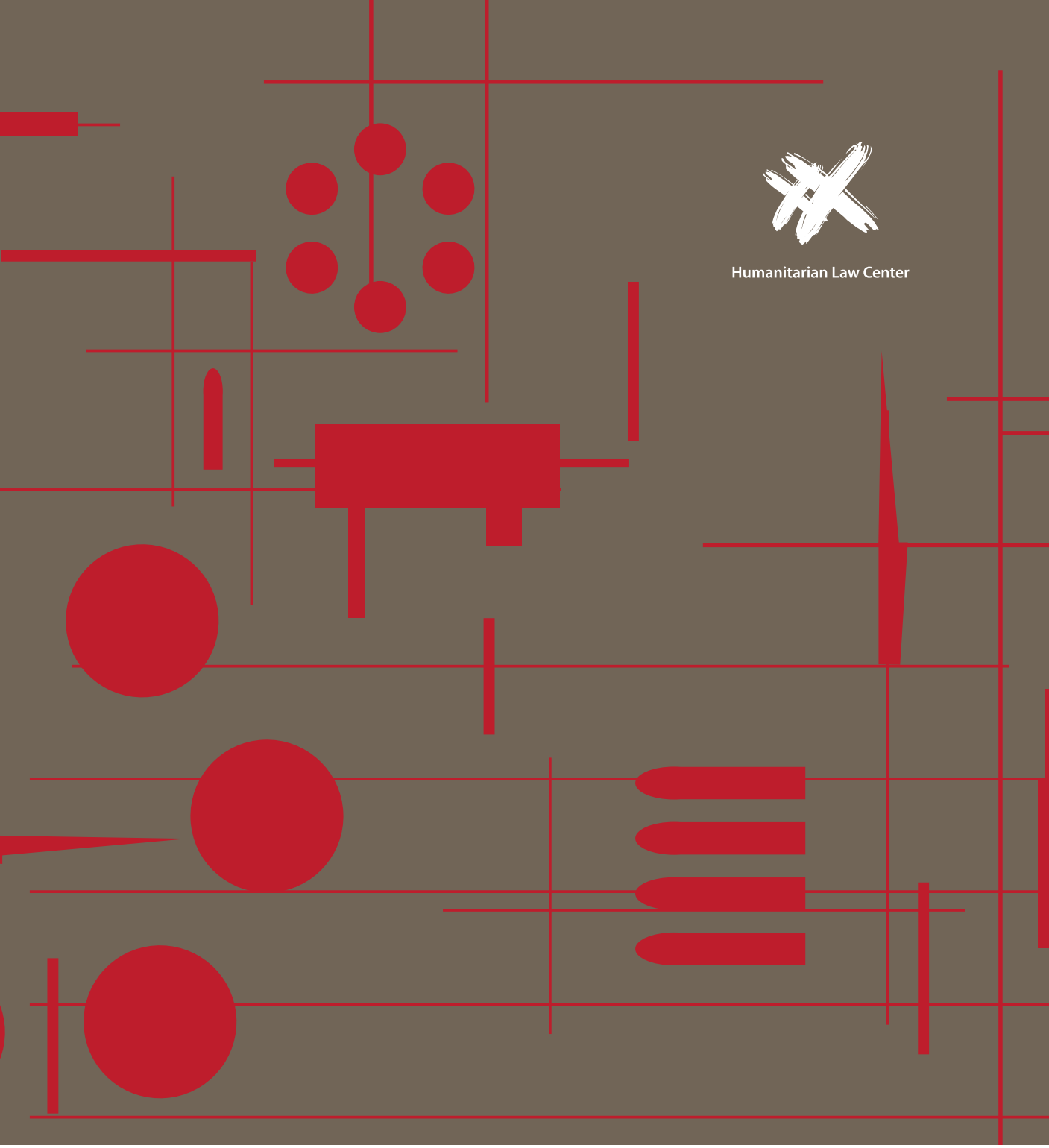

Humanitarian Law Center

REPORT ON WAR CRIMES TRIALS IN SERBIA DURING 2016

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ON WAR CRIMES TRIALS IN SERBIA DURING 2016

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CONTENT

Abbreviations used in the text

BIH	Bosnia and Herzegovina
CC FRY	Criminal Code of the Federal Republic of Yugoslavia (Official Gazette of the SFRY, No. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of FRY, No. 35/92, 37/93 and 24/94)
ZKP	The Criminal Procedure Code (Official Gazette of the Republic of Serbia, No. 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014)
ECHR	The European Convention on Human Rights
ECtHR	The European Court of Human Rights
EU	The European Union
HLC	The Humanitarian Law Center
ICRC	The International Committee of the Red Cross
ICTY	The International Criminal Tribunal for the former Yugoslavia
IHL	International humanitarian law
JNA	The Yugoslav People's Army
KLA	The Kosovo Liberation Army
Law on War Crimes	The Law on Organization and Jurisdiction of State Authorities in Prosecuting Perpetrators of War Crimes (Official Gazette of the Republic of Serbia, No. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 2 and Article 4, para. 1
MUP	The Ministry of the Interior
OWCP	The Office of the War Crimes Prosecutor of the Republic of Serbia
RPPO	The Office of the Republic Public Prosecutor
VJ	The Yugoslav Army
VRS	The Army of the Republic of Srpska

Introduction and methodology

This is the sixth Report of the Humanitarian Law Center (HLC) on war crimes trials in Serbia.

The HLC Legal Team has monitored all war crimes trials conducted in the territory of Serbia in 2016 - that is to say, a total of 26 trials conducted by the War Crimes Departments of the Higher Court or the Court of Appeal in Belgrade, or the courts of general jurisdiction. Furthermore, HLC lawyers represented victims in four cases before the Department of War Crimes of the Higher Court in Belgrade in the reporting period,[1] and in two cases on appeal before the War Crimes Department of the Court of Appeal in Belgrade.[2]

The Report features a brief overview of all 26 cases observed and the HLC's key findings on each case, which the public needs to be informed about. Given that a significant portion of the war crimes proceedings presented in the Report have been ongoing for a number of years, the previous annual HLC Reports on war crimes trials should also be consulted for a full appreciation of the course of the proceedings and the corresponding findings. The Report also covers trials for crimes that are not classified as war crimes by the relevant prosecutor's offices of general jurisdiction; despite the fact that the circumstances of such cases indicate they do constitute war crimes.

The Report focuses particularly on the work of prosecutor's offices and courts, notably in the analysis of indictments and judgments. An analysis of the work of other institutions involved in war crimes prosecution (the War Crimes Investigation Service of the Serbian Ministry of the Interior, the Protection Unit, etc.) could not be made within the context of each case as a result of the lack of publicly available information on their work.

The War Crimes Department of the Higher Court in Belgrade handed down first-instance judgments in three cases over the reporting period,[3] and a judgement accepting a plea agreement concluded between the OWCP and a the defendant.[4] The War Crimes Department of the Court of Appeal in Belgrade has issued six rulings on appeals against judgments passed by the Higher Court in Belgrade.[5] The courts of general jurisdiction handed down four judgments.[6] Eight OWCP's indictments were confirmed in the reporting period against 15 individuals accused of a war crime against a civilian population.[7]

1 *Lovas, Trnje, Ćuška* and *Srebrenica*.
2 *Skočić* and *Sotin.*
3 *Gradiška, Sanski Most – Kijevo,* and *Bosanski Petrovac.*
4 *Srebrenica-Branjevo* case.
5 In the cases of *Luka Camp, Sanski Most, Beli Manastir, Bijeljina II, Sotin and Sanski Most-Kijevo.*
6 In the *Cobras* and *Kušnin* case.
7 KTO 1/16 against Brano Gojković (*Srebrenica-Branjevo*), KTO 2/16 against Dušan Vuković (*Doboj*), KTO 3/16 against Milanko Dević (*Ključ-Šljivari*), KTO 4/16 against Dalibor Maksimović (*Bratunac*), KTO 5/16 against Ranka Tomić (*Bosanska Krupa*), KTO 6/16 against Dragan Bajić (*Ključ-Kamičak*), KTO 7/16 against Marko Pauković (*Ključ- Kamičak*), KTO 2/15 opagainst Nedeljko Milidragović, Aleksa Golijanin, Milivoje Batinica, Aleksandar Dačević, Boro Miletić, Jovan Petrović, Dragomir Parović and Vidoslav Vasić (*Srebrenica-Kravica).*

The analyses of the cases in the Report are preceded by an overview of the general findings on war crimes trials in 2016, and a summary of the significant social and political events that had a bearing on the war crimes trials.

General findings and social-political context

I. Unwarranted delays in war crimes proceedings

Unwarranted delays, which continued in 2016, have become the hallmark of war crimes cases in Serbia. It is certain that they have had a negative impact on efforts to establish the rule of law and end the culture of impunity for those responsible for the grave crimes committed in the 1990s.

It was found that the courts also contributed to delays during the reporting period by leaving long time lags between hearings, which was alarming. In 2016, only **56 trial days were held in all ongoing war crimes trials** (in the first and second instances), and **23 scheduled trial days were adjourned for various reasons**.

In 2016, the lag between hearings for first-instance proceedings was on average 47 days. Only **50 trials days were scheduled for first-instance proceedings in 2016**, or just five trial days per trial on average. Out of these 50 trial days scheduled, **only 33 were held**, and 17 were cancelled, largely because of the non-appearance of a witness or defendant: ostensibly on grounds of ill health (see, e.g., the *Trnje* Case).

The statistics from previous years clearly indicate that this is indeed a trend, and that proceedings are being deliberately delayed. **In 2016, the number of trial days scheduled totalled 56** (in 18 cases), whereas **several years ago about the same number of trial days were scheduled per case** (in the *Lovas* Case, for instance, 52 trail days were scheduled in 2011). In the period 2011-2013 the average number of trial days scheduled in the *Ćuška* Case was 28 days per year, whereas in 2016, nine trial days were scheduled (and only five held). In the *Skočić* Case, three trials days were scheduled (and only one was held) in 2016, in constrast to the 17 scheduled trial days in 2012. Nine trial days were scheduled in the *Lovas* Case in 2016, whereas in this case, in the period 2008-2012 the average number of trial days scheduled was 44 per year.

The most striking example of excessively and unjustifiably long proceedings is the *Ovčara* Case, in which, four years after the final judgment was rendered, and 10 years after the indictment was issued, the judgment has been quashed and the case remanded to the War Crimes Department of the Court of Appeal for reconsideration on appeal. Only two trial days were held in this case during 2016, in contrast to the average 33 trial days per year in the period 2004-2008.

The excessive length of proceedings produces consequences, which are both far-reaching and serious. As the years pass, defendants die and witnesses lose trust in the Serbian judiciary and refuse to testify at repeated trials. Over the reporting period, one defendant died (see the *Lovas* Case), and many victim-witnesses declined to testify again owing to weariness, the desire to avoid re-traumatization from repeating their testimony (see the *Skočić* Case), and also because they have lost faith in the procedures and institutions (as evidenced in the *Ćuška* Case). Additionally, the excessive length of proceedings and their repetition sends a negative and discouraging message to future witnesses and victims – that it would be difficult, if not impossible, for them to receive justice from Serbian institutions. Finally, the delays in proceedings leave the general public, who are already uninterested, disoriented and unable to follow the trials. The result of these delays and the associated public disinterest is that media outlets have practically stopped sending their reporters to cover war crimes trials, further reducing trial accessibility.

II. Witnesses and victims called to give evidence in court face a new obstacle

The role of witnesses in war crimes proceedings can be described as crucial, because their testimonies are often the only evidence available, and therefore the success of the proceedings often depends entirely on them. On the other hand, giving evidence in court can be a traumatic experience, especially for victim-witnesses. It is therefore necessary to ensure every effort is made to make it easier for witnesses and victims to participate in proceedings.

In adition, simplifying the procedure for reimbursement for the costs associated with giving evidence would also be a step in the right direction. According to the Rules on Reimbursement of Costs associated with judicial proceedings, participants in court proceedings are entitled to receive compensation for travelling expenses, meals and lodging expenses, and lost earnings.[8] Until 1 January 2016, the expenses of all persons appearing in court to give evidence for war crimes cases were reimbursed by the court in cash immediately after their hearing was completed. Since that practice was abandoned, **reimbursements of expenses related to giving evidence are now being made solely via deposits to witnesses' bank accounts**. As a result of this change, witnesses who lodge a claim for expenses associated with giving evidence in court must argeously submit their bank account number if they come from Serbia, or submit a foreign currency account number, including instructions for foreign payment, if they come from abroad. The Treasury of the National Bank of Serbia pays witness expenses, and the process may take as long as several weeks.

The said procedures have significantly complicated matters for witnesses who go to court to give evidence, and consequentially, have resulted in a negative impact on war crimes proceedings. The

8 Aricle 5 of the Rules on Reimbursement of Costs associated with judicial Proceedings, Official Gazette of the RS, nos. 9/2016 and 62/2016.

costs linked to giving evidence in court can be rather high, especially for witnesses from foreign countries or those coming from small towns and villages without a direct transport connection to Belgrade. The financial situation of most witnesses, especially victim-witnesses, is rather poor, so they often need to borrow money to go to court. For elderly witnesses, some of whom are sick or illiterate, opening a foreign currency account is a tricky task and creates an additional burden. Most of the witnesses who testify in war crimes proceedings find this new procedure annoying, and even disturbing, especially for vulnerable witnesses.

Thus, a seemingly unimportant procedure can jeopardise the efficient conduct of court proceedings. Namely, it is precisely because of a witnesses' inability to finance their appearance in court that a significant number of hearings were adjourned during 2016.[9] This will undoubtedly add one more item to the already long list of reasons why victims refuse to give evidence before the War Crimes Department in Belgrade.

For witnesses from Serbia who cannot afford to finance their appearance in court a failure to show up when summoned could even result in a fine, which would further deteriorate their financial situation, or result in the police bringing them to court, which means being treated as criminals and further humiliated.[10]

The above-described rules on the reimbursement of witness expenses should be changed as a matter of urgency. The Witness and Victim Support Unit should organise the arrival of witnesses to court, so that the witnesses do not have to pay any upfront expenses out of their own pockets or go through cumbersome administrative procedures.

III. Low public visibility of war crimes trials

Keeping members of the public informed about war crimes trials and the judicially established facts concerning past war crimes is a key prerequisite to fostering a more objective understanding of the past and the creation of a social memory about past crimes. At the same time, it is something that the state must do in order to ensure that its citizens know what happened in the recent past and who the key protagonists and actors in those events were. As laid down in the UN Principles for Combating Impunity, "every people has the inalienable right to know the truth about past events concerning the perpetration of heinous crimes and about the circumstances […] that led […] to the perpetration of those crimes."[11]

9 See, e.g., *Trnje*, the main hearing of 20 May 2016, p. 110, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/19-20.05.2016..pdf; HLC's trial report of 23 May 2016 in *Bosanski Petrovac – Gaj*, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Bosanski_Petrovac_-_Gaj_-_Izvestaj_sa_sudjenja_23.05.2016.pdf.

10 ZKP, Article 384.

11 Updated Set of principles for the protection and promotion of human rights through action to combat impunity (E/CN.4/2005/102/Add.1), 8 February 2005; available at https://documents-dds-ny.un.org/doc/UNDOC/GEN/G05/109/00/PDF/G0510900.pdf?OpenElement, accessed on 16 May 2016.

The latest opinion polls conducted in Serbia have shown that **the majority of citizens cannot name even one war crime trial conducted by domestic courts**, or any institution involved in the prosecution of war crimes.[12]

Both the Action Plan for Chapter 23 (developed in the context of Serbia's EU accession negotiations), and the National Strategy for the Prosecution of War Crimes, envisage a number of measures to improve the visibility of war crimes trials:

12 Belgrade Center for Human Rights, Public opinion survey - *Attitudes towards war crimes, the ICTY and the national judiciary 2011 – detailed tables,* available at http://www.bgcentar.org.rs/istrazivanje-javnog-mnenja/stavovi-prema-ratnim-zlocinima-haskom-tribunalu-domacem-pravosudu-za-ratne-zlocine/, accessed on 22 July 2016.

