, and pinched defendant Gruicic's cheek. During his examination, the witness Radomir Narancic, at the time the police station commander in Teslingrad, sounded confused and unconvincing, and spoke incoherently.

During the reading of the judgment,<sup>37</sup> the President of the Trial Chamber, Judge Vinka Beraha-Nikicevic, said that the Chamber placed its faith to the statement of the defendant Budisavljevic, which was supported by the evidence. In the opinion of the Court, Budisavljevic had no reason to

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<sup>36</sup> The main trial commenced on October 4, 2010. Seven trial days were held before the trial court, during which five expert witnesses and 14 witnesses, among them five victims, were examined.

<sup>37</sup> The HLC was not able to review and further analyze the first instance judgment, due to the decision of the President of the Trial Chamber to disclose only the final judgment.

arbitrarily implicate the other defendants, because doing so would not have put him in a better position. The Trial Chamber did not accept the defense of the defendants Malinovic, Bogunovic and Gruicic, finding that it was calculated to avoid criminal liability.

**II** According to the decision of the Court of Appeal in Belgrade, the Trial Chamber made substantive violations of the criminal procedure provisions when it omitted from the judgment the order indicated in the indictment,<sup>38</sup> and incorrectly determined that Budisavljevic was significantly more eager to commit the crime than the other defendants. This was also a violation of the rights of the defendant Budisavljevic because he was denied the opportunity to comment on the revised description of the facts in the indictment. It remains unclear whether the Court established that no evidence of the order existed, or if it had just not considered whether the order had existed. The explanation did not explore any evidence pertaining to the existence of an agreement between Budisavljevic, Malinovic, Bogunovic and Gruicic. Specifically, the Court analyzed and accepted only Budisavljevic's claim, according to which he did not order any of the other defendants, nor did he threaten them, to kill the Rakic family members; rather, they all freely agreed to do it, and they acted in mutual agreement. On the other hand, the Court did not explain why, or for which reasons, it did not accept the defense of defendants Bogunovic and Gruicic, who claimed otherwise.<sup>39</sup> Furthermore, during sentencing, the Court accepted as aggravating circumstances the fact that a family of five was eliminated, and that all members were civilians who had not participated in hostilities - these facts constitute the criminal offense for which the defendant was convicted and cannot be assessed as an aggravating circumstance.

#### ***4. The Prijedor Case***

A judgment of the Higher Court in Belgrade - War Crimes Chamber from October 1, 2010, sentenced the defendant Dusko Kesar to a prison term of 15 years for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, as a co-perpetrator, and under Article 22 of the Criminal Code of the FRY.

On February 28, 2011, the Court of Appeals in Belgrade issued a decision that overturned the first instance judgment and sent the case for retrial.

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<sup>38</sup> The reference is to the order which, according to defendant Budisavljevic's statement, the defendant received from Dusan Orlovic, the former chief of the State Security Service of MUP of the SAO Krajina, to kill the members of the Rakic family, because they were suspected to have been in possession of a radio transmitter and to have cooperated with the Croatian forces.

<sup>39</sup> In his defense, the defendant Bogunovic claimed he did not know the real reason why he was going to the cottage where Lucija Rakic was staying, and that Budisavljevic had told him to go and get the radio transmitter. He did not know that other members of the Rakic family were to be killed either. Budisavljevic told him that they must transfer the prisoners to Knin or to Korenica. Gruicic defended himself by claiming that Budisavljevic had told him that they had to transport the arrested members of the Rakic family to Korenica, and that only on the way there did he say that he had earlier killed Lucija Rakic.

On December 1, 2011, following the retrial, the Higher Court in Belgrade - War Crimes Chamber sentenced the defendant Kesar to 15 years for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY.

**I** On October 1, 2010, the Higher Court Trial Chamber, presided over by Judge Vinka Beraha-Nikicevic, found that on the night of March 30, 1994, the defendant Kesar, who at the time was a reserve police officer with the MUP of Republika Srpska, together with Drago Radakovic, Drasko Krndija and Radoslav Knezevic, against whom proceedings had been completed,<sup>40</sup> acting on a previous agreement to go and kill Muslims, went to 29, Petra Preradovica Street in Prijedor, where Faruk Rizvic lived with his family. Kesar and Krndija each threw a grenade at Rizvic's house, after which Krndija laid plastic explosives on the windowsill. The explosion demolished the window. Police officers Radoslav Knezevic and Dragan Gvozden immediately arrived. In the house, they found Faruk, his wife Refika and Faruk's sister Fadila Mahmuljin, all alive. In front of the house they saw the defendant Kesar, Krndija and Radakovic. Knezevic told them not to touch the family before he and Gvozden left. After Knezevic and Gvozden had departed, the defendant Kesar, Krndija and Radakovic entered the house, and using blunt objects and a sharp blade, killed Faruk and Refika Rizvic, and Fadila Mahmuljin.

The trial of Kesar commenced on March 5, 2010.<sup>41</sup> The defendant pleaded not guilty to the charges.<sup>42</sup>

**II** The Court of Appeal in Belgrade – War Crimes Chamber, accepted appeals from the attorney and the wife of the defendant, and found that in its decision the trial court had violated the criminal procedure under Article 368, paragraph 1, counts 10 and 11.

The Trial Chamber of the Higher Court had based its judgment on the valid judgment of the District Court in Banja Luka delivered on November 17, 2005, which according to the findings of the Court of Appeal in Belgrade could not in itself constitute evidence. Specifically, the court had the opportunity to hear evidence through the reading of the testimony and the written evidence presented at the trial before the District Court in Banja Luka. The court reviewed the evidence by reading some of the testimonies and made a partial evaluation, on the basis of which, the Court of Appeal decided it could not be inferred which facts and circumstances would be relevant for the assessment of the actions for which the defendant Kesar was charged.

The Court of Appeal also held that the judgment was unclear, that it contradicted the reasons provided in the explanation of the judgment, and that the reasons for the judgment were vague and contradictory. The Higher Court failed to explain which evidence led it to conclude that the defendant Kesar and Krndija, threw the bomb at the house, or that he subsequently entered the house of the Rizvic family and killed three members of the family. In the reading of the

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<sup>40</sup> The judgment of the Supreme Court of Republika Srpska delivered on April 18, 2006, sentenced Drago Radakovic and Drasko Krndija each to 20 years in prison, and Radoslav Knezevic to 10 years. As the defendant Dusko Kesar, was living in Novi Sad and had acquired citizenship of the Republic of Serbia, he was not under the jurisdiction of the judicial authorities of Republika Srpska.

<sup>41</sup> Eight trial days were held, during which 10 witnesses and one expert witness were examined.

<sup>42</sup> Kesar defended himself by claiming that on the night in question he was not in Prijedor, and that he was not involved in the murder of the Rizvic family in any way.

judgment, the Higher Court stated that the defendant Kesar had murdered three civilians, but in describing the criminal act, the Court failed to specify which acts that the defendant had committed. However, contrary to the information in the reading of the judgment, in the explanation of judgment, the Higher Court claimed that the defendant Kesar had accepted the actions of other perpetrators as his own, believing that the act was a common endeavor. The first instance decision did not provide any reasons or reach any conclusion concerning the relationship between the actions of the defendant Kesar, armed conflict and civilian victims, without which no legal qualification of a war crime against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY can be established. The Higher Court failed to articulate clearly why it had rejected a proposal from the defense attorney to question the witnesses Dragan Gvozden and Radoslav Knezevic, whose statements differed concerning the presence of the defendant Kesar at the crime scene on the night in question. When it evaluated the aggravating circumstances, the trial court did not explain what constituted an aggravating circumstance – ruthlessness and persistence in killing three civilians.

The Court of Appeal ordered the Higher Court to re-examine the witnesses Gvozden and Knezevic and confront them with regard to the differences in their statements, to determine whether, and if so, to what extent, there were links between the armed conflict and the commission of the offense with which the defendant was charged, which individuals were involved in the commission of the offense and in what way, and if necessary to explore other evidence on which to base a clear and reasoned decision.

**III** The judgment of the Higher Court in Belgrade – War Crimes Chamber established that on the night between March 30 and 31, 1994, the defendant Kesar, at the time a reserve MUP police officer in Republika Srpska, revolted by the death of fellow-officers on the battlefield in Bihac, together with Drago Radakovic and Drasko Krndija, and with prior intent to intimidate Muslims, approached the house of the Rizvic family in Prijedor. He and Krndija each threw a grenade. The defendant Kesar threw his into the courtyard of the Rizvic family house. Krndija threw his grenade beneath the window, after which he placed explosives on the same window ledge, which was blown in by the resulting explosion. Screams were heard from Rizvic family members and police officers Radoslav Knezevic and Dragan Gvozden arrived. They found the family members alive and scared, and also saw the defendant Kesar, Krndija and Radakovic. Radoslav Knezevic told them not to touch the Rizvic family until the two of them had left. Thereafter, the defendant Kesar, Krndija and Radakovic entered the house, and with blunt objects and a sharp blade killed Faruk and Refika Rizvic and Faruk's sister Fadila Mahmuljin.

The retrial commenced on June 8, 2011.<sup>43</sup> The defendant Kesar adhered to his defense, denying that he had any part in the commission of the criminal acts.

The Trial Chamber of the Higher Court acted on the orders of the Court of Appeal and re-examined the witnesses Gvozden and Knezevic, and confronted them about the differences in their statements. In a brief statement during sentencing,<sup>44</sup> the President of the Higher Court Trial

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<sup>43</sup> The Chamber held five trial days, during which six witnesses were examined.

<sup>44</sup> The HLC did not have access to the first-instance judgment, because the Trial Chamber's position was that a first-instance judgment was not a public document.

Chamber stated that the Chamber had placed its faith in Dragan Gvozden, who had persuasively testified that on the night in question, after he had heard a violent explosion, he and Knezevic came to the house of the Rizvic family and found the defendant Kesar, Drasko Krndija and Drago Radakovic across the street from the Rizvic house. He asked them what they were doing but Kesar, Krndija and Radakovic remained silent. After that Knezevic told to the three men not to touch the family until he and Gvozden had left the area. Gvozden's allegations that the defendant Kesar had been at the scene on the night in question were backed up by Drasko Krndija. Krndija also said that he and Kesar each threw a grenade at the Rizvic house. The police record from the crime scene, notes that components of explosive devices – grenades – were found in front of the house and in the house. The findings and opinions of expert witnesses showed that the deaths of Faruk Rizvic, Refika Rizvic and Fadila Mahmuljin were violent, that a hard object was used to inflict injuries on the head and chest, causing cranial bone fractures and contusions, as well as the destruction of brain tissue. Individually: Faruk had been cut on the neck, with a sharp blade, which caused him to bleed to death; Refika had wounds to the right side of the sternum; and Fadila had several smaller wounds below the right clavicle. These injuries, in their entirety, directly caused the death of the three victims.

The Trial Chamber stated that the joint action of Radakovic, Krndija and the defendant Kesar, which consisted of a previous agreement to intimidate Muslims, the throwing of grenades, setting up and activating explosives, formed a body of evidence that was logically related and that resulted in the murder of Faruk and Refika Rizvic and Fadila Mahmuljin. On the basis of these facts, each of the three men had accepted the actions of the other two and the consequences of their actions. The defendant Kesar acted with a direct intent, was aware of the act and wanted to execute it.

In assessing sentence, the Trial Chamber of the Higher Court accepted as mitigating circumstances the lack of previous criminal record, family situation, unemployment and health status of the defendant. As an aggravating factor, it accepted the deprivation of life of three innocent and defenseless civilians.

### *5. The Tenja Case*

On November 17, 2010, the Higher Court in Belgrade – War Crimes Chamber, presided over by judge Rastko Popovic, delivered a judgment sentencing defendant Darko Radivoj to 10 years in prison for the criminal offense of war crimes against prisoners of war under Article 144 of the Criminal Code of the FRY.

On April 11, 2011, the Court of Appeal in Belgrade overturned the first instance judgment, and rendered a final judgment sentencing the defendant to 12 years in prison.

The court found that Radivoj murdered Marijan Pletes a member of the 130<sup>th</sup> brigade of the Croatian Army, who had been previously wounded and captured. On November 20, 1991, together with Branko Stjepanovic, a member of the militia of the Republic of Srpska Krajina (RSK), the defendant took Pletes from the hospital in Tenja, in order to transport him to the command post in Bobota. On the way to Bobota, by the local cemetery, in the village of Celija,

Radivoj stopped the vehicle, pulled Pletes out of it and near the entrance to the cemetery and killed him with an automatic rifle.

The State Attorney's Office of the Republic of Croatia transferred this criminal case to the office of the War Crimes Prosecutor (WCP) of the Republic of Serbia, in keeping with the Agreement on Cooperation in the Prosecution of War Crimes Perpetrators. An indictment against the defendant Radivoj was issued on March 11, 2010.<sup>45</sup> The defendant denied the charges against him.<sup>46</sup>

Having evaluated the evidence, the court properly established the facts. Witness Branko Stjepanovic, the only eyewitness to the killing of the captured Marijan Pletes, remained consistent and convincing in all his statements in terms of the essential and decisive facts: by whom, when, how and where Pletes was killed. His witness statement clearly indicates that on the day in question, on the order of the Commander of the Territorial Defense (TO) force, Jovan Rebraca, the witness went to transport the wounded Pletes from the hospital in Tenja to the military command in Bobota; it was clear, further, that the defendant Radivoj accompanied him. A witness, Dusanka Danilovic, (at the time a doctor at the clinic in Tenja) confirmed that she had registered a wounded person of Croatian nationality and added that some civilian police officers had come to pick him up and took him immediately after his wounds had been dressed. While on the road to Bobota, passing by the cemetery in the village Celije, at the request of Radivoj, Stjepanović stopped the vehicle. Radivoj took Pletes out of the vehicle, while Stjepanović remained in the vehicle. Stjepanovic then heard a gun shot, got out of the car, and near the entrance to the cemetery found the wounded Pletes lying on the ground. He died shortly thereafter. His remains were found in a mass grave near the place where he was killed and were subsequently identified. The findings and opinions of medical experts, were that they could not exclude the possibility that multiple fractures of the bones in Pletes's torso, if they had occurred while the victim was still alive, were incurred as a consequence of bullets fired from a pistol. The Trial Chamber of the Higher Court found that the discrepancies in the testimony of Stjepanovic were understandable, given that the event took place 20 years ago, and that they neither cast doubt on his testimony, nor made it unconvincing and unreliable. The court found that the victim was a member of the 130<sup>th</sup> brigade of the Croatian Army, that on the day in question, November 20, 1991, he was wounded in the fighting near Seles and Orlovnjak, that he was subsequently captured by members of the Serb armed forces, and that the defendant Radivoj was a member of a militia within the Territorial Defense Force of Tenja.

In determining the sentence, the Trial Chamber assessed as mitigating circumstances the defendant's family situation (married with two children) as well as the absence of a previous criminal record. As aggravating circumstances it noted Pletes's youth and the fact that he was killed because he was of different nationality, and Radivoj's conduct – when asked by Stjepanovic why he had killed Pletes, he answered: “Fuck the Ustasha.”

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<sup>45</sup> The trial commenced on May 6, 2010. Five trial days were held, during which seven witnesses were examined. Four witnesses testified via video-link from the County Court in Osijek.

<sup>46</sup> In his defense, he claimed never to have seen the victim Marijan Pletes and that the first time he had heard of him was during the proceedings. He also stated that he had never participated with the witness Branko Stjepanovic in the transportation of prisoners of war. He added that the witness Stjepanovic had falsely accused him saying that the reason for this was their private enmity.

**II** The Court of Appeal in Belgrade took on the OWCP's appeal and overturned the first-instance judgment regarding sentence. The Court of Appeal was correct when it found that the trial court had properly assessed the mitigating and aggravating circumstances, but that its sentence would not have achieved the purpose of punishment. Furthermore, the court found that the trial court incorrectly applied the criminal law to properly and fully established facts. The Higher Court treated Pletes as a prisoner of war in accordance with Article 144 of the Criminal Code of the FRY, although at the moment of capture Pletes had been shot, and hence had the status of a wounded person, who under the provisions of international humanitarian law enjoyed greater protection.<sup>47</sup> With regard to this violation, noted by the Court of Appeals, it remains unclear why the Trial Chamber did not change the legal classification of the offense, and why the WCP failed to correct such an obvious error prior to completion of the proceedings.

### **6. *The Medak Case***

A judgment of the Higher Court in Belgrade – War Crimes Chamber from June 23, 2010, sentenced the defendants Milorad Lazic and Nikola Konjevic to three years in prison and Mirko Marunic to two years imprisonment for the criminal act of war crimes against prisoners of war under Article 144 of the Criminal Code of the FRY. Perica Djakovic was acquitted of criminal responsibility.<sup>48</sup>

On January 19, 2011, the Court of Appeal – War Crimes Chamber in Belgrade delivered a judgment confirming the judgment against the defendants Lazic, Konjevic and Marunic, but overturning the judgment against Djakovic and returning the case for retrial to the trial court.

At the retrial trial, on July 1, 2011, the Higher Court in Belgrade – War Crimes Chamber again acquitted Djakovic.

**I** The Higher Court in Belgrade – War Crimes Chamber, found that on September 3, 1991, during the armed conflict in Croatia, victim Mirko Medunic, a member of the Croatian police, having laid down his arms after fighting with members of the SAO Krajina militia on their way to Bilaj, was arrested and taken to the local police station, which had been set up in the *Jadran* (Adriatic) inn, also known as Kod Bose, in Medak. At the police station, between September 3 and September 8, 1991, defendants Lazic, Marunic and Konjevic, along with several unidentified persons, both during and after interrogation, day and night, struck Medunic with their hands, feet, sticks and wooden bats and cut him and stabbed him with a knife, injuring him and inflicting severe pain, which caused him to pass-out repeatedly. The defendant Milorad Lazic struck Medunic repeatedly with his hands and feet, hitting him on the head and the body; he used a large

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<sup>47</sup> According to Art. 380, Paragraph 1, Count 2 of the The Criminal Procedure Code (CPC), the Court of Appeal reviewed the judgment with regard to the elements contested in the appeal, but always in the line of duty and in an attempt to determine whether the criminal law was violated to the detriment of the defendant. Since the law was not violated in this case to the detriment of the defendant Radivoj, the Court of Appeal changed the qualification of the offense.

<sup>48</sup> Members of the Trial Chamber: Justice Vinka Beraha-Nikicevic (President of the Trial Chamber), Justice Snezana Nikolic-Garotic and Justice Rastko Popovic.

kitchen knife to remove Medunic's uniform, leaving him completely naked. Then he cut his face, shoulders and back and stabbed him in the left thigh. The defendant Mirko Marunic beat him with a rubber baton on the back and the defendant Konjevic beat him with a stick to the body and legs, and then with a beer bottle to the head. These acts inflicted great suffering on Medunic and constitute a war crime against prisoners of war, under Article 144 of the Criminal Code of the FRY.

The State Attorney's Office of the Republic of Croatia transferred the *Medak* case to the Office of the Serbian War Crimes Prosecutor under the Agreement on cooperation in the prosecution of perpetrators of war crimes. The War Crimes Prosecutor issued an indictment on October 6, 2009.<sup>49</sup> The defendants denied all the charges.<sup>50</sup>

On June 7, 2010, the OWCP amended the indictment and brought the prosecution of Nikola Vujanovic to an end, after which the Trial Chamber dismissed proceedings against this defendant. According to the OWCP, the reason for the withdrawal of the charges against the defendant Vujanovic was the testimony of the victim Medunic, who in his earlier statements had claimed that Vujanovic had spent no more than 15 minutes in the police station at the time when he was imprisoned there, and that although Vujanovic had sat on his legs (while the defendant Djakovic hit the soles of his feet), he did not beat him. It is not clear why the OWCP decided to end the prosecution after it had received the testimony of the two witnesses from Germany who provided an alibi for Vujanovic<sup>51</sup> immediately before the trial and why it did not instead leave it to the Trial Chamber to assess and decide on the case.

After a comprehensive evaluation of evidence, the court found the following facts: on September 3, 1991, following an armed conflict on the road to Bilaj, the victim Medunic, a member of the Croatian police forces (MUP), surrendered to the enemy (the militia of the SAO Krajina) – the act of surrender secured him the status of prisoner of war. The victim was held in a makeshift police station, in the *Jadran* inn. The court accepted the testimony of the witness Medunic who testified in detail, consistently and convincingly about the injuries some of the defendants had inflicted on him. In the opinion of the court, his testimony did not contain inconsistencies in

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<sup>49</sup> The trial commenced on November 24, 2009. During the ten trial days, 12 witnesses were heard and three expert witnesses. The victim Mirko Medunic and witness Milan Cubrilo testified via video-conference from the County Court in Rijeka, while two witnesses from Germany (Mario Baumeister and Aurelio Ruis) were examined before the Trial Chamber in Belgrade.

<sup>50</sup> Lazic defended himself by claiming that in the period in question he had been stationed in eastern Gospic, that he went back home on leave to change his clothes and rest. It was then that in one of the rooms in the local inn *Kod Bose* that he saw a number of people and one naked man. One soldier, called Doctor Nikolic, cut the naked man with a knife on his body and face. He found out that the man was Mirko Medunic. He couldn't watch the events, so he closed the door and went home. Djakovic stated that he had never been to the inn where the police station was located (Medak). Together with Jovica Ivancevic, he kept watch over Medunic while the latter was in the hospital (Medunic was taken from the inn to hospital). Vujanovic defended himself by claiming that at the time in question he was living and working in Nuremberg, Germany, and was not in Medak. Marunic claimed in his defense that during the period in question he was in Belgrade, and only later in Medak, but that he did not visit the inn *Kod Bose*, or participate in the acts with which he was charged. Konjevic stated that he arrived in Medak on September 8, 1991, when, with Jovica Ivancevic he transported the injured Medunic to hospital in Udbina. He noticed that Medunic had injuries, but did not know how they had been inflicted.

<sup>51</sup> The witnesses stated that in the period in question the defendant Vujanovic was in Nuremberg, and that they had trained together at the wrestling club *Nürnberg 04*.

terms of what had happened to him or about the conduct of the defendants. Medunic's testimony was confirmed by the witness Jovanka Vracar-Visnjic, who at the time in question worked in the outpatient clinic in Medak, and who provided medical assistance to the victim in the inn; and by the witness Bogdan Matic, who worked at the hospital in Udbina, and who received and treated Mednic. The findings and the opinion of the forensic expert Dr. Zoran Stankovic confirmed that the testimony of the victim Medunic corresponded completely with his opinion of the manner in which the injuries were inflicted and the tools used to inflict them. The court also found that Medunic had no reason to falsely accuse the defendants. This view was strongly supported by the victim's statement in which he said that he would not call for the prosecution of the defendants: "I would prefer that you let them go. Let their conscience deal with it, I forgive them everything."

The court did not accept the defense of Lazic, Marunic and Konjevic, assessing them as unconvincing and their evidence as calculated to avoid criminal liability.

In determining sentence, the Trial Chamber found the following mitigating circumstances: in relation to the defendant Lazic – lack of previous criminal record; in relation to the defendant Marunic – married, father of two children, and no permanent employment; in relation to Konjevic – no previous criminal record, his conduct after the execution of the criminal act (he took Medunic to hospital in Udbina), father of two children. With regard to Marunic, the court considered his previous conviction as an aggravating circumstance.