Activity	Time limit	Implementation status
"Setting clear rules governing the anonymization of judicial decisions in various areas of law, prior to their publication, relying on the rules of the European Court of Human Rights."[13]	Second quarter of 2016	Not implemented
"Improving access to relevant case law by creating and improving comprehensive and generally accessible electronic case law databases, with full respect for the regulations governing data confidentiality and protection of personal data."[14]	Continuously from the third quarter of 2014	Not implemented
Enhancing the OWCP website "to enable members of the public to see what activities have been undertaken by the OWCP in relation to specific criminal charges and when."[15]	Continuously from the second quarter of 2015	Not implemented
The OWCP is to prepare a report "which will be made accessible to the public and present its actions taken in respect to all criminal charges filed since 2005, so that it can be determined whether all war crimes charges have been properly investigated."[16]	Second quarter of 2016	Not implemented
"Securing the consistent application by the presidents of competent courts of Article 16a of the Law on the Organisation and Competence of Government Authorities in War Crimes Proceedings (which allows for the recording and broadcasting of main hearings).[17]	"Continuously"	Not implemented
"Upgrading the website of the Higher Court in Belgrade by posting all the necessary information about its judgments, and gradually to increase the posting of judgments handed down in war crimes cases."[18]	"Continuously"	Not implemented

13 Action Plan for Chapter 23 of the negotiation process, Activity 1.3.9.2, available at http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf, accessed on 8 March 2017.
14 Ibid, Activity 1.3.9.4.
15 Ibid, Activity 1.4.1.9.
16 Ibid, Activity 1.4.1.10.
17 Ibid, p. 36.
18 Ibid.

Access to documents pertaining to war crimes cases

Only the War Crimes Department of the Court of Appeal in Belgrade and the OWCP, acting on their own initiative, publish their judgments and indictments on their respective websites. The Higher Court does not do this, despite the fact that their first-instance judgments constitute a primary source of the facts from war crimes trials. The OWCP, for its part, does not have a clear policy regarding publishing indictments on its website, but it usually publishes its indictments without a statement of reasons, which is a constituent part of each indictment.[19] Also, contrary to its earlier practice, the OWCP delivers incomplete indictments when responding to free access to information requests (see cases *Doboj, Bratunac, Ključ-Šljivari* and *Ključ-Kamičak*).

In spite of the measures envisaged in the Action Plan and the National Strategy, public access to war crimes trials did not improve in 2016. No Information on war crimes trials or the schedule of hearings can be found on the website of the Higher Court in Belgrade, only information identifying the existence of a war crimes department. The Higher Court, furthermore, turned down several requests for access to specific court decisions and trial transcripts made by the the HLC in 2016 under the Law on Free Access to Information, and in blatant disregard for the earlier decisions of the Commissioner on Information of Public Importance. The reason given by the court for denying access to the requested documents has been that supplying these documents would jeopardize the criminal proceedings in the given cases.[20] However, in none of its refusal notices did the court explain how providing the documents requested would have jeopardised criminal proceedings, which is a practice the Commissioner had already identified as unfounded.[21]

Anonymization of documents pertaining to war crimes cases

Although the Court of Appeal and the OWCP publish their judgments/indictments on their respective websites, these are, as a rule, anonymized (with parts of the text redacted, or blacked out). The Higher Court also only delivers redacted versions of its judgments when requested to deliver information of public interest. In several instances, the court even redacted the names of the accused and their lawyers, judges, witnesses, expert witnesses and whole passages in their judgments. As a result, **judgments are rendered entirely unreadable and unusable for legal analysis, with victims denied a symbolic recognition of their suffering, and the general public is denied the right to know the truth about past crimes**.[22]

19 See, e.g., the indictment in *Trnje*, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2013_11_04_eng.pdf, accessed on 19 June 2016.

20 Article 9 of the Law on Free Access to Information of Public Importance.

21 See, e.g., Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-04661/2014-03 of 19 April 2016. See also: Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-01776/2012-03 of 30 August 2012; Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-02408/2014-03 of 6 October 2015.

22 Humanitarian Law Center, "Anonymization of judgments in war crimes cases contrary to domestic and international regulations" (press release), 14 January 2014, available at http://www.hlc-rdc.org/?p=26065&lang=de, accessed on 21 November 2016.

When turning down requests for access to non-anonymized judgments, courts invariably cite the provisions of the Law on Personal Data Protection. This law, however, does not provide protection for personal data if this data is already accessible to the general public,[23] nor does it prohibit access to personal data if such data is requested with a view to "protecting rights and freedoms and other public interests"[24] or relates to a person, event or occurrence of public interest.[25] The first exemption cited is particularly relevant when it comes to war crimes trials. Particularly, as war crimes trials are public (except in a few justifiable cases) and therefore all personal information made known at main hearings, such as the names of victims and witnesses, become "publicly available" and as such the information cannot be considered protected. The sheer absurdity of the anonymization of information made public at open court proceedings becomes patently clear if one bears in mind that journalist can attend trials and report freely on everything they have learned at trials.

The practice of Serbian courts in **anonymizing victim's names in war crimes case judgments** gives particular cause for concern[26] as it makes victims invisible to the public, and thus denies the right to truth not only to victims, but also to their families and society as a whole. The HLC sees this practice as utterly wrong, as it is only when their identity is revealed that victims cease to be arbitrary numbers or abstract statistics and become known to the public as real persons who, only by virtue of their ethnicity or religion, became crime victims. Furthermore, making their names known and saying them in public brings some sort of satisfaction to victims, and is a prerequisite for recognition of the suffering they endured only because of their identity.

The Republic of Serbia does not have specific legislation concerning the anonymization of prosecutorial and court decisions. This matter is in part regulated by the internal rules and regulations of courts and prosecutors' offices, namely their rules on anonymization. Unlike the OWCP and the Higher Court in Belgrade, the Supreme Court of Cassation and the Court of Appeal in Belgrade have such rules in place,[27] which stipulate that the identity and other information concerning individuals accused and convicted of war crimes are not to be anonymized.

Although the Action Plan envisages "setting clear rules governing the anonymization of judicial decisions in various areas of law prior to their publication, relying on the rules of the European Court of Human Rights",[28] the Working Group responsible for the implementation of this activity prepared

23 Article 5, paragraph 1, sub-paragraph 1 of the Law on Personal Data Protection.
24 Ibid, Article 13.
25 Ibid, Article 14.
26 See, e.g., the judgment of the Court of Appeal in the *Beli Manastir* Case, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Drugostepena_presuda_12.02.2016.pdf accessed on 17 March 2017.
27 Court of Appeal in Belgrade, Rulebook on amendments to the Rulebook on minimum anonymization of court decisions (Su. br. I -2 84/12), 26 April 2012, p. 178, available (in Serbian) at http://www.bg.ap.sud.rs/images/INFORMATOR_7_2013_LAT.pdf accessed on 16 June 2016; Supreme Court of Cassation, Rules on data replacement and redaction (anonymization) in court decisions (Su 303/10-1), 27 May 2010, available (in Serbian) at http://www.vk.sud.rs/sites/default/files/PravilnikOAnonimizaciji.pdf, accessed on 12 July 2016.
28 Action Plan for negotiations on Chapter 23, Activity 1.3.9.2, available at http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf, accessed on 8 March 2017.

Draft Rules on anonymization **only for the decisions of the Supreme Court of Cassation**.[29] Not only was this contrary to the obligations assumed under the Action Plan, it was also pointless because the Supreme Court of Cassation already had its rules on anonymization: rules which have not brought about standardisation or uniformity in the practices of Serbian courts.

Recording of war crimes trials for the purpose of public broadcasting

The key to reconciling with the past can be found by raising the public visibility of war crimes trials, and informing the general public of the facts concerning war crimes established through court proceedings in a manner that is accessible and easily understandable to them. As television is the main source of information in Serbia,[30] television coverage of these trials could substantially raise the profile and public visibility of war crimes.

Notwithstanding the legal framework which allows for the recording and broadcast of war crimes trials,[31] in the over 12 years of domestic war crimes prosecutions the general public in Serbia has not had a chance to see a single testimony of a victim, perpetrator or witness participating in the trials, or a court delivering a judgment in a war crime case. What happens in practice is that requests for recording trials are regularly denied, contrary to the law, by the authorizing party, namely the President of the Higher Court in Belgrade, (see the *Gradiška* and *Lovas* cases). Unlike in Serbia, war crimes trials in other countries in the region are regularly recorded and reported upon by the media.[32]

IV. OWCP's inefficiency

The downward trend in the number of indictments continued in 2016, with fewer indictees and fewer victims included in the indictments. According to OWCP data,[33] over 800 war crimes cases are still at the preliminary investigation stage. If the OWCP continues to work at its present pace, it will over the next 10-year period solve less than 10 percent of war crimes cases.

The present trend and projections of OWCP results indicate that both; the human, material and professional resources of the OWCP need to be strengthened significantly; and that the existing

29 Report 4/2016 on implementation of the Action Plan for Chapter 23, December 2016, pp. 97-98, available at http://www.mpravde.gov.rs/files/Report%20no.%204-2016%20on%20implementation%20of%20Acti%20on%20plan%20for%20Chapter%2023.pdf, accessed on 17 March 2017.

30 See, e.g., the Serbian media integrity research conducted by the Bureau for Social Research, available (in Serbian) at http://www.birodi.rs/barometar-integriteta-medija-bim/, accessed on 2 February 2017.

31 Law on Organisation and Competence of Government Authorities in War Crimes Proceedings, Official Gazette of the RS nos. 67/2003, 135/2004, 61/2005, 101/2007, 104/2009, 101/2011-other law and 6/2015, Article 16a.

32 See, e.g., Al Jazeera Balkans video report on Basic Court in Mitrovica delivering a judgment against Oliver Ivanović, available (in Serbian) at https://www.youtube.com/watch?v=gO6ChZRDiOs; video recording of the delivery of judgment against Veselin Vlahović; video report in a TV1 News Bulletin on judgment against Aleksandar Cvetković; video report in TV1 News Bulletin on plea-entering in *Naser Orić*; See, e.g., Al Jazeera Balkans video report, District Court in Zagreb reading out Tomislav Merčep judgment, accessed on 17 March 2017.

33 See HLC, "Analysis of the prosecution of war crimes in Serbia 2004-2013", p. 17, available at http://www.hlc-rdc.org/?p=27457&lang=de.

resources should be used more efficiently, primarily for dealing with high-priority cases (cases involving a high number of victims, high-level perpetrators, other perpetrators etc.). These problems should be addressed in its prosecution strategy, whose adoption has been postponed until after the appointment of a new War Crimes Prosecutor.[34]

1. Paucity of indictments

During 2016 the OWCP brought seven indictments against seven individuals.[35] **All seven indictments concern cases that have been transferred to Serbia by the BiH Judiciary**, which are not complex and mainly involve just one victim. As all these indictments were in fact transferred to the OWCP after being confirmed by courts in BiH, it is clear that **the OWCP did not issue a single indictment resulting from its own investigation** during the reporting period. It is further cause for concern that the OWCP in the reporting period tried to simulate efficiency by issuing separate indictments against co-perpetrators in a crime, only to request later that the indictments be joined, and defendants tried in a single trial (see the *Ključ-Kamičak* Case).

2. Absence of indictments for crimes in Kosovo

In nearly three years the OWCP has not issued a single indictment for crimes committed in Kosovo.[36] The last such indictment, for the *Ljubenić* Case, concerns three newly identified perpetrators of the crime which had already been tried as part of the ongoing *Ćuška* Case. The HLC, in contrast, has filed nine criminal complaints since 2013 for crimes committed in Kosovo, namely the crimes in Peć/Pejë,[37] Mala Kruša/Krushë e Vogel,[38] Savine Vode,[39] Vučitrn/Vushtrri,[40] Goden,[41] Kraljane/

34 Report 4/2016 on implementation of the Action Plan for Chapter 23, p. 112, available at http://www.mpravde.gov.rs/files/Report%20no.%204-2016%20on%20implementation%20of%20Acti%20on%20plan%20for%20Chapter%2023.pdf, accessed on 29 March 2017.

35 KTO 1/16 against Brano Gojković (Case *Srebrenica-Branjevo*), KTO 2/16 against Dušan Vuković (Case *Doboj*), KTO 3/16 against Milanko Dević (ase *Ključ-Šljivari*), KTO 4/16 against Dalibor Maksimović (Case *Bratunac*), KTO 5/16 against Ranka Tomić (Case *Bosanska Krupa*), KTO 6/16 against Dragan Bajić (Case *Ključ-Kamičak*), and KTO 7/16 against Marko Pauković (Case *Ključ – Kamičak*).

36 The last indictment for a crime in Kosovo was brought on 7 April 2014, Case *Ljubenić* available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2010_09_10_eng.pdf, accessed on 10 February 2017.

37 The HLC press release of 08 March 2013 "Criminal Complaint in Murder of Two Albanian Civilians in Peć on March 26th, 1999", available at http://www.hlc-rdc.org/?p=22643&lang=de, accessed on 10 February 2017.

38 The HLC press release of 15 March 2013 "Criminal Complaint for Murder of Two Albanian Civilians in Mala Krusa on March 28th, 1999", available at http://www.hlc-rdc.org/?p=22679&lang=de, accessed on 10 February 2017.

39 The HLC press release of 4 June 2013 "Criminal complaint for crimes against three Albanian civilians in May 1999", available at http://www.hlc-rdc.org/?p=23090&lang=de, accessed on 10 February 2017.

40 The HLC press release of 19 June 2013 "Criminal Complaint for Murder of Nine Albanian Civilians in Vučitrn in April and May 1999", available at http://www.hlc-rdc.org/?p=23342&lang=de, accessed on 10 February 2017.

41 The HLC press release of 4 July 2013 "Criminal Complaint against Officers, Non-Commissioned Officers and Soldiers with regard to the Murder of 21 Albanian Civilians on March 25th, 1999", available at http://www.hlc-rdc.org/?p=23483&lang=de, accessed on 10 February 2017.

Kralan,[42] Landovica/Landovicë,[43] Poklek[44] and Rezala/Rezallë. Nevertheless, none of these crimes have been investigated as of the end of 2016.

Acting upon the HLC's complaint regarding the crime in the village of Poklek, the OWCP drew up an official note. The note stated, among other things, that: the OWCP has interviewed 20 individuals who served as members of the PJP or VJ which were deployed in the village at the time of the crime in question; these individuals said that they had never heard of the events set out in the complaint; "all these individuals were subjected to polygraph tests, after which forensic psychologists provided their opinion, according to which the individuals tested did not show the psychological and physiological responses characteristic of lying when asked questions about the events because of which they were subjected to testing."[45] On the basis of these results, the OWCP decided to file this case into the KTN register (register of cases where the perpetrators are unknown). Since **polygraph test results are not admissible as evidence, nor is their use regulated by the ZKP, it is unclear why they were used here**.

Absence of co-operation with Kosovo

After the HLC urged the OWCP to take action with respect to its complaints regarding the crimes in Kosovo, the OWCP replied that they are *de facto* unable to investigate these crimes because they cannot undertake any evidentiary actions in Kosovo. The EULEX mission, which previously facilitated judicial cooperation between Serbia and Kosovo, since May 2014 EULEX no longer has the mandate to undertake investigations as investigations were transferred to the competence of local prosecutors. Local prosecutors refuse to cooperate with the OWCP (see "Constitutional appeal for Landovica" below).

In the HLC's view, **the vacuum that has been created by the EULEX Mission's gradual withdrawal from Kosovo should be addressed as a matter of priority in the Serbia-Kosovo talks in Brussels** in order to facilitate judicial cooperation between the two countries in the prosecution of war crimes.

3. Absence of charges against high-level perpetrators

All confirmed indictments from the reporting period have been filed against direct war crimes perpetrators – members of armed formations who, as a rule, had no rank. Thus, the practice of non-prosecution of perpetrators who held senior positions in the hierarchies of former military, police,

42 The HLC press release of 10 October 2013 "Criminal Complaint against Officers and Members of YA and MUP on account of Crime Committed against 78 Kosovo Albanians", available at http://www.hlc-rdc.org/?p=25046&lang=de, accessed on 10 February 2017.

43 The HLC press release of 27 December 2013 "Criminal Complaint against Yugoslav Army Officer for Crime Committed Against 17 Kosovo Albanians and One Ashkali", available at http://www.hlc-rdc.org/?p=26011&lang=de, accessed on 10 February 2017.

44 The HLC press release of 17 Augusta 2015 "Criminal charges against police officers for crimes against 53 Albanian civilians in Poklek", available at http://www.hlc-rdc.org/?p=29803&lang=de, accessed on 10 February 2017.