**II** The Court of Appeal in Belgrade rejected the appeals from the defense attorneys of Lazic, Konjevic and Marunic as unfounded, and confirmed the first instance judgments. According to the Court of Appeal, the lower court did not significantly violate the criminal procedure, and applied the law correctly and properly and fully established facts. The Court found that the trial court acted correctly when it characterized the mitigating circumstances as particularly mitigating, finding that the lesser punishment, under Article 42 and 43 of the Criminal Code of the FRY, could achieve the purpose of punishment.

It is not clear which arguments the court examined in this particular case. Family status and financial situation do not in themselves constitute particularly mitigating circumstances, while aggravating circumstances, particularly prior convictions, should exclude the possibility of mitigation of a sentence below the statutory minimum.

The Court of Appeal in Belgrade properly held that the Higher Court had substantively violated the criminal procedure provisions under Article 368, Paragraph 1, Count 11 of The Criminal Procedure Code (CPC) of Serbia, when it claimed that it had not been proven that Djakovic had committed the offense he was charged with, arguing that there was no evidence of the criminal offense the defendant was charged with. Specifically, in relation to the defendant Djakovic, the trial court found that it was not proven beyond doubt that Djakovic committed the crime he was charged with; however it later found that it was proven beyond doubt that in the tavern Djakovic had beaten the injured party Medunic with a rubber baton, hitting him on the soles of his feet, although these actions did not cause great suffering to the victim nor did they damage his physical integrity.

Furthermore, the Court of Appeal correctly found that the Higher Court did not offer clear arguments, nor did it explain its decision that the actions of Djakovic did not constitute illegal acts because of the severe mental or physical injury inflicted on the victim Medunic. Medunic was subjected to torture and inhuman treatment for five days, and sustained injuries that in their overall effect constituted serious bodily injury. Although in its first instance judgments on the defendants Lazic, Konjevic and Marunic, the Higher Court found that it had assessed the severity of pain and suffering on the basis of the nature of the injuries, as well as on the basis of the means used to inflict the injuries, but had not taken into account the views of the injured party Medunic who was not able to assess and describe the pain and suffering he felt, the court failed to explain why, in its judgment on Djakovic, it had accepted a subjective assessment from the injured party Medunic, who said he had suffered no consequence from being beaten on the soles of the feet by the defendant with a rubber baton for between 15-20 minutes and half an hour.

**III** At the retrial, the Higher Court in Belgrade – War Crimes Chamber, again acquitted the defendant Djakovic.<sup>52</sup>

The retrial commenced on May 9, 2011.<sup>53</sup> According to the OWCP indictment, the defendant Djakovic was charged with inflicting inhuman and cruel treatment on the injured party Mirko Medunic: during Medunic's interrogation in a makeshift police station in the *Jadran* inn Djakovic, together with Milorad Lazic, Mirko Marunic, Nikola Konjevic and Nikola Vujnovic, beat Marunic day and night, between September 3 and September 8, 1991, using their hands, feet, sticks, a wooden stake, cutting and stabbing him with a knife, while Djakovic, on an unspecified date in this period, beat the injured party with a rubber baton on the soles of his feet while Nikola Vujnovic sat on his knees. Severe pain was inflicted on Medunic, causing him to repeatedly pass-out . This constitutes a war crime against prisoners of war. The defendant Djakovic pleaded not guilty.<sup>54</sup>

### **7. *The Banski Kovacevac Case***

On March 15, 2010, the Higer Court in Belgrade – War Crimes Chamber, with the Trial Chamber presided by judge Olivera Andjelkovic, delivered its judgment on the defendants, Pane Bulat and Rade Vranesevic, sentencing them to 15 and 12 years respectively for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY and Article 22 of the Criminal Code of the FRY.

On February 14, 2011, the Court of Appeals in Belgrade, with judge Radmila Dragicevic-Dicic presiding, delivered its judgment which overturned the sentences on Pane Bulat and Rade Vranesevic handed down in the first instance judgment, imposing more severe punishments of a

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<sup>52</sup> The HLC had no insight into the judgment, due to the Trial Chamber's decision that the first instance judgment was not a public document.

<sup>53</sup> During the three trial days, Nikola Vujnovic was examined as witness. He adhered to his earlier statement given during the previous trial.

<sup>54</sup> The defendant Djakovic adhered to his previous defense, claiming that he had never gone to the tavern where the injured party Medunic was located.

maximum of 20 years and 13 years in prison respectively.<sup>55</sup> The other first instance judgments were confirmed.

I Pane Bulat and Rade Vranesevic were convicted for the following: on an unspecified date between March 19 and 23, 1992, in Banski Kovacevac (Republic of Croatia), during the internal armed conflict between the Territorial Defense force of the self-proclaimed Republic of Srpska Krajina (SAO) on the one hand, and the National Guard and police forces of the Republic of Croatia on the other, Bulat and Vranesevic murdered six Croatian civilians who were not a part of any military formation, and who were not participating in military operations. The defendant Pane Bulat, who was assistant commander for security of the Second Battalion of Territorial Defense Force, and the defendant Rade Vranesevic, a soldier in IV Company of the same battalion, arrived in Banski Kovacevac and ordered the soldiers to gather the remaining Croat civilians, ostensibly so that they could be transferred outside the area of combat operations. Six elderly civilians were brought to the yard of the house of Zlatko Mihalic.

The defendants lined them up and then Bulat fired at them with an automatic pistol and Vranesevic with an automatic rifle. Bulat then shot one of the wounded civilians, Grga Mihalic, who was showing signs of life, in the head. The following civilians were killed: Grga Mihalic (b.1920), his wife Bara Mihalic (b.1929), Kata Mihalic (b.1920), Veronika Krupic (b.1914), Mara Lesar (b.1913) and Marija Djerek (b.1911). With the help of a soldier brought by Vranesevic, the two defendants threw the victims' bodies into a well in the same courtyard, into which, later the same night an explosive device was thrown. Over the next few days, in order to conceal the crime, Bulat organized for the bodies to be taken from the well and transferred to the village of Prkos in the *Gusto cerje* forest – all this with the assistance of the Second Battalion. After some time, five bodies were burned in the forest, while one body was burned in the threshing barn in the yard where the civilians had been killed.

The State Attorney's Office of the Republic of Croatia transferred the case against Pane Bulat and Rade Vranesevic to the Office of the Serbian War Crimes Prosecutor (WCP) in keeping with the Agreement on Cooperation in the Prosecution of War Crimes Perpetrators. The investigation was conducted before the County Court in Karlovac, but as both defendants were resident in the Republic of Serbia, and Pane Bulat was a citizen of the Republic of Serbia, the Office of the War Crimes Prosecutor of the Republic of Serbia issued an indictment on April 16, 2008. The main hearing commenced on September 2, 2008.<sup>56</sup>

Pane Bulat pleaded not guilty. In his defense the defendant Rade Vranesevic admitted that he was present when the civilians were killed, but claimed not to have taken any part in the killing. He

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<sup>55</sup> The defendant remained in custody until the commencement of their prison sentence: the defendant Pane Bulat from October 18, 2007 until the final judgment; the defendant Rade Vranesevic from October 17, 2007 until December 4, 2007, when his detention was lifted, and from the first instance judgment on March 15, 2010 when he was ordered to remain in custody until the final judgment.

<sup>56</sup> During the trial, 29 trial days were held. One expert witness and 48 witnesses were examined, one of whom was protected – during his testimony, the trial was closed to the public. Three witnesses/victims were examined before the trial court, while the statements of three witnesses/victims, made before the County Court in Karlovac, were read aloud.

stated that he saw the defendant Bulat shoot at the civilians, and he saw him approach the wounded man, who was still showing signs of life, and shoot him in the head with his pistol. As well as Bulat, Vranesevic initially said he saw an "unidentified soldier," who was also engaged in the shooting, but later withdrew this claim, saying that he didn't see him shoot, but had only assumed that the soldier had also shot the civilians. He said that Bulat had ordered the soldiers to throw the bodies of the civilians into a well, and then ordered the sappers to bring explosives, which they did.

The Higher Court in Belgrade did not accept either man's defense, other than that part of Vranesevic's defense in which he directly charged the defendant Bulat as the perpetrator, as that part of his statement was supported by witness testimonies. The court concluded that in mentioning the 'unidentified soldier', Vranesevic was attempting to evade his criminal liability. The court considered that the unknown soldier was none other than Vranesevic.

The most important statements were given by witnesses Marko Mamula and Rade Malobabic, who found the armed defendants at the spot where the bodies of the executed civilians lay. The trial court ruled that the witness Marko Mamula had witnessed the event, although he himself denied it. The court noted that in his statement, the witness refused to disclose that he had actually witnessed the event, but that from his confrontation with the defendant Bulat it was clear that he had. In a confrontation with the defendant Bulat, he said: "You killed, so confess. You cannot get away with it. You had a *scorpion* (a sub-machine gun) and you killed them with it. You killed old women out of greed, not for some national motives."

Witnesses Stanko Cica, Milan Dzakula, Mile Gabric, Savo Malobabic and Petar Skaljic helped the process of fact-finding by claiming to have heard that both defendants had shot the civilians, from the soldiers who were on guard on the night of the killings.

The court took into account the conduct of the defendant Bulat, after the commission of the criminal offense, which they found clearly indicated his personal responsibility. On the same night, Bulat threatened Rade Malobabic and Duro Ceko, warning them not to talk about the event. He then requested that the well be covered. He also threatened the soldiers, telling them to be careful about what they said, because they had wives and children. After the bodies had been removed from the well, Bulat requested that they be burned.

During the trial, many witnesses, former comrades of the defendant, gave statements which differed from those that they had previously given to the courts in Croatia. The President of the Trial Chamber doubted their testimonies, and on one occasion even asked the witnesses who it was that they were protecting and hiding. In its judgment, the court stated that these witnesses had generally declared that either they had no information about the event or that they had indirect knowledge that the civilians had disappeared or were murdered by the Croatian Army, something for which there was no evidence. Such accounts were not accepted by the court, nor did the court take time to explain them in its judgment.

The trial court took into account the fact that the bodies were destroyed. It is significant that the court managed to determine the number and identity of those killed, based on the testimonies of family members of the murdered civilians and several other witnesses.

The court assessed as mitigating circumstances the fact that the defendants had no previous criminal records, as well as the fact that at the time the crime was committed their mental capacity was diminished as they were intoxicated. However, it is questionable whether the fact that the defendants' mental capacity was diminished (albeit not substantially) should be treated as a mitigating circumstance since they themselves were responsible for their intoxicated state. More specifically, the trial court accepted the findings and opinions of a psychiatric expert witness who stated that by analyzing the behavior of the defendants at the time of the offense, as well as the fact that they were able to reconstruct their own behavior completely, the issue was one of simple drunkenness, where the ability of the defendant to understand the importance of their actions and the ability to control their conduct was reduced, although not dramatically. Further, the defendants themselves said that they had consumed alcohol that day and several witnesses testified about their visible intoxication. Bearing in mind the circumstances, and the doctrine of *actiones liberae in causa* (self-induced incompetence),<sup>57</sup> the lingering impression is that the court improperly valued intoxication as a mitigating circumstance.

With regard to aggravating circumstances, the court correctly stated that the crime was committed against elderly and helpless people whose only sin was that they were of a different nationality. Their bodies were dismembered by explosives thrown into the well. Having been removed from the well, the bodies were burned, which made it impossible for the victims' families to bury their loved ones with dignity. Furthermore, the responsibility of Bulat, as assistant commander of the battalion in charge of security, was far greater than that of an ordinary soldier, such as his co-defendant Vranesevic. The defendant Bulat was in fact the one who should have prevented such event from happening. Bulat's conduct after the commission of the crime was also taken into account, as he demonstrated particular ruthlessness in an attempt to cover up traces of the execution.

Given such a large number of aggravating circumstances on the one hand, and the lack of a criminal record as the only mitigating factor on the other, the decision to sentence Pane Bulat to 15 years in prison, and Rade Vranesevic to 12 years, is disproportionately light, given the severity of the crime, the consequences, and the degree of criminal responsibility.

**II** The decision of the Court of Appeal, which overturned the first instance judgment with regard to the sentence and imposed a heavier penalty, was based on the law and is consistent with the gravity of the crime.

The Court of Appeal found that the trial court had over-emphasized the significance of the mitigating circumstances, and failed to assign adequate significance to the aggravating circumstances. The Court of Appeal cited as mitigating circumstances the defendants' lack of a criminal record and the fact that 18 years had passed since the commission of the crime, properly omitting, although without explanation, that the defendants were in a state of diminished mental capacity. The Court of Appeal accepted all of the other aggravating circumstances that the trial court had listed in its judgment.

## **8. *The Suva Reka/Suharekë Case***

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<sup>57</sup> The Criminal Code of the FRY, Article 24.

An indictment issued on April 25, 2006 charged Radojko Repanovic, Radoslav Mitrovic, Nenad Jovanovic, Sladjan Cukaric, Milorad Nisavic, Miroslav Petkovic, Zoran Petkovic and Ramiz Papic with having ordered and committed the murder of 48 Albanian civilians, looted and destroyed the homes, and displaced Albanian civilians in Suva Reka/Suharekë on March 26, 1999, in their capacity as members of the Special Police Units (PJP) of the Serbian MUP, as active members and reservists of police units, the State Security Forces of the Republic of Serbia and the Territorial Defense Force of Suva Reka, thereby committing war crimes against the civilian population under Article 142, paragraph 1 of the Criminal Code of the FRY.

The trial began on October 2, 2006 before the District Court in Belgrade – War Crimes Chamber, with Judge Vinka Beraha-Nikicevic presiding. The first instance decision was delivered on April 23, 2009. The defendants Radojko Repanovic and Sladjan Cukaric were sentenced to 20 years, the defendant Miroslav Petkovic to 15, and the defendant Milorad Nisavic to 13 years in prison. Defendants Radoslav Mitrovic, Nenad Jovanovic and Zoran Petkovic were acquitted, and following the Prosecutor’s decision not to proceed with the prosecution, charges against Ramiz Papic were withdrawn.

On June 30, 2010, the Court of Appeal in Belgrade delivered a decision which confirmed the first instance judgment of April 23, 2009 with regard to the sentencing of the defendants Sladjan Cukaric, Milorad Nisavic and Miroslav Petkovic; and with regard to the acquittal of the defendants Radoslav Mitrovic, Nenad Jovanovic and Zoran Petkovic. Radojko Repanovic’s 20-year prison sentence was quashed and a retrial ordered. With regard to the acquittal of the defendant Radoslav Mitrovic, the commander of the 37<sup>th</sup> PJP Detachment during the armed conflict in Kosovo and who after the war became the deputy commander of the Gendarmerie of the Republic of Serbia, the HLC holds that the court protected the general, by laying the blame and the command responsibility on the local chief of police.<sup>58</sup>

**I** The retrial of the defendant Repanovic commenced on November 10, 2010 before the Higher Court in Belgrade – War Crimes Chamber, presided over by Judge Vinka Beraha-Nikicevic.<sup>59</sup> On December 15, 2010 the court again sentenced the defendant Radojka Repanovic to 20 years in prison.<sup>60</sup>

Repanovic was sentenced for the following: on March 26, 1999, in his capacity as the police commander of the Secretariat of the Interior (OUP) Suva Reka, making use of the situation in which the VJ was involved in combat actions against the KLA, Repanovic gathered a group of active and reserve police officers, and ordered them to kill Albanian civilians in the village of Berisha, where members of the Berisha family lived, and then gathered another group of police

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<sup>58</sup> An analysis of proceedings and court judgments in the *Suva Reka/Suharekë* case is available at: [http://www.hlc-rdc.org/wp-content/uploads/2011/10/Izvestaj\\_o-domacim-sudjenjima-za-r-zl\\_srpski.pdf](http://www.hlc-rdc.org/wp-content/uploads/2011/10/Izvestaj_o-domacim-sudjenjima-za-r-zl_srpski.pdf).

<sup>59</sup> Dissatisfied with the decision of the Court of Appeal in Belgrade, which acquitted the defendant Radoslav Mitrovic, commander of the 37<sup>th</sup> Detachment of the Special Police Units, the injured parties refused to participate in the retrial of the defendant Radojko Repanovic.

<sup>60</sup> During the retrial, three trial days of hearings were held, during which three witnesses were examined and the statements given by witnesses at the first trial were read.

officers whom he ordered, together with the members of the Civil Protection forces, to load the bodies of those killed onto a truck and drive them away from the scene of the murders.

Radojko Repanovic pleaded not guilty. The Higher Court did not accept Repanovic's defense, in which he claimed that he had sent a group of police officers to merely inspect the house in which the OSCE Mission was located. The court concluded that the defendant's defense was illogical because after the group of police officers had found no one in the house, they set the house on fire and immediately went to the next house, looking for members of the Berisha family, some of whom they killed in front of the house.

The judgment was based on the testimony of the witness Velibor Veljkovic, who, at the time of the event was a police officer in the OUP Suva Reka. His testimony was confirmed by other evidence. He testified that commander Repanovic gave him an order; Veljkovic could not remember the exact wording of the order but he understood that it would mean having to commit the crime of murder. The defense challenged the credibility of this witness because he repeatedly changed his statement. In assessing his testimony, the court took into account the findings and opinions of expert witnesses about the character and personality of this witness. The court took the stance that the witness was unable to accurately remember the wording of the order, but that he had never once said that the defendant Repanovic did not order the killing of the civilians.

Apart from the testimony of witness Veljkovic, the court assessed the testimony of the witness Ivica Novkovic, protected witness A and the (defense) witness Miroslav Petkovic. On the basis of these testimonies, it was established beyond doubt that when the order was issued, Sladjan Cukaric and Miroslav Petkovic (both now convicted as perpetrators) were present. They did not confirm the statements of the witnesses Veljkovic, who refused to act on the said order. Witness Novkovic said the defendant issued an order, but that the order requested them to search the houses and bring back evidence, rather than to kill civilians. The court was correct not to accept these allegations – it is unlikely that this witness would have claimed that the order was to attack and kill, since he was trying to avoid being held criminally responsible.

Although the defendant claimed that he learned about the mass murder from members of the public and other police officers while in the *Calabria* pizzeria, and that he found out about the details of the crime only after he had left Suva Reka/Suharekë, at the trial of Slobodan Milosevic, the court rejected his statement, because a number of witness testimonies placed him at the scene when the bodies were collected.

During the retrial, members of the defendant's family, who monitored the trial, behaved inappropriately. They often commented and objected during the examination of the witness Veljkovic. They were warned by the presiding judge that they would be removed from the courtroom if they continued to interfere with the trial. During the reading of the judgment, the family members of the defendant made inappropriate comments. For this contempt of court, the presiding judge ordered that the public gallery be cleared.

Assessing all the mitigating and aggravating circumstances, the court sentenced the defendant Repanovic to 20 years in prison, a sentence proportionate to the seriousness of the offense.

In the new judgment, the Higher Court emphasized that the defendant Repanovic had taken advantage of the ongoing combat activities involving the 37<sup>th</sup> PJP Detachment and the Fifth

Combat Group of the 549<sup>th</sup> Detachment in the area of the village of Rastane/Reshtan and Studencane/Studenčan. According to the findings of the court, he drew up the plan and ordered a group of police officers to assault and kill ethnic Albanian civilians in the area of the town near the Rashtane Road. That the plan was designed to kill civilians is indicated by the fact that there was no ongoing conflict between members of the KLA and Serb forces in Suva Reka/Suharekë. The court stated that it could not determine from any evidence that the order had come from a higher authority. However, the court could have taken into account the judgment of the ICTY in the case against Milan Milutinovic *et al.* from February 26, 2009,<sup>61</sup> which convicted Sreten Lukic, former Chief of police in Kosovo, among others things, of the crimes committed in Suva Reka/Suharekë. More concretely, the ICTY Trial Chamber found Sreten Lukic responsible beyond reasonable doubt for the action (through his participation in a joint criminal enterprise) of the following crimes in the village of Suva Reka/Suharekë: deportation as a crime against humanity, other inhumane acts (forcible transfer) as crimes against humanity, murder as a crime against humanity, murder as a violation of the laws and customs of war,<sup>62</sup> persecution (murder) as a crime against humanity, persecution (destruction or damage of religious objects) as a crime against humanity.

**II** On June 6, 2011, the Court of Appeal in Belgrade, with judge Radimila Dragicevic-Dicic presiding, dismissed as unfounded, the complaints of Radojko Repanovic and his defense counsel, and confirmed the judgment.

In deciding the criminal sanction, the trial court properly established all mitigating and aggravating circumstances for the defendant, and properly assessed the severity of the crime and its consequences, i.e. that 48 people were killed whose actions had in no way prompted the actions taken by the defendant. The physical and mental suffering caused to the injured parties, and the obvious mental suffering caused to the survivors were also taken into account. The Court of Appeal further stated that the Higher Court had correctly concluded that the maximum sentence stipulated for this offense – 20 years – was the only reasonable punishment for the defendant who at the time was a member of the police and a commander, and whose duty was precisely to protect civilians.

### **9. The Tuzla Column Case**

In an amended indictment issued by the Office of the War Crimes Prosecutor on September 18, 2009,<sup>63</sup> the defendant Ilija Jurisic was charged with the following: that on May 15, 1992 in Tuzla,

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<sup>61</sup> IT-05-87 *Milutinovic et al.*, Vol. 3 of the judgment:

<http://www.icty.org/x/cases/milutinovic/tjug/en/jud090226-e3of4.pdf>.

<sup>62</sup> The ICTY Trial Chamber concluded: “As there is no doubt that the perpetrators caused the death of 45 members of the Berisha family and that this was their intent, the Chamber concludes that all the elements of murder as a violation of the laws or customs of war, punishable under Article 3 of the Statute have been established. In addition, given the fact that the murders were committed in the context of a widespread or systematic attack directed against the civilian population, that the acts of the perpetrators were part of attacks and that the perpetrators, or persons under whose command they acted, knew this, the Chamber has been convinced that all the elements of murder as a crime against humanity have been established.”

<sup>63</sup> The indictment was issued on November 9, 2007.

as a member of the Bosniak and Croat party to the conflict, in his capacity as the duty officer at the Operational Headquarters of the Public Safety Center in Tuzla, and in possession of the power to issue orders to all armed formations of the said party in the area of Tuzla, on receipt of orders to attack, from his superior officer (Meho Bajric, Commander of the operational Headquarters and Chief of the Public Safety Center), he ordered an attack over the radio at the moment when the second part of a JNA column was peacefully passing along Skojevska Street at the intersection known as *Brcanska malta*. On that occasion, as many as 51 JNA members were killed and at least 50 were wounded. This, the indictment alleged, constituted the criminal offense of the use of illegal combat means under Article 148, paragraph 2 of the Criminal Code of the FRY.

The trial commenced on February 22, 2008 before the District Court in Belgrade – War Crimes Chamber, presided over by Judge Vinka Beraha-Nikicevic. On September 28, 2009 the court delivered its judgment, sentencing Ilija Jurisic to a 12-year prison term.