45 Official note of the Office of the War Crimes Prosecutor, KTR no. 124/15 of 13 October 2016.

and political institutions of Serbia/ the Federal Republic of Yugoslavia, has continued. The only high-ranking perpetrators charged thus far by the OWCP were members of the armed forces or civilian authorities of the Republic of BiH and the Republic of Croatia.[46]

It was only in 2014 that the OWCP for the first time launched an investigation into a high-ranking officer of the Serbian or Yugoslav Armed Forces. This officer was General Dragan Živanović.[47] The HLC filed a criminal complaint against him in 2010,[48] and published a dossier in 2013 on crimes committed in the area of responsibility of the brigade under his command.[49] Although the investigation concluded in December 2016, at the time of this writing the OWCP has not brought charges against Živanović.

The absence of investigations and charges against high-ranking perpetrators has also drawn criticism from the presiding judges of the War Crimes Department who manage trial chamber war crimes cases. When reading out their judgments and explaining the reasons behind their decisions, they publicly question why no superior officers have been charged, despite hearing evidence during the trials indicating their responsibility (see the cases of *Lovas, Beli Manastir* and *Ćuška*).

Non-prosecution of high-ranking suspects runs contrary to the adopted National Strategy for the Prosecution of War Crimes, in which the Republic of Serbia has pledged that "the cases against high ranking suspects, *de jure* or *de facto*, should have priority in the Prosecutor's work."[50]

Criminal complaint against former Commander of the 2nd JNA Brigade

In November 2016, the HLC filed a criminal complaint against Dušan Lončar, the former Commander of the Second Proletarian Elite Motorized Brigade of the JNA, over war crimes committed in the village of Lovas.[51] The complaint is founded on Lončar's order to attack Lovas, which is attached to the complaint, and on other documents which have been in the OWCP's possession for quite some time, as indicated by their mentioned on OWCP indictment issued in 2007 against some low-level

46 Ejup Ganić, member of BiH Wartime Presidency, BiH Army General Jovan Divjak, Vesna Bosanac, Director of the General Hospital in Vukovar, Vladimir Šeks, Speaker of the Croatian Parliament, Naser Orić, Bosnian Army Commander in Srebrenica and others.

47 OWCP press release of 5 August 2014, available (in Serbian) at http://www.tuzilastvorz.org.rs/sr/vesti-i-saop%C5%A1tenja/saop%C5%A1tenja/naredba-za-sprovo%C4%91enje-istrage-protiv-generala-%C5%BEivanovi%C4%87a-za-ratne-zlo%C4%8Dine-na-kim, accessed on 17 February 2017.

48 See the HLC press release of 25 August 2010 "Criminal Complaint Filed against Members of VJ and MUP Serbia Accused of War Crimes against Albanian Civilians in the Villages of Zahać/Zahaq and Pavljan/Pavlan", available at http://www.hlc-rdc.org/?p=13073&lang=de, accessed on 7 May 2015.

49 Dossier on "125th Motorized Brigade of the Yugoslav Army", available at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Dossier-125th-mtbr.pdf, accessed on 7 May 2015.

50 National Strategy for the Prosecution of War Crimes, Official Gazette of the RS no. 19/2016, 1.3., available at http://www.mpravde.gov.rs/files/National%20Strategy%20for%20the%20Prosecution%20of%20War%20Crimes.pdf, accessed on 17 February 2017.

51 See the HLC press release of 3 November 2016, "Criminal Complaint for Crime in Lovas Committed In 1991", available at http://www.hlc-rdc.org/?p=32894&lang=de, accessed on 17 February 2017.

perpetrators[52] (see the Lovas Case below and what the Presiding Judge said when reading out the judgment in this case in 2012).

V. Implementation of Action Plan for Chapter 23

The Action Plan for Serbia's negotiations with the EU on Chapter 23 of the EU acquis (judiciary and fundamental rights) imposes a number of obligations on institutions with regard to war crimes prosecution, and sets out a number of activities that need to be implemented in the coming years during the negotiations with the EU. They include a gradual strengthening of the OWCP's capacity through the hiring of additional staff, including eight deputy prosecutors and seven assistant prosecutors in the period 2015-2018, as well as the potential hiring of military experts.[53] The Action Plan also envisages the adoption of a prosecutorial strategy for the investigation and prosecution of war crimes in Serbia,[54] and a national strategy for the prosecution of war crimes.[55]

The Action Plan also stipulates conducting an analysis of the legal and *de facto* situation in the War Crimes Investigation Service, in order to improve its performance. Special attention will be given to the issues of "whether the hiring process should be reformed to take into account the potential impact of the previous participation of job candidates in the armed conflicts in the former Yugoslavia",[56] and for the Witness Protection Unit.[57] Additionally, the Action Plan also envisages enhanced cooperation between the OWCP and the ICTY,[58] training for all relevant actors on international criminal law.[59] The enhanced cooperation will strengthen the capacity of the OWCP and Service for the Support and Assistance to Victims and Witnesses to deal with witnesses and victims,[60] specifying criteria for the anonymization of judgments,[61] and in setting out measures to improve the rights and position of victims in proceedings.[62]

On 11 December 2015, the Government of the Republic of Serbia established its Council for the Implementation of the Action Plan for Chapter 23, which is tasked with monitoring and reporting on its implementation. From the last report on the implementation of the Action Plan submitted in December 2016 it can be concluded that only a few activities have been implemented so far, and that Serbia is creating a false appearance of successfully implementing the Action Plan, where a certain

52 OWCP indictment KTRZ 7/07 of 28 November 2007, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Lovas-Optuznica-Ljuban-Devetak-i-dr..pdf, accessed on 17 February 2017.
53 Final version of the Action Plan for the negotiation on Chapter 23, Activity 1.4.1.2, available at http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf, accessed on 6 March 2017.
54 Ibid, 1.4.1.3. and 1.4.3.2.
55 Ibid, 1.4.1.1. and 1.4.3.1.
56 Ibid, 1.4.1.7.
57 Ibid, 1.4.4.2.
58 Ibid, 1.4.3.4.
59 Ibid, 1.4.1.6.
60 Ibid, 1.4.4.3. and 1.4.4.4.
61 Ibid, 1.3.9.2.
62 Ibid, 3.7.1.21, 3.7.1.20, 3.7.1.18, 3.7.1.23, 3.7.1.17.

number of activities are apparently being implemented but in an entirely non-transparent manner.[63] Namely, the implementation of some of the key activities aimed at improving the efficiency of war crimes processing and an oversight of the OWCP's work has been brought to a standstill because a new war crimes prosecutor has not been elected. These activities include the adoption of the prosecutorial strategy for war crimes (Activity 1.4.1.3) and the OWCP's report on its activities regarding all criminal complaints received since 2005, which will serve to determine whether all war crimes allegations have been adequately investigated (Activity 1.4.3.5).

Evidence that Serbia is only pretending to be implementing the Action Plan becomes evident if one examines the activities concerning the strengthening of the OWCP's capacity, specifically where the report states that this activity is being "implemented successfully". According to the Action Plan, four deputy prosecutors and four assistant prosecutors were to be elected by the end of 2016, this has not occurred. What the Council for monitoring the implementation of the Action Plan considered a "success" was based on the fact that the State Prosecutorial Council has drawn up a shortlist of candidates they considered suitable for the position of war crimes prosecutor, and submitted it to the Government. This step on its own can hardly be considered as a full implementation of the given activity, besides, the election of the war crimes prosecutor is not a capacity-building activity but the mere filling of a vacant post, as required by law.

Another example of misrepresentation of facts concerns the obligation to publish the war crimes case law of the Higher Court, Court of Appeal, and Supreme Court of Cassation. This activity was described in the report as partially implemented. As explained by the Council, the Supreme Court of Cassation publishes all its ruling for war crimes cases on its website.[64] However, this court has never issued a ruling on a war crimes case, as its jurisdiction is limited to extraordinary legal remedies, and issues concerning conflicts and the transfer of jurisdiction.[65] Incidently, the Supreme Court of Cassation is already required by the Law on Organisation of Courts to publish its rulings on its website.[66]

Finally, the activity aimed at reforming the War Crimes Investigation Service (Activity 1.4.1.7) is described in the report as being successfully implemented with the activities relating to the Witness Protection Unit[67] (Activity 1.4.4.2) being presented in the report as "fully implemented". However,

63 Fourth Report on implementation of the Action Plan for Chapter 23, December 2016, available at http://www.mpravde.gov.rs/files/Report%20no.%204-2016%20on%20implementation%20of%20Acti%20on%20plan%20for%20Chapter%2023.pdf, accessed on 6 March 2017.

64 Ibid, 1.4.2.3., p. 119.

65 Law on Organisation of Courts, Article 30, Official Gazette of the RS nos. 116/2008, 104/2009, 101/2010, 31/2011 – other Law, 78/2011 – other Law, 101/2011, 101/2013, 106/2015, 40/2015 – other Law, 13/2016 and 108/ and ZKP, Article 486.

66 Law on Organisation of Courts, Article 32, Official Gazette of the RS nos. 116/2008, 104/2009, 101/2010, 31/2011 – other Law, 78/2011 – other Law, 101/2011, 101/2013, 106/2015, 40/2015 – other Law, 13/2016 and 108/2016.

67 Shortcomings in the work and functioning of the Witness Protection Unit have been criticised by the European Commission in its Progress Reports on Serbia for 2013, 2014 and 2015. A series of concrete problems have been identified: failure to protect insider witnesses, inadequate control of the Unit's work, and absence of a formal procedure for complaining against Unit members.

evaluations of the performance of these two bodies, upon which the reforms are supposed to be based, are not even partially made available to the public. The work of these bodies is of such a nature that it cannot be fully transparent; however this should not be an obstacle preventing the general public and the legal community in particular from receiving at least partial information about the reforms taking place in these bodies, especially if these reforms were envisaged in the Action Plan. The HLC sees the sudden replacement of the Head of the War Crimes Investigation Unit, Dejan Marinković, as a prominent example of non-transparency and wrong implementation of the Action Plan.[68] Marinković was removed from office in August 2016 right after the final report on the analysis of the "legal and de facto situation in the WCIU and its needs" had been completed. His dismissal, or the reasons for his dismissal, was not publicly announced so it was not possible to find out if the reasons had anything to do with the analysis and its findings and recommendations.

VI. National Strategy for the Prosecution of War Crimes

On 20 February 2016, the Government of Serbia adopted its National Strategy for the Prosecution of War Crimes for the period 2016-2020.[69] The adoption of this strategy was envisaged in the Action Plan for Chapter 23.

The Strategy emphasizes that war crimes trials are one of the most important steps in the process of reconciliation, development of good neighbourly relations, and in building lasting peace in the region; where efficient war crimes trials are a prerequisite for the full democratization of society through the affirmation of the rule of law and respect for the principles of humanitarian law, as supremely important achievements of modern humankind.

The overall objective of The Strategy is to significantly improve the efficiency of war crimes investigation and prosecution. This objective is expected to be achieved through: curtailing impunity for war crimes, by punishing those responsible regardless of their capacity and status; supporting the judiciary through the promotion of regional judicial cooperation and harmonization of case law in order to achieve proportionality of punishment; enhancing witness and victim support mechanisms; improving cooperation between government bodies responsible for uncovering and prosecuting war crimes; and by raising the level of societal awareness about the importance of punishing war crimes perpetrators.

68 Since August 2016 Momčilo Stevanović has been the Head of the War Crimes Investigation Service, MUP's reply no. 1346/16/3 of 6 January 2017.

69 National Strategy for the Prosecution of War Crimes, Official Gazette of the RS no. 19/2016, available at http://www.mpravde.gov.rs/files/National%20Strategy%20for%20the%20Prosecution%20of%20War%20Crimes.pdf, accessed on 7 March 2017.

In its analysis of the current state of affairs, The Strategy, has identified some of the key shortcomings in the work of the institutions responsible for prosecuting war crimes and offered several useful proposals to remedy them. The Strategy emphasizes the regard given to strengthening the capacities of all institutions involved in war crimes prosecutions, as well as improving the legal framework, and witness and victim protection and support systems. The Strategy also envisages that the OWCP should develop and adopt its own strategy for investigating and prosecuting war crimes in the Republic of Serbia, whereby its resources would be directed towards prosecuting high-priority cases, which would be identified on the basis of the criteria to be laid down in the strategy. It also envisages strengthening of the OWCP's capacities through an increase in the number of deputies as well as other staff, and to continue professional advancement of holders of judicial offices and staff engaged in war crimes cases through regular training.

Some of the outputs that indicating that the Strategy is being successfully implemented include: more indictments in relation to the number of investigations, an increase in the number of finally adjudicated cases, shorter average durations of war crimes proceedings, a reduced number of missing persons whose fate has not been verified, and positive reports from the Chief Prosecutor, President of the ICTY and other relevant government and non-governmental organisations.

In 2016, however, no new War Crimes Prosecutor nor Deputy Prosecutor had been appointed, nor the prosecution strategy adopted, and the OWCP had only raised seven indictments, all of which were simple cases transferred from BiH after being fully investigated and their indictments confirmed by the BiH judiciary. Not a single indictment was raised for crimes in Kosovo in 2016, and the number of persons still missing was not reduced, with the proceedings in the main cases such as *Ovčara*, *Lovas*, *Ćuška* and *Skočić,* still not completed. All these indicate that the National Strategy is not being implemented.

VII. Lack of political support for war crimes trials

The attitude of the current Serbian leadership towards the past and the issue of war crimes has had a direct impact as a result of the way judicial institutions have handled war crimes, which are undoubtedly the worst in the last 10 years. Members of the government have shown through their actions that they attach no importance to war crimes trials. At the same time, they have been actively engaged in creating a social environment where the prosecution of those responsible for war crimes, especially those who held medium or high ranks, has become virtually impossible. Serbia's claim in fulfilling the EU demands is only words; in reality, Serbia has been without a chief war crimes prosecutor for over a year, and war crimes convicts and their close associates are being given back their previous positions in government institutions where they are regarded almost like moral beacons. Political attempts at a negationist revision of judicially established facts are stronger than ever.

Appointment of next chief war crimes prosecutor

A new chief war crimes prosecutor was not appointed as of the end of the reporting period. This post has been vacant for a year, since the expiry of the term of office of the former Chief War Crimes Prosecutor, Vladimir Vukčević, on 31 December 2015. The inactivity of government authorities in the appointment of his successor is evidence of the lack of political will to improve Serbia's track record of war crimes prosecution. In 2016, Deputy Prosecutor Milan Petrović was the acting head of the OWCP.

After the failed election of a new war crimes prosecutor in 2015,[70] the State Prosecutorial Council (SPC) launched a new open competetion for that post in February 2016. Five candidates applied and presented their programmes on 10 June 2016. On 23 September 2016, the State Prosecutorial Council drew up its final list of candidates for the job, including their rankings.[71] The SPC ranked the candidates as follows: 1) Snežana Stanojković (69.6 points); 2) Milan Petrović (63.6 points); 3) Dejan Terzić (61.6 points); 4) Milorad Trošić (59.2 points); and Đorđe Ostojić (40.8 points).[72]

The programmes presented by the candidates Milan Petrović, Snežana Stanojković, Dejan Terzić and Đorđe Ostojić were for the most part identical to the programmes they presented during the previous pre-selection process in late 2015.[73] Yet this time they were evaluated differently. As in the previous pre-selection process, the evaluation procedure was not transparent regarding the methodology and criteria used to rank the candidates, and the evaluation results suggest that the political suitability of a candidate was also taken into account.

Thus Đorđe Ostojić, the only candidate who advocated for command responsibility prosecutions, and in establishing a framework for cooperation between the OWCP and the Kosovo Office of the State Prosecutor[74], received only 40.8 points, as opposed to the 69.2 he had received previously, and was ranked the lowest. Unlike Ostojić, the candidates who proposed focusing prosecution on crimes against Serbs ranked much higher. Milorad Trošić, Deputy Higher Public Prosecutor in Novi Sad, was one such candidate. His programme, presented over one and a half pages, did not meet even the minimum criteria to be taken into account as a proposed OWCP programme. In it, Trošić proposed that the OWCP should focus on prosecuting crimes "which involved grave consequences for

70 HLC, "Election of Politically Suitable Prosecutors Undermines Rule of Law", 23 December 2015, available at http://www.hlc-rdc.org/?p=30911&lang=de, accessed on 17 February 2017.

71 Minutes of the 12th Session of the State Prosecutorial Council of 23 September 2016, available (in Serbian) at http://www.dvt.jt.rs/wp-content/uploads/2016/11/Zapisnik-sa-Dvanaeste-redovne-sednice-stalnog-sastava-Drzavnog-veca-tuzilaca-od-23.-septembra-2016.-godine.pdf, accessed on 16 February 2017.

72 Ibid.

73 "Programi kandidata za Tužioca za ratne zločine" [Candidates for War Crimes Prosecutor have presented their programmes], available (in Serbian) at http://www.hlc-rdc.org/?p=30935, accessed on 17 February 2017.

74 Programme of the candidate Đorđe Ostojić, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/Program-organizacije-i-unapre%C4%91enja-rada-tu%C5%BEila%C5%A1tva-za-ratne-zlo%C4%8Dine-za-period-od-2016-2022.-godine-%C4%90or%C4%91e-Ostoji%C4%87.pdf, accessed on 17 February 2017.

members of the JNA, Serbian MUP and Serbian civilians."[75] The programme put forward by Snežana Stanojković, which was given the best marks, is severely critical of Croatia, contrary to the National Strategy for the Prosecution of War Crimes, and puts emphasis on prosecuting war crimes against Serbs as well as holding trials in absentia.[76]

Having ranked the candidates, the State Prosecutorial Council submitted to the Government of Serbia its final shortlist of candidates consisting of the three highest-ranking candidates, namely Snežana Stanojković, Milan Petrović and Dejan Terzić. The Serbian Prime Minister Aleksandar Vučić on 10 November 2016 pledged that the new war crimes prosecutor would be appointed "next week";[77] but that was not the case, even seven weeks following the promise.

In his two latest regular semi-annual reports for 2016 submitted to the UN Security Council, the Prosecutor of the International Residual Mechanism for Criminal Tribunals criticised the delay in the appointment of a Chief War Crimes Prosecutor,[78] an issue that was mirrored by the European Commission as being of particular concern.[79]

Glorification of war criminals and their return to institutions

The glorification of convicted war criminals, which began in 2015, has continued during the reporting period and culminated in an official welcome organised by the state for General Vladimir Lazarević, who was coming back to Serbia after serving the sentence passed on him by the ICTY for crimes committed against Kosovo Albanians.[80]

75 Programme of the candidate Milorad Trošić, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/Program-organizacije-i-unapre%C4%91enja-rada-tu%C5%BEila%C5%A1tva-za-ratne-zlo%C4%8Dine-za-period-od-2016-2022.-godine-Milorad-Tro%C5%A1i%C4%87.pdf, accessed on 17 February 2017.

76 Programme of the candidate Snežana Stanojković, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/Program-organizacije-i-unapređenja-rada-tužilaštva-za-ratne-zločine-za-period-od-2016-2022.-godine-Snežana-Stanojković, accessed on 17 February 2017.

77 *Blic* daily newspaper, "Vučić: Tužilac za ratne zločine biće imenovan sledeće nedelje" [Vučić: War Crimes Prosecutor will be appointed next week], available (in Serbian) at http://www.blic.rs/vesti/politika/vucic-tuzilac-za-ratne-zlocine-bice-imenovan-sledece-nedelje/9grwm3p, accessed on 30 March 2017.

78 Report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, paragraph 52, available at http://www.unmict.org/sites/default/files/documents/161117_progress_report_en.pdf, accessed on 17 February 2017.

79 European Commission, Serbia 2016 Progress Report, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2016/20161109_report_serbia.pdf, accessed on 17 February 2017.

80 HLC, "Victims Mocked by Government Reception for Lazarević", 4 December 2015, available at http://www.hlc-rdc.org/?p=30815&lang=de, accessed on 31 March 2017.

Another convicted war criminal – Veselin Šljivančanin – has become a regular speaker at public forums organised by Serbia's ruling Serbian Progressive Party (SNS). This party provides him with opportunities to promote himself in exchange for his public support for the SNS. During 2016, Šljivančanin participated in numerous discussion events staged by the SNS, including those held in Bačka Palanka,[81] Starčevo,[82] Bački Gračac[83] and Omoljica.[84]

In April 2016, Momčilo Krajišnik, a former Speaker of the Bosnian Serb Assembly during the war in BiH, promoted his book "How Republika Srpska was Born – Notes from the Hague Prison" at the Belgrade Youth Centre, a cultural and educational institution founded by the City of Belgrade.[85] Krajišnik has previously been convicted by the ICTY for extermination, murders, persecution on political, racial and religious grounds, deportation and inhumane treatment of non-Serbs during the war in BiH.[86] In his book, Krajišnik denies the crimes of which he was convicted, and the promotion took place despite protests by civil society organisations.[87]

Another war criminal Nikola Šainović, whom the ICTY convicted of crimes against Kosovo Albanian civilians, made appearances in the mass media during 2016[88] in his capacity as a member of the Main Board of the Socialist Party of Serbia, a part of Serbia's ruling coalition. Šainović was elected to the Board as soon as he returned to Serbia after serving the sentence passed on him by the ICTY.[89]

81 SNS website, news of 30 January 2016, available (in Serbian) at http://backapalanka.sns.org.rs/lat/novosti/vesti/veselin-sljivancanin-knjizevno-vece, accessed on 16 February 2017.

82 RTV Pančevo "Šljivančanin pružio podršku SNS-u" [Šljivančanin supports SNS], 16 March 2016, available (in Serbian) at http://rtvpancevo.rs/Vesti/Politika/sljivancanin-pruzio-podrsku-sns-u.html, accessed on 16 February 2017.

83 Radio Odžaci, "Veselin Šljivančanin sa tribine u Bačkom Gračacu pružio podršku listi SNS" [Veselin Šljivančanin supports SNS list at public discussion in Bački Gračac], 6 April 2016, available (in Serbian) at http://www.ico.rs/veselin-sljivancanin-sa-tribine-u-b-gracacu-uputio-podrsku-listi-sns/

84 RTV Pančevo "Šljivančanin u Omoljici: U SNS su čestiti ljudi i patriote" [Šljivančanin in Omoljica: SNS are honest people and patriots], 13 April 2016, available (in Serbian) at http://rtvpancevo.rs/Vesti/Politika/sljivancanin-u-omoljici-u-sns-su-estiti-ljudi-i-patriote.html, accessed on 16 February 2017.

85 Dom omladine [Belgrade Youth Center] web page, "About us", available (in Serbian) at http://www.domomladine.org/o-nama/ accessed on 31 March 2017.

86 ICTY, *Momičilo Krajišnik*, Case Information Sheet, available at http://www.icty.org/x/cases/krajisnik/cis/en/cis_krajisnik_en.pdf, accessed on March 2017.

87 N1, "NVO: Dom omladine da ne promoviše knjigu Momčila Krajišnika"[NGOs: Belgrade Youth Center should not promote Momčilo Krajišnik's book], 15 April 2016, available (in Serbian) at http://rs.n1info.com/a152138/Vesti/Vesti/NVO-Dom-omladine-da-ne-promovise-knjigu-Momcila-Krajisnika.html accessed on 31 March 2017.

88 See, e.g., N1, "Intervju sa Nikolom Šainovićem večeras u 21h" [Interview with Nikola Šainović tonight at 9:00], 1 February 2016, available (in Serbian) at http://rs.n1info.com/a135467/Vesti/Vesti/N1-intervju-Nikola-Sainovic.html; M.R. Milenković, "Šainović: Rat u Jugoslaviji počeo odlukom Ante Markovića"[Šainović: War in Yugoslavia started by Ante Marković's decision], 16 September 2016, available (in Serbian) at http://www.danas.rs/politika.56.html?news_id=327827 accessed on 31 March 2017.

89 SPS, "Održana glavna sednica odbora SPS [SPS: SPS board main session held], 4 September 2015, available (in Serbian) at http://www.sps.org.rs/2015/09/03/glavni-odbor-sps-2/ accessed on 31 March 2017.

Vojislav Šešelj, a war crimes indictee whose case is still on appeal before the ICTY, was elected to the Serbian National Assembly in the 2016 parliamentary election. Šešelj was also elected to sit on the National Parliament's Security Services Control Committee.[90] The acquittal of Šešelj by the ICTY Trial Chamber has sparked an outcry in the legal community.[91]

The return of Danica Marinković to Serbian institutions is also indicative. Marinković was appointed to the Anti-Corruption Agency Board,[92] after the ruling Serbian Progressive Party proposed her for the office and Vojislav Šešelj's Radicals endorsed the proposal.[93] Marinković served as an investigative judge in the Court in Prishtinë at the time of the war in Kosovo. She gained notoriety for defending Serbian leaders and denying crimes committed against Kosovo Albanians while giving evidence before the ICTY as a defence witness in the cases against Slobodan Milošević and police generals Sreten Lukić and Vlastimir Đorđević. During her courtroom examination, evidence was presented which showed that while serving as an investigative judge, she was biased and engaged in covering up crimes against Kosovo Albanians.[94] Marinković was also appointed to the Anti-Corruption Board despite the strong disapproval of civil society organisations.[95]

Attempts to revise judicially established facts about the war in Bosnia and Herzegovina

During the reporting period, government institutions and members of the ruling parties, backed by some educational and cultural institutions, contributed to creating an environment favourable to revisionist efforts.

The most glaring example of the revisionist attitude towards the past has been the attempt to deny the responsibility of VRS General Novak Đukić for the crime in Tuzla's Kapija [Gate]. In a final judgment passed by the Court of Bosnia and Herzegovina, Novak Đukić, in his capacity as the Commander of the Ozren Tactical Group of the VRS, was sentenced to 20 years imprisonment for ordering an

90 Website of the Serbian National Assembly, Security Services Control Committee, available at http://www.parlament.gov.rs/national-assembly/composition/working-bodies/committees.91.492.html, accessed on 31 March 2017.

91 HLC, "ICTY Trial Chamber Judgment in Šešelj Case: In Time of War, Laws Fall Silent", 1 April 2016, available at http://www.hlc-rdc.org/?p=31551&lang=de; see also: Marko Milanović, "The acquittal of Vojislav Šešelj", *EJIL: Talk!*, 4 April 2016, available at https://www.ejiltalk.org/the-sorry-acquittal-of-vojislav-seselj/; Gregory S. Gordon, "Vojislav Šešelj's Acquittal at the ICTY: Law in an Alternate/Alternative Universe", *Jurist,* 11 April 2016, available at http://www.jurist.org/forum/2016/04/gregory-gordon-seselj-acquittal.php accessed on 31 March 2017.

92 "Danica Marinković izabrana za člana Odbora Agencije za borbu protiv korupcije" [Danica Marinković appointed to Anti-Corruption Agency Board], Beta News Agency, available (in Serbian) at http://www.blic.rs/vesti/politika/danica-marinkovic-izabrana-za-clana-odbora-agencije-za-borbu-protiv-korupcije/ct6wwez accessed on 31 March 2017.

93 "SRS odustala od svog kandidata i podržala Danicu Marinković za člana Odbora Agencije za borbu protiv korupcije" [SRS gave up on their own candidate for Anti-Corruption Agency Board and backed Danica Marinković], *Tanjug,* 26 December 2016, available (in Serbian) at http://www.blic.rs/vesti/politika/srs-odustala-od-svog-kandidata-i-podrzala-danicu-marinkovic-za-clana-odbora-agencije/9y3sgvr, accessed on 31 March 2017.

94 For more see "Petition against Election of Danica Marinković for Position of Member of Board of Anti-Corruption Agency", 22 December 2016, available at http://www.hlc-rdc.org/?p=33146&lang=de, accessed on 31 March 2017.

95 "Petition against Election of Danica Marinković for Position of Member of Board of Anti-Corruption Agency", 22 December 2016, available at http://www.hlc-rdc.org/?p=33146&lang=de, accessed on 31 March 2017.

artillery strike on Tuzla on 25 May 1995, which killed 71 civilians in the town's downtown area known as Kapija. During 2016, the Higher Court in Belgrade conducted proceedings for the recognition and enforcement in Serbia of the judgment passed on Novak Đukić (see the Case of *Novak Đukić*).

At the same time as the court proceedings for the recognition and enforcement of his verdict, Đukić's defence team was trying to create an impression of his innocence amongst the general public, and was backed in this effort by public and government institutions. The Army of Serbia was the first to support these efforts by allowing Đukić's defence team to use its' Technical Testing Centre at Nikinci near Ruma for their experiments, which supposedly demonstrated that the shell that killed civilians was not fired from the VRS positions.[96] The Serbian press widely publicised the results of the experiment,[97] and claimed that they were being done with the approval of Serbian state authorities.[98]The Belgrade University Law School allowed their premises to be used to present the findings of the experiment at Nikinci during a public discussion of "Science for Truth: Tuzla's Kapija, 25 May 1995".[99] Shortly afterwards, a documentary entitled "Mučni teret podmetnute krivice" [Painful Burden of Imputed Blame], based on the experiments conducted at Nikinci, was shown at Belgrade's Zvezdara Theatre.[100]

Furthermore, some new experiments at the training grounds at Nikinci have been announced, which are expected to show that the VRS was not responsible for the artillery attacks on the Markale marketplace and Vaso Miskin Street in Sarajevo.[101] What is particularly worryisome is that these experiments seek to challenge facts that have been proven during several ICTY trials, namely the trial of Stanislav Galić and Dragomir Milošević, former commanders of the Sarajevo-Romanija Corps of the VRS, and the subsequent trial of Radovan Karadžić, the former Bosnian Serb leader and Commander-in-Chief of the Bosnian Serb army.[102]

96 Response of the VS General Staff of 13 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Odgovor_na_zahtev_za_pristup_informacijama_od_javnog_znacaja,rekonstrukcija_dogadjaja_na_Tuzlanskom_trgu_25.05.1995,Generalstab_Vojske_Srbije.pdf, accessed on 16 February 2017.

97 See, e.g., *Večernje novost*i daily newspaper, 25 February 2016, "Srpska granata nije ubila ljude u Tuzli" [Serbian shell did not kill people in Tuzla], available (in Serbian) at http://www.novosti.rs/vesti/naslovna/hronika/aktuelno.291.html:592567-Srpska-granata-nije-ubila-ljude-u-Tuzli, accessed on 16 February 2017.

98 *Politika* daily newspaper, 13 October 2016, "Istina o zločinu na trgu u Tuzli" [Truth about the crime in Tuzla's square], available (in Serbian) at http://www.politika.rs/sr/clanak/366792/Istina-o-zlocinu-na-trgu-u-Tuzli, accessed on 30 March 2017.

99 Daily newspaper *Večernje novosti*, 24 October 2016, "Laž razbijena 32 puta: Ljudi na "Kapiji" ubijani simultano iz više pravaca" [Lie debunked 32 times: People in Kapija killed simultaneously from different directions], available (in Serbian) at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:631462-Laz-razbijena-32-puta-Ljudi-na-Kapiji--ubijani-simultano-iz-vise-pravaca, accessed on 16 February 2017.

100 *Večernje novosti*, 4 November 2016, "Dokumentarac o Tuzli: Prava istina o poturanju laži" [Documentary on Tuzla: Real truth about fabricating lies], available (in Serbian) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:633415-Dokumentarac-o-Tuzli-Prava-istina-o-poturanju-lazi, accessed on 16 February 2017.

101 See, e.g.: Nikola Joksimović, "Srbi nisu mogli da pucaju na Markale" [Serbs could not possibly shell Markale], 19 September 2016, available (in Serbian) at https://rs-lat.sputniknews.com/analize/201609191108175313-masakr-markale-vasemiskina-rat-bih/; S.J.Matić, "Srbija u Nikincima ruši laž s Markala" [Serbia debunks Markale hoax at Nikinci], 19 September 2016, available (in Serbian) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:625814-Srbija-u-Nikincima-rusi-laz-s-Markala accessed on 16 February 2017.

102 See: *Stanislav Galić* at http://www.icty.org/en/cases/party/690/4; *Dragomir Milošević* at http://www.icty.org/en/cases/party/739/4; *Radovan Karadžić* at http://www.icty.org/en/cases/party/703/4, accessed on 16 February 2017.