On April 21, 2012, the Court of Appeals in Belgrade with Judge Sinisa Vazic presiding, sat to consider the case and examined new witnesses. On October 11, 2010 the Appeal Court reached its decision,<sup>64</sup> overturning the first instance judgment, and sending the case for retrial before a different Chamber of the Higher Court. The Court of Appeal also quashed the defendant Ilija Jurisic's custody order.<sup>65</sup>

The Court of Appeal correctly concluded that based on the evidence presented during the trial and the appeal proceedings, it could not be proved beyond reasonable doubt that there existed an agreement between Bosnia and Herzegovina and the Federal Republic of Yugoslavia on the peaceful withdrawal of the JNA from the territory of Bosnia and Herzegovina to the territory of the FRY. Furthermore, the facts surrounding the status of the *Husin Rebellion* barracks and the 92<sup>nd</sup> Motorized Brigade were not fully established in the context of the General Staff's order for JNA members, who were citizens of the FRY, to leave the territory of Bosnia and Herzegovina. In addition, the existence of any essential elements of the agreement between the representatives of civilian and military authorities in Tuzla and the commander of the *Husin Rebellion* barracks, Mile Dubajic, remained unclear in terms of the timing and modalities of withdrawal. Finally, it is unclear whether the defendant, as a member of the Operational Headquarters of the Public Safety Center in Tuzla could have known about any possible agreement between Bosnia and Herzegovina and the FRY on the peaceful withdrawal of the JNA from the territory of Bosnia and Herzegovina, or of an agreement between the authorities in Tuzla and the barracks commander.

The Court of Appeal ordered that the retrial analyze whether there was a plan to attack the JNA column, whether the defendant Jurisic knew about it and the way in which he participated in the implementation of any such plan. The court also ordered that the circumstances concerning the initiation of shooting at the column and as well as in other locations, be identified and evaluated

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<sup>64</sup> Television stations were allowed to broadcast from the trial, in accordance with Section 59 of the Court Rule Book, which stipulates that video and audio recordings of the trial, and public broadcasting of it, is to be carried out with the approval of the President of the Supreme Court of Cassation, upon prior opinion of the presiding judge of the Trial Chamber, the judge and the parties' consent.

<sup>65</sup> The accused had been in custody since May 11, 2007.

more carefully, and also to explore whether police officers on deployment were familiar with the order, which the defendant Jurisic passed on.

The retrial commenced on July 6, 2011.<sup>66</sup>

Although the authorities of Serbia do not have the ability to compel the presence of the defendant Jurisic, a citizen of Bosnia and Herzegovina, he has regularly taken part in the proceedings.<sup>67</sup>

The defendant Jurisic continues to protest his innocence at the retrial.

The witnesses examined so far were examined only about how it came to be agreed that the column leave the barracks on May 15, 1992, because the Court of Appeal had called for discrepancies in their earlier statements to be clarified. The court did not in the end obtain facts to confirm the indictment, since the witnesses Mile Dubajic and Enver Delibegovic had no knowledge of the defendant Ilija Jurisic, while the witness Meho Bajric stated that although the defendant Jurisic was on duty, he did not inform Jurisic about his meetings with the commander, Dubajic, and that therefore Jurisic knew nothing about the preparations for the evacuation of troops from the barracks.<sup>68</sup>

In 2012, a number of witnesses will be re-examined and, new evidence will be obtained, and additional expert witness testimony will be given. Once this process is complete a first instance judgment can be made.

### ***10. The Gnjilane Group Case***

An indictment issued by the Office of the War Crimes Prosecutor on August 11, 2009 charged Agush Memishi, Fazli Ajdari, Rexhep Aliu, Shaqir Shaqiri, Shefqet Musliu, Sadik Aliu, Idriz Aliu, Faton Hajdari, Shemsi Nuhiu, Ahmet Hasani, Nazif Hasani, Ramadan Halimi, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu with war crimes against civilians under Article 142, Paragraph 1 of the Criminal Code of the FRY, and Article 22 of the Criminal Code of the FRY.

The trial commenced on September 23, 2010 before the War Crimes Chamber of the District Court in Belgrade. On May 14, 2010, the Trial Chamber issued a ruling severing criminal proceeding against those defendants who were being tried *in absentia*: Shefqet Musliu, Sadik Aliu, Idriz Aliu, Shemsi Nuhiu, Ramadan Halimi, Fazli Ajdari, Rexhep Aliu and Shaqir Shaqiri. On November 11, 2010, the Chamber decided that the proceedings against these defendants be terminated until more evidence is presented.

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<sup>66</sup> By the end of 2011, two trial days had been held, during which the defendant was examined, along with three witnesses.

<sup>67</sup> The retrial was monitored by the defendant's wife, a representative of the Foundation Truth, Justice, Reconciliation, representatives of the OSCE Mission to Serbia, the Embassy of Bosnia and Herzegovina in Belgrade, the media, representatives of the Humanitarian Law Center and other NGOs.

<sup>68</sup> Witnesses Mile Dubajic and Meho Bajric testified at the first trial before the War Crimes Chamber in Belgrade and before the Court of Appeal in Belgrade, while the witness Enver Delibegovic testified only before the Court of Appeal. Witnesses Meho Bajric and Enver Delibegovic testified via video-link from the premises of the Court of Bosnia and Herzegovina in Sarajevo.

An amended indictment of November 16, 2010 charges that the defendants – Agush Memishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimona Sadiku and Burim Fazliu from early June until the end of December 1999, in order to establish civil and military control over the territory of Kosovo and Metohija, and for the purpose of simultaneous expulsion of Serb and other non-Albanian population, committed the crimes of unlawful detention, inhumane treatment, torture, rape, murder, bodily injury, the infliction of great suffering and looting. These acts resulted in the following: as many as 80 people were brutally tortured to death and killed,<sup>69</sup> at least 34 persons are still registered as missing, while at least 153 persons were illegally detained, tortured and then released. The defendants were charged with having committed the crimes as members of the KLA, or as persons who voluntarily joined the KLA, after their unit had, at the beginning of June 1999, been deployed on the territory of Gnjilane/Gjilan and its surroundings (the command of the unit was placed in the building of the JNA in Gnjilane/Gjilan, while other members were located in the building of the boarding high school and in other facilities).

Agush Memishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu have been in custody since December 26, 2008. Samet Hajdari, who pleaded not guilty, exercised his right not to testify. All of the other defendant denied any involvement with the crimes, but agreed to testify.

**I** On January 21, 2011, the Higher Court in Belgrade – War Crimes Chamber, presided over by Judge Snezana Nikolic-Garotic, rendered its judgment in this case. The defendants were sentenced to imprisonment as follows: Agush Memishi, Selimon Sadiku and Samet Hajdari, each to 15 years; Faton Hajdari, Ahmet Hasani and Nazif Hasani each to 10 years; and Kamber Sahiti and Ferat Hajdari to 8 years. Agush Memisha, Faton Hajdari, Samet Hajdari and Selimon Sadiku, were held in custody, pending appeal, while the defendants Ahmet Hasani, Nazif Hasani, Ferati Hajdari, Kamber Sahiti and Burim Fazliu, were released from custody on December 29, 2010, but were prohibited from leaving their place of residence without the court's approval and ordered to report regularly to their local police station.

**II** The Court of Appeal in Belgrade passed judgment on December 7, 2011, overturning the first instance judgment and sent the case to the trial court for retrial. Agush Memisha, Faton Hajdari, Samet Hajdari and Selimon Sadiku were additionally held in custody pending retrial. According to the findings of the Court of Appeal, the first instance judgment was unclear and contradictory. The explanation made no mention of crucial facts and reasons for the lack of facts were largely vague and contradictory.

In its decision, the Court of Appeal concluded that the trial court had violated the presumption of innocence under Article 3 of the the Criminal Procedure Code (CPC), which stipulates that everyone is presumed innocent until proven guilty by the final judgment of a competent court. The trial court's judgment stated that the defendants Agush Memisha, Faton Hajdari, Ahmet

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<sup>69</sup> The bodies of eight persons were found, but only the remains of Stojace and Zorica Mladenovic have been identified so far.

Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu, together with those defendants against whom proceedings had been terminated (Fazli Ajdari, Rexhep Aliu, Shefqet Musliu, Sadik Aliu, Idriz Aliu, Shemsa Nuhiu, Ramadan Halimi and Shaqir Shaqiri), had committed war crimes against the civilian population. The Court of Appeal stated that those persons against whom proceedings had been terminated should not have been included in the judgment. More precisely, the position of the Court of Appeal was that these persons had not had the opportunity to use all of the rights that they would have legally been due, if criminal proceedings in this case had been conducted against them.

The Court of Appeal correctly noted the contradictions and the lack of clarity in the first instance judgment, which among other areas, was manifested in the timings given for the offenses. The first part of the judgment notes that in early July 1999, KLA units were deployed on the territory of Gnjilane/Gjilan and its surrounding; later, the period from early June until the end of December 1999, and the first half of June 1999 until the end of September 1999, are both stated as the time of the offenses. In part of the judgment that concerns the specific acts of the defendants, only June 1999 is stated (mid-June 1999: June 17-23, 1999; June 27, 1999; June 19, 1999, and the second half of June 1999). However, the trial court lists in its explanation the period from early June to the end of December 1999, and then also the period from the first half of June through the end of September 1999, which makes the judgment both incomprehensible and contradictory.

It should be noted that the time that the war crime against civilians was committed and with which the defendants were charged, was an important feature. Accuracy in determining the time of the offense is significant for the proper application of the criminal law, which states that war crimes can be committed only during war, armed conflict or occupation. It is clear that in this particular case it was necessary to establish that armed conflict was indeed taking place at the time of the commission of the crimes. Armed conflict is defined as a resort to armed force between states or protracted armed violence between the authorities and organized armed groups, or between such groups within a state. To make this determination, it is necessary that the time of the commission of the crime be specified in a clear and unambiguous manner.

The Court of Appeal held that, when it came to the issue of whether an armed conflict was taking place, the trial court did not give clear reasons or conclusions. The Court of Appeal held that the vague phrasing of the judgment in the segment where the existence of an armed conflict is associated with the fact that the KLA, contrary to its obligation to immediately cease all offensive actions and to enforce demilitarization, continued attacks on the civilian population and individual civilians. Attacks on civilians by the KLA carried out after the withdrawal of Serbian military forces from Kosovo, cannot be characterized as an armed conflict, because such actions do not constitute armed struggle between armed formations.

While it is undoubtedly true that, following the withdrawal of the armed forces of the FRY, the killings and disappearances of Serbs, Roma and Albanians designated as associates of Serbian authorities, went on, it is necessary to actually establish the existence of armed conflict. In addition, in order to qualify certain actions as a war crime against civilians, the link between the crime for which a person is charged and armed conflict must be established.

The Court of Appeal held that the trial court had applied double standards in evaluating the testimony of the protected prosecution witness *Bozur 50*. In its explanation of the judgment, the trial court stated that this witness spoke of a number of facts in very general terms (the witness was unable to determine the time of any event even remotely, was unable to talk about anything that might identify the victims etc.), and this was why his testimony was rendered unreliable and vague with respect to the participation of individual defendants in the offenses. Despite this opinion, the trial court in one part of its explanation accepted the testimony of this witness, referring to other evidence that supported his testimony. Later, the trial court did not accept the very same evidence, and justified this rejection by the fact that the testimony was not supported by other evidence.

Concerning the assessment of the testimonies of the protected witnesses *C1* and *C2*, the Court of Appeal considered that the trial court, despite stating that it had noted some differences between testimonies before the investigating judge and testimonies at the trial, did not offer good enough arguments to explain why it had accepted their statements from the trial. This is especially important in view of the fact that at the hearing before the District Court in Nis in 2000 the protected witness did not mention rape, and because there were differences with regard to the stated time of their capture and release. The Court of Appeal considered that the trial court did not review these parts of their testimonies, which it should have done, taking into account the complete testimony of the witness Danica Marinkovic, who as an investigating judge in 2000 had heard these two witnesses (*C1* and *C2*).

At the trial, witness Danica Marinkovic stated that, according to witnesses *C1* and *C2*, they were detained for one day only, not for five or six as they said at the later hearing. She also stated that witnesses *C1* and *C2* did not mention that they had been raped. During the hearing before her, Marinkovic said that they were under stress, one was crying, the other was nervous and wanted to finish her testimony as soon as possible. One of them had medical records. The witness Marinkovic, in her capacity as the investigating judge, had intended to examine them in detail when they calmed down and were feeling better, because at the time of the hearing were in therapy. However, soon afterwards, she was transferred to another court, and so she had no knowledge of the outcome of the case.

The Court of Appeal considered the explanation concerning identification of the defendant by the two protected witnesses to be vague. Witness *C1* was asked to identify the defendant on two occasions, after she had been questioned by the investigating judge. On the first occasion, which was interrupted, witness *C1* failed to recognize any of the defendants, while on the second round, the next day, and at the trial, she recognized all defendants. Identifications made by witness *C2* before the investigating judge and those at the trial did not match.

In 2012, by order of the Court of Appeal, among the witnesses to be heard during the retrial will be victim/witness *C1*'s brother and sister-in-law, who were the first persons known to the victim who were in contact with *C1* and *C2* following their release and arrival in Serbia.

## ***11. The Rastovac case***

On September 23, 2011, the War Crimes Chamber of the Higher Court in Belgrade, with Judge Rastko Popovic presiding, delivered a judgment sentencing Veljko Maric to 12 years in prison<sup>70</sup> for a war crime against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY.<sup>71</sup>

On October 31, 1991, as a member of the 77th Grubisno Polje Independent Battalion of the Croatian armed forces, during the *Otkos 10* action (Clippings 10), which consisted of the cleansing of Rastovac village in the municipality of Grubisno Polje (Republic of Croatia), armed and in uniform, Veljko Maric entered the house of the Serb Slijepcevic family, and fired several rounds from an automatic rifle into Petar Slijepcevic in the presence of his wife Ana, thereby committing a war crime against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY.

The defendant Veljko Maric denied committing this criminal offense.

In his oral explanation of the decision, the presiding judge stated that the Court did not accept the indictee's defense, but instead placed its faith in the testimonies of Josip Kiseli and Darko Cerni. During the trial on May 30, 2011, witness Darko Cerni said: "That morning we went from Ivanovo Selo in two directions: one group headed toward Mali Rastovac, and the other, where Veljko and I were, toward the main road with a mission to search the area. Having reached the first houses, Mr. Maric entered the house from which I then heard shots. When he came out, he said that he was attacked and had to defend himself."

Zeljko Slijepcevic, son of Petar Slijepcevic, also testified, saying that that his mother Ana had told him that on October 31, 1991, around 9:00 a.m. the indictee Veljko Maric broke into their house alone and shouted: "Are there any Chetniks in here?" When they replied that there were none, he grabbed Zeljko's father by the chest, pushed him across the dining table onto the bed in the kitchen and shot him with a rifle.

The only eyewitness, Ana Slijepcevic, could not testify in court due to poor health but the court accepted her statement, given to the investigating judge in the County Court in Bjelovar. In that statement, she said that she would not be able to identify her husband's murderer.

In his explanation of the sentence, the presiding judge listed as mitigating circumstances that the indictee Maric was a father of five children, and as aggravating circumstances the conduct of the indictee, the fact that he entered the house, shouted and threw Petar Slijepcevic onto the bed, that the victim was killed in front of his wife, that Slijepcevic was a civilian, unarmed and unable to offer any resistance, and the past behavior of the indictee Maric. Since the only extenuating circumstances are the family circumstances of the indictee, and because he offered no sincere confession or repentance, the sentence is not proportionate to the seriousness of the offense, nor does it fulfill the requirement for justice.

The key drawback at this trial was that Veljko Maric was tried in Serbia, instead of Croatia. In the interest of efficiency, equity and good judicial cooperation between the two countries, and in

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<sup>70</sup> During the six trial days, ten witnesses were examined, among whom were one injured party and one expert witness.

<sup>71</sup> The OWCP issued an indictment against Veljko Maric on August 12, 2010.

keeping with the 2006 Agreement on Cooperation in the Prosecution of War Crimes Perpetrators, the Republic of Serbia should have extradited the indictee to the Republic of Croatia and transferred the evidence against him to the State Attorney's Office of the Republic of Croatia. The situation created following the pronouncement of the judgment, and following the Croatian Parliament's adoption, in November 2011, of the Law on Invalidation of Certain Legal Acts of the Judicial Bodies of the Former Yugoslav National Army, the former Yugoslavia and the Republic of Serbia, could mean that if a final judgment is handed down, the defendant, Veljko Maric, would have to serve his sentence in Serbia, separated from his family and in a hostile environment.

During the trial, the hearing was occasionally postponed because witness statements obtained during the investigation from persons invited to testify in court had not been made available to the defense. The prosecutor opposed the postponements, despite the fact that this would have left the defense without the legally mandated time to prepare. To justify his position, the prosecutor said he believed there were no reasons to postpone the trial, since the witnesses who had been summoned, were already in the court. The Trial Chamber correctly decided that the trial should be postponed until the defense was familiar with the content of the statements.

The Court made some omissions in the way it ruled on proceedings. The defense claimed that when Veljko Maric was arrested on April 18, 2010, neither the warrant nor the request for his investigation by the Office of the War Crimes Prosecutor were presented to him. The defense attorney requested that the court obtain a report from the the Republika Srpska Ministry of Interior (RS MUP) on the formal legal grounds for the detention of the defendant Maric on April 18, 2010, given that the request for his investigation was not filed until the next day, April 19, 2010. The presiding judge said that the Chamber would rule on this later, but this did not happen even though a first instance judgment was handed down.

### *1. The Kusnin/Kushnin Case*

On September 16, 2002, an altered indictment charged<sup>72</sup> defendants Zlatan Mancic, Rade Radojevic, Danil Tesic and Misel Seregi with the commission of war crimes against civilians, under Article 142, paragraph 1 of the Criminal Code of the FRY. The indictment charged that on an unspecified date in early April 1999, in the village of Kusnin/Kushnin, in the municipality of Prizren, the defendants participated in the killing of two ethnic Albanian civilians. The indictee Mancic ordered the indictee Radojevic, then a platoon commander, to take another soldier with him and kill two men who he had just been brought to the security officer. The indictee Radojevic passed on the order to Tesic, a soldier, and on the basis of the order received, Tesic and another soldier, Seregi took two brothers, Miftar and Selman Temaj, both from the village of Kusnin/Kushin, toward Prizren. Close to the road, about four kilometers from the place where their unit was located, they killed the Temaj brothers with an automatic weapon and burned their bodies. The indictee Mancic was further charged with having taken an unspecified amount of money from a person who was in a refugee column, which the army stopped in March 1999

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<sup>72</sup> The initial indictment of July 19, 2002 charged the men with the crime of murder under Article 47, paragraph 2, count 6 of the Criminal Code of the Republic of Serbia.

above a place known as Vran stena on the road between Orahovac/Rahovec and Malisevo/Malishevë.

The first instance trial commenced on September 16, 2002 before the Military Court in Nis. Indictees Tesic and Seregi admitted the offense. The trial ended on October 11, 2002 with their conviction<sup>73</sup> which the Supreme Court in Belgrade reversed only with respect to the sentence.<sup>74</sup> However, the Supreme Court of Serbia quashed the judgment because the Supreme Military Court presented one piece of evidence outside the trial.

The retrial began on June 6, 2007 before the District Court in Nis.<sup>75</sup> Following changes in legislation<sup>76</sup> and the composition of the Trial Chamber, the trial began anew in 2010 before the Chamber of the Higher Court in Nis, presided over by judge Dijana Jakovic.<sup>77</sup>

All indictees have been granted bail, and deny having committed the offense. Furthermore, their attorneys even deny that the victims ever existed. Miftar Temaj was identified in 2004 on the basis of DNA analysis, while the remains of Salman Temaj have yet to be found. At the trial on March 24, 2009, one piece of evidence presented was a documentary film, *If you are burning, burn better!* by Jasna Jankovic, produced by B92 in 2004 (after the final judgment of the Supreme Court had been pronounced). Indictees Danilo Tesic, Misel Seregi, Rade Radojevic and Zlatan Mancic appear and speak in the film. Tesic and Seregi describe in detail and acknowledge the commission of the offense. When asked why they had changed their defense from that which they had presented to the military court, and which they had confirmed in the documentary, Seregi said that he had admitted having participated in the murder because this was the line taken by his first defense attorney. Tesic stated that he had invented the story about the murder, believing that the investigation would determine that the murder had never taken place, but, as that did not happen during the trial, he decided to deny his guilt and tell what had really happened.

The Court did not obtain facts to uphold the indictment because most of the witnesses, former colleagues of the accused, stated that they did not remember the killing of any civilians in Kusnin/Kushnin. They had heard of the event only when the investigation was launched and they were invited to give statements as witnesses. Only one witness implicated Mancic in a crime. However, this witness did not charge him with giving orders for the killing of two civilians from the village of Kusnin/Kushnin but with the seizure of money from refugees in a convoy at Vran stena.

Witness statements were mainly obtained during the investigation or the first trial in 2002. After taking the oath but prior to the examination of each witnesses, the presiding judge of the Trial

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<sup>73</sup> The following sentences were pronounced: Zlatan Mancic 7 years; Rade Radojevic 5 years; Daniel Tesic 4 years, and Misel Seregi 3 years.

<sup>74</sup> Indictree Mancic was sentenced to 14 years in prison, indictree Radojevic to 9, indictree Tesic to 7 years, and indictree Seregi to 5 years in prison.

<sup>75</sup> This criminal case was transferred to the District Court in Nis in accordance with the Law on the transfer of jurisdiction of military courts, military prosecutors and military attorney's office to member-states' jurisdictions, in effect as of November 19, 2004.

<sup>76</sup> The Law on Seats and Territories of Courts and Public Prosecutors from December 22, 2008 stipulates that as of January 1, 2010, higher courts replace district courts.

<sup>77</sup> In 2011, five trial days were held, during which six witnesses were examined.

Chamber read out the witnesses earlier statements, a move that is contrary to the Criminal Procedure Code (CPC), which stipulates that the statement be read only in exceptional instances, not as a way of reminding the witness of his or her earlier testimony. The witness should be invited to present in his/her own words, in an uninterrupted speech, everything he/she knows about the case, and can then be asked questions for the purpose of checking, for additional information and clarifications. If the witness has made statements during the investigation which he/she no longer remembers in court, or if he/she departs from his/her earlier statement, the earlier testimony will be presented or, more concretely – the discrepancies between the previous and the present testimonies will be pointed out and he/she will be asked why he/she departed from the previous statement. If necessary, the earlier statement or parts of it will be read out.

Defense attorneys commented inappropriately throughout the course of the trial, and sometimes addressed the Trial Chamber while sitting or without asking permission to speak. The President of the Trial Chamber always halted such inappropriate comments, but did not punish any defense attorney, a move which may possibly have prevented future incidents.

It is problematic that a death certificate was missing from the case files, a document which was presented as evidence at the trial on June 25, 2008.

Proceedings are expected to be completed and a first instance judgment delivered in 2012.

## **2. *The Orahovac/Rahovec Case***

An indictment issued by the District Attorney's Office in Pozarevac on February 19, 2003<sup>78</sup> charged the defendant Boban Petkovic, then a member of the MUP (Interior Ministry) of Serbia, with committing war crimes against civilians, a criminal offense under Article 142, paragraph 1 of the Criminal Code of the FRY. Additionally, the defendant Djordje Simic was charged, as member of the MUP of Republika Serbia, with having aided and abetted a war crime against civilians, under Article 142, paragraph 1 of the Criminal Code of the FRY and also Article 24 of the Criminal Code of the FRY.