The public campaign to absolve former Serbian President Slobodan Milošević of responsibility for the war in BiH waged in August 2016 was revisionism at its highest. Some ministers in the Serbian Government were quick to conclude that "the Hague has proved Milošević's policies correct"[103] when incorrectly reacting to the claims of some pseudo-analysts[104] that the ICTY had "exonerated" the former President of Serbia and Federal Republic of Yugoslavia in its judgment convicting Radovan Karadzic. This process culminated in the initiative launched by the Serbian Foreign Minister and his party colleagues to erect a monument to Slobodan Milošević in Belgrade.[105]

By such pronouncements, which deliberately disregard the fundamental fact that in Radovan Karadžić's case only Karadžić could be convicted or cleared of war crimes charges, members of the current government seek to decriminalise and rehabilitate the regime of Slobodan Milošević, whose role in the wars of the 1990s was confirmed in several ICTY judgments.[106] The negative impact of such public statements is pointed out also by the ICTY Prosecutor in his latest report to the UN Security Council.[107]

Undermining regional judicial cooperation in war crimes processing

For the first time in 12 years, the OWCP did not participate in an annual regional conference of war crimes prosecutors. This year's conference was held on September 2016 on the Brijuni Islands in Croatia. As the decision not to participate in the conference came at the time bilateral relations between Serbia and Croatia hit a low point,[108] the HLC sees this as alarming evidence of political interference with the judiciary, which undermines the implementation of both the Action Plan for Chapter 23 and the National Strategy for the Prosecution of War Crimes.[109]

103 N1 News, 13 August 2016, "Dačić: Hag presudom priznao da Milošević i Srbija nisu krivi" [Dačić: Hague Tribunal admitted that Milošević and Serbia are not guilty], available (in Serbian) at http://rs.n1info.com/a184916/Vesti/Vesti/Dacic-Hag-presudom-Karadzicu-priznao-da-Milosevic-i-Srbija-nisu-krivi.html, accessed on 17 February 2017. N1 News, 13 August 2016, "Vulin: Hag potvrdio ispravnost Miloševićeve politike" [Vulin: Hague Tribunal has proved Milošević's policies correct], available (in Serbian) at http://rs.n1info.com/a184807/Vesti/Vesti/Vulin-Hag-potvrdio-ispravnost-Miloseviceve-politike.html, accessed on 17 February 2017.

104 See e.g. Webtribune, 10 August 2016, „ŠOKANTNA PRESUDA U HAGU: Slobodan Milošević oslobođen svih optužbi za ratne zločine u Bosni"[SHOCKING JUDGMENT IN THE HAGUE: Slobodan Milosevic acquitted of all charges of war crimes in Bosnia], available in Serbian at http://webtribune.rs/sokantna-presuda-u-hagu-slobodan-milosevic-osloboden-svih-optuzbi-za-ratne-zlocine-u-bosni/, accessed on 17 February 2017.

105 N1 News of 15 August 2016, "Dačić i Mrkonjić za spomenik Miloševiću"[Dačić and Mrkonjić in favour of a monument to Milošević], available (in Serbian) at http://rs.n1info.com/a185306/Vesti/Vesti/Dacic-i-Mrkonjic-za-spomenik-Milosevicu.html, accessed on 30 March 2017.

106 ICTY Trial Chamber Judgment in *Milan Martić* (IT-95-11-T), available at http://www.icty.org/x/cases/martic/tjug/en/070612.pdf; ICTY Trial Chamber Judgment in *Vlastimir Đorđević* (IT-05-87/1-T), available at http://www.icty.org/x/cases/djordjevic/tjug/en/110223_djordjevic_judgt_en.pdf, accessed on 17 February 2017.

107 Report of the Prosecutor of the International Residual Mechanism for Criminal Tribunals, paragraph 52, available at http://www.unmict.org/sites/default/files/documents/161117_progress_report_en.pdf, accessed on 17 February 2017.

108 See, e.g.,Tomislav Šoškarić, "Hrvatska i Srbija: Psihoza i 'šamaranje' za domaću publiku" [Croatia and Serbia: Psychosis and exchange of "blows" for domestic consumption], 26 August 2016, available (in Serbian) at http://balkans.aljazeera.net/vijesti/hrvatska-i-srbija-psihoza-i-samaranje-za-domacu-publiku

109 HLC, "Consequences of Political Tensions on Prosecution of War Crimes: For the first time, Serbia does not participate in the regional conference of war crimes prosecutors", 7 September 2016, available at http://www.hlc-rdc.org/?p=32698&lang=de, accessed on 7 March 2017.

Namely, the Action Plan for Chapter 23 foresees joint activities among prosecutor's offices in the region in the field of war crimes prosecution,[110] and the National Strategy states as one of its goals to "support to the judiciary through improving regional cooperation", and specifically mentions the participation of the OWCP in the regional conferences of war crimes prosecutors.[111]

A consequence of the cross-border nature of the armed conflicts in the former Yugoslavia is that victims, witnesses, perpetrators, and evidence are for the most part today not located within the territory of one state or within the competence of a single national judiciary. furthermore, as almost all former Yugoslavia successor states ban extradition of their citizens for trials in other countries, the prosecution of war crimes committed on the territory of the former Yugoslavia is impossible without effective judicial cooperation among the countries in the region. The efforts to improve and formalize regional judicial cooperation for war crimes processing emerged in 2004, and developed into what is now known as the "Brijuni Process", which has produced meaningful results.

Denial of war crimes made legal

On 23 November 2016, the National Assembly of the Republic of Serbia passed the Law on Amendments to the Criminal Code.[112] The law, among other things, amended Article 387 of the Code referring to the criminal offence of racial and other discrimination by adding a new paragraph, which reads as follows: "Whoever publicly approves, denies or significantly minimises the severity of the criminal offences of genocide, crimes against humanity and war crimes committed against a group of people or a member of a group of people defined as such on the basis their race, skin colour, religion, origin, nationality or ethnicity, in a way that can lead to violence or instigate hate towards that group of people or a member of that group of people, and if the offences above cited have been established by the final judgments of a court in Serbia or the International Criminal Court, shall be punished by imprisonment from six months to five years."

The above-cited provision best illustrates Serbia's approach to its obligations: on the one hand, it fulfils its administrative obligations on its path towards EU accession, and on the other hand, it opens the way for the revision of the judicially established facts, especially those indicating the accountability of Serb perpetrators. Namely, the prohibition does not cover denying the findings of two international courts, the International Court of Justice and International Criminal Tribunal for the Former Yugoslavia, whose judgments are of the utmost importance for Serbia and the region. By acting this way the state, while formally fulfilling its international obligations, has created a legislative framework that allows for the denying of the Srebrenica genocide, and all other crimes tried by the two above-

110 Final version of the Action Plan for negotiations on Chapter 23, Activity 1.4.1.3, available at http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023.pdf, accessed on 6 March 2017.

111 National Strategy for the Prosecution of War Crimes, Official Gazette of the RS no. 19/2016, available at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF, accessed on 7 March 2017.

112 Law on amendments to the Criminal Code, Official Gazette of the RS no. 94/2016.

mentioned courts based in The Hague. Other examples include denying; the crime at the Ovčara farm near Vukovar, the killings and expulsions of the Croatian Civilians from eastern Slavonija and Kninska Krajina, the artillery and sniper terror in Sarajevo, crimes against non-Serbs in the Prijedor detention camps, the mass rapes of non-Serb women in Foča, and the killing of several thousand and expulsion of over 800,000 ethnic Albanians in Kosovo.

In addition to contravening the Law on Cooperation with the ICTY,[113] inwhich Serbia agreed to comply with the decisions of the tribunal,[114] the above-cited provision contravenes the Charter of the United Nations Article 94 under which Serbia is bound to comply with the decisions of the International Court of Justice. On 26 February 2007[115] the court established that genocide was committed in Srebrenica and found Serbia in breach of the Convention on the Prevention and Punishment of the Crime of Genocide.

Non-cooperation with the ICTY

On 18 May 2016, the War Crimes Department of the Higher Court in Belgrade issued a ruling[116] denying the request for the arrest and extradition to the ICTY of three senior officials of the Serbian Radical Party, namely Petar Jojić, Vjerica Radeta and Jovo Ostojić. The three are wanted by the ICTY to stand trial on the contempt of court charges, for threatening two witnesses who were to give evidence at the ICTY, by intimidated them, offering them bribes, and in using other methods to attempt to dissuade them from cooperating with the ICTY Prosecutor's Office and make them testify as defence witnesses instead at the trial of Vojislav Šešelj.

Ultimately the court found that the legal requirements for their extradition had not been met. As stated by the court, the Law on the Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991 does not allow for the extradition of persons charged with contempt of court, but only those charged with war crimes, crimes against humanity, and the crime of genocide.[117]

113 Law on the Cooperation of Serbia and Montenegro with the International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the Former Yugoslavia since 1991, Official Gazette of the FRY no. 18/2002 Official Gazette of Serbia and Montenegro no. 16/2003.

114 Ibid, Article 1 paragraph 2.

115 Judgment of the International Court of Justice of 26 February 2007 on the genocide charges Bosnia and Herzegovina filed against the Federal Republic of Yugoslavia, available at http://www.icj-cij.org/docket/files/91/13685.pdf, accessed on 28 February 2017.

116 Rulings of the War Crimes Department of the Higher Court in Belgrade, Pom Ik2 Po2 48/2016 and Kv Po2 16/2016 of 16 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/2st_presuda_Jojic,_Radeta_i_Ostojic.pdf, accessed on 28 February 2017.

117 See HLC, "Court's Decision to Refuse Extradition of Three Members of Serbian Radical Party a Result of Political Calculations of Government of Serbia", 25 May 2016, available at http://www.hlc-rdc.org/?p=32029&lang=de, accessed on 28 February 2017.

However, Serbia has acted differently in exactly the same situations in the past, and extradited persons wanted by the ICTY for contempt of court without hesitation. Thus for example, when Jelena Rašić,[118] Dragomir Pećanac,[119] and Ljubiša Petković[120] were charged with the same act, the competent authorities of the Republic of Serbia, applying the same law as in the case of the three Radicals, found that the legal conditions for extradition had been met and handed them over to the ICTY. Such a glaring inconsistency in the court's approach suggests that Serbia's cooperation with the ICTY is dependent upon the political opportunism of the current Government rather than on its genuine commitment to the rule of law and to justice for victims of the most serious crimes against international law.

VIII. Related proceedings

1. Ljubiša Diković's compensation claim against Nataša Kandić and the HLC[121]

In February 2013, Serbian Army Chief of Staff Ljubiša Diković filed a defamation lawsuit against the founder, and then current Executive Director of the HLC, Nataša Kandić and the HLC, seeking compensation for the non-pecuniary damage he suffered owing to damage to his honour and reputation caused by the allegations made against him in the HLC's Dossier "Ljubiša Diković",[122] released in January 2012. In the Dossier, inter alia, the HLC published the facts and evidence on the crimes committed by the Serbian forces in the area of responsibility of the 37th Motorized Brigade in Kosovo under the command of Ljubiša Diković.

On 3 March 2016, the First Basic Court in Belgrade handed down a decision partially granting the Serbian Army Chief of Staff's claim and awarding him 550,000 dinars.[123] The Court of Appeal upheld the decision on 18 August 2016.[124] In the view of the HLC, both decisions depart drastically from the case law of the European Court of Human Rights, and further limit the space for debate on issues

118 Sense News Agency, "Nova optužnica zbog podmićivanja svedoka" [New indictment for offering bribes to witnesses], available (in Serbian) at http://www.sense-agency.com/tribunal_(mksj)/nova-optuznica-zbog-podmicivanja-svedoka.25.html?news_id=11917, accessed on 30 March 2017.

119 Sense News Agency, "Major Pećanac refuses to testify against General Tolimir", http://www.sense-agency.com/icty/major-pecanac-refuses-to-testify-against-general-tolimir.29.html?news_id=13270, accessed on 30 March 2017.

120 Sense News Agency, "Ljubiša Petković se izjasnio da nije kriv" [Ljubiša Petković pleaded not guilty], available (in Serbian) at http://www.sense-agency.com/tribunal_(mksj)/ljubisa-petkovic-se-izjasnio-da-nije-kriv.25.html?cat_id=1&news_id=713, accessed on 30 March 2017.

121 Hearing records available (in Serbian) at http://www.hlc-rdc.org/?p=30931, accessed on 3 April 2017.

122 HLC, Dossier "Ljubiša Diković", available at http://www.hlc-rdc.org/wp-content/uploads/2012/11/Ljubisa-Dikovic-File-and-Annex.pdf, accessed on 3 April 2017.

123 Judgment of the First Basic Court in Belgrade 2 P.no. 1400/13 of 3 March 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Presuda_Ljubisa_Dikovic-Natasa_Kandic_Fond_za_hum.pravo-anonimizovana.pdf, accessed on 3 April 2017.

124 Judgment of the Court of Appeal in Belgrade Gž 5479/16 of 18 August 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Presuda_Apelacionog_suda_u_Beogradu_o_potvrdjivanju_presude_Prvog_osnovnog_suda_po_tuzbi_Ljubise_Dikovica_protiv_Natase_Kandic_i_Fonda_za_humanitarno_pravo.pdf, accessed on 3 April 2017.

of public concern that protect government officials from any criticism and public scrutiny of their potential criminal responsibility for past war crimes.

As the Court of Appeal dismissed most of the grounds of appeal set out by the HLC without any explanation, one might rightly say that its decision was not guided by law.

In its appeal, the HLC pointed to a **violation of freedom of expression**. Namely, the Court of Appeal in its judgment failed to give due consideration to the fact that Ljubiša Diković is a public figure and a senior state official, and that the information published by the HLC did not concern his private life. The court ignored the extensive case law of the European Court of Human Rights concerning the right to freedom of expression versus the right to privacy of a public figure, which strongly emphasizes that "the limits of acceptable criticism are wider when it comes to public servants", and that the right to freedom of information includes "even statements capable of causing damage to individuals" or information which "offends, shocks or disturbs". The Court of Appeal merely stated, without providing any further explanation, that "freedom of expression, even when the opinion expressed concerns state officials, is not an unlimited right."

Another violation the HLC pointed to was **violation of the right to a public trial**. The public was allowed to follow the proceedings in the courtroom until the moment came for Nataša Kandić to cross-examine Ljubiša Diković. It was at this moment during the hearing held on 15 September 2015 that the Presiding Judge ruled to exclude the public, explanatining that the courtroom was too small to hold the members of the press. It should be noted that the *very same* courtroom had been used throughout the proceedings, and that its limited space had not previously been used as a reason for public exclusion. Even though the HLC cited the relevant case law of the European Court of Human Rights and the UN Commission on Human Rights, according to which national judiciaries *have a duty* to enable the public to attend hearings in high-profile cases, and the case at hand was a high-profile case as it involved a senior public official, the Court of Appeal very briefly and without any further explanation stated that "the court of first instance acted properly in concluding that the public should be partially excluded in the interest of public order, and in so doing, it did not in any way suspend the norms of a democratic society".

The next ground of appeal was a **violation of equality of arms**, i.e. the right to defence. Namely, although the court of first instance required that the HLC *prove* the truth of its allegations which gave rise to the lawsuit, at the preparatory hearing it refused to hear *any* of the evidence proposed by the HLC, finding that evidence "superfluous for ligation proceedings" and "irrelevant for the determination of the dispute that is the subject-matter of the litigation". In this way the HLC was *de facto* denied the right to a defence and the right to adversarial proceedings. Notwithstanding this, the Court of Appeal held that "the rejection of certain evidence put forward by the defendants did not infringe their right to adversarial proceedings", adding that "the decision on the evidence to be used in determining the underlying facts […] comes within the competence of the court", without providing any further explanation thereof.