According to the indictment, on May 9, 1999, at a place known as *Ria* on the road out of Orahovac/Rahovec toward the village of Velika Hoca/Hoçë e Madhe, indictee Petkovic caught up with Ismail Derguti, an ethnic Albanian who was fleeing from the region of combat operations, knocked him to the ground and shot him once in the head with a pistol he had previously obtained from indictee Simic, causing Derguti's immediate death. Petkovic then headed to a nearby house. When he saw Albanian civilians Sezair Miftari and his wife Shefkie coming out of the family house, he fired several shots from an automatic weapon in their direction. Both Sezair and Shefkie Mitrari were hit and died immediately. The first instance trial began on June 20, 2000 before the District Court in Pozarevac. On July 19, 2000 the judgment sentenced Boban Petkovic to 4 years and 10 months in prison for the crime of murder under Article 47, paragraph 2, count 6 of the Criminal Code of the Republic of Serbia, while defendant Djordje Simic, who was tried *in absentia*, was sentenced to one year for aiding and abetting in the murder of Ismail Derguti. Petkovic was also ordered to undergo compulsory psychiatric treatment on his release.

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<sup>78</sup> The indictment was issued on November 12, 1999 for the criminal act of murder under Article 47 of the Criminal Code of the Republic of Serbia.

On December 18, 2001, the Supreme Court of Serbia passed a ruling quashing the judgment and the case was sent for retrial.

The new first-instance trial commenced on February 28, 2003 before the District Court in Pozarevac based on an amended indictment, with the criminal offense redefined as a war crime against the civilian population. A new first-instance judgment was pronounced on August 21, 2003. The defendant Boban Petkovic was sentenced to five years in prison, and ordered to undergo compulsory psychiatric treatment on his release. Defendant Djordje Simic was acquitted. A ruling of the Supreme Court of Serbia delivered on May 25, 2006 quashed the first instance judgment and sent the case back to the District Court in Pozarevac for a second retrial.

On February 9, 2007, the District Court in Pozarevac declared the case to be outside of its jurisdiction and ordered that the case be submitted to the District Court of Prizren, located in Pozarevac.<sup>79</sup> The trial commenced before this court on January 22, 2008.<sup>80</sup> Following changes in legislation<sup>81</sup> and the composition of the Trial Chamber, the trial began anew on September 20, 2011, before the Higher Court in Pozarevac, presided over by judge Dragan Stanojlovic.<sup>82</sup>

The defendants pleaded not guilty, and have been granted bail.

Injured parties from the Derguti and Miftari families are not taking part in the trial.

The prosecutor has suggested that exhumation and autopsy of the corpses be ordered, something which is impossible without application to, and cooperation from, the judiciary of Kosovo and EULEX. The Trial Chamber ruled that the trial be postponed indefinitely.

### *3. The Oto Palinkas et al. Case*

On September 8, 1999, the Office of the Military Prosecutor in Nis issued an indictment, later amended on June 6, 2000, against Oto Palinkas and Miodrag Miskovic, charging that in mid April 1999 in Gornja Klina/ Klinë e Epërme, Srbica/Skenderaj, together with indictee Dragan Milosavljevic,<sup>83</sup> they killed Shefqet Sejdiu and five other unidentified Kosovo Albanians. The Prosecutor charged them with having taken the six some 200 to 300 meters from the hotel where they were being detained, lining them up next to a house, opening fire with automatic weapons from about 10 meters and killing them. Defendant Dragan Milosavljevic was accused of throwing the bodies of five of those killed into a well in the yard of the house, and defendant Oto Palinkas of throwing the body of the sixth victim into the well, pouring gasoline on the bodies and burning them. The Prosecutor qualified the defendants' actions as an offense of murder under Article 47,

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<sup>79</sup> After Serbian institutions ceased functioning in Kosovo in June 1999, judges and prosecutors who fled from Kosovo continued to work in courts and prosecutors' offices located in Serbia but with their original Kosovo jurisdiction. Parallel courts operated in Kosovo under the supervision of UNMIK.

<sup>80</sup> In 2008, two trial days were held. In 2009 and 2010 there was no trial.

<sup>81</sup> The Law on Seats and Territories of Courts and Public Prosecutors from December 22, 2008 stipulated that the as of January 1, 2010 Higher Courts would replace District Courts.

<sup>82</sup> In 2011 one trial day was held, when the defendants were heard.

<sup>83</sup> Defendant Dragan Milosavljevic is registered as a missing person following the conflict. Proceedings against him have been ended.

Paragraph 2, Count 2 of the Criminal Code of the Republic of Serbia, as co-perpetrators and Article 22 of the Criminal Code of the FRY. A second count in the same indictment, charged that in mid April 1999 in Donja Klina/Klinë e Epërme, in the municipality of Srbica/Skenderaj, Oto Palinkas, Igor Mijatovic, together with Dragan Milosavljevic, killed two unidentified Kosovo Albanians, whom they separated from a refugee column on the road between Kosovska Mitrovica and Pec, taking them about one kilometer from the column, and in the backyard of an abandoned house shooting at them a number of times with automatic weapons. After the murders, the defendant Dragan Milosavljevic was alleged to have thrown the bodies into a well in the yard of the house. The actions of the defendants were adjudged by the Prosecutor to constitute the criminal offense of murder under Article 47, Paragraph 2, Count of the Criminal Code of the Republic of Serbia, and Article 22 of the Criminal Code of the FRY.

On June 7, 2000 The District Court in Kraljevo and its Trial Chamber presided over by judge Ivica Vukicevic acquitted the defendants Oto Palinkas, Miodrag Miskovic and Igor Mijatovic of all charges. The District Public Prosecutor in Kraljevo appealed the judgment, and the Supreme Court of Serbia quashed the judgment and sent the case for retrial.

On May 12, 2011, at the retrial, the Higher Court in Kraljevo and its Trial Chamber presided over by Judge Dragica Pancic, once again acquitted the defendants Oto Palinkas, Miodrag Miskovic and Igor Mijatovic.<sup>84</sup>

On October 6, 2011, the Court of Appeal in Kragujevac<sup>85</sup> dismissed an appeal by the Higher Public Prosecutor in Kraljevo and the judgment of the Higher Court in Kraljevo was confirmed, thereby absolving the defendants Oto Palinkas, Miodrag Miskovic and Igor Mijatovic of any criminal liability.

In a statement in his defense given to the investigating judge of the Military Court of the command of the Pristina Corps, defendant Oto Palinkas admitted that he committed the criminal offenses he was charged with under both counts of the indictment. He emphasized that he committed the murder, together with other defendants, on the orders of a superior officer, Lieutenant Colonel Slobodan Stosic.<sup>86</sup> Likewise, defendant Miodrag Miskovic in his defense in the proceedings admitted that he committed the murder under count 1 of the indictment, claiming that defendant Palinkas had conveyed to him Lt. Col. Stosic's orders that they should, together with Dragan Milosavljevic, eliminate the six detained Kosovo Albanians, which they did. Further, in the previous proceedings, defendant Igor Mijatovic admitted committing the murders from the second count of the indictment, claiming that defendant Palinkas told him that Lt. Col. Stosic had ordered that the two of them, together with Dragan Milosavljevic, kill the two Kosovo Albanians separated from the refugee column. At the trial, Palinkas changed his defense, claiming that the six Kosovo Albanians from the first count of the indictment were killed by Dragan Milosavljevic, and denying that the murder of the two ethnic Albanians in the second count of the indictment had occurred at all. He added that his confession before the investigating

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<sup>84</sup> Defendant Igor Mijatovic was tried *in absentia*, because he was on the run and not available to the authorities.

<sup>85</sup> Members of the Chamber were: judge Sonja Pavlovic, who presided over the Chamber, and judges Milevka Milenkovic and Branislav Stanic.

<sup>86</sup> Lieutenant Colonel Slobodan Stosic was investigated for a war crime against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, and Article 22 of the Criminal Code of the FRY, but the military prosecutor dropped the prosecution, and criminal proceedings were suspended.

judge of the Military Court of the command of the Prishtina Corps had been given under duress. Further, defendants Miodrag Miskovic and Igor Mijatovic disputed their own confessions made in the same proceedings, emphasizing that they had pleaded guilty under the threat of a beating by the military police and that they had to sign a record compiled by the investigating judge on the basis of the official records of the Military Police, rather than in accordance with their testimony.

I In the explanation of its May 12, 2011 decision which acquitted the defendants of the allegations in the first count of the disposition of the indictment, the Higher Court in Kraljevo stated that it was unable to locate the exact site where the crime had been committed due to lack of documentation from the investigation – i.e. the record of the crime scene investigation, crime scene sketches and photo-technical documentation. The court was also unable to determine the time of the alleged crime in the first count of the indictment, citing as a reason the inaccuracy of the statement of the forensic expert Dr. Zoran Stankovic. The Court said that Dr. Stankovic, who on June 10, 1999, conducted an external examination of the six corpses, defined the time period in which the deaths occurred (mid-March to mid-May 1999), too broadly, leaving the possibility that the victims were not killed together and at the same time, but separately and independently from one another.

In the period from April 2 until May 10, 1999, other military and police units were also located in in the village of Gornja Klina/Klinë e Epërme along with the defendants' unit and the court concluded that it could not be determined with certainty that "these persons [from Count 1 of the disposition of the indictment], whose bodies were found later, were shot only by members of the defendants' military unit."<sup>87</sup>

In the explanation of its decision, the court further stated that none of the witnesses examined was an eye-witness to the events, and none confirmed the factual allegations in the disposition of the first count of the indictment, according to which Palinkas and Miskovic, along with Milosavljevic, killed six Kosovo Albanians. On the basis of differences in the testimony of witnesses regarding the number of prisoners, their age and the clothing worn, the court concluded that "on the basis of their statements, it could not be accurately determined whether on that occasion there were six, or perhaps more or fewer prisoners, and particularly it could not be determined whether they described the same persons."<sup>88</sup> The Court noted that at the trial only defendant Palinkas and witness Slobodan Stosic<sup>89</sup> stated that three captured Kosovo Albanians wore KLA uniforms, and that the other three Albanians were in civilian clothes. All other witnesses either stated that all persons captured were in civilian clothes or that they did not remember what clothes they were wearing.

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<sup>87</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 23.

<sup>88</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 17.

<sup>89</sup> At the time of commission of the crime, Lieutenant Colonel Slobodan Stosic was on duty as the commander of the rear battalion, in which the defendants served as volunteers. Stosic was investigated for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, and Article 22 of the Criminal Code of the FRY, but the military prosecutor dropped the prosecution, and criminal proceedings were suspended.

The first instance court points to the notes of the external examination of the corpses, which Dr. Stankovic made on June 10, 1999, which provide detailed descriptions of clothing and shoes on the bodies, on the basis of which he established that "all persons were wearing civilian clothes and that none were wearing military uniforms or had military equipment, or parts thereof."<sup>90</sup>

In their defense, during the first hearing before the Military Court, defendants Palinkas and Miskovic admitted killing the six Kosovo Albanians.

Their statements formed part of the record of the examination of the defendants before the investigating judge of the Military Court in the command of the Prishtina Corps. The records state that Milutin Zekovic acted as the investigating judge. At the trial, Zekovic explained that at the time of the investigation, he had not been appointed as a judge. In the same records it is mentioned that a ruling had been rendered to appoint defense counsels for Palinkas and Mijatovic *ex officio*" but this piece of information was omitted from the report of Miskovic's examination. In the pre-trial proceedings, Palinkas was not told that he could use his native language. For all these reasons, the Higher Court in Kraljevo " evidence has been presented to the court on which the court cannot base its decision, since the manner in which the evidence was obtained renders it inconsistent with the provisions of the Criminal Procedure Code (CPC) which was in effect at that time"<sup>91</sup>

In its explanation of its judgment on the second count of the disposition of the indictment, the court stated that the location and time of the crime could not be determined as "there is no evidence that an investigation of this incident was conducted, that photo-technical documentation was compiled or that technical examination of the crime scene was performed."<sup>92</sup> Further, since the bodies of the two unidentified Kosovo Albanians were not found, the court concluded that the charges were based "only on the of the minimal acknowledgment of guilt from the defendants given during the first examinations, in a procedure that was not carried out lawfully."<sup>93</sup>

**II** In its decision, the Court of Appeal concluded that the first instance court had properly and fully established the facts in accordance with the evidence it obtained, performed and evaluated. According to the Court of Appeal, the first instance court correctly concluded that it had not been proven that the defendants committed the crimes mentioned in the first count of the indictment. Further, in the opinion of the Court of Appeal, the first instance court, the Higher Court in Kraljevo, had properly concluded that it had not been proven that the defendants committed the crime they were charged with in the second count of the indictment.

Contrary to this finding by the Court of Appeal, there is ample evidence that challenges the correctness and accuracy of the conclusions of the first instance court.

Firstly, at the retrial, in the explanation of its decision, the Trial Chamber of the Higher Court in Kraljevo stated that the commission, the place and time of the criminal offense in the first count of the indictment had not been determined. However, it is a fact that the court heard the testimonies of Slavisa Vuksanovic, Sveta Stanisic, Rade Krsmanovic and expert witness Dr.

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<sup>90</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 20.

<sup>91</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 23.

<sup>92</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 27.

<sup>93</sup> Judgment of the Higher Court in Kraljevo, 1K. 1/10, May 12, 2011, p. 27.

Zoran Obradovic, who was part of the Forensic team that on June 10, 1999 conducted an investigation of the scene of the crime. The court failed to evaluate their testimonies, other than that of Dr. Zoran Stankovic, stating that they were not eyewitnesses to the event and they were heard only about the circumstances of the crime scene investigation, even though their statements could have been used as evidence of the crime scene itself as well. The Court also stated that it was unable to identify the crime scene, referring to the fact that it did not receive the crime scene sketch, the photo-technical documentation on the crime scene or a report on the investigation from the military authorities, although both the defendant Palinkas at the trial, and witness Djurdjevic spoke of the crime scene in their statements. Information about the site of the executions can be determined from the report of the external examination of the corpses as well. As for the time of the crime in the first count of the indictment, all the defendants spoke of it at trial, as did the witnesses Stosic, Djurdjevic, Atanasijevic, Vukadinovic, Bezanovic, and the expert witness Dr. Stankovic, who gave his estimate of how long the bodies which were found could have been dead. The time of the crime is confirmed by the established fact about the period when the defendants' unit was in the area where the crime was committed, as well as by the fact that the time of the murders was confirmed, more or less uniformly, by the defendants and all the witnesses.

The Court of Appeal demonstrated clear bias in its acceptance of the finding that the Higher Court in Kraljevo could not determine the exact number of killed Albanians, despite the defendants Palankas and Miskovic, and witnesses Stosic, Djurdjevic, Bezanovic and Sudarski clearly speaking of the number. In its evaluation, the Higher Court in Kraljevo even went so far as to claim that it could not establish that all of the persons killed were Kosovo Albanians, although it is generally known that in Gornja Klina/Klinë e Epërme and the surrounding area the population was exclusively Kosovo Albanian. It remains unclear whether the Court of Appeal in Kragujevac holds that victims' ethnicity determines the character of the criminal offense of murder, with which the defendants were charged.

The most important and the most relevant omission of the Court of Appeal for the outcome of the proceedings is its acceptance of the reasoning of the Higher Court in Kraljevo which refused to accept the defendants' acknowledgment of their guilt, given in earlier proceedings. The first instance court cites as its reason that Milutin Zekovic was never in the professional military services, and therefore could not be appointed as a military court judge. However, the judge of the military court at the headquarters of the Pristina Corps, Zdravko Djordjevic, testified that this court had been formed from among people who were in the civilian justice system, who were conscripted during the war. He said that his colleague, Zekovic, was appointed judge to this case in the regular manner. Witness Milutin Zekovic clearly stated that his reports were signed by judge Djordjevic, because at that time he had not been appointed as a judge. It is unclear why the Court of Appeal ignored the fact that even in everyday situations expert consultants carry out work as investigative judges, and that their records are signed by elected judges. This was certainly the practice during the war when the court was established in the manner described above and in the conditions described. It is important to note that failure to enter into the record, the permission for defendant Palinkas to use his native language is a rather serious breach of procedure, but this cannot be a reason to exclude his testimony from the body of evidence. It is also important to point out that Milutin Zekovic stated that defendants Palinkas and Miskovic were not forced to sign the record of their interviews and that they were compiled solely on the

basis of their testimony. Although the Higher Court in Kraljevo itself noted that the defendants were heard by a court formed in the special circumstances of war, away from the premises of the court, in an area where military action was ongoing, the court concluded that the evidence was obtained in contravention of the Criminal Procedure Code (CPC) and hence could not be accepted as proof on which a judicial decision could be based.

It should be particularly emphasized that the explanation of the first instance decision in the retrial of May 12, 2011 was copied from the text of the first instance decision of June 7, 2000, which the Supreme Court overturned. The Supreme Court explained that the first instance court had taken into account differences in the testimonies of the witnesses heard, without having identified and carefully assessed the circumstances that had created such differences in the first place. The Supreme Court further stated that the first instance court had apparently failed carefully to consider and assess the fact that the defendants in the pre-trial procedure clearly and unequivocally admitted to having committed the offenses they were charged with, and that the testimonies of some witnesses, even if only indirectly, point to the defendants as the perpetrators. Having quashed the judgment, the Supreme Court ordered the first instance court to present all available evidence in the retrial and to render a proper and just judgment while bearing in mind that the criminal proceedings were initiated in a time of war. However, in the retrial, the first instance court did not act upon this order and that it chose to copy the decisions of an earlier court leaves the impression that the court's opinion and decision were formed before the trial and were unaffected by any evidence presented to it.

That the Court of Appeal has confirmed this 'copied' decision, in direct contravention of the wishes of the Supreme Court, raises questions about whether the decisions of appellate courts in Serbia differ due to their composition, and even suggests obvious bias and a conscious decision to reach verdicts which run contrary to the law.

Finally, this decision of the Higher Court in Kraljevo raises several issues that have remained unresolved. Despite the Supreme Court decision quashing the initial first instance judgment, in the retrial, the new first instance court, heard only three witnesses and the statements of other witnesses were only read out. Given the changes to the statements of defendants and some witnesses, as well as the ruling on the respect for the principles of immediacy, the court was supposed to hear other witnesses too. Those whose testimonies were read out are important for the clarification of evidence in the case. It should also be asked why other members of the unit to which the defendants belonged were not heard. Those whom defendant Palinkas himself had said were eyewitnesses to the incident.

Further, it seems incredible that the Court of Appeal would accept a decision in which the statements of the witnesses who were part of the Forensic team, had not been assessed. In the absence of documentation on the crime scene, those witnesses were the only source of information about the discovery of the bodies, their condition, the crime scene and the relationship between that information and the other evidence presented during the proceedings.

Similarly, the prosecutor's actions, or rather his failure to act, leave an impression of incompetence and lack of professionalism, especially given some of the facts established during

the proceedings, such as the lack of traces of burning on and around the bodies of those killed, and the position of the victims at the time of murder which was different from that specified in the indictment. The Prosecutor's passivity and failure to adjust the indictment to the facts established by the evidence presented during the trial appear at the very least to demonstrate ignorance and indifference – especially given that these facts are of importance to the nature of the offense the defendants were charged with.

A separate failure of the prosecution is the legal qualification of this criminal offense, which was tried as murder despite the fact that the first instance court itself had found that all victims were civilians, killed during the war by members of Yugoslav Army units. Little legal knowledge or experience is needed to conclude that given these circumstances the case should, without doubt, have been tried as a war crime.

It must be stressed that on March 28, 2011 the HLC sent a letter to the Office of the Higher Prosecutor in Kraljevo<sup>94</sup> containing the names of all of the victims, whom the indictment records as unidentified persons. To the detriment of justice and the families of the victims, this letter remains unanswered, and the result is the final decision which absolves those accused of such serious crimes, of any criminal responsibility.

#### **4. *The Lovas Case***

The following fourteen defendants are being tried before the Higher Court in Belgrade – War Crimes Chamber, on the basis of an indictment issued by the OWCP on November 29, 2007: Ljuban Devetak, Milan Devcic, Milan Radojic and Zeljko Krnjajuc, all members of local civil and military authorities in Lovas; Miodrag Dimitrijevic, Darko Peric, Radovan Vlajkovic and Radisav Josipovic, members of the Valjevo Territorial Defense force (TD), which upon the unit's arrival in the Republic of Croatia became part of the Second Proletarian Guard Motorized Brigade of the JNA; Petronije Stevanovic, Aleksandar Nikolaidis, Dragan Bacic, Zoran Kosijer, Jovan Dimitrijevic and Sasa Stojanovic, members of the *Dusan Silni (Dusan the Great)* volunteer unit, which was incorporated into the local Territorial Defense Force and militia upon the unit's arrival in Lovas. These indictees are charged with war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY as co-perpetrators, and Article 22 of the Criminal Code of the FRY.<sup>95</sup> All indictees were granted bail pending trial. After the release of the principal defendant Ljuban Devetak and Petronije Stevanovic, following a decision of the Court of Appeal in Belgrade on April 29, 2011, some victims' families stopped monitoring the trial in protest.

The indictees are charged with the killing of Croatian civilians in the village of Lovas during the October 10, 1991 attack on the village, carried out by officers from the police station in Tovarnik, the Tovarnik Territorial Defense force and members of the *Dusan the Great* volunteer unit, among whom were the indictees Aleksandar Nikolaidis and Petronije Stevanovic. Indictees Ljuban Devetak, Milan Devcic, Milan Radojic and Zeljko Krnjajic were also involved in the assault in different ways. During the attack, 21 Croat civilians were killed. The indictees are also

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<sup>94</sup> HLC's submission to the Office of the Higher Prosecutor in Kraljevo, HlcIndexOut 038-2656-1 of March 28, 2011.

<sup>95</sup> Trial Chamber members are: judge Olivera Andjelkovic – President of the Trial Chamber, and judges Tanja Vukovic and Dragan Mirkovic as members of the Chamber. The prosecutor is Veselin Mrdak, the Deputy War Crimes Prosecutor.

charged with the killing of civilians on October 10, 1991, once control had been established in the village, when as representatives of a new civil-military government, indictee Ljuban Devetak in his capacity as commander of the village and director of the Agricultural Cooperative, indictee Milan Devcic in his capacity as commander of the police station, and indictee Milan Radojcic as commander of the Lovas Territorial Defense, ordered – and in some cases participated in – the illegal arrest, detention, interrogation and torture of a number of civilians, thereby encouraging and supporting other unidentified members of these armed groups to kill 27 persons in the period October 10-18, 1991 at various locations in the village. They are also charged with the killing of civilians in a minefield. The indictment charges Ljuban Devetak, Milan Devcic, Milan Radojcic and Miodrag Dimitrijevic (who on behalf of the TD Zone Headquarters Valjevo was appointed Combat Coordinator in the village of Lovas on October 17, 1991), with illegally detaining and torturing civilians, and on October 18, 1991 using them as "human shields" in the surveying and searching of the area. Participating in this crime were members of the counter-terrorist squad of the Valjevo Territorial Defense force, whose leaders were commander, Darko Peric, company commander, Radovan Vlajkovic and platoon commander, Radislav Josipovic, as well as members of the *Dusan the Great* volunteer unit, among whom are indictees Jovan Dimitrijevic, Sasa Stojanovic, Dragan Bacic, and Zoran Kosijer. Upon reaching a field which members of these formations knew had been mined, they ordered the civilians to enter it. When the mines were activated, indictees also opened fire on the civilians. The resulting explosions and the gunfire killed 20 civilians, while 12 sustained either serious or minor injuries.

In 2011 examination of evidence continued with the interviewing of injured parties, witnesses and military expert witnesses.<sup>96</sup> All of the victims were examined by video-conference by county courts in Vukovar, Rijeka, Osijek and Zagreb; the OWCP did not directly interview four witnesses. One is deceased, and the other three are unable to testify due to their age and or infirmity. It is now clear that, since much time has passed between the event and the trial, there is a real danger in this case of a permanent loss of evidence from oral testimonies. It should be noted that in proceedings of this kind the statements of witnesses are often the only evidence.

Twenty former members of the Valjevo Territorial Defense force testified, mainly as defense witnesses. Some witnesses described in detail their arrival in Croatia and Lovas. Some said they saw Croat civilians, detained in the Cooperative, being beaten by members of the *Dusan the Great* volunteer unit and that they had visible injuries when they were led into a minefield. At the same time, these witnesses did not explain who had ordered the civilians to move towards the minefield, or why they went there, who was in command or who, following the explosion of the mines, shot at the civilians. Witness Dragan Lukic, a company commander of Territorial Defense force from Ljig, said that he had learned of the civilian casualties in a minefield only the next day from a local woman, although his platoon was stationed just 300 meters from the minefield. Only one member of the Valjevo Territorial Defense said that, on the basis of the direction from which

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<sup>96</sup> The trial commenced on April 17, 2008. During a total of 167 trial days, 191 witnesses and one expert witness were examined. In 2011, 46 trial days were held, and 88 witnesses examined, of whom 24 were injured parties and one a military expert witness. Five witnesses were examined at the suggestion of the Humanitarian Law Center. The trial was monitored by 7 members of victims' families, whose presence at the trial was secured by the HLC.

he heard gunfire, he had concluded that the civilians in the minefield were shot "by someone from their side as well." No one later inquired about the events in the minefield, nor did they discuss the event with each other. Other testimonies of former members of the Valjevo Territorial Defense force raise doubts as to their completeness, and the desire of the individuals to testify and reveal everything they know.

Eight Serb witnesses from Lovas and surrounding villages, who, as officers from the police station in Tovarnik, participated in the attack on Lovas, testified. They attempted to minimize their participation in the events, claiming to have no knowledge of how the civilians from Lovas were killed. They accused the volunteers of mistreating the civilians, stating that they were on good terms with the Croat residents both before and during the occupation of Lovas. They were unable to explain why they had been accused of involvement by such a large number of victims, saying that they considered their statements to be false and malicious.

In their testimonies, the injured parties described the attack on Lovas in detail, along with the discriminatory measures undertaken against them by the local authorities, such as the marking of their houses with white cloths and being made to wear white ribbon around their arms, a requirement that was also applied to their children. They testified that members of the newly formed Lovas Territorial Defense Force and militia, together with volunteers, imprisoned the Croats, beat them and killed some because of their membership of the HDZ political party, or because their family members were in the police or armed forces of the Republic of Croatia. They said they left Lovas under duress, and before departure had been forced to sign a declaration leaving all of their property to the authorities of the self-proclaimed autonomous region, SAO Slavonia, Baranja and Western Srem. They also claimed that members of the JNA who were in the village, did nothing to protect them, but instead actively participated in marching the civilians to the minefield. In their testimonies, indictee Ljuban Devetak was described as the person most responsible for the arrests, killings and expulsions. Their testimonies which were in full agreement, significantly contributed to determining the facts and confirmed a number of allegations in the indictment. They are especially important because they additionally point to the forced relocation of civilians, which was not part of the original indictment.

In his report, and during his testimony, military expert witness Bosko Antic said that in his opinion the units that took part in the attack on the village of Lovas were led by the commander of the Second Infantry-Guard Motorized Brigade (2<sup>nd</sup> PGMBR). The Territorial Defense force of Valjevo, the Territorial Defense Force of Lovas (regardless of who formed them and how), the militia and the *Dusan the Great* volunteers were all subordinate to the commander of the 2<sup>nd</sup> PGMBR until October 14, 1991, after which time they were under the command of indictee Miodrag Dimitrijevic, former lieutenant colonel, who held seniority by rank. The expert witness found that the minefield had been laid by the Engineering Battalion of the 2<sup>nd</sup> PGMBR on October 13, 1991. With regard to the action of 'terrain surveying', when the civilians were used as 'human shields', Antic said that all units had to be deployed under the unified command of the person most senior in rank. As indictee Lieutenant Colonel Miodrag Dimitrijevic, and indictee Darko Peric Captain of the First Class were absent, the next in command would have been the company commander of the Counter-Terrorist Detachment of the Territorial Defense force of Valjevo, indictee Radovan Vlajkovic.

On December 28, 2011, the OWCP submitted to the court an amended indictment, in which indictee Zeljko Krnjajic was charged, as commander of the forces from the Tovarnik police station, which, together with members of the Territorial Defense force, the *Dusan the Great* volunteer group and the 2nd Infantry Guards Motorised Brigade, on the orders of the commander of the brigade, participated on October 10, 1991 in the attack on the civilians in the village of Lovas, in which at least seven persons of Croatian nationality were killed. Indictees Ljuban Devetak, Milan Radojic and Milan Devcic were charged with having established a new civil-military local government after Lovas was occupied on October 10, 1991. According to the indictment, Ljuban Devetak as commander of the village and the director of the Agricultural Cooperative, indictee Milan Devcic as commander of the police station, Milan Radojic as commander of the Territorial Defense Force of Lovas, ordered members of the Territorial Defense Force of Lovas, the militia and the *Dusan the Great* armed group, to subject the Croat civilian population to inhuman treatment, forced labor, torture and violations of bodily integrity (causing serious bodily harm), and murder, which by October 18, 1991 had resulted in the deaths of 18 civilians. At times the also directly participated in these actions.

Further, indictees Ljuban Devetak and Miodrag Dimitrijevic (at the time an active military commander with the rank of lieutenant colonel, coordinator for the Territorial Defense force of Valjevo, and the military officer with most senior rank in Lovas) are charged to have jointly made the decision on October 17, 1991 to have the Croat civilians detained in the courtyard of the Agricultural Cooperative, and to use them the next day, October 18, 1991, as a "human shield" in an operation, clearing and surveying the terrain, despite the fact that they knew that some of the sites had been mined a few days earlier by the engineering unit of the Infantry Guards Motorised Brigade (PGMBR). Indictee Darko Peric, as commander of the Counter-Terrorist Detachment, Radovan Vlajkovic, as commander of the counter-terrorist Company, and indictee Radisav Josipovic, as commander of the First Platoon of the same company, are charged with having participated, along with Jovan Dimitrijevic, Sasa Stojanovic, Dragan Bacic and Zoran Kosijer, members of the *Dusan the Great* volunteer group, in the operation of clearing and surveying the terrain. In this operation civilians were used as "human shields"; on the orders of an unidentified member of the *Dusan the Great* group. Civilians were also used for mine clearance. After several mines had been activated, they opened fire on the civilians, killing 18 and wounding 12 who sustained major and minor injuries. The amended indictment charged Aleksandar Nikolaidis and Petronije Stevanovic, as members of the *Dusan the Great* group, incited by indictee Ljuban Devetak, to have subjected Croat civilians to inhuman treatment, inflicting bodily harm on them. They are charged with having participated in the murder of an unspecified number of civilians between October 14 and 18, 1991.

The amended indictment is in agreement with the facts established by the evidence.

##### **5. *The Skocic Case***

Acting on an indictment raised by the Office of the War Crimes Prosecutor on April 30, 2010, the Higher Court in Belgrade – War Crimes Chamber, charged indictees Sima Bogdanovic, Damir Bogdanovic, Zoran Stojanovic, Tomislav Gavric, Djordje Sevic and Zoran Alic, former members of the volunteer group known as *Simini cetnici (Sima's Chetniks)*, with committing war crimes

against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY as co-perpetrators, and Article 22 of the Criminal Code of the FRY.<sup>97</sup>

The indictees are charged that as members of the volunteer group *Sima's Chetniks*, under the command of indictee Sima Bogdanovic, on July 12, 1992 in a house in the village Skocic in the municipality of Zvornik, Bosnia and Herzegovina they detained 27 Roma, among whom were children, women and adult men, that they first took all of their valuables, and then beat them with their fists, feet, rifle butts and other objects. One man was killed, a number of other men, all related to each other, were ordered to undress and perform oral sex on one another and three Roma women, of whom two were minors, were repeatedly raped. In the end, all of them were taken on a truck to the neighboring village of Malesic. After arriving in Malesic, three Roma women were separated from the group and later sexually exploited and forced into slave labor, and the others were taken to a pit in the Hamzici residential area. They were taken from the vehicle one by one and killed either with firearms or by knives. Their bodies were then thrown into the pit. Twenty two civilians were killed, including one woman in the later stages of pregnancy. Zija Ribic (d.o.b. 02. 16. 1984), was the only survivor, although he too was shot, stabbed with a knife, and then thrown into the pit.<sup>98</sup>

The presentation of evidence continued in 2011, when witnesses were examined, among whom were two victims.<sup>99</sup>

On February 23, 2011, the Office of the War Crimes Prosecutor filed an indictment against Zoran Alic. Alic was subsequently identified as a member of the volunteer group *Sima's Chetniks*. The case against him was joined with the proceedings being conducted against indictees Sima Bogdanovic, Damir Bogdanovic, Zoran Stojanovic, Tomislav Gavric and Djordje Sevic.

Indictee Zoran Alic denied committing the offense he was charged with. In his defense, he said that he was a member *Sima's Chetniks*, and that he once went to the village of Skocic with the members of the unit, among whom were indictees Sima Bogdanovic and Zoran Stojanovic, Bogdan Milovanovic, Rusmir Suljić, Savo Lazic and persons he knew only as Savkic, Slavica and Zlatan from Dubnica. He and Bogdan Milovanovic remained around the truck and the jeep, while other members of the unit went to the mosque. After some time, an explosion was heard and the mosque collapsed. After that indictee Sima Bogdanovic and other members of the unit went to the backyard of a house, near where the truck that they had arrived in, was parked. After 45 minutes, the members of the unit led a group of civilians to the truck, who climbed into the trailer hitched to the back of the truck. Among the civilians, there were women, children and elderly. He did not see that any gold or money had been seized from the civilians, or that they had

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<sup>97</sup> Members of the Trial Chamber: judge Rastko Popovic – President of the Trial Chamber, judges Vinka Behara-Nikacevic and Snezana Nikolic-Garotic, members of the Trial Chamber. Prosecutor, Deputy War Crimes Prosecutor Milan Petrovic. The trial commenced on September 14, 2010.

<sup>98</sup> In 2008, the Humanitarian Law Center submitted to the War Crimes Chamber a criminal complaint against Sima Bogdanovic *et al*, for the criminal offense of a war crime against civilian population, which contained the statement of the only survivor, Zija Ribic.

<sup>99</sup> So far, 15 trial days have been held, during which 28 witnesses have been examined. In 2011, there were 6 trial days, during which 8 witnesses were examined. The injured party Zijo Ribic is monitoring the trial. His presence was secured by the Humanitarian Law Center.

been abused. He saw no sign of rape either. He only saw indictee, Zoran Stojanovic, beat one civilian with a baton.

Having made this statement, the indictee refused to continue with his defense and requested expert evaluation of his mental capacity to testify.

Dr. Miodrag Blagojevic, a psychiatric expert witness, in his report stated that indictee Zoran Alic was capable of attending the trial and presenting his defense, and that the first part of his defense could be taken as valid. After this expert opinion, the indictee stated that he did not want to continue with his defense because "everything got mixed up in [his] head."

Witnesses examined in 2011 had no direct knowledge of the events in the village of Skocic. Witnesses Milan Pantic, Zeljko Pantic and Radojka Pantic, Serbs from the village of Pantici, located about 2 kilometers from the village of Malesici, testified that they had found the injured party, Zija Ribic, and taken him to the hospital in Zvornik. Asked about the suffering of the Roma in Skocic witness Radojka Pantic said she did not even know that the Roma lived in Skocic but had heard about the events much later. Witness Muradif Hamzic, a Muslim, testified that he had learned about the events in Skocic from Spasoje Spasojevic, his Serb neighbor, who in his own statement categorically denied knowing anything about the event or even speaking with Muradif. Witness Radosav Jeremic also categorically denied knowing anything about the event, and after he was told that proceedings had been conducted against him in the same case – or more precisely, that he was included in the investigation request – he said that he was not even in Bosnia at the time.

Injured parties Senija Becirevic, the common law partner of indictee Tomislav Gavric, and Munevera Bogdanovic, indictee Damir Bogdanovic's wife, exercised their legal right not to testify. Following the events in Skocic, both were captured and detained against their will by *Sima's Chetniks*.

The Serb witnesses so far examined claim either that they know nothing or that they heard later that some Roma had been killed.

On December 22, 2011, the OWCP issued an indictment for the same criminal offense against Zoran Djurdjevic and Dragana Djekic, also members of the *Sima's Chetniks* volunteer unit, who had been subsequently identified. A separate trial is underway before the same court in the *Bijeljina Case* against Zoran Djurdjevic on OWCP charges, issued on June 5, 2011, for the offense of war crimes against civilians, under Article 142, paragraph 1 of the Criminal Code of the FRY and Article 22 of the Criminal Code of the FRY.

## **6. *The Podujevo Case***

A judgment of the Court of Appeal in Belgrade – War Crimes Chamber, pronounced on February 11, 2011,<sup>100</sup> confirmed the judgment of the Higher Court in Belgrade – War Crimes Chamber pronounced on September 22, 2010, sentencing Zeljko Djukic to 20 years in prison for war

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<sup>100</sup> The Chamber: judge Radmila Dragicevic-Dicic as President of the Trial Chamber, and judges Sinisa Vazic, Sonja Manojlovic, Sretko Jankovic and Miodrag Majic as members of the Chamber.

crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, as a co-perpetrator, and Article 22 of the Criminal Code of the FRY.

On April 14, 2008, the OWCP issued an indictment against Zeljko Djukic, Dragan Medic, Dragan Borojevic and Miodrag Solaja for the criminal offense of war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY, as co-perpetrators, and Article 22 of the Criminal Code of the FRY. They are charged that during the bombing attack on the former Federal Republic of Yugoslavia (FRY) by NATO forces, and the simultaneous armed conflicts between the military forces of the FRY and Serbian police forces on the one hand, and the Kosovo Liberation Army (KLA) on the other, the defendants, in their capacity as members of the *Scorpions* unit, which was part of the MUP of Serbia, violated the rules of international law. On the arrival of the *Scorpions* in Podujevo on March 28, 1999, the defendants together with Sasa Cvjetan (sentenced previously for the same offense)<sup>101</sup> and other unidentified members of the unit, opened fire with automatic weapons on a group of ethnic Albanian civilians, including women and children, with the intention of killing them. Fourteen civilians, 7 of whom were juveniles, were killed; 5 minors were seriously injured.

In this case, the OWCP launched new criminal proceedings based on the evidence presented in the criminal proceedings against the convicted member of the *Scorpions*, Sasa Cvjetan.

**I** The trial commenced on September 8, 2008 before the District Court in Belgrade – War Crimes Chamber.<sup>102</sup> During the trial, 34 witnesses were examined, 7 of whom were injured parties.<sup>103</sup> One had the status of protected witness and testified under the pseudonym P1. The judgment of June 18, 2009 found the defendants guilty and sentenced Zeljko Djukic, Dragan Medic and Dragan Borojevic each to 20 years in prison, and defendant Miodrag Solaja to 15 years. Having processed the evidence, the court established beyond doubt that the defendants were among the members of the *Scorpions* unit, which on March 28, 1999 in the Gashi family house in Podujevo fired into a group of 19 Albanian civilians, killing 14 (7 of whom were minors) and seriously wounding the remaining five, who were aged between 6 and 14. The youngest victim was only 21 months old, the oldest 71 years of age. The court based its decision on the guilt of defendants Dragan Medic, Dragan Borojevic and Miodrag Solaja on the testimony of protected witness P1, witness Goran Stoparic and very credible testimonies of the four surviving children – injured party Saranda, Jehona, Liria and Fatos Bogujevci, and on their recognition of the defendants Dragan Medic and Miodrag Solaja. With regard to the involvement of defendant Zeljko Djukic in the commission of this criminal offense, the court based its decision solely on the testimony of the protected witness P1, evaluating it as convincing and clear.

**II** The Court of Appeal in Belgrade pronounced judgment on May 24 and 25, 2010 on the appeals lodged by Zeljko Djukic, Dragan Borojevic and Miodrag Solaja, and their defense attorneys, confirming the first instance judgment, finding that the first instance court properly

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<sup>101</sup> On December 22, 2005 the Supreme Court of the Republic of Serbia confirmed the judgment delivered on June 17, 2005 by the District Court in Belgrade, whereby defendant Sasa Cvjetan was sentenced to 20 years in prison for the same criminal offense.

<sup>102</sup> The Trial Chamber: judge Snezana Garotic-Nikolic as President of the Trial Chamber, judge Vinka Behara-Nikicevic and judge Rastko Popovic, who replaced judge Vesko Krstajic in January 2010.

<sup>103</sup> The HLC secured the injured parties' presence at the trial.

applied the criminal law on the properly and fully established facts. It also found that the first instance court properly appreciated all the circumstances relevant to the sentence, giving these circumstances adequate importance, and properly handed down a maximum prison term of 20 years for defendants Dragan Medic and Dragan Borojevic, and a prison term of 15 years for the defendant Miodrag Solaja, in recognition of the fact that at the time of the offense Solaja was a young adult. The Court of Appeal overturned the first instance judgment on Zeljko Djukic, returning his case to the first instance court as he had been found guilty and sentenced to 20 years, for substantive violations of the Criminal Procedure Code (CPC) based solely on the testimony of the protected witness P1, contrary to the law.

**III** Djukic's retrial commenced on July 8, 2010 before the Higher Court in Belgrade – War Crimes Chamber and one witness was directly examined. At the session on September 20, 2010, the OWCP amended the indictment, charging defendant Zeljko Djukic with the commission, together with Sasa Cvjetan, Dragan Medic, Dragan Borojevic and Miodrag Solaja, of war crimes against the civilian population under Article 142, paragraph 1 of the Criminal Code of the FRY and Article 22 of the Criminal Code of the FRY. On September 22, 2010 the court delivered its judgment, finding the defendant Zeljko Djukic guilty and sentencing him to 20 years in prison. In the explanation of the judgment, the court stated that defendant's participation in the commission of the crime had been clearly established on the basis of statements from the injured party, the protected witness P1 and witnesses Dragan Brajic, Sinisa Bozic and Goran Stoparic who were members of the *Scorpions* unit and who all described his physical appearance in identical terms. The portion of the testimony of witness Goran Stoparic, in which he expressed his opinion and concluded that defendant Zeljko Djukic was not involved in the commission of the offense, was not taken into consideration by the court as this was just the personal opinion of the witness. The court particularly noted the fact that Zeljko Djukic's wife had contacted this witness before he testified and directed him to contact the defendant's attorney.

**IV** On February 11, 2011, the Court of Appeal in Belgrade pronounced judgment on the appeal lodged by the defendant and his defense lawyer dismissing them as unfounded and confirming the first instance judgment, finding that the first instance court had properly and fully established the facts and correctly applied the criminal law.

In confirming defendant Zeljko Djukic's sentence of 20 years, the Court of Appeal in Belgrade was justified in estimating that, given the serious consequences of the offense, the victims' ages (seven children, of whom the youngest was only 21 months old), the severe injuries with lasting consequences inflicted on those victims who survived the massacre, and the other extremely difficult circumstances under which the offense was committed, only the maximum sentence could achieve the purpose of punishment.

## **7. *The Emini Case***

On November 17, 2011, the Court of Appeal in Nis<sup>104</sup> dismissed the appeal of the Higher Public Prosecutor in Nis, confirming the judgment of the Higher Court in Nis of July 7, 2010, which acquitted defendants Milos Simonovic and Dragisa Markovic of the criminal offense of murder, under Article 113 of the Criminal Code. The pair had been charged with murdering Kosovo Albanian civilian, Isa Emini, from Pristina/Prishtinë on May 5, 1999.

On February 12, 2001, the parallel Pristina District Attorney's Office, based in Nis, indicted Milos Simonovic and Dragisa Markovic, who at the time of the offense were members of the reserve police force of Serbian MUP, for the crime of murder under Article 47 of the Criminal Code of the Republic of Serbia. The proceedings began on October 8, 2004, and the District Prosecutor in Nis amended the indictment on February 2, 2007.<sup>1</sup> The indictees were charged that on May 5, 1999 at approximately 18:30hrs having previously made an agreement to do so, they entered the apartment of Isa Emini in Yuri Gagarin Street No. 2/8 in Pristina/Prishtinë, dressed in police camouflage uniforms, armed and threatening to use their weapons. There they found Isa and his wife Ramiza. Indictee Markovic took Ramiza to another room where he tied her hands and feet and beat her, while in the living room, indictee Simonovic fired two bullets into the head of Isa, wounding him fatally.

The trial began on October 10, 2004 before the District Court in Nis, five and a half years after the crime, despite the fact that the investigation had been completed on the night of the murder, that a request for investigation into the defendants had been filed two days later, and that the indictment had been issued on February 2, 2001.

After nearly three years,<sup>105</sup> on June 15, 2007, the District Court in Nis acquitted the defendants.<sup>106</sup> In its explanation of the judgment, the court said that an the analysis of the evidence had established that Isa Emini was killed on May 5, 1999 in his apartment, not at the time stated in the indictment, but rather an hour later, when defendant Simonovic was already on duty as a guard. According to the findings of the court, it had not been established that the defendants had participated in the murder of the victim, adding that of all the evidence presented at the trial, only the testimony of the injured party Ramiza implicated them in the murder. The court characterized her testimony as inconsistent, illogical and unconvincing.

Following an appeal from the District Attorney's Office in Nis, the Supreme Court quashed the judgment on June 30, 2008 and sent the case back to the District Court in Nis for retrial, before a different trial chamber. The Supreme Court stated in its explanation that the facts had not been fully established, and emphasized that the first instance court had not given enough weight to the testimony of the injured party Ramiza Emini, or to the fact that she had not changed her statement in those parts where she accused the indictees with the murder of her husband, or that her statement had no connection with the testimony of Nikola Colakovic, who lived in the same building as the injured parties and who testified that Ramiza Emini told him that Milos Simonovic had killed her husband.

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<sup>104</sup> The President of the Trial Chamber was judge Vera Milosevic, members of the Chamber were judges Ljiljana Miljkovic and Ranko Bankovic.

<sup>105</sup> During the 22 trial days, the defendants were heard, as was injured party, three expert witnesses and 14 witnesses.

<sup>106</sup> The President of the Trial Chamber was judge Zoran Krstic; members of the Trial Chamber were judge Milan Nikolic and judges Aleksandar Milenovic, Gordana Krsmanovic and Zagorka Cvijic.

The retrial commenced on March 16, 2009,<sup>107</sup> before a different Trial Chamber of the District Court in Nis.<sup>108</sup> On July 7, 2010, the Higher Court in Nis<sup>109</sup> delivered its judgment, acquitting the defendants Milos Simonovic and Dragisa Markovic.