Particularly worrying is the Court of Appeal's conclusion that the reputation and honour of Ljubiša Diković were damaged by the presentation of "*unproven facts* that have an offensive connotation capable of causing harm to human dignity". That the facts presented in the Dossier, and other statements, were *unproven* as court inferred from the facts that "it has been established beyond doubt that the plaintiff has not been subject to criminal prosecution for any offence." First and foremost, the dossiers and public statements which were the subject of the lawsuit, presented evidence that implicate Ljubiša Diković in criminal acts committed during the wars in the former Yugoslavia and, by consequence, the opinion that he is unworthy to hold the office of Chief of the Serbian Army's General Staff. The evidence and opinions were presented with a view to informing members of the public and competent government institutions about matters of public interest. Accordingly, the HLC had a duty to prove in court *the truth of its allegations* that Diković is responsible for war crimes, not to prove that the plaintiff *is* responsible for war crimes, because the latter issue falls within the competences of the judiciary, as the court rightly observed. In order to prove its allegations, the HLC indicated to the Court of Appeal the existence of numerous judgments of the International Criminal Tribunal for the former Yugoslavia, exhibits, and statements of victims, witnesses and survivors, which all testified to war crimes having been committed in the area of responsibility of the brigade under Diković's command. The Court of Appeal failed to take any of them into consideration, but instead satisfied itself that Diković "has not been subject to criminal prosecution", despite the fact that at that very time he already faced preliminary investigation by the OWCP.[125]

Such an outcome goes against the relevant ECtHR case-law in the area of freedom of expression. For instance, in a similar case which also concerns publishing information that suggests the criminal responsibility of a state official (*Dalban v. Romania*, No. 28114/95, paragraph 50), the journalist who published the information was not required by the ECtHR to prove the criminal responsibility of the person in question. Instead, the ECtHR upheld the principle of freedom of expression by concluding that "there is no proof that the description of events given in the articles was totally untrue and designed to fuel a defamation campaign." In contrast to this, the Court of Appeal in Belgrade completely ignored the extensive body of evidence presented before the ICTY concerning the crimes committed in the area of responsibility of the brigade under Diković's command and the statements of witnesses interviewed by the HLC, and concluded that the facts presented by the HLC were unproven, although the HLC offered strong circumstantial evidence pointing to the former Commander of the Yugoslav Army 37th Motorized Brigade's responsibility for the war crimes committed in his area of responsibility. Finally, the right to freedom of expression and the guarantees it provides to organisations working in the public interest are aimed at enabling free public debate on issues of public concern, "not discouraging members of the public, for fear of criminal or other sanctions, from voicing their opinions on issues of public concern" [ECtHR: *Barfod v. Denmark*, *Lingens v. Austria*, *Incal v. Turkey*, etc.]. The Court

125 "Tužilaštvo pokrenulo predistražni postupak protiv generala Dikovića" [Prosecutor's Office launches preliminary investigation process with regard to General Diković], daily newspaper *Danas,* 13 November 2015, available (in Serbian) at http://www.hlc-rdc.org/?p=30691, accessed on 3 April 2017.

of Appeal's ruling in fact suggests quite the opposite: that it is actually forbidden for members of the public to criticise and subject to scrutiny the responsibility of a state official, even with thousands of pages of authentic evidentiary material testify to it. The explanation given by the court, namely that "the responsibility of the state official has not been proven by a conviction", however legitimate and lawful it may seem, cannot justify its decision. By banning public debates on the responsibility of suspected perpetrators, such decisions serve to perpetuate the already prevailing climate of impunity for crimes committed during the wars in the former Yugoslavia.

Chronology of the case

The HLC published the "Ljubiša Diković" Dossier on 23 January 2012, with a view to drawing public attention to the evidence concerning the crimes committed in the area of responsibility of the brigade commanded by Ljubiša Diković during the war in Kosovo - more specifically, in the municipalities of Skenderaj/Srbica and Gllogoc/Glogovac - and during Diković's engagement in the war in Bosnia and Herzegovina, with the purpose of suggesting that because of that he is unworthy of holding the position of Chief of the Serbian Army's General Staff. In April 2012, General Diković started a private prosecution against Nataša Kandić for defamation.[126] However, after defamation had been decriminalised by the amendments to the Criminal Code, the prosecution was dismissed. So General Diković in February 2013 filed a lawsuit seeking that the HLC and Nataša Kandić, under joint and several liability, pay him one million dinars in non-pecuniary damages for damaging his honour and reputation.

In the meantime, the HLC came into possession of new evidence regarding the involvement of the VJ 37th Motorized Brigade in crimes against Albanian civilians in Kosovo and the subsequent concealment of the bodies of victims in a clandestine mass grave at Rudnica.[127]

In 2012, the OWCP refused to launch an investigation into the allegations presented in the "Ljubiša Diković" Dossier.[128] In October 2015, the HLC was notified that on the basis of its criminal complaint against Diković and another three former members of the VJ 37th Motorized Brigade, the OWCP had launched a preliminary investigation into the crime in Rezalle/Rezala, where members of the VJ had killed more than 40 civilians. The mortal remains of 27 of the victims were later found in the Rudnica mass grave.

On 18 October 2016, the HLC appealed to the Constitional Court against the ruling of the Court of Appeal. The appeal had not yet been decided upon by the end of the reporting period in 2016.

126 Branka Mihajlović, "Diković: Načelnik Generalštaba tužio Natašu Kandić"[Army Chief sues Nataša Kandić], *Radio Free Europe,* 19 March 2012, available (in Serbian) at http://www.slobodnaevropa.org/a/dikovic_tuzio_natasu_kandic/24520282.html, accessed on 3 April 2017.

127 HLC, Dossier "Rudnica", available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Dosije_Rudnica_eng.pdf, accessed on 3 April 2017.

128 HLC press release, "OWCP has shown no genuine will to investigate crimes committed by the 37th Motorized Brigade of the Yugoslav Army ", 1 February 2015, available at http://www.hlc-rdc.org/?p=28088&lang=de, accessed on 3 April 2017.

2. A case taken to the ECtHR because of the OWCP's failure to investigate

In September 2011, the Humanitarian Law Center lodged a criminal complaint with the OWCP over the war crime committed in the Šljivovica and Mitrovo Polje detention camps in the period between the end of July 1995 and 10 April 1996. In the complaint, the HLC submitted about 70 statements from the camps' detainees who survived torture and inhumane treatment, and proposed that the OWCP examine them as witnesses.

On 8 March 2013, the OWCP notified the HLC that "there are no grounds for initiating criminal prosecution against the alleged perpetrators, as the complaint itself and all subsequently gathered information and actions undertaken indicate that their acts do not possess the elements of a war crime against prisoners of war, or any other crime that falls within the responsibility of this prosecutors' office".[129]

By subsequent verification, the HLC found out that none of the proposed witnesses were ever contacted by the OWCP, which indicates that the OWCP failed to conduct a thorough, independent and effective investigation, and by consequence, failed to meet its obligations under the European Convention for the Protection of Human Rights and Fundamental Freedoms, which requires that States Parties to the Convention should investigate all incidents where individuals sustained injuries while under the effective control of state authorities and should provide a sufficient and reasonable explanation of how these injuries occurred.

On 4 April 2013 the HLC lodged a constitutional appeal before the Constitutional Court of Serbia on behalf of 78 former camp detainees. This court on 27 June 2014 rejected the appeal, finding that as the decision of the OWCP the HLC had appealed against was not an act which concerned the rights and obligations of the appellants, the Constitutional Court thus did not have the subject-matter jurisdiction to decide the case.[130]

Having exhausted all domestic remedies, the HLC took the case to the ECtHR. On 24 December 2014, the HLC lodged an application with the European Court of Human Rights on behalf of the former camp detainees against the Republic of Serbia, claiming that the OWCP's failure to carry out an effective investigation into the deaths, torture, and inhumane and degrading treatment of detainees at the Šljivovica and Mitrovo Polje detention camps amounted to violations of Articles 2, 6 and 13 of the European Convention.[131]

129 The Office of the War Crimes Prosecutor notification KTR no. 134/11 of 1 March 2013.
130 Decision of the Constitutional Court of the RS no. 2603/2013 of 26 June 2014.
131 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in Article 3 enshrines the right to life, in Article 6 the right to a fair trial, and in Article 13 the right to an effective remedy.

In late October 2016, the ECtHR handed down a decision[132] rejecting the application of the former camps' detainees. Also, the Court refused to decide on the merits of the case, finding that the applicants applied for the protection of their Convention rights too late.[133] Namely, the Convention imposes an obligation on individuals whose Convention rights' have been violated to react promptly by bringing the complaints that are available to them, first in the state responsible for the violation, and eventually with the ECtHR. Even though the HLC submitted its application within the prescribed time limit of six months following the decision of the Constitutional Court, the ECtHR concluded that the applicants' complaint was out of time, as 16 years had passed since the events in question and the lodging of the criminal complaint.

The court held that the victims of the crimes in the Šljivovica and Mitrovo Polje detention camps ought to have been aware much earlier that the OWCP would not prosecute the crimes complained of. On that basis, it was concluded that the six-month time limit to apply to the ECtHR did not manifest from the date on which the last available domestic remedy was exhausted, in this case when the Constitutional Court ruled upon the HLC's appeal, but from the moment when the victims became aware that the OWCP would not conduct investigations into what happened to them. In the ECtHR's view, that moment came somewhere between 2006 and 2010 when the Serbian judiciary was delivering its final judgments inwhich the conflict in Bosnia and Herzegovina was not being classified as an international armed conflict. This, according to the ECtHR, should have signalled to the Bosniak victims from the Serbian camps, and to the HLC, as their representative, that the OWCP would not act upon their case, because the crimes alleged in their complaint, since they were considered as having been committed in the context of an internal armed conflict, were not covered by the Geneva Conventions, which only apply to international armed conflicts, and therefore could not be classified by the OWCP as a crime against prisoners of war. However, the ECtHR's conclusion that Serbia consistently classifies the war in Bosnia and Herzegovina as an internal armed conflict does not hold water, because in the *Tuzla Convoy* Case, for instance, the war in Bosnia and Herzegovina was classified as an international armed conflict.[134]

The ECtHR did not accord attention to the fact that, in rejecting the criminal complaint, the OWCP had stated that "there are no elements of a war crime against prisoners of war or any other crime that falls within the responsibility of this prosecutor's office". However, this rather general formulation is not true; because the acts referred to in the complaint do have the elements of a crime against humanity, which crime does fall within the OWCP's responsibility and does not require the context of an armed conflict. Even though the ECtHR Chamber hearing this case specifically stated that it left aside the question of whether or not the OWCP's interpretation of international law was correct, by

132 Decision of the European Court of Human Rights in *Kamenica et al. v. Serbia* (no. 4159/15), 4 October 2016.
133 The application lodged on behalf of the families of the detainees who died in the camps is pending.
134 See the OWCP indictment of 18 September 2009 in *Tuzla Convoy*, available (in Serbian) at na http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optu%C5%BEnica.pdf

failing to take into account all aspects of the case, it has in effect granted amnesty to the OWCP for its failure to apply international law.

Undoubtedly, this decision of the ECtHR will further weaken the chances of the victims of crimes committed in the Šljivovica and Mitrovo Polje camps of obtaining justice from the Serbian judiciary.

First instance proceedings before the War Crimes Department of the Higher Court in Belgrade

I. Case Ključ-Kamičak[135]

CASE INFORMATION	
Stage of the proceedings: first-instance proceedings	
Date of indictment: 26 May 2016	
Trial commencement date: 8 September 2016	
Prosecutor: Snežana Stanojković	
Defendants: Dragan Bajić and Marko Pauković	
Criminal offence charged: war crime against a civilian population	

Chamber	Judge Vera Vukotić (presiding) Judge Vinka Beraha Nikićević Judge Vladimir Duruz

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 3
Number of victims: 5	**Number of witnesses heard in the reporting period:** 2
Number of witnesses heard: 2	

Key developments in the reporting period:

Main hearing

135 *Ključ-Kamičak* case trial reports and documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc-kamicak.html, pristupljneo accessed on 10 January 2017.

The course of proceedings

Indictment

Dragan Bajić[136] and Marko Pauković[137], in their capacity as members of the VRS Sana Brigade military police, are charged with killing Hasan Rahić on the outside staircase of Minka Jusić's house in the village of Kamičak (municipality of Ključ, BiH) on 10 October 1992, by firing a number of shots at him with their automatic rifles, after which they left the scene. Soon afterwards, they came back to Minka Jusić's house, stormed inside and fired several shots at the persons they found there, killing Minka Jusić, Munira Hotić, Džemila Behar, and Safeta Behar, a minor.[138]

After issuing separate charges against the defendants, the OWCP filed a motion asking the court to merge the two cases and try them together.

Defendants' defence

Both defendants denied having committed the offence of which they are accused. Dragan Bajić[139] claimed that at the time relevant to the indictment he was on sick leave, after being wounded on the battlefield at Gradačac on 13 August 1992. Marko Pauković[140] said that the case against them was "fabricated by the BiH judiciary", adding that he heard that all members of his unit were listed as war criminals.

Witnesses

Witness Emsud Behar[141] was in Kamičak at the relevant time, in Muharem Behar's house. From a window he saw the defendants enter the house of Minka Jusić, after which he heard bursts of automatic gunfire coming from the house. The next day he went to Minka's house and saw the dead body of Hasan Rahić on a landing of the staircase. The people who took the victims' bodies out of the house told him that Munira Hotić, Džemila and Safeta Behar and Minka Jusić had been killed in the house. At the time of the murder, Refik Hotić was also in the house, hiding behind a door. He later said that the defendants had killed the victims.

136 OWCP Indictment KTO no. 6/16 of 26 May 2016, available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/d_bajic_mediji.pdf, accessed on 10 January 2017.

137 OWCP Indictment KTO no. 7/16 of 26 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Optuznica_Marko_Paukovic.pdf, accessed on 10 January 2017.

138 This case was transferred to the OWCP from BiH, because the defendants are citizens and residents of Serbia and, as such, unavailable to the BiH authorities.

139 Trial report of 8 September 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/1._Kljuc_-_Kamicak_-_Izvestaj_sa_sudjenja_08.09.2016..pdf, accessed on 27 January 2017.

140 Ibid.

141 Trial report of 24 October 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/2._Kljuc_-_Kamicak_-_Izvestaj_sa_sudjenja_24.10.2016..pdf, accessed on 27 January 2017.

Witness Duško Vidović[142] served as a VRS military policeman together with the defendants. He would regularly come with them to the village. Usually it was the defendants who patrolled the village in the company of Nenad Kaurin, also a military policeman. The witness did not know the victims, but was present during the crime scene investigation. Following the murder of these civilians the defendants and Nenad Kaurin arrested two fighters, who fought under the command of "a certain Čeda", on the suspicion of having committed the murder in question. The witness heard villagers say that it was "Čeda's soldiers" who had killed the civilians.

The presentation of evidence will continue with the examination of other witnesses.

HLC Findings

Fictitious increase in the number of indictments

The OWCP issued two separate indictments on the same day against Dragan Bajić and Marko Pauković,[143] even though they had been identified as co-perpetrators. After the indictments were confirmed, the OWCP moved that the court merge the cases against the defendants and try them as one single case, and amended the indictment to add precision. By bringing two indictments for charges relating to the same facts, the OWCP attempted to make itself appear more efficient i.e. by issuing more and more indictments, which is behaviour inappropriate for a judicial institution.

Contradictory indictments

The original separate indictments were mutually contradictory, and raise serious doubts as to the responsibility of one of the defendants. The indictment against Dragan Bajić[144] states that the defendant "and Marko Pauković […] **fired together** a short burst into the front door […] entered the house […] with the intent to kill them […] **fired together** a large number of shots into them from their automatic rifles […]"; whereas the indictment against Marko Pauković[145] states that the defendant "[…] **fired** a short burst into the front door […] **fired** an undetermined number of shots […] entered the house and **fired** an undetermined number of shots from an automatic weapon into […]".

If we compare the two indictments, we will notice that only **Marko Pauković was charged with shooting**, which could point to the conclusion that the defendant Dragan Bajić did not perform any

142 Trial report of 2 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/3._Kljuc_-_Kamicak_-_Izvestaj_sa_sudjenja_02.12.2016.pdf, accessed on 27. January 2017.

143 Ibid.

144 OWCP indictments KTO nos. 6/16 and 7/16, both of 26 May 2016. KTO 6/16 available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/d_bajic_mediji.pdf; KTO 7/16 available (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc-kamicak.html, accessed on 27 January 2017.

145 OWCP Indictment KTO no. 7/16 of 26 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Optuznica_Marko_Paukovic.pdf, accessed on 27 January 2017.

incriminating act and should therefore be exonerated from criminal responsibility. A person's mere presence at the scene of a crime is not considered by the Court of Appeal to be proof of someone's criminal responsibility.[146] The OWCP should be well aware of this position of the Court of Appeal.

By its unscrupulous and unprofessional behaviour aimed at giving a false impression of its efficiency, the OWCP has seriously undermined the possibilities of a successful outcome of this case. The HLC considers the behaviour of the acting prosecutor to be unacceptable for a person aspiring to become the chief War Crimes Prosecutor.

Incomplete indictments delivered to the HLC

The HLC requested the OWCP to supply it with the indictments brought against Dragan Bajić and Marko Pauković. The request was made pursuant to the Law on Free Access to Information of Public Importance. The OWCP delivered the indictments,[147] but only after removing the statement of reasons sections from both documents. Without having the complete indictments, it is difficult to analyse their quality or follow the proceedings in this case.

146 Judgment of the Court of Appeal in Belgrade in *Bijeljina II,* Kži po 2 1/16 of 29 September 2016, p. 11, para 49. available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Drugostepena_presuda_26.09.2016..pdf, accessed on 27 January 2017;Court of Appeal Judgment Kž1 Po2 1/12 of 30 November 2012, p. 8, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/02/Drugostepena-presuda-u-ponovljenom-postupku-30.11.2012..pdf, accessed on 27 January 2017.