In its explanation of its judgment, the Higher Court in Nis supported the reasoning in the of the initial first instance court, which the Supreme Court of Serbia had quashed. The explanation of the judgment stated that the court accepted the defendants' defense as both logical and convincing, because it was supported by the statements of several witnesses, i.e. their colleagues, friends and relatives. In contrast, the court did not accept the testimony of the injured party Ramiza Emimi in the part in which she alleges that the defendants were the murderers of her husband. The reason cited in the explanation was that “the testimonies of the victim, of which there were several during the entire criminal procedure, were inconsistent, contradictory, illogical, unconvincing, the main characteristic of her testimony being ... that she constantly modified [it] by adapting it to new situations.” The court did not accept as sufficient evidence of guilt the fact that throughout the proceedings the injured party claimed that the defendants were the murderers, and that this part of her testimony remained unchanged throughout the proceedings. The repeated analysis of the testimony of witness Nikola Colakovic and the relationship between his testimony and the testimony of the victim was confirmation for the court of the view that Ramiza's testimony was inconsistent.

The court's actions leave the impression that a series of concessions have been made for the defendants during the trial. The court accepted repeated excuses for the absence of the defendants from the trial, justifying their absence by the lack of promptness in the delivery of court summonses, which significantly delayed the process. The court persistently failed to ensure the presence of the defendants either by serving summonses or by remanding the defendants in custody. Finally, the testimony of the injured party Ramiza, who witnessed the murder of her husband which was committed, according to her, by the defendants who were her neighbors, who lived in the same building, was characterized by the court as inconsistent and unconvincing, although the court failed to provide sufficiently clear and convincing arguments for such an evaluation.

### ***8. The Beli Manastir Case***

On June 23, 2010, the OWCP issued an indictment against Zoran Vuksic, Slobodan Strigic, Branko Hrnjak and Velimir Bertic for the criminal offense of war crimes against civilians under Article 142, Paragraph 1 of the Criminal Code of the FRY. The State Attorney's Office of the Republic of Croatia transferred this case to the OWCP of the Republic of Serbia under the

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<sup>107</sup> During the 7 trial days, the defendants and the injured party were heard three times, and five other witnesses were examined.

<sup>108</sup> The President of the Trial Chamber was judge Radomir Mladenovic. Members of the Trial Chamber were: judges Bratislav Krstic, Slavica Lepojevic, Jelena Stamenkovic and Petar Vujovic.

<sup>109</sup> According to the Law on Courts (Sl. glasnik RS No.116/08 and 104/09), the District Court in Nis was dissolved and the case was transferred on January 1, 2010 to the Higher Court in Nis. The trial continued before a new Chamber, presided over by judge Mirko Draskovic, with judges Aleksandar Teodosic, Ljiljana Parmac, Jasminka Petkovic and Dragana Lalovic completing the Trial Chamber.

Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide.

According to the indictment, between August and the end of 1991, the indictees, at the time members of the SUP in the town of Beli Manastir, intimidated, illegally detained and abused a number of Croat civilians, killing at least six of them on the basis of their ethnicity.

The indictees were arrested on December 24, 2009. Indictee Zoran Vuksic is still in the custody of the Higher Court in Belgrade, while other defendants were granted pre-trial bail.<sup>110</sup> All of the accused pleaded not guilty.

The trial of Vuksic, Strigic, Hrnjak and Bertic commenced on November 1, 2010<sup>111</sup> before the Higher Court in Belgrade – War Crimes Chamber.<sup>112</sup>

So far, the prosecution has presented a large body of evidence that appears to substantiate the allegations in the indictment. The testimonies of the injured parties have particularly contributed to the establishment of relevant facts.<sup>113</sup> Particularly striking was the testimony of the victim Ana Baric, who witnessed the murder of her husband, Adam, and who alleges that she was herself injured by the defendant Vuksic. The victim identified the defendant Vuksic and said that he was the murderer of her husband. Nine other victims, who were illegally detained and abused, also testified. They testified of having been taken to the detention facilities of the SUP in Beli Manastir, where a number of police officers beat them and forced them to sing Chetnik songs. They identified the defendants Vuksic and Bertic as being among the officers who abused them. Defendants Vuksic, Bertic and Hrnjak denied having any knowledge about these events or having participated in them. Unlike them, defendant Strigic said that he saw the defendants Vuksic and Hrnjak forcing the detainees to sing Chetnik songs. The testimonies of twenty-five police officers about the abuse of detainees were rather unconvincing. In their testimonies they claimed to have had no knowledge of any such events, adding that "it may have happened at night when they were not on duty", or that their "offices were located in another part of the building so that they could not hear anything."

On August 28, 1991, joint forces of the Territorial Defense force, the JNA and the Beli Manastir SUP 'cleansed' the village of Kozarac, in the municipality of Beli Manastir. According to the testimony of Milan Jaric,<sup>114</sup> about a thousand soldiers were involved in the operation. Several witnesses have been questioned in relation to the assault on Kozarac and the crimes allegedly committed during the operation. Most striking was the testimony of the injured party Josip Vid, who alleges that defendant Vuksic tortured him and shot him in the leg. During his testimony, the victim identified defendant Vuksic. Ivo Melek was killed in the attack on Kozarac. His wife

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<sup>110</sup> Indictee Slobodan Strigic was granted pre-trial bail on February 12, 2010; indictees Velimir Bertic and Branko Hrnjak were released on bail on May 14, 2010.

<sup>111</sup> In 2011, 23 trial days were held during which 55 witnesses were heard, of whom 13 witnesses were injured parties.

<sup>112</sup> President of the Trial Chamber is judge Dragan Mirkovic. Members of the Trial Chamber are judges Tatjana Vukovic and Olivera Andjelkovic.

<sup>113</sup> All injured parties are citizens of the Republic of Croatia and testified via video-link from the District Court in Osijek, Croatia.

<sup>114</sup> Milan Jaric was the commander of the Special Operations Unit of the SUP of Beli Manastir, and at the time of the attack on Kozarac, defendants Vuksic, Strigic and Bertic were members of the unit. Jaric led the unit in this attack.

testified that her husband was killed during the attack while she was hiding near the house. She did not see who killed him, but heard from a neighbor that he was killed by defendant Vuksic. In his defense, Vuksic said that he neither injured nor killed anyone in the attack on Kozarac. Matilda Vranic from Kozarac, who was wounded during the attack, was not present in the courtroom, due to age and infirmity, but the facts concerning her injury were determined by the examination of the emergency physician who assisted her. Further, witness Milan Jaric said he had heard from colleagues that the defendant Bertic had wounded an old lady during the attack. Defendant Bertic denied having shot anyone during the operation. The testimonies of victims about the attack on Kozarac sounded logical and convincing. The testimonies of police officers involved in the attack were in the HLC's opinion utterly unconvincing and contradictory. While some said that on the day in question there was no shooting in Kozarac, others claimed that there was "shooting all over" although they did not encounter any members of Croatian forces in the town.

Several witnesses testified about the circumstances of the murder of Vinko, Mate, Ivan and Ante Cicak on October 17, 1991 in the vicinity of Beli Manastir. Jadranka Cicak, the wife of the murdered Ivan, said in her testimony that on the day in question, defendants Vuksic, Hrnjak and Zoran Madzarac came to their backyard and demanded that all four men come to the police station to be interrogated in connection with the alleged theft of pigs. As not all men were at home in the morning, in the afternoon they drove in their own car to the SUP in Beli Manastir. Jadranka Cicak has not seen them since then. Consistent with hers was the testimony of her mother-in-law, Andja Cicak. Defendants Vuksic, Strigic and Hrnjak did not deny that the four members of the Cicak family had been taken out of Beli Manastir and killed. Instead, they accused one another of the murder. Defendants Strigic and Hrnjak accused defendant Vuksic and Zoran Madzarac, while defendant Vuksic accused the other two.

After the examination of the prosecution witnesses, defense witnesses began testifying on December 12, 2011.

### ***9. The Bijeljina Case***

On June 5, 2011, the OWCP issued an indictment against Dragan Jovic, Zoran Ristic Djurdjevic and Alen Ristic,<sup>115</sup> for the criminal offense of war crimes against civilians under Article 142, Paragraph 1 of the Criminal Code of the FRY. The indictees are charged that on June 14, 1992, together with Milorad Zivkovic<sup>116</sup> and Danilo Spasojevic,<sup>117</sup> they entered the house of Ramo Avdic in Bijeljina, threatening him with weapons. They took Ramo and his wife to one room, and separated them from their daughter Nizama and daughter-in-law Hajrete whom they took to another room. While some kept watch on the family members, others searched the house and took from the injured party Ramo, the weapons he legally possessed, as well as money and jewelry that they found in the house. Then they ordered Hajrete and Nizama to take off their

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<sup>115</sup> Indictee Ristic has been in custody of the Higher Court in Belgrade since February 8, 2011, while indictees Jovic and Djurdjevic have been in custody since February 18, 2011. All three went to Bosnia and Herzegovina as volunteers for the Serbian Radical Party.

<sup>116</sup> The indictee is on the run.

<sup>117</sup> On November 17, 2009, the Office of the District Prosecutor in Bijeljina, Bosnia and Herzegovina, issued an indictment against Danil Spasojevic for his involvement in this crime.

clothes, raped them and subjected them to perverse sexual acts. Defendant Jovic then placed a gun in Ramo's mouth and fired, after which he fell dead. Immediately after that, the defendants left the house taking with them the injured parties Nizama and Hajrete, who were naked. They went to a nearby house, where they took from the occupant Desa Todorovic money, jewelry and car keys, and drove toward Brcko. Upon reaching a place called Ljeljenca, they stopped the car, took Nizama and Hajrete out of the car, raped them, subjected them to perverse sexual acts and then fled the scene, leaving them by the side of the road.

The trial commenced on July 4, 2011 before the Higher Court in Belgrade – War Crimes Chamber<sup>118</sup> with the examination of the indictees.<sup>119</sup>

The circumstances of the event have largely been clarified in the course of the trial so far, particularly following the testimonies of the injured parties Fata Avdic, her daughter Nizama and daughter-in-law Hajrete.<sup>120</sup> Fata and Nizama testified directly.

The defendants admitted breaking into the house of the injured parties, and defendant Jovic admitted killing Ramo Avdic. All of the defendants denied the rape of Nizama and Hajrete, and the theft of valuables from Ramo Avdic and Desa Todorovic's houses. The defense tended to minimize the involvement of the defendants in this crime. Defendant Jovic claimed to have killed Ramo Avdic by accident, shooting from a distance of one meter. His defense was challenged by the victims and by the forensic expert who confirmed that the victim Ramo Avdic was killed in the manner described in the indictment. The police detective who interrogated the accused who were arrested on the night of the attack was also questioned. He testified that stolen valuables from the houses of Ramo Avdic and Desa Todorovic were found on the defendants, and were returned to the families they belonged to. In order to clarify the circumstances of the case Danilo Spasojevic was also summoned as a witness.

### ***10. The Bitici/Bytyqi Case***

On August 23, 2006, the Office of the War Crimes Prosecutor of the Republic of Serbia issued an indictment against Sreten Popovic and Milos Stojanovic for the criminal offense of war crimes against prisoners of war, under Article 144 of the Criminal Code of the FRY. Indictee Sreten Popovic, who at the time of the event was the company commander of the Operations Pursuit Group (OPG) which belonged to the 124<sup>th</sup> intervention brigade of the Serbian MUP's Special Police Unit (SPU), was charged with ordering the indictee Milos Stojanovic, a member of the Operations Pursuit Group company, together with several other members of the unit, to arrest and bring to the SPU's Training Center in Petrovo Selo near Kladovo, the injured parties Agron, Yllij, and Mehmet Bytyqi, members of the *Atlantic Brigade* volunteer group, part of the KLA armed forces, as soon as they left the prison in Prokuplje. Indictee Stojanovic is charged with

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<sup>118</sup> By the end of 2011, seven trial days had been held, and 10 witnesses, of whom 4 were injured parties, were heard.

<sup>119</sup> The President of the Trial Chamber is judge Vinka Beraha-Nikicevic, members of the Trial Chamber are judges Snezana Garotic-Nikolic and Rastko Popovic.

<sup>120</sup> Victim Hajrete Avdic agreed to give a statement to the court, but because of the trauma she suffered at the hands of the defendants, she did not want to meet with them, or see their photographs. For this reason, the President of the Trial Chamber questioned the victim on December 12, 2011 at the Embassy of the Republic of Serbia in Vienna, where the victim currently lives.

arresting the three Bytyqi brothers on July 8, 1999 as they were leaving the the District Prison of Prokuplje, where they had been serving a sentence for illegally crossing the border. Together with other members of the unit, Stojanovic took the victims to the SPU's Training Center, where they were handed over to defendant Popovic. Popovic locked them in an empty warehouse in the Training Center. On the evening of July 9, 1999, although he could reasonably have known that the victims would be liquidated, he handed them to unidentified members of the SAJ and MUP, who tied the victims hands with wire and drove them to the waste disposal pits, also located within the Training Center. There all three were shot in the back of the head, and died immediately. The remains of the victims were exhumed on June 14, 2001 from a mass grave hidden in the SPU camp in Petrovo Selo. Their hands were tied with wire, and each had a bullet wound to the back of the head.

I The trial commenced on November 13, 2006 before the District Court in Belgrade – War Crimes Chamber.<sup>121</sup> The indictees claimed to have arrested the Bytyqi brothers on the orders of General Djordjevic, who at the time was Deputy Minister of the Interior of Serbia. They did not know that the victims were members of the KLA and did not consider them prisoners of war. They treated them correctly. As one possible reason why they, as members of the SPU, were involved in the deportation of the Bytyqi brothers (the indictees claimed that they thought the Bytqi brothers were to be deported), they stated that the three Albanians were U.S. citizens, and hence it was necessary to perform the task professionally. They took the injured parties to the Training Center in Petrovo selo near the border with Romania, because they believed that was where the brothers were to be deported to. When asked why they did not have a written deportation order from General Djordjevic, they said that in their unit an oral order had the same effect as a written one, and also that this kind of work was not their primary responsibility and this was why they were not familiar with the procedure in such cases.

All the witnesses heard were members of the Serbian MUP. Most of them were members of the Special Operations Unit, who were hired as training instructors at the camp in Petrovo selo. Before the court, they claimed that they learned about the murder the Bytyqi brothers and about the mass grave in the Training Center in Petrovo selo from the media, a few years later, and that at the time when they were in the camp they did not notice anything suspicious. Several witnesses, who came to be trained in Petrovo selo from police stations and units that did not participate in the armed conflicts in Kosovo, testified about the fear that reigned in the camp and about restricted movement. The first instance trial was regularly monitored by two or three former members of the Special Operations Unit, which the trial monitors and the victims' families and their attorneys interpreted as an attempt to intimidate the witnesses.

After almost three years, on September 22, 2009, the court acquitted the defendants Popovic and Stojanovic. In its explanation of the verdict, the Chamber stated that the charges from the

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<sup>121</sup> President of the Trial Chamber was judge Vesko Krstajic; members of the Trial Chamber were judge Vinka Beraha-Nikicevic and judge Snezana Nikolic-Garotic.

indictment had not been proven and that actions of the defendants were not illegal; rather, they acted in accordance with the rules of engagement.

**II** Acting on an appeal lodged by the OWCP, on November 1, 2010, the Court of Appeal in Belgrade quashed the first instance judgment and remanded the case back to the first instance court for retrial.

After months of delay, the retrial commenced on September 23, 2011 before the Higher Court in Belgrade – War Crimes Chamber.<sup>122</sup>

Defendants Popovic and Stojanovic<sup>123</sup> pleaded not guilty, and adhered to the defense given during the first trial.

All of the witnesses examined so far<sup>124</sup> claimed to have learned of the fate of the Bytyqi brothers and of the mass graves in the police camp in Petrovo selo from the media.

### ***11. The Cuska/Qushk Case***<sup>125</sup>

On December 12, 2010, the Higher Court in Belgrade – War Crimes Chamber, with judge Snezana Nikolic-Garotic presiding,<sup>126</sup> opened the trial in the case against the defendants Toplica Miladinovic, Srecko Popovic, Slavisa Kastratovic, Boban Bogicevic, Zvonimir Cvetkovic, Radoslav Brnovic, Vidoje Koricanin, Veljko Koricanin and Abdulah Sokic for the criminal act of war crimes against civilians under Article 142, Paragraph 1, of the Criminal Code of the FRY, as co-perpetrators and Article 22 of the Criminal Code of the FRY.

The OWCP indictment dated September 9, 2010 charges the following indictees: Toplica Miladinovic, commander of the 177<sup>th</sup> Military Territorial Detachment (VTO) of Pec/Pejë; the late Nebojsa Minic, commander of the 177<sup>th</sup> of the first platoon of the VTO known as the *Sakali* (*Jackals*); members of that unit – defendants Srecko Popovic, Slavisa Kastratovic, Zvonimir Cvetkovic and Boban Bogicevic; Vidoje Koricanin and Radoslav Brnovic, who voluntarily joined the *Jackals*. They are charged that together with defendants Ranko Momic, Zoran Obradovic, Milojko Nikolic, Sinisa Misic, Sinisa Dundjer and Predrag Vukovic, (against whom criminal proceedings have been ended), other unidentified members of the *Jackals* and members

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<sup>122</sup> The President of the Trial Chamber is judge Rastko Popovic, members of the Trial Chamber are judge Vinka Beraha-Nikicevic and judge Snezana Nikolic-Garotic.

<sup>123</sup> The defendants have been released on bail and are regularly employed in the Gendarmerie.

<sup>124</sup> By the end of 2011, three trial days had been held, during which the defendants and 8 witnesses had been examined.

<sup>125</sup> On September 11, 2011, Swedish prosecutors filed an indictment against Milic Martinovic, a member of the Operative Pursuit Group of the Special Police Unit of the Republic of Serbia, under the command of Goran Radosavljevic, nicknamed Guri, for crimes against humanity. Prosecutor Lars Hedval indicted Martinovic for participation in the killing of 44 Kosovo Albanians in the village of Cuska/Qushk on May 14, 1999. The war crimes committed in the village of Cuska/Qushk are being tried in Serbia as well, before the War Crimes Chamber, except that for the murder of the Kosovo Albanian civilians, the indicted are members of the 177<sup>th</sup> Military Territorial Detachment (VTO) rather than members of the Special Police Units (SPU). During the trial, before the District Court of Stockholm the Deputy War Crimes Prosecutor of the Republic of Serbia, Dragoljub Stankovic, testified as defense witness, and Natasa Kandic, in her capacity as a human rights expert, as a prosecution witness.

<sup>126</sup> Members of the Trial Chamber are judge Rastko Popovic and judge Vinka Beraha-Nikicevic.

of the Territorial Defense Force, among whom were the defendants Veljko Koricanin and Zoran and Vidoje Jasovic, (against whom criminal proceedings have also been ended) and with members of the reserve and active police forces that during the armed conflict between, on the one hand, the forces of the FRY-VJ/MUP of the Republic of Serbia, and on the other, NATO and the KLA forces, which took place from March 23 until June 20, 1999 in Kosovo, the defendants carried out actions with the aim of expelling the Kosovo Albanian population from the area, establishing complete control over the entire territory of Kosovo, and creating ethnically cleansed areas. The indictment further alleges that on May 14, 1999 they carried out an armed attack on the entire civilian population of the village Cuška/Qushk. The defendants are charged with having committed individual and group killings on that day, of having intimidated and terrorized the inhabitants by destroying and torching their houses, ancillary facilities and vehicles. Forty four civilians were killed; more than 40 family houses and more than 40 ancillary facilities destroyed, along with 3 trucks, 5 cars and 3 tractors. The defendants seized property from Kosovo Albanian civilians, taking their money (a total of more than 125,000 DM), jewelry and valuables of undetermined value. They took possession of a number of passenger cars and two trucks, with no legitimate military purpose. In addition to this, the defendants displaced those civilians who survived, with the aim of deporting them to the Republic of Albania. In this way they evicted from the village of Cuska/Qushk more than 400 women, children and the elderly.

Following the issue of a separate indictment<sup>127</sup> against the defendants Zoran Obradovic, Milojk Nikolic, Ranko Momic and Sinisa Mistic, the criminal proceedings against them were merged with the previously initiated proceedings against the defendants Toplica Miladinovic *et al.*

The OWCP dropped the charges against defendants Sasa Dzudovic, and Vidoje and Zoran Jasovic and on September 2, 2011 the court issued a ruling terminating the proceedings against them.<sup>128</sup>

All of the defendants denied committing the offenses they were indicted for. Some claimed to have never set foot in the village of Cuska/Qushk; to have heard of the crimes only after the war, from the media or, as in the case of the principal defendant Miladinovic, only after judicial proceedings were initiated. Defendants Popovic, Bogicevic, Sokic, Obradovic, Nikolic and Momic admitted being in the village Cuska/Qushk on the day in question, as members of the 177<sup>th</sup> VTO, but deny having participated in any crime.

A number of witnesses have been examined,<sup>129</sup> whose testimonies have significantly contributed to the establishment of the facts, in the HLC's opinion, confirming to large extent all the allegations from the indictment. All of the injured parties who testified gave identical descriptions of the attack that they allege took place on the village Cuska/Qushk: house-to-house searches, expelling of family members from their homes and gathering them in one place; looting and seizure of personal property, documents, money, valuables and vehicles; separation and killing of individuals, mostly men, on several occasions in front of other villagers; and finally, the eviction from the village of the rest of the population and the torching of their houses. It should

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<sup>127</sup> The OWCP issued an indictment against Zorana Obradovic on April 1, 2011, against Milojk Nikolic on April 27, 2011, against Ranko Momic on May 31, 2011 and against Sinisa Mistic on November 7, 2011.

<sup>128</sup> Sasa Dzudovic, Vidoje Jasovic and Zoran Jasovic were included in the OWCP's Investigation Request from March 13, 2010, together with other indictees.

<sup>129</sup> In 2011, 37 witnesses were examined, 21 of whom were witnesses for the injured parties.

be noted that during their testimonies some witnesses conspicuously suffered from 'short-term memory loss' and fear, and that some noticeably strove to eliminate any possibility of their own involvement in, and responsibility for, any crimes committed. Others tried to transfer the responsibility for failures and omissions from the Army to the Police, and vice versa. This was particularly noticeable in the testimony of the witness Borislav Vlahovic, former Chief of Police in Pec, Milicka Jankovic, former commander of the Armoured Battalion of the 125<sup>th</sup> Motorized Brigade of the VJ, and Dusko Antic, former commander of the Military Department of Pec.

The most important and certainly the most convincing testimony was that of the protected witness PS – Zoran Raskovic. At the start of his six-day testimony, Zoran Raskovic requested that he be allowed to testify without protective measures, using his full name, claiming he wished to look the defendants in the eye and tell every one of them what he thought of them and of the crimes they had committed. The Trial Chamber acceded to his request. The witness began his testimony with a detailed description of his arrival and his joining of the 177<sup>th</sup> Military Territorial Detachment (VTO), explaining the command structure of the unit and its composition. He described the commander of the first platoon of the 177<sup>th</sup> VTO, Nebojsa Minic, known as Mrtvi (deadman), as a cruel man, a very awkward character, who had previously spent 15 years in prison, adding that Minic said he had killed his first 'Shiptar' (a derogatory term for members of the ethnic Albanian community) when he was just 13 years old. One day after the NATO bombing campaign had begun, Minic gathered ten of his friends, among whom were the defendants Ranko Momic, Zoran Obradovic, Sinisa Mistic, Milojko Nikolic, Slavisa Kastratovic and Srecko Popovic. The witness vividly explained that at that time the group did not have uniforms and looked more like a 'team' than the army. On the day in question, Mimic spent some time at the headquarters of the VJ which was under the command of the principal defendant Toplica Miladinovic. Minic then ordered the group to move, saying they were going to "hunt down the Germans." About 25 to 30 members of the *Jackals*, in 7 to 10 vehicles, their faces colored with soot, headed to the village of Cuska/Qushk, where some 10 reservists of the Territorial Defense Force and several members of the police had already arrived. They stopped in the center of the village and moved "according to the established methods," since this was not their first operation. They were divided into 4 groups, one led by Minic, another by defendant Popovic, the third and fourth by defendants Momic and Nikolic. The witness emphasized that at this point there were no 'terrorists' in the village of Cuska/Qushk, nor was anyone shooting at them. Women, children and the elderly were gathered in the center of the village and, according to the witness, "a battlefield was created." As they reached the village, he saw defendant Sobic kill two Kosovo Albanians, who approached them to ask if they "needed anything." A little later he saw defendant Popovic shoot three Kosovo Albanians in front of a house, and he also saw 25 males standing in a line on the other end of the village, and then heard gunshots. The witness saw the defendants Momic, Nikolic and Madjo Vukovic usher 15 Albanians into a house, after which gunfire was heard from the same house. Once members of the *Jackals* took their money and other valuables, Albanian civilians were forced to pack their things onto tractors and other vehicles and leave the village. From the village of Cuska/Qushk the *Jackals* moved toward the village of Pavljane/Pavlan, where at the entrance to the village they saw a Kosovo Albanian man whom defendant Popovic, shouting "for Serbia," shot in the head. In the village, defendant Momic raped and killed a Kosovo Albanian woman, whom the witness Raskovic said he believed was pregnant. After 40 minutes, they left the village of Pavljane/Pavlan and arrive in the village Zahac/Zahaq, where again they split into several groups before entering houses, robbing and

burning them, and expelling the population. Upon their return to Pec/Pejë, the witness heard the name of Agim Ceçu for the first time and learned that in the village of Cuska/Qushk Minic had killed his father. They collected together all the money and valuables, and went back to the headquarters of defendant Toplica Miladinovic. In response to his testimony, defendant Misić called the witness "Vuk Brankovic" (a 14th century leader accused of betraying the Serbs). Responding to these words, the witness said he was particularly pleased to be called a traitor by such a man, and would always choose to betray such a Serb.

Describing the brutality of the *Jackals*, the witness said defendants Sokic and some other members of the unit threw bombs at 4-5 year-old children. The witness described the *Jackals* as the most brutal unit in Kosovo in 1999, which performed the dirtiest jobs that nobody else wanted to do. Their operations and brutality were known in the wider region of Pec/Pejë, so the VJ officers had to have been familiar with their actions. After each action, the witness would follow Nebojsa Minic to the VJ Command, where Minic would meet defendant Toplica Miladinovic. Testifying about the actions of the *Jackals* unit, the witness said that in addition to the events in Cuska/Qushk, members of the unit committed serious crimes and devastated the villages of Ljubenice/Lubeniq, Pasino selo/Katundi i Ri and a residential area Brezanik/Brezhenik in Pec/Pejë. According to the witness, the worst crime was committed in Ljubenic/Lubeniq, where 100 bodies of dead Kosovo Albanian civilians were heaped in a pile. Due to the *Jackals'* actions, columns of expelled Kosovo Albanians moved towards Albania for days. The only order of Nebojsa 'Mrtvi' Minic, was "to exterminate the vermin." The witness pointed out that defendants Zvonimir Cvetkovic, Vidoje Koricanin, Veljko Koricanin and Radoslav Brnovic were not in the village of Cuska/Qushk at the time when the crimes were committed there.

Defense attorneys and other defendants attempted to attack the credibility of the witness by stating that he was a convicted criminal and a drug addict. During the trial, defendant Srecko Popovic called the witness derogatory names and at one point directed an avalanche of names and insults at the deputy prosecutor. This atmosphere and constant outbursts from the defendants forced the Trial Chamber to change courtroom in an attempt to maintain order and security during the trial.

Having begun his testimony, which was to last several days, witness Zoran Raskovic requested protection from the court because of the threats and pressures to which he was exposed. He stated that a senior police officer responsible for his safety said that Kosovo Albanians committed crimes as well, but that they usually killed their witnesses, so that he (Raskovic) could not expect to be pampered either. His parents, who live in a refugee camp, received death threats, while his brother, who had never taken part in the war, was maltreated by the police. The officer tasked with Zoran Raskovic's protection, called him a "scumbag" and said he was disgusted by him. Finally, Raskovic asked whether society in Serbia was ready for his testimony and asked to be told if it wasn't, as he did not want to "end up dead" like some other protected witnesses, adding that he could be killed, but the truth could not.

The beginning of the trial was marked by unprofessional outbursts from defense attorneys, who in all possible ways, and contrary to the law and code of professional ethics, tried to stop the

plaintiffs' proxies<sup>130</sup> participating in the proceedings. Although they had no legal basis for the request, they insisted that plaintiffs' proxies be prevented from further representing the injured parties. By questioning their expertise, they tried to belittle their work, sought to restrict their right to ask questions, and even shouted rudely, using vulgar language and insults. This behavior from a defense attorney led the plaintiff-proxies, lawyer Mustafa Radoniqi, to point out that he felt his colleagues were being hostile to him. Similarly striking were the efforts of some defense attorneys to introduce politics into this process, and redirect attention from serious crimes the defendants were charged with and turn the courtroom into a testing ground for the defense of 'national interests'.

Through effective and confident management of the proceedings, the President of the Trial Chamber made it clear that she would not tolerate any interference with the proceedings. Unfortunately, despite this, some defense layers committed outbursts later in the trial as well, something which both disturbed order and slowed down the process.

Through his informal approach and casual behavior, the representative of the public prosecution service in part contributed to this atmosphere in the courtroom.<sup>131</sup> The Deputy Prosecutor devalued the importance of the process by frequently taking the floor against the rules of procedure, inappropriately commenting and entering into verbal disputes with defense counsel and with the Chamber, something quite unworthy of the representative of such an important state body. The Deputy Prosecutor seemed unaware that this made the injured parties lose confidence, and encouraged the defendants and their counsel to be even more disrespectful both to him and to other participants in the process, and indirectly to the state, which he himself was representing, and the authority of which is inevitably tested in these trials.

Given the facts presented in the earlier part of the procedure, it is reasonable to expect that the OWCP will expand the indictment to include crimes allegedly committed in the villages of Pavljane/Pavlan, Zahac/Zahaq and Ljubenice/Lubeniq.

## ***12. The Zvornik II Case***

On November 22, 2010 the Higher Court in Belgrade – War Crimes Chamber, presided over by judge Tatjana Vukovic, pronounced the defendants, Branko Grujic and Branko Popovic guilty of committing the criminal offense of war crimes against the civilian population, under Article 142, Paragraph 1, of the Criminal Code of the FRY, as accomplices, and under Article 22 of the FRY, and defendant Branko Popovic for aiding and abetting under Article 24 of the Criminal Code of the FRY, and sentenced them to prison – defendant Branko Grujic to 6 years, defendant Branko Popovic to 15 years.

On October 3, 2011, the Court of Appeal in Belgrade fully confirmed the first instance judgment and dismissed as unfounded, appeals from the War Crimes Prosecutor, the defendants and their attorneys.

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<sup>130</sup> In the name of the HLC, the plaintiffs' proxies were Natasa Kandic, attorney Mustafa Radoniqi and Slavica Jovanovic.

<sup>131</sup> Deputy War Crimes Prosecutor Dragoljub Stankovic.

I The first instance verdict found that, during the armed conflicts on the territory of Bosnia and Herzegovina between May and July 1992, in the municipality of Zvornik, as members of the Serb side in the conflict, Branko Grujic, in his capacity as President of the Provisional Government and member of the War Headquarters and the War Secretariat, and Branko Popovic, under the false name of Marko Pavlovic, as Commander of the Territorial Defence Headquarters, member of the War Headquarters and Commander of the Military Territorial Command in the newly established Serb municipality of Zvornik, by prior arrangement and in a joint decision, took civilian military-aged Muslim men hostage. On May 27, 1992 they took 174 persons from the village of Divic, on June 1, 1992 about 700 persons from the villages of Klisa, Djulici, Grbavica, Kucic Kula, Grebe, Seetici, Celismani, Radave, Sjenokosa and other places inhabited by the Muslim population.

From the group of about 500 Muslim civilians in the village Divic, on Branko Popovic's orders, armed members of the Zvornik Territorial Defense Force singled out 174 men and transported them to the administrative building of the *Novi izvor* company, where they were held in a closed room, under guard, for two days; the 162 persons remaining (after 11 persons had been taken away and one used for exchange) on May 29, 1992 were transported to the Cultural Center in Celopek. They were held there as hostages until July 1, 1992, although the premises did not meet even the minimum standards for accommodation, such as beds, blankets, conditions for maintaining personal hygiene, water for bathing and washing, etc, something the members of the Zvornik Territorial Defense Force consciously failed to provide, and in doing so inhumanely treated the inmates, endangering their mental and physical health. On July 1, 1992 the hostages who had not been exchanged and had survived, estimated to be 116, were transported to the prison established in the building of the Magistrates Court in Zvornik, from where on July 15, 1992 the 83 surviving prisoners were transferred to the *Batkovic* camp for exchange.

After an agreement had been reached between representatives of the Serb municipality of Zvornik and representatives of the Muslim community in Klisa to evict Muslims from Klisa, Djulici and other villages populated by Muslims, the defendants decided not to follow the agreement, and from the group of 5,000 civilians, on the orders of the defendants, members of the Territorial Defense Force of Zvornik forcibly separated about 700 military-aged Muslim men and detained them in the *Technical School Center* (TSC) in Karakaj, in a room entirely inappropriate to fit the number of detainees, without appropriate ventilation, which resulted in the suffocation of several persons on that same day. In this way, the defendants acted inhumanely towards the detainees, failing to provide them with the minimum accommodation requirements to guarantee their security, leaving them in this condition until June 5, 1992, when the hostages were transported to the Culutral Center in Pilica.

On June 26, 1992, following the military seizure of the village of Kozluk, the defendants among whom were members of the Territorial Defense Force and the police of Zvornik, together with members of the Yugoslav National Army's tank company and the Military Police Company of the Zvornik Brigade, acting on their previous mutual agreement and a joint decision, forcibly displaced the Muslim population from the village of Kozluk, a total of 1,649 persons, and took them under armed escort to Loznica, Serbia. Following that, the civilians were transported to Palic near Subotica, where the Secretariat of Internal Affairs (SUP) in Subotica immediately

issued them with travel documents, with which a few days later they crossed into Hungary and then on to other European countries.

The first instance judgment determined that defendant Branko Popovic also inhumanly treated the injured parties Ramiz Smailovic and Spomenka Stojkic. On May 16, 1992, with an unidentified member of the Territorial Defense Force, he arrived at the prison in the Magistrates' Court in Zvornik, ordered Ramiz Smailovic to lie on his back on the floor, after which an unidentified member of the Territorial Defense force, together with Popovic, and with his consent, kicked Smailovic in the chest with his military boots. During this interrogation, he insulted Spomenka Stojic, calling her names and slapping her repeatedly. In addition to this, Popovic deprived Spomenka Stojic and Abdulah Buljbasic, nicknamed Bubica, of the right to a fair and impartial trial, having ordered that Spomenka Stojic be detained in the Magistrates' Court without trial, after which she was moved to the prison in the *Novi Izvor* company, where she spent a further 76 days. On his orders and without any court order, the injured party Bubica was detained on the *Economy* farm, where members of the Territorial Defense Force of Zvornik interrogated, beat him and tortured him, after which he was transferred to the prison at the Magistrates' Court in Zvornik, from where he was taken away and killed by unidentified members of the Territorial Defense Force. Popovic knowingly failed to protect Bubica's life, assisting the unidentified members of the Territorial Defense Force to commit the murder.

Between May 29 and July 1, 1992, the 162 civilians who had been transported from the *Novi izvor* building, to the Cultural Center in Celopek were detained as hostages. Popovic knowingly failed to protect their lives and physical integrity, even after he was told that that members of the Territorial Defense Force had entered the Cultural Center in Celopek, killing and inflicting bodily harm on hostages, and by his failure to act, Popovic aided and abetted the killing and injuring of the victims. At least 27 were killed and 20 wounded. Likewise, he failed to protect the life and physical integrity of hostages detained in Training School Center in Karakaj from June 1-5, 1992, who were moved to the Cultural Center in Pilica, where they remained from June 5-8, 1992, some of whom were beaten, physically tortured and killed by members of the Territorial Defense Force. By his failure to act, Popovic aided and abetted the perpetrators in their killings. The survivors from among those detained in the Training School Center of Karakaj, were transferred to the Cultural Center in Pilica. 352 bodies were found and identified in mass graves.

Some members of the Territorial Defense force of Zvornik, under the command of the convicted Branko Popovic, who were sentenced as direct perpetrators of these murders, and who also inflicted bodily harm on the Muslim civilians, have been sentenced by final judgment in the *Zvornik I case*, while others have been sentenced in a first instance judgement handed down in the *Zvornik III/IV cases*.

By its comprehensive and thorough assessment of the evidence presented at the trial, the first instance court established the facts in a largely correct and detailed manner. However, the court found that it was not proven that the defendants had unlawfully and forcibly displaced Muslims from the village of Skocic on June 26, 1992, which is why that particular operation was omitted from the verdict. The court's conclusion seems difficult to justify, and in the opinion of the HLC is highly questionable, given that the court itself found that the entire territory of the Zvornik Municipality, including the village of Skocic, was permeated by an atmosphere of fear, that there was shooting in the villages of the municipality, that houses, hay and barns were torched, that

residents were evicted from their homes and threatened, in some cases by armed Serb neighbors, that the residents of Skocic complained to witness Fadil Banjanovic (the then mayor of Kozluk) that they could no longer endure the terror, that they were aware of the illegal detention of Muslims from the municipality of Zvornik, that Skocic is located just 2 km from Kozluk, that the residents of Skocic had family ties with the locals from Kozluk, (Banjanovic took care of them whenever they came to him with problems) and that it was entirely natural that they would leave together with the Kozluk villagers, and that, according to the witness Banjanovic, "it is unimaginable what would have happened to them had they stayed." The killing on July 11, 1992, of 22 civilians who had not left the village of Skocic, lends support to this testimony. Criminal proceedings in the *Skocic Case* are being conducted presently a fact the trial chamber is no doubt aware of. Precedence established in earlier cases before the ICTY suggests that the character of this resettlement cannot be considered as voluntary.<sup>132</sup>

In its explanation of the judgment, the court stated that it had been clearly established that 11 persons (whose remains were later exhumed from a mass grave) were taken from the premises of the *Novi izvor* company, prior to the transportation of the residents of Divicani to the Cultural Center in Celopek, but the court concluded that the defendants had not been charged with this event, which was, therefore, omitted from the judgment. Further, in its explanation, the court clearly found that on June 1, 1992 in Klisa and Beli Potok, six civilians were killed and later exhumed from a mass grave. The court once again indicated that the defendants had not been charged with the killings (although originally these killings were contained in the text of the indictment), and hence this too had to be omitted from the judgment. Such omissions and sloppiness by the OPWC, both in indicting the defendants and during the criminal procedure when new circumstances were disclosed, led to the exclusion of certain killings from the court decision, which whilst it did not change the essence of the judgment itself, is indicative of the quality of the prosecution service's work.

However, the court correctly and accurately applied the substantive law to the facts established, both domestic criminal law provisions, and international humanitarian law, qualifying the defendants' actions as war crimes against civilians. In addition to his complicity in the crimes, the court established further that Popovic, by his failure to act, was assisting in the commission of the crime. The court considered this to essentially be a form of participation in the commission of the offense. In this way, for the first time in the practice of domestic courts, a principle has been established which, according to a number of authors, has all the aspects of command responsibility in cases when superiors knew of crimes. Since the concept of command responsibility could not have been applied because it was not a feature of national legislation at the time the offense, the application of this reasoning has special significance as it represents an attempt to bridge this gap. This is supported by the practice of the ICTY.<sup>133</sup>

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<sup>132</sup> In the *Stakic* case (2006), the Appeals Chamber established that violence, detention, psychological pressure and abuse of power created an atmosphere in the municipality of Prijedor which was so coercive that voluntary resettlement was an inappropriate term.

<sup>133</sup> In the *Krnjelac* case (2002), the Trial Chamber's position was that, in cases when conditions are met for the responsible person to be qualified simultaneously as both a superior and abettor, the defendant's actions should be characterized as abetting.

The decision to sentence Branko Popovic to 15 years in prison, and Branko Grujic to 6 years, cannot be understood as being a punishment proportional to the severity of the crime, the consequences of the crime, or the degree of criminal responsibility of the defendants, and is especially insufficient as a punishment. The position of the Court that it had in mind that the most serious consequences of the crimes which occurred as a result of Popovic's failure to act – viewing his actions as abetting, the least severe form of complicity – is not only unacceptable but is also in contradiction with the fact that the defendant's liability could also be considered command responsibility, which entails a much greater degree of responsibility, in this case probably greater than the act of perpetration itself. Although it could not apply the principle of command responsibility, the trial court should have had it in mind when pronouncing sentence. In its explanation of the decision on criminal sanction, the court stated that at sentencing it appreciated the apparent involvement of others in these events – whether direct perpetrators, or those with powers similar to the powers of the defendants – who were not brought to justice. The conclusion that other persons were involved is absolutely correct, and stems from the ample evidence and testimonies of a number of witnesses who stated that there was “some kind of system” to the commission of the crimes that the “politicians had agreed on things”, that everything was being decided at the meetings of the SDS. However, given that the convicted Grujic was chairman of the local board of the SDS in Zvornik, that several witnesses reported having heard that Popovic worked for the Department of State Security (DB) of the Republic of Serbia, and that he personally said this to some persons, it is clear that in addition in conjunction with persons unknown, the two were the creators of a plan whose aim was to carry out the crime; hence, participation of other persons cannot be viewed as a mitigating circumstance. Given the obviously inadequate sentence handed down to Grujic, which verges on the border of the special minimum for this kind of offense, the purpose of punishment has been rendered meaningless and as such the sentence doesn't serve the purpose of either special or general prevention.

**II** Explaining its decision, the Court of Appeal stated that in the first instance judgment there had been no violation of criminal procedures, that the facts were accurately and completely identified, that the substantive law was correctly applied, and that the decision on criminal sanction was appropriate to the seriousness of the crime and for the purpose of punishment.

However, careful analysis of the facts established leads the HLC to the conclusion that if the standards of contemporary national and international criminal law had been followed, the legal decision would have been slightly different. In accordance with the evidence presented, the actions of the defendants, which consisted of killing, torture, inhuman treatment, violation of bodily integrity, forced displacement and resettlement, pillaging, hostage taking, and deprivation of the right to a fair and impartial trial, constitute persecution, the most severe form of crime against humanity, which at the time of the offense, was not provided for in the national criminal law. The large body of evidence presented before the first instance court clearly shows that persecution of the Muslim population took place in the wider area of the Zvornik municipality. Listed below are just a few actions which clearly confirm this claim.

From mutually consistent witness statements, the court itself found and cited in the explanation of its decision that after control had been established in Zvornik by the Serbs during the conflict in early April 1992, the Muslim population was forced to move to Klisa; that in the days leading up

to June 1, 1992, Muslims began arriving to Klisa from the following villages: Pod Pecinom, Divic, Beli Potok, Lopar, Garevic, Grbavci, Hajdarevic, Hamzic, Radava, Kucic Kula, Lupa, Djulic, Mahmutovic, Mrakodol, Spreka, Tahic, Ramic, Calisman, Djina, Sjenokos, Kaludrani, Setic, and Trsic, awaiting resettlement. This situation was strikingly described by witness Fatima Jasarevic, who pointed out that the shooting started in April, that some villages were shelled, that in May villages began to be 'cleansed' one by one, and that people from the whole of the Zvornik area began pouring into Klisa, that from mid-May the Serb army passed by her house on tanks, that they were shooting, that there were occasional power blackouts, that nobody was allowed to go anywhere, that they were all, according to a witness, "in a pot, as it were." Witness Dragan Djokanovic said in his testimony that he arrived in Zvornik on June 11, 1992 as the Commissioner of the Presidency of Republika Srpska of Bosnia and Herzegovina; that he found Zvornik emptied of Muslims; that he was present when Momcilo Krajisnik, in a speech in March 1992, had proposed starting ethnic separations and forced relocations; that he did not know who supported the civilian and military authorities in Zvornik, but that it was obvious that they had ordered that Zvornik be emptied of its Muslim population, and that it was certain that the civilian and military leadership of Zvornik, including Grujic and Popovic could not have engaged in such a thing on its own, but that it had to have been "ordered by someone up high." During the proceedings, an order sent on May 28, 1992 by the brigade commander of the Birac brigade of the Serb forces, Major Svetozar Andric, to the Headquarters of the Territorial Defense force of Zvornik, was presented. This order was previously presented as proof to the ICTY in the *Krajisnik* case, and among other things stipulates that "... the removal of the Muslim population must be organized and carried out in coordination with the municipalities through which the resettlement takes place, that only children and women can be resettled, while men of fighting age are to be held in the camps for the purpose of exchange..." Further, reading of the regular combat report of the Zvornik Brigade Commander, Lt. Col. Vidoje Blagojevic, sent to the headquarters of the the East Bosnian Corps, in June 26, 1992, convinced the court that he (Lt. Col. Vidoje Blagojevic) informed headquarters that the eviction of the Muslim population from the village of Kozluk had been carried out and led the court to conclude that units which at the time were formally a part of the Zvornik Brigade, of the Army of Republika Srpska were also involved in the forced deportation of the Kozluk residents.

Given the aforementioned, this was undoubtedly a crime against humanity, which along with genocide constitutes one of the two most serious crimes in the corpus of international criminal law.

The *Zvornik II* case is one of a number of war crimes cases before national courts arising from offenses committed in the municipality of Zvornik, but what makes this case most important, and therefore an object of greatest attention, is the status and the responsibility of the persons convicted, whose action and failure to act, created the conditions for the commission of crimes by others, against whom proceedings have been or are now being conducted. The actions of Branko Grujic and Branko Popovic should not be viewed in isolation, but in the context of the event that took place in this particular area, at this particular time, and in light of the cumulative effect, which is reflected in the ethnic cleansing of the entire area of Zvornik. Their role is best described by the witness Milorad Davidovic, the Federal brigade commander of the Federal SUP, who explained that the policy of the SDS party, chaired in the municipality of Zvornik by Branko Grujic, was that Muslims "be evicted in an organized, planned and systematic manner, from the

territory of Republika Srpska," and that the "alpha and omega" of all events in Zvornik was Branko Popovic.

In several of its decisions, the ICTY has taken a clear position that persecution, as the gravest of crimes against humanity, requires a particularly severe punishment.<sup>134</sup>

The greatest problem in this case is the decision on criminal sanction or, more precisely, on how severe the prison sentences should be. Not only do the penalties imposed *not* achieve the purpose of punishment, but the social role of the court as an institution has not been fulfilled either. In the current social, historical and political moment, when acts of this kind and this weight are not accompanied by adequate social and moral condemnation, the Court of Appeal should have borne in mind that its decisions were not only a reflection of the individual attitudes and perceptions of each judge and the Chamber, but that they would send a strong message to society as a whole, delivering a value judgment separating civilized society from the most serious crimes, which this certainly was.