147 OWCP indictments KTO nos. 6/16 and 7/16, both of 26 May 2016. KTO 6/16 available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/d_bajic_mediji.pdf; TO 7/16 available (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc-kamicak.html, accessed on 27 January 2017.

II. Case Bratunac[148]

CASE INFORMATION	
Stage of the proceedings: first-instance proceedings	
Date of indictment: 14 April 2016	
Trial commencement date: 29 June 2016	
Prosecutor: Bruno Vekarić	
Defendant: Dalibor Maksimović	
Criminal offence charged: war crime against the civilian population	
Chamber	Judge Vladimir Duruz (presiding) Judge Vera Vukotić Judge Vinka Beraha Nikićević
Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 5
Number of victims: 5	**Number of witnesses heard in the reporting period:** 7
Number of witnesses heard: 2	**Number of expert witnesses heard:** 1
Key developments in the reporting period: The trial stage has commenced.	

148 *Bratunac* Case trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/bratunac.html accessed on 10 January 2017.

Course of the proceedings

Indictment

Dalibor Maksimović, former member of the VRS, stands accused of involvement in the killing of four civilians – Huso, Omer and Nezir Salkić and Mujo Šaćirović – on 9 May 1992 in the villages of Repovac and Glogova (in the municipality of Bratunac, BiH), and the unlawful abduction and holding of two Bosniak women, protected witnesses VS1 and VS2, and of raping VS1 on multiple instances.[149]

Defendant's defence

Maksimović denied having committed the crimes with which he is charged. He said that between April and June 1992 he was positioned ten kilometres from Milići with other members of the VRS, and that he occasionally left this position for a day or two to go home and have a bath. He said he could not remember if in May 1992 he was at home, but did not rule out that possibility. He described his house in Milići, saying that at the relevant time his mother, stepfather, and two younger brothers lived in the house. When told by the Presiding Judge that protected witness VS1, in her testimony, described in-detail his house in Milići and the people who lived in it (she knew the house because she was raped in it), and that her description for the most part matched his own, Maksimović could not explain this point.[150]

Psychiatric examination of a protected witness

Before the protected witness VS1 was put on the stand, the court appointed a psychiatric expert to evaluate her mental fitness to testify. The expert found her fit to testify. The OWCP moved that the expert also assess the level of anguish suffered by the victim, determine whether she suffered from post-traumatic stress disorder as a consequence of the traumatic event she experienced, and whether a causal relationship could be established between the acts of the defendant and the witness's present psychological problems: which are interfering with her daily life.[151] The court-appointed expert witness explained that such examination would take time, and therefore could not be performed at that moment. The court dismissed the OWCP's motion, on the basis of Article 252 of the ZKP (which stipulates that a compensation claim will be considered in criminal proceedings if those proceedings would not be significantly prolonged by it), as well as other provisions requiring that criminal proceedings be conducted expeditiously. The court held that its decision did not imply that

149 OWCP indictment KTO no. 4/16 of 14 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Optuznica_Bratunac_14.04.2016.pdf, accessed on 10 January 2017. The Court of BiH referred this case to the OWCP under the agreement on International Legal Assistance in Criminal Matters, because Dalibor Maksimović is a citizen and resident of Serbia.

150 Transcript of the main hearing of 29 June 2016 available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/02-29.06.2016..pdf accessed on 10 January 2017.

151 Ibid, pp. 2-3.

the witness would not be able to file a compensation claim on a later date, "and, of course, be subject to medical examination during some other proceedings".[152]

The attorney for the protected witness VS1, who joined the proceedings on 15 December 2016, also filed a motion seeking that she be subject to medical examination for the purpose of assessing the level of mental anguish suffered by her during the events in question and their long-lasting effects on her, as the victim was planning to file a compensation claim, which according to the ZKP, had to be supported by evidence. The court had not made a decision on this motion by the end of 2016.

Witnesses

The victim, protected witness VS1 said that on the relevant day she was with her cousin, protected witness VS2, in the village of Hranča (municipality of Bratunac, BiH). The Serbian army entered the village, drove its residents out into the road, and put them on buses and transported to Repovac. In Repovac, they separated the men from the women and children. According to her account, the defendant shot Huso, the local Muslim imam, along with Nezir and Omer in Repovac, and then slit Huso's throat. She did not know the defendant at the time, but heard other soldiers calling him "Dača". He was young, of medium stature, wearing camouflage fatigues and a headband.

Shortly after the bus, which was to take them from Repovac to Kladanj, pulled in. The witness (protected witness VS1) and witness VS2 were held by "Dača" and another soldier and ordered into a passenger car. The car drove behind the bus. When the bus arrived in Glogova, it stopped to take in a man, and a woman with children. The defendant got out of the car and shot the man whose name was Mujo. He returned to the car and they continued their way.

Somewhere between Milići and Vlasenica, they turned off the main road and entered a forest. They stopped the car and ordered the victim and protected witness VS2 out of the car. While the other soldier took victim VS2 deeper into the forest, "Dača" raped protected witness VS1. After that, they continued driving through the forest until the car got stuck. The soldiers then split apart. The other soldier went away with protected witness VS2, while protected witness VS1 and "Dača" headed to Milići. He told her they were going to his house.

She described the defendant's house as a two-storey structure built of blocks. In the house she saw two men, two boys and the defendant's mother. The defendant took her to a room on the first floor and forbade her to leave it without his permission. That night, he raped her twice. The next morning, he told her to go to a bus stop to wait for a bus to Bratunac.

152 Transcript of the main hearing of 9 September 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/03-09.09.2016.pdf, accessed on 31 January 2017.

When giving her statement to the competent BiH authorities, the victim was presented with a photographic line-up and identified the defendant as the person who raped her.[153]

Witnesses Ramo Salkić,[154] the son of the murdered Huso Salkić, and Nedžib Salkić,[155] the son of the murdered Nezir Salkić, had no direct knowledge about the events in question.

The protected witness VS3,[156] the wife of the murdered Mujo Šaćirović, said that she and her husband and their three children were told by Serbian policemen to set off on foot from their village of Ramići towards the village of Glogova, and that a bus would pick them up down the road. As they walked down the road, a bus came along, followed by a car. The bus stopped and so did the car. A man of medium stature, wearing a patterned uniform and a headband, stepped out of the car and told the victim and her children to get on the bus and her husband to stay there. When her husband tried to get onto the bus, the man killed him. The protected witness VS3 believes that there were two more persons in the car; a man, and a woman she recognised as her neighbour. The woman was the protected witness VS1.

Witness Mensura Brčaninović,[157] the daughter of the murdered Mujo Šaćirović, also described the relevant events. She did not see her father being killed but only heard a burst of automatic gunfire.

Witnesses Zuhra and Zumra Salkić, eyewitnesses to the killing of Huso, Omer, and Nezir Salkić, described how the men were killed. A young soldier of medium stature, wearing a red headband, shot them. As Nezir was still alive, the soldier slit his throat. Zumra Salkić[158] positively identified the defendant in a photograph, while Zuhra Salkić[159] pointed to a photograph showing a person that might be the soldier with a red scarf around his head.

The presentation of evidence continues.

153 Transcript of the main hearing of 9 September 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/03-09.09.2016.pdf, accessed on 31 January 2017.
154 Transcript of the main hearing of 15 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/06-15.12.2016..pdf, accessed on 14 February 2017.
155 Transcript of the main hearing of 2. November 2016 available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/05-02.11.2016..pdf, accessed on 14 February 2017.
156 Transcript of the main hearing of 5. October 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/04-05.10.2016..pdf, accessed on 31 January 2017.
157 Ibid.
158 Transcript of the main hearing of 2 November 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/05-02.11.2016..pdf, accessed on 14 February 2017.
159 Transcript of the main hearing of 15 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/06-15.12.2016..pdf, accessed on 14 February 2017.

HLC Findings

Incomplete indictment delivered to the HLC

Pursuant to the Law on Free Access to Information of Public Importance, the HLC made a request to the OWCP seeking access to the indictment brought against Dalibor Maksimović. The judgment was delivered, but it was incomplete, with the entire statement of reasons section having been removed from it.[160] Bearing in mind that by the time the HLC had requested access to the indictment it had already been confirmed, and that that the trial was to be held in open court. There can be no justification for leaving out the statement of reasons. Previously, the OWCP had always delivered a complete indictment after a request for access to information of public importance.

Violations of the right to defence

The court was required by the ZKP to disclose to the defendant and his defence counsel the identities of the protected witness no later than **15 days prior to the commencement of the trial**.[161] However, at the main hearing the Presiding Judge discovered that the defendant did not know the identities of the protected witnesses. It was only after the main hearing, at which the defendant presented his defence, that the identities of the protected witnesses were disclosed to him and his attorney.[162] Nonetheless, his attorney failed to react to this violation of the ZKP (see *Srebrenica* Case for comparison).

In contrast to the ZKP the Law on Witness Protection of BiH, under which witnesses VS1 and VS3 were initially accorded the status of protected witnesses, prescribes that a witness's identity must be revealed no later than **on the date on which s/he testifies at the trial**.[163] However, as the Republic of Serbia assumed criminal prosecution in this case, the proceedings have been conducted pursuant to domestic law - specifically, the ZKP, which stipulates otherwise.

Compensation claim by a sexual violence victim

In the course of criminal proceedings for war crimes, victims, as injured parties, can file a claim seeking compensation in respect of material or non-pecuniary damages suffered. A compensation claim must be filed before the completion of the trial stage.[164] Yet, in the war crimes proceedings conducted so far, **the court has never decided upon compensation claims** filed in the course of

160 OWCP indictment KTO no. 4/16 of 14 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Optuznica_Bratunac_14.04.2016.pdf, accessed on 10 January 2017.
161 ZKP, Article 106, para. 2.
162 Transcript of the main hearing of 29 June 2016, p. 28 available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/02-29.06.2016..pdf, accessed on 10 January 2017.
163 Law on Protection of Witnesses under Threat and Vulnerable Witnesses, Art. 12, para. 8 (Official Gazette of Bosnia and Hercegovina nos. 3/03, 21/03, 61/04, 55/05).
164 ZKP, Art. 252–260.

criminal proceedings, but rather has instructed the injured parties to claim compensation through civil litigation.[165]

The ZKP requires the OWCP to gather the evidence necessary for adjudicating a compensation claim even before such a claim has been filed,[166] which the OWCP has failed to do in the present case. No piece of evidence that may support any compensation claim was gathered during the investigation, nor did the OWCP propose at the preliminary hearing that such evidence, including expert opinion expressing the type and extent of mental suffering endured by the victim, be presented. Yet, during the main hearing the OWCP moved that the victim be subjected to a medical examination. The court dismissed the motion, stating that it would delay the proceedings.[167]

When deciding on the OWCP's motion, and also every time it refused to adjudicate a compensation claim, the court would justify its decision by **vaguely saying that such an action would "delay the proceedings"**,[168] or by citing the ZKP provisions governing compensation claims without explaining the rationale behind its decisions. However, the relevant article of the ZKP stipulates that a compensation claim will be considered in criminal proceedings "if its consideration would not **substantially** delay those proceedings."[169] It appears that the courts have ignored the "substantial delay" requirement when deciding on whether or not to deal with restitution claims; as a "substantial delay" is a much higher a threshold than just a "delay". Moreover, the concern that a restitution claim may delay proceedings seems utterly unfounded given the fact that war crimes trials in Serbia typically last five years or longer, and that they are nearly always delayed for reasons which are often unjustified (see general finding I).

An unreasoned decision on a compensation claim amounts to a breach of the right to a fair trial. The case-law of the European Court of Human Rights is quite clear regarding this matter: injured parties in criminal proceedings also enjoy the ECHR Article 6 safeguards (right to a fair trial), including the right to obtain a reasoned decision.[170]

Finally, the HLC is of the opinion that the War Crimes Department of the Higher Court should be particularly conscientious when it comes to compensation claims by rape victims and other victims

165 Judgment of the Higher Court in Belgrade in *Sotin*, K.Po2 2$14 of 26.06.2015, p. 8, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 8 February 2017, Judgment of the Higher Court in Belgrade in Podujevo, K.Po2 44/2010 of 22. September 2010, available at http://www.hlc-rdc.org/wp-content/uploads/2012/03/3.-Podujevo-IIprvostepena-presuda-u-ponovljenom-postupku-Djukic-Zeljko-broj-44-2010-nd.pdf, accessed on 8 February 2017, Judgment of the Higher Court in Belgrade predemtu in *Zvornik II* case, K.Po2 28/2010, of 22 November 2010, p. 17, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/ZVORNIK-II-prvostepena-presuda-22.11.2010..pdf, accessed on 8 February 2017.

166 ZKP, Article 256.

167 Transcript of the main hearing of 9 September 2016, p. 3, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/03-09.09.2016.pdf, accessed on 14 February 2017.

168 Ibid.

169 Article 252, paragraph 1, ZKP.

170 See, e.g., ECtHR, *Perez v. France,* application no. 47287/99, paras. 70-71; ECtHR decisions in: *Georgiadis v. Greece*, of 29 May 1997, § 43; *Higgins at al. v. France*, of 19 February 1998, § 43.

under protection measures. Serbian laws do not provide for "transfer" of protection measures from criminal to civil proceedings. As a result, when instructed by criminal courts to pursue compensation through civil proceedings, injured parties **have to make a difficult choice between their personal security and obtaining compensation for the violation of their rights**.

Unlike in Serbia, Bosnia and Hercegovina has recognised the problems encountered by victims of wartime sexual violence when pursuing compensation outside criminal proceedings, and thus has begun affording them compensation during criminal proceedings.[171] Serbia should follow BiH's example

171 First-instance judgment of the Court of Bosnia and Herzegovina S1 1 K 012024 14 Kri in *Ostoja and Bosiljko Marković*, First-instance judgment of the Court of Bosnia and Herzegovina S1 1 K 019771 15 Kri in *Krsto Dostić*; Second-instance judgment of the Court of Bosnia and Herzegovina S1 1 K 017213 14 Krž in *Savić Slavko*.

III. Case Ključ-Šljivari[172]

CASE INFORMATION
Stage of the proceedings: First-instance proceedings
Date of indictment: 5 April 2016
Trial commencement date: 21 October 2016
Prosecutor: Milan Petrović
Defendant: Milanko Dević
Criminal offence charged: war crime against a civilian population

Chamber	Judge Zorana Trajković (presiding) Judge Mirjana Ilić Judge Dejan Terzić

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 2
Number of victims: 1	**Number of witnesses heard in the reporting period:** 8
Number of witnesses heard: 8	

Key developments in the reporting period:

Main hearing

172 *Ključ-Šljivari* Case trial reports and documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/kljuc_sljivari.html accessed on 13 January 2017.

The course of proceedings

Indictment

According to the indictment,[173] Milanko Dević (a member of the VRS at the time) together with Bogdan Šobota and another unidentified VRS soldier, came to the house of Ismet Šljivar in the hamlet of Šljivari (Donja Sanica, the municipality of Ključ, BiH) in the second half of July 1992. The defendant took Šljivar out of his house at gunpoint, took him to the place called "Božin mlin" [Boža's Mill] on River Sanica, where the three men killed him by firing several shots at him and then threw his body into the river.[174]

Defendant's defence

Milanko Dević denied having committed the crime, claiming that he was in Donja Sanica at the relevant time. He also denied having known Ismet Šljivar.[175]

Witnesses

Eight witnesses were heard in 2016. They included the sons of the killed Ismet Šljivar, who did not have direct knowledge of the event, but who both said they had known the defendant, as they all lived in the same area, where everybody knew each other.

The witnesses Safet and Rasema Šljivar[176] saw some soldiers take Šljivar away, but could not tell who the soldiers were. However, the witnesses of Semir Šljivar, Šemsa Šljivar and Abaz Bašić,[177] who also saw Ismet Šljivar being taken away, did recognise the defendant as one of the soldiers who had taken him to the "Božin mlin". They said that next they heard shots from the direction of the mill, after which Ismet Šljivar disappeared.

Witness Siniša Obradović[178] denied having direct knowledge of the event. It should be noted that Obradović, the defendant and Bogdan Šobota, were all three charged with this murder in proceedings conducted by the Court in Bihać.

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173 OWCP Indictment KTO no. 3/16 of 5 April 2016, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/devic_m_medijii.pdf,accessed on 13 January 2017.

174 The Cantonal Court in Bihać transferred this case to the OWCP pursuant to the Law on International Legal Assistance in Criminal Matters, because Milanko Dević is a citizen and resident of the Republic of Serbia.