### ***13. The Zvornik III/IV Case***

On May 13, 2010, the Higher Court in Belgrade – War Crimes Chamber issued a ruling joining the criminal proceedings against indictees Goran 'Savo' Savic, and Sasa Cilerdzic, for war crimes against civilians under Article 142, Paragraph 1 of the Criminal Code of the FRY, and Article 22 of the Criminal Code of the FRY with the procedure for the same offense against the defendant Darko 'Pufta' Jankovic.<sup>135</sup>

Subsequently, on September 10, 2010, the OWCP changed and specified the charges against the indictees Jankovic, Savic and Cilerdzic for the war crimes against civilians under Article 142, Paragraph 1 of the Criminal Code of the FRY, and Article 22 of the Criminal Code of the FRY.

On December 16, 2011, after a three-year trial, the Trial Chamber of the the Higher Court in Belgrade – War Crimes Chamber, presided over by judge Tatjana Vukovic,<sup>136</sup> delivered its judgment<sup>137</sup> finding defendant Darko 'Pufta' Jankovic guilty and sentencing him to 15 years in prison and defendant Goran Savic guilty, sentencing him to 1 year and 6 months in prison. Sasa Cilerdzic was acquitted of criminal responsibility.<sup>138</sup>

The court found that on May 5, 1992 Jankovic and Savic, along with Dragan Slavkovic and Ivan Korac arrived at the premises of the *Economy* farm in Zvornik, where detained Muslim civilians were located, among whom were Muhamet Redzic, Kemal Kortukovic, Bego Bukvic, Nesib Dautovic, Ismet Cirak, Abdulah 'Bubica' Buljubasic and protected witnesses U, 4 H, T, F and Beta. The defedants hit the men with their fists and beat them with various objects.

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<sup>134</sup> The judgment of the Trial Chamber in the *Blaskic* case (2000), the judgment of the Trial Chamber in the *Todorovic* case (2001), the judgment of the Trial Chamber in the *Sikirica* case (2001).

<sup>135</sup> The OWCP issued an indictment against Goran Savic and Sasa Cilerdzic on March 14, 2008; the trial commenced on September 4, 2008. The indictment against Darko Jankovic was issued on April 26, 2010.

<sup>136</sup> Members of the Trial Chamber were judge Olivera Andjelkovic and judge Dragan Mirkovic.

<sup>137</sup> During the 31 trial days 34 witnesses were examined, of whom 9 were protected witnesses and 2 were witnesses previously convicted in the *Zvornik I* case, Ivan Korac and Dragan Slavkovic.

<sup>138</sup> At the time this report was compiled, the written form of the judgment was still pending.

It was additionally found that on May 11 and 12, 1992 Savic and Dragan Slavkovic arrived at the *Economy* farm, and Slavkovic severely beat Abdulah Buljubasic, while defendant Savic stood nearby, holding his rifle. At one point Savic used the tip of his rifle to remove a gold chain from the victim Buljubasic, saying: "You won't need this anymore."

In the second half of June 1992, t Jankovic took Ismet Cirak from the premises of the *Ciglane* brick factory in Zvornik, where Muslim civilians were detained, and took him to another room, cutting him on the neck, and then loaded him into the trunk of his car and drove him to an unknown destination, after which he killed him. The court found that Jankovic killed Cirak with a firearm. His remains were found in a mass grave on the Crni Vrh ( the black peak). On the same occasion, Jankovic ordered detainee Enver Dautovic to scrape his crescent tattoo from his arm. When Dautovic failed to remove it, Jankovic cut the skin from his arm. The Prosecution failed to prove that defendants Savic and Cilerdzic were present when Jankovic attacked Cirak and Dautovic.

The court found that Jankovic had engaged in looting, between May 12 and late June 1992, when he took the Muslim detainees with him to abandoned houses in Zvornik. The court found that defendants Savic and Cilerdzic played no part in this.

On the eve of Bajram, an Islamic religious holiday, on June 10 or 11, 1992 defendant Jankovic, and the late Dusan Vuckovic, and several unknown persons from the Territorial Defense Force of Zvornik, ordered Fikret Jahijagic and his son Valmir, Mehmedalija Bikic and his son or nephew Saban onto the theater stage of the Cultural Center in Celopek, in which Muslim civilians were detained and demanded that they take off their clothes and perform oral sex on each other. The defendant Jankovic killed Zaim Pezerovic, Hasan Atlic, Sakib Kapidzic and Fikret Jahijagic by slitting their throats and then, together with the late Vuckovic, stabbed Saban Bikic to death. After that, Jankovic and another soldier ordered the other inmates to clean the room and remove the dead bodies. Hasan Halilovic, Salih Zahirovic, Husein Salihovic, Nesib Okanovic and Sead Dzihic took the bodies out and loaded them on a previously prepared truck, and together with unknown soldiers were taken to an unknown destination, from which they never returned. Their bodies were exhumed after the war from a mass grave on Crni Vrh. On the same occasion, defendant Jankovic ordered the witness G to step on stage, take his clothes off and sit in a praying position. When the witness did so, Jankovic stabbed him several times in the thighs of both legs.

Also, after Bajram, on June 13, 1992 Jankovic came to the Cultural Center with several members of the Territorial Defense of Zvornik and cut off Zulkanrein Efendic's penis and Enes Cikaric's ear, forcing them to eat the body parts.

In the explanation of its sentence, the president of the Trial Chamber cited as a mitigating circumstance in the case of Jankovic that at time the of the offense he was a young adult, that he was now a family man, and that he had no prior criminal record. As aggravating circumstances, she cited the number of his actions, the brutality and ruthlessness, the fact that the injured parties were helpless, kept in inhuman conditions and exposed to severe physical and mental suffering. The President of the Chamber emphasized that with regard to the defendant Savic there were no aggravating circumstances, and gave as the mitigating circumstances that at the time of the crime he was young, and is now a family man The president did not specifically explain whether these

circumstances were such that they could be considered particularly mitigating circumstances which justified the imposition of a sentence below the statutory minimum (five years).

The judgment against the accused Jankovic is in the opinion of the HLC, fair, and the sentence is in accordance with the seriousness of the offense. At this point, while there is still no insight into the written explanation of the judgment, it remains unclear what reasons led the court to acquit Cilerdzic and hand down a sentence of less than the statutory minimum on Savic.

### **III Regional Cooperation**

In 2011, the judicial authorities in Serbia and Croatia continued to exchange evidence and court cases, but in what seemed to be worsening conditions. The circumstances deteriorated after the arrest of Croatian citizen Tihomir Purda in Bosnia and Herzegovina on a Serbian arrest warrant, after the Serbian OWCP's refusal to transfer the indictment and the evidence against Croatian citizen Veljko Maric to the Croatian judiciary, the activation, by the OWCP of the charges first brought by the military Prosecutor's Office of the former JNA against 44 citizens of Croatia and finally after the adoption on November 21, 2011 by the Croatian Parliament of the Law on Invalidation of Certain Legal Acts of the Judicial Bodies of the Former Yugoslav National Army, the former Socialist Federal Republic of Yugoslavia and of the Republic of Serbia. No agreement had been reached on the abolition of parallel investigations and exchange of evidence between Serbia and Bosnia and Herzegovina. Serbia continued to demand the extradition of indictees for the crimes committed in Dobrovoljacka Street in Sarajevo, regardless of the legal defeat it had suffered before the British Courts, when it requested the extradition of a citizen of Bosnia and Herzegovina, Ejup Ganic.

In 2011, the OWCP continued to initiate proceedings against foreign nationals, firm in the belief that it was responsible for protecting the interests of Serb victims in the territory of the former Yugoslavia. In the case of the warrant issued for the arrest of the retired General of the Army of Bosnia and Herzegovina, Jovan Divjak, the Austrian courts rejected Serbia's request for his extradition on the grounds that he "could not expect a fair trial in Belgrade." In the opinion of the HLC in the case of Croatian veteran Tihomir Purda, the OWCP demonstrated a lack of professional distance from the documentation and the cases it had inherited from the Military Prosecutor of the former JNA. The OWCP demanded the extradition of a Croatian citizen from the judiciary of Bosnia and Herzegovina on the basis of an indictment drawn up by the former JNA, which in turn was based on a coerced statement from Tihomir Purda, given during his captivity in Serbia. The OWCP indicted Croatian citizen Veljko Maric, despite the fact that the Croatian Ministry of Justice had requested the transfer of this case in accordance with the Agreement on Cooperation in the Prosecution of War Crimes Perpetrators between Serbia and Croatia from 2006. In November 2011, the OWCP forwarded to the Croatian Ministry of Justice an indictment issued by the former JNA's Military Prosecutor's Office against 44 Croatian citizens for war crimes allegedly committed in Vukovar in 1991. Although the adoption of the Law on Invalidation, passed by the Croatian Parliament, works particularly against the interests of the citizens of Croatia, it should be noted that the Serbian OWCP strongly contributed to the adoption of the act, by its refusal to hand over evidence to the Croatian authorities about war

crimes. The act threatens to undo the good results achieved by the prosecutors of Croatia and Serbia regarding the exchange of evidence and transfer of war crimes cases.

### **1. The *Divjak* Case**

On March 3, 2011, in Vienna, the Austrian police arrested retired General of the Army of Bosnia and Herzegovina, Jovan Divjak, based on a warrant issued by the Republic of Serbia in 2009, charging him with participation in the commission of war crimes in Dobrovoljacka Street in Sarajevo, during the withdrawal operation of a JNA column in May 1992.

The Austrian court decided to release Divjak from extradition detention, releasing him on bail of €500,000 with the condition that he remain in Austria pending a full hearing.

On March 9, 2011, the War Crimes Prosecutor Vladimir Vukcevic submitted to the Ministry of Justice of the Republic of Serbia, as the competent authority for extradition requests, the documentation in the *Divjak* case. Immediately thereafter, Serbia requested the extradition of Divjak.

As the Office of the Prosecutor of Bosnia and Herzegovina had also conducted its own investigation into the *Dobrovoljacka* case, on March 23, 2011 Bosnia and Herzegovina also requested the extradition of Divjak.

On July 29, 2011, the Austrian court rejected Serbia's request for extradition on the grounds that "in Belgrade, he could not expect a fair trial." The court also referred to the opinion of the ICTY, which had previously found that there was insufficient evidence to open an investigation against Divjak and others whom the Republic of Serbia wants to try for crimes committed in Dobrovoljacka Street.

### **2. The *Purda* Case**

On January 5, 2011, at the Orasje border crossing, between Bosnia and Herzegovina and Croatia, Bosnian police arrested a Croatian citizen, Tihomir Purda, on the basis of an arrest warrant issued by the Ministry of Justice of the Republic of Serbia in 2007 for his alleged involvement in the commission of war crimes. The same arrest warrant issued by the Republic of Serbia included two other members of the Croatian Armed Forces, Danko Maslov and Petar Janjic, on suspicion that in November 1991, in Vukovar, they committed a war crime against the wounded and the sick under Article 143, Paragraph 1 of the Criminal Code of the FRY, when they shot three wounded JNA soldiers, immediately killing two, while the third died in hospital. The warrant was based on an indictment issued by the former JNA Military Prosecutors, which was taken over by OWCP.

On January 20, 2011, the Serbian Ministry of Justice filed a request for the extradition of Purda with the Bosnia and Herzegovina authorities

On March 5, 2011 the HLC published a statement, criticizing the OWCP for its failure, following defeat in its extradition request before the British courts in the Ejup Ganic case and the refusal of the Austrian courts to extradite General Jovan Divjak, to review and revoke those arrest warrants and indictments issued by the Military Prosecutor of the former JNA, which are not based on solid evidence. In the Purda case, the only evidence that the OWCP has publicly provided is a confession by Purda, made while he was arrested and held in a detention camp in Serbia, when he had no information about the identity of the victims with whose murder he was charged.

Purda was questioned on February 21, 2011 in the Office of the Prosecutor of Bosnia and Herzegovina in Sarajevo, in the presence of Deputy War Crimes Prosecutor of Serbia, Dusan Knezevic, and the investigating judge of the Higher Court in Belgrade – War Crimes Department, Milan Dilparic. Defendant Maslov was questioned on February 24, 2011 in the County Court in Zagreb, while defendant Kresimir Devcic was questioned on February 24, 2011 in the County Court in Vukovar. Representatives of the Serbian Ministry of Justice were present during the questioning of Maslov and Devcic.

Purda was questioned on February 21, 2011 at the Office of the Prosecutor of Bosnia and Herzegovina in Sarajevo, in the presence of Deputy War Crimes Prosecutor of the Republic of Serbia, Dusan Knezevic, and the investigating judge of the High Court in Belgrade – War Crimes Chamber, Milan Dilparic.

Maslov was questioned on February 24, 2011 in the Zagreb County Court, and Kresimir Devcic on February 24, 2011 in the County Court in Vukovar. During the hearing of both defendants, representatives of the Serbian Ministry of Justice were also present.

On March 3, 2011, the OWCP made the decision to waive prosecutions of Purda, Maslov and Janjic due to a lack of evidence that they had committed a war crime against the wounded and sick. On the same day, the Court of Bosnia and Herzegovina issued a decision to suspend extradition proceedings against Purda, and released him from custody.

In the case of Purda, the OWCP acted unprofessionally. Instead of reviewing the evidence on which the indictment of the former JNA Military Prosecution rested, and reaching the conclusion that a confession extracted by torture cannot constitute valid evidence with which to initiate criminal proceedings, the OWCP again acted to the detriment of the judiciary of the Republic of Serbia.

### **3. The *Seks* Case**

On October 10, 2011, the OWCP of the Republic of Serbia sent to the Ministry of Justice of the Republic of Croatia an indictment previously issued by the Military Prosecutor's Office of the former Yugoslav National Army (JNA) against 44 members of Croatian armed forces for the criminal act of genocide and war crimes committed in Vukovar in 1991. The indictment, among

others, indicted Vladimir Seks,<sup>139</sup> the then president of the Crisis Headquarters of the Republic of Croatia for Slavonia and Baranja; Ivan Vekic, the wartime Minister of the Interior of the Republic of Croatia; Branimir Glavas, head of the Crisis Headquarters of Osijek; and Tomislav Mercep, the assistant to the wartime Minister of Interior of the Republic of Croatia. On September 14, 2011, the Minister of Justice of the Republic of Croatia forwarded the indictment to the competent court in Osijek.

#### **4. The *Veljko Maric* Case**

On September 23, 2011, the Higher Court in Belgrade – War Crimes Chamber delivered its judgment in the case against Veljko Maric, a Croatian citizen, convicting him and sentencing him to 12 years in prison<sup>140</sup> for war crimes against civilians under Article 142, paragraph 1 of the Criminal Code of the FRY.<sup>141</sup>

The main flaw in this trial was that Veljko Maric, was tried in Serbia instead of Croatia. For reasons of efficiency, fairness and in the spirit of good cooperation between judicial authorities of the two countries, the Republic of Serbia should have extradited the indictee to the State Attorney's Office of the Republic of Croatia, and transferred the evidence against him, in accordance with the Agreement on Cooperation in the Prosecution of Perpetrators of War Crimes from 2006.

#### **5. The Law on Invalidation**

Having received the indictment in *Seks et al.* and after the first instance judgment in the *Veljko Maric* case had been pronounced before the Higher Court in Belgrade, the government of the Republic of Croatia promptly forwarded to Parliament a draft Law on Invalidation for approval, which was subsequently adopted by the Parliament on November 21, 2011.

The Law made void the legal acts of the judicial bodies of the former JNA, SFRY and the Republic of Serbia, in which the citizens of Croatia are suspects, indictees and/or convicted of criminal offenses against the values protected by international law, which were allegedly committed on the territory of the Republic of Croatia. The law provided for exceptions – "invalidation does not apply to those acts which the judicial authorities of the Republic of Croatia establish meet the legal standards of the criminal legislation system of the Republic of Croatia." According to Article 3 of the Law, "The judicial authorities of the Republic of Croatia shall not act on a request of the judicial authorities of the Republic of Serbia for legal assistance in criminal proceedings if such an action would be in conflict with the legal system of the Republic

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<sup>139</sup> In October 2011, at the time when the indictment against the 44 Croatian citizens was made public, Seks was Deputy President of the then governing party Croatian Democratic Union (HDZ) and of the Croatian Parliament.

<sup>140</sup> During the six trial days, 10 witnesses were examined, among whom were the injured party and one expert witness.

<sup>141</sup> The Office of the Prosecutor for War Crimes issued an indictment against Veljko Maric on August 12, 2010.

of Croatia and infringe upon its sovereignty and security. The decision on how to respond to such requests is to be made by the Minister of Justice."<sup>142</sup>

Although the President of the Republic of Croatia, Ivo Josipovic, the Chief Prosecutor of Croatia Mladen Bajic, opposition politicians and non-government organizations have described the Law on Invalidation as endangering the citizens of Croatia who may have been unjustifiably indicted by the OWCP of the Republic of Serbia, because such charges exist independently of the fact that they are not recognized by the Croatian legal system, one should not overlook the fact that the unprofessional conduct of the OWCP, and its politically motivated position (that it is responsible for the prosecution of the crimes committed against all Serb victims), undermined the good cooperation with the Prosecution service of the Republic of Croatia, especially with regard to the exchange of evidence in cases where indictees are inaccessible to the judicial bodies of Croatia or Serbia.

#### **IV Protected witnesses**

The Special Rapporteur of the Council of Europe for the Protection of Witnesses, Jean-Charles Gardetto said at a meeting of the Council of Europe Sub-Committee Against Crime and Terrorism, held on October 28, 2011 in Belgrade, that the protection of witnesses in Serbia should be improved. He recommended that the Witness-Protection Unit (WPU) be placed under the control of the Ministry of Justice, that identity protection of protected witnesses be improved, and that a political climate in which witnesses-insiders would be encouraged to testify, should be created.

The HLC notes the case of the two police officers, both former protected witnesses, in the 37<sup>th</sup> *PJP Detachment* case who testified publicly to the HLC, to the media and at the regional conference on war crimes, held in Belgrade on September 16, 2011, and that the Office of the War Crimes Prosecutor attempted to deter them from testifying against indicted members of the 37<sup>th</sup> PJP Detachment, while members of the WPU threatened them if they continued to disclose the names of police officers who committed war crimes. One protected witness had his protected status revoked on October 29, 2009 without explanation, while the other left the program on July 4, 2011 because he could not endure the psychological torture exerted on him by the OWCP and the WPU.

The first of these two learned that his status as a protected witness had been revoked only when members of the WPU came to his apartment on October 29, 2009 and ordered him to pack his bags because he was to be returned home.<sup>143</sup> The OWCP stated<sup>144</sup> that the witness had put pressure on the prosecutor Dragoljub Stankovic to employ him in the Prosecutor's Office. When

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<sup>142</sup> The Law on Invalidation of Certain Legal Acts of the Judicial Bodies of the Former Yugoslav National Army, SFRY and the Republic of Serbia, NN 124/11. The President of the Republic of Croatia, Ivo Josipovic, in keeping with his authority, requested that the Constitutional Court of the Republic of Croatia give an assessment of the constitutionality of this law. In March 2012, the new government of the Republic of Croatia did the same. Decisions from the Constitutional Court of the Republic of Croatia on these requests are still pending.

<sup>143</sup> *Extended Report on the Irregularities in War Crimes Proceedings in the Republic of Serbia*, HLC, September 2011.

<sup>144</sup> OWCP RS, *Objections to Reports Submitted by the Humanitarian Law Center*:

[http://www.tuzilastvorz.org.rs/html\\_trz/VESTI\\_SAOPSTENJA\\_2011/S\\_2011\\_11\\_14\\_ENG.pdf](http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2011/S_2011_11_14_ENG.pdf)

the prosecutor refused to do so, the OWCP allege that the witness "began to express his discontent by launching false accusations." The OWCP says of the second witness that "he blackmailed the acting prosecutor [Stankovic] all the time, and refused to testify unless the prosecutor ensured his re-employment in the police [...] This is why the witness failed to respond during the investigation to a number of summonses from the investigating judge to testify, and in the end refused to testify about anything."<sup>145</sup>

This pattern of dramatically poor protection and treatment of prosecution witnesses has been repeated in the *Cuska/Qushk* case. During testimony, at the main hearing on January 25, 2012, the protected witness Zoran Raskovic, a former member of the 177<sup>th</sup> Military Territorial Detachment of the VJ, requested protection from the court chamber, pointing out that he had no one else to turn to, that he felt insecure, that he was insulted and threatened even by the police officers responsible for his safety, that members of his family had been harassed and put under pressure by the police, and that he had received no assistance, other than the verbal support of the OWCP. He demanded to be told whether society was indeed ready to hear a testimony like his – as he did not wish to “disappear” as some other protected witnesses had.<sup>146</sup>

## V Limiting criticism

The existing legislation of the Republic of Serbia severely limits any form of criticism of the prosecution of war crimes. The Criminal Code of the Republic of Serbia prescribes a prison sentence (six months) and a monetary fine for anyone “who during court proceedings and before the final court decision, with an intent to injure the presumption of innocence and independence of the court, provides public statements to the media.”<sup>147</sup>

The Civil Procedure Code limits access to justice for individuals, organizations, independent bodies, associations and media. By imposing high fines, Articles 499 and 500 discourage anyone from expressing critical views on matters of public concern.<sup>148</sup>

The Criminal Procedure Code (CPC), Article 50, Paragraph 1, Count 3, establishes a monopoly of attorneys in representing the interests of crime victims and revokes their right to self-elect a representative who is not an attorney. This measure disallows human rights experts from representing the victims of war crimes in war crimes cases, unless they are also attorneys.<sup>149</sup>

## VI Defense

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<sup>145</sup> Protected witness K-79, who testified in two trials before the Hague Tribunal, in case no. IT-02-54, *Prosecutor v. Slobodan Milosevic*, and case no. IT-05-87/1, *Prosecutor v. Vlastimir Djordjevic*. In the ruling on V. Djordjevic, the Chamber relies on the testimony of this witness, which it evaluates as very reliable. In a statement given to the HLC, the witness claimed that he was deterred by prosecutor Stankovic from testifying.

<sup>146</sup> See II, Count 22 – *Cuska/Qushk* case.

<sup>147</sup> The Criminal Code of the Republic of Serbia, Article 336a.

<sup>148</sup> The Civil Procedure Code (“Sl. glasnik RS”, No. 72/2011) came into effect on February 1, 2012.

<sup>149</sup> The Criminal Procedure Code (“Sl. glasnik RS”, br. 72/2011), Art. 50, Para.1, Count 3. In those cases of criminal acts of organized crime and war crimes, the Code has been applied since January 15, 2012.

While the courts strive to create an atmosphere that encourages and promotes the full protection of the rights of the defendants in accordance with international standards, most defense attorneys abuse this right through various obstructions, delays and, above all, by attempting to present the criminal proceedings as political. Also, some defense attorneys use the trials for public displays of their 'patriotic' convictions. Very few defense attorneys are familiar with, and actually use, the practices of the ICTY in the defense of their clients.

## **VII The application of international criminal law**

A striking characteristic in the practice of the domestic courts is a resistance to the wider application of international criminal law and greater reliance on the practice of the ICTY. As the rules of customary international law, according to the Constitution of the Republic of Serbia, constitute an integral part of the country's internal legal order,<sup>150</sup> there are no legal barriers to their implementation. However, even those who adhere to the view that obstacles do exist for the application of particular issues of international criminal law, must nevertheless always take them into consideration, especially when imposing criminal sanctions.

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<sup>150</sup> The Constitution of the Republic of Serbia, Article 16, Paragraphs 142 and 194.