175 Trial report of 21 October 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Kljuc-Sljivari_-_Izvestaj_sa_sudjenja_21.10.2016..pdf pristupljneo accessed on 13 January 2017.

176 Trial report of 1 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Kljuc-Sljivari_-_Izvestaj_sa_sudjenja_01.12.2016..pdf, accessed on 13 January 2017.

177 Ibid

178 Trial report of 21 October2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Kljuc-Sljivari_-_Izvestaj_sa_sudjenja_21.10.2016..pdf accessed on 13 January 2017.

The presentation of evidence will continue with examination of other witnesses.

HLC Findings

Regional cooperation

This case is another example of a successful cooperation between Serbia and BiH in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. As the defendant, being a citizen and resident of Serbia, was not accessible by the BiH authorities, the Cantonal Court in Bihać transferred the case against him to the Serbian judiciary.

Incomplete indictment delivered to the HLC

Under the Law of Free Access to Information of Public Importance, the HLC requested from the OWCP access to the indictment against Milanko Dević. The OWCP delivered an incomplete version of the indictment.[179] More specifically, the entire passage containing the statement of reasons is missing from it, which renders any analysis of the indictment impossible and makes it difficult for the HLC to follow the proceedings in this case.

179 OWCP Indictment KTO no. 3/16 of 5 April 2016, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/devic_m_medijii.pdf, accessed on 13 January 2017.

IV. Case Doboj[180]

CASE INFORMATION
Stage of the proceedings: first-instance proceedings
Date of indictment: 21 March 2016
Trial commencement date: 14 July 2016
Prosecutor: Milan Petrović
Defendant: Dušan Vuković
Criminal offence charged: war crime against a civilian population

Chamber	Judge Vinka Beraha Nikićević (presiding) Judge Vera Vukotić Judge Vladimir Duruz

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 3
Number of victims: 14	**Number of witnesses heard in the reporting period:** 2
Number of witnesses heard: 2	

Key developments in the reporting period:

Main hearing

180 *Doboj* Case trial reports and documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/doboj.html, pristupljneo accessed on 10 January 2017.

The course of proceedings

Indictment

The indictment[181] alleges that the defendant, Dušan Vuković, in his capacity as a guard at the District Prison in Doboj (BiH), physically abused several detainees in the period from May 1992 to March 1993, and that a detainee died as a result of the abuse. Further, the defendant allowed members of the Army of Republika Srpska and the "Red Berets" to enter prison cells and abuse detainees. A detainee was reportedly taken away from the prison; while he was being taken away, a "Red Berets" member told him to say goodbye to the other detainees, as he would never see them again. This detainee has been missing ever since.[182]

Defendant's defence

The defendant denied having committed the crime with which he is charged. He admitted to having served as a guard at the District Prison in Doboj, but denied having tortured any detainee. He also claimed not having been authorised to let third persons into the prison. He admitted that at a certain period "Red Berets" members did enter the prison, but only by requesting guards at gunpoint to let them do so, after which they would physically abuse detainees. According to the defendant, each visit by the "Red Berets" was recorded and reported to the prison warden and they never came while he was on duty, which can be verified in the prison records. In regards the death of a detainee, the defendants said the police had investigated it and found that the prison guards had nothing to do with it.[183]

Witnesses

Mustafa Kovačević, a civilian who was detained at the District Prison, gave a testimony that supported the charges against the defendant. He said that the defendant, who was nicknamed "Vuk" [The Wolf], struck terror into detainees, as he beat everyone he could get his hands on. He was also the "captain" of a team of guards who beat detainees, comprising certain persons by name of Staniša, Ninković, and Njegoš who came from Montenegro. The witness saw the defendant beat detainee Fadil Ahmić. He heard detainee Marko Kikić being taken out of his cell at night. This detainee subsequently died in the prison.[184]

181 OWCP Indictment KTO no. 2/16 of 21 March 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Optuznica_Doboj.pdf, accessed on 10 January 2017.

182 This case was transferred to the OWCO by the District Court in Doboj (BiH) pursuant to the Law on International Legal Assistance in Criminal Matters, as Dušan Vuković is a citizen and resident of the Republic of Serbia.

183 Trial report of 14 July 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Doboj_-_Izvestaj_sa_sudjenja_14.07.2016.pdf, accessed on 10 January 2017.

184 Trial report of 11 October2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/2._Doboj_-_Izvestaj_sa_sudjenja_11.10.2016..pdf, accessed on 10 January 2017.

The testimony of the witness Suljo Mehić, a pre-war policeman, also incriminated the defendant. This witness shared a cell with another policeman, and clearly recalled the events that occurred on 28 May 1992, when members of the "Red Berets" came to the prison. The defendant unlocked the door to their cell and told the "Red Berets" that two policemen were inside it. Four members of the "Red Berets" in camouflage uniforms then entered the cell and immediately set upon them with their batons.[185]

The presentation of evidence will continue with examination of witnesses.

HLC Findings

Armed conflict qualification

In this indictment, the OWCP qualified the armed conflict in BiH as a non-international conflict, relying on Article 3, common to all Geneva Conventions, applicable "in the case of armed conflict not of an international character". In accordance with its common and highly problematic practice, the OWCP again offered no explanation for choosing such a qualification. It appears that the OWCP chooses a qualification it deems convenient on a case-by-case basis (see, e.g., *Tuzla Convoy*) or chooses the one that best accommodates the political views of the Republic of Serbia. According to which; the war in BiH was a non-international armed conflict, the Republic of Serbia did not participate in the war, and therefore cannot be held accountable for crimes committed in BiH (see, e.g., *Luka Camp*). In the *Doboj* Case, this "accommodation" to state interests is particularly apparent.

In this case, great care should have been exercised in classifying the armed conflict and the classification chosen ought to have been thoroughly explained, because the indictment itself states that **armed forces of a state other than BiH, namely the "Red Berets", a unit of the Serbian State Security Department, operated in Doboj during the period covered by the indictment**.[186]

Selective indictments

The OWCP indictment did not charge any "Red Berets" members with the crimes in Doboj, despite the existence of publicly available evidence implicating them in these crimes. Such evidence is set out in the ICTY Trial Judgment delivered in the Case of *Stanišić and Simatović*, with the description of abuses committed by "Red Berets" in the District Prison in Doboj. The judgment also specifically identified Radojica Božović as one of the commanders of the unit involved in the ill treatment of detainees in Doboj.[187]

185 Trial report of 23 November 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/4._Doboj_-_Izvestaj_sa_sudjenja_23.11.2016.pdf, accessed on 10 January 2017.
186 See, e.g., ICTY Trial Judgment in *Stanišić and Simatović*, para. 1421.
187 ICTY Trial Judgment in *Stanišić and Simatović*, paras. 755-757, 775.

Apart from the events set out in the OWCP indictment, the Trial Chamber of the ICTY found that "Red Berets" members Slobodan Karagić and Davor Subotić on 24 May 1992 took 10 detainees out of the District Prison in Doboj, after which all traces of these 10 men have been lost. Many other crimes committed by the "Red Berets" in the Doboj area were also documented in the ICTY judgment.[188]

In February 2016, the trial of Slobodan Karagić, on the charge of having committed a crime against humanity in Doboj, commenced before the Court of BiH. The charges against Karagić also included the events in the District Prison.[189] While giving evidence in this case, several witnesses said that Karagić, together with "Riki" (Davor Subotić), Branislav "Brana" Ninković and Jorgić, took several Bosniaks out of the District Prison in Doboj on 24 May 1992, following which Subotić and Jorgić took them to a "Red Berets" camp and killed them.[190]

In late 1995, Nikola Jorgić was arrested in Germany and finally sentenced by the Federal Supreme Court in Düsseldorf to life imprisonment for genocide committed against Bosniaks in Doboj.[191] Jorgić died in 2014.[192] In 2016, the District Court in Doboj sentenced Branislav Ninković to 15 months in prison for inflicting bodily harm to several detainees in the District Prison in Doboj during 1992 and 1993.[193]

Not a single "Red Berets" member has ever been prosecuted or tried before a Serbian court for crimes committed during the wars in the former Yugoslavia. It is quite clear that the OWCP is prosecuting this case only because it received a "ready-made" case from the District Court in Doboj under the agreement on regional cooperation. In other cases, even where evidence is readily available, the OWCP is not willing to act, despite being required by law to do so.

In accordance with its legal obligation to undertake criminal prosecution whenever there is a reasonable suspicion that a criminal offence has been committed, the OWCP should, at the very least, amend the indictment to cover all the persons known to have participated in the crimes described in the initial indictment.

188 Ibid, para 777.

189 Justice Report, "Karagić charged with Doboj crimes", available (in Serbian) at http://www.justice-report.com/en/articles/karagic-charged-with-doboj-crimes, accessed on 16 March 2017.

190 Justice Report, "Počelo suđenje Slobodanu Karagiću", [Karagić's trial begins], available (in Serbian) at http://www.justice-report.com/bh/sadr%C5%BEaj-%C4%8Dlanci/po%C4%8Delo-su%C4%91enje-slobodanu-karagi%C4%87u accessed on 16 March 2017.

191 "U njemačkom zatvoru umro Jorga, prvi srpski zločinac osuđen za genocid nad Bošnjacima" [Jorga, the first Serbian criminal convicted of genocide against Bosniaks, dies in German jail], available (in Serbian) at http://bosnjaci.net/prilog.php?pid=52584 accessed on 16 March 2017.

192 "VASILIJE ŠAINOVIĆ: Najnovija vijest iz grada Doboja!" [VASILIJE ŠAINOVIĆ: latest news from Doboj], available (in Serbian) at http://dobojski.info/drustvo-i-politika/pisma-i-reagovanja/item/4169-vasilije-sainovic-najnovija-vijest-iz-grada-doboja, accessed on 16 March 2017.

193 Justice Report, "Smanjena kazna Branislavu Ninkoviću" [Ninković's sentence reduced], available (in Serbian) at http://www.justice-report.com/bh/sadr%C5%BEaj-%C4%8Dlanci/smanjena-kazna-branislavu-ninkovi%C4%87u accessed on 16 March 2017.

Incomplete indictment delivered to the HLC

The HLC made a request to the OWCP under the Law on Free Access to Information of Public Importance, seeking access to the indictment brought against Dušan Vuković. The judgment that the OWCP delivered was incomplete.[194] More specifically, the entire passage containing the statement of reasons was removed, which renders any analysis of the indictment impossible and makes it difficult for the HLC to follow the proceedings in this case. Given that the indictment had already been confirmed by the time the HLC requested access to it, and that the case is being heard in open court, there can be no justification for such behaviour by the OWCP.

194 OWCP Indictment KTO no. 2/16 of 21 March 2016, available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2016_03_21_eng.pdf, accessed on 10 January 2017.

V. Case Srebrenica[195]

CASE INFORMATION
Stage of the proceedings: first-instance proceedings
Date of indictment: 21 January 2016
Trial commencement date: 12 December 2016
Prosecutors: Mioljub Vitorović, Bruno Vekarić
Defendants: Nedeljko Milidragović, Milivoje Batinica, Aleksandar Dečević, Boro Miletić, Jovan Petrović, Dragomir Parović, Aleksa Golijanin and Vidosav Vasić
Criminal offence charged: war crime against the civilian population

Chamber	Judge Mirjana Ilić (presiding) Judge Zorana Trajković Judge Dejan Terzić

Number of defendants: 8	
Defendants' rank: low	**Number of trial days in the reporting period:** 0
Number of victims: 1313	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 0	

Key developments in the reporting period:

Main hearing

195 *Srebrenica–Kravica* trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/srebrenica.html, accessed on 30 December 2016.

The course of proceedings

Indictment

The defendants, at the time members of the Jahorina Training Centre of the Special Police Brigade of the MUP of the Republika Srpska, are accused of having killed at least 1,313 Bosniak civilians inside and in the immediate vicinity of a farm warehouse in the village of Kravica (in the municipality of Bratunac, BiH) on 14 July 1995.[196]

The accused are: Nedeljko Milidragović (commander of the 1st Unit's 2nd Platoon); Milivoje Batinica, Aleksandar Dečević, Boro Miletić, Jovan Petrović and Dragomir Parović (members of the 2nd Platoon); and Aleksa Golijanin and Vidosav Vasić (members of the 1st Unit's 1st Platoon).

In the early morning of 14 July 1995, Nedeljko Milidragović ordered Golijanin, Batinica, Dečević, Miletić, Parović and Vasić, as well as other member of his unit, to kill about one hundred civilians who were held captive in the warehouse in Kravica. Following the order, they formed a firing squad, took the civilians out of the warehouse, and made them sing Chetnik songs, after which they and Milidragović killed them with machine guns. Milidragović, Batinica, Petrović and Golijanin using single shots, then killed those who were still alive.

On the same day, as the civilians were transported by buses and trucks to the warehouse in Kravica, Milidragović on multiple instances ordered Golijanin, Batinica, Dačević, Miletić, Petrović and Parović to kill them, whilst he himself also took part in the killings.

As a result, at least 1,313 civilians were killed. Their identities have been established after their mortal remains were found at the following mass-grave sites in BiH: Glogova, Ravnice, Hangar Kravica, Blječeva, Zeleni Jadar, Zalazje and Pusmulići.

Trial

The trial that was supposed to start on two consecutive days in December 2016 was adjourned. Before the opening of the trial, the defence lawyers argued that conditions had not been met for the trial to begin, because the court had not revealed the names of the protected witnesses to the defendants and their lawyers. Without knowing the identity of the witnesses against them, they claimed, the defendants could not properly present their defence. The defence first requested that the hearing be postponed, but the chamber denied the request, after which the defence lawyers moved that the entire chamber be recused. This automatically interrupted the trial, and the motion was referred to the Court

196 OWCP Indictment KTO no. 2/15 of 21 January 2016, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/kto_2_15_dopuna_kravica_engl.pdf, accessed on 30 December 2016.

President for a ruling.[197] The Court President denied the motion. But the trial did not begin, this time because the Presiding Judge said that the chamber had not been given the identity of the protected witnesses either, and called for the Prosecutor to supply the chamber with this information.[198]

The main hearing was postponed until February 2017.

HLC Findings

Irresponsible conduct of the court

The chamber hearing this case deserves serious criticism for being ill prepared for the beginning of the trial. By failing to reveal to the defendants and their lawyers the identity of protected witnesses, which is something it ought to have done no later than 15 days before the commencement of the trial, as stipulated by the relevant provision of the ZKP,[199] the chamber violated the defendants' right to defence.

The Presiding Judge initially denied that the defendants' right to defence had been violated, saying, "we cannot interpret this provision so restrictively […] because it does not say 15 days before the opening of the main hearing […] and therefore, if it is properly interpreted, the defendants' right to defence has not been violated if 15 days before the main hearing at which the said evidence is presented they have been informed thereof."[200]

Such an interpretation of an explicit and unambiguous legal provision is unfounded, because the Law precisely stipulates that the identity of a protected witness "shall be revealed by the court to the defendant and his defence counsel no later than 15 days before the commencement of the trial".

Not even after the motion for recusal had been denied did the Presiding Judge open the main hearing, although there were no formal obstacles to it. Instead, she said that the court did not know the identity of the protected witnesses because the OWCP had not delivered this information to it, and called for the OWCP to do so, and set a deadline within which the OWCP was to reveal this information to the defendants and their lawyers.[201] In doing so, the court indirectly admitted that it had made a mistake by not revealing their identity to the defendants and their lawyers before the main hearing.

197 Transcript of the main hearing of 12 December 2017, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/03-12.12.2016..pdf, accessed on 18 January 2017.
198 Transcript of the main hearing of 13 December 2017, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/04-13.12.2016..pdf, accessed on 18 January 2017.
199 ZKP, Article 106, paragraph 3.
200 Transcript of the main hearing of 12 December 2017, p. 5, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/03-12.12.2016..pdf, accessed on 18. January 2017.
201 Transcript of the main hearing of 13 December 2017, p. 5, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/04-13.12.2016..pdf, accessed on 18 January 2017.

Such conduct of the court was unprofessional and irresponsible, especially bearing in mind that this is one of the biggest and most important trials ever dealt with by the War Crimes Department, and one long-awaited. The HLC draws particular attention to the fact that the Protocol on Cooperation signed between the OWCO and the Prosecutor's Office of BiH stipulates that evidence and information pertaining to a case may be transferred to the prosecutors' office of the other party only with the consent of the victims concerned. In the present case, the victims gave their consent, showing their faith in the Serbian judiciary. Therefore, it is not surprising that they reacted to the way the court handled this case by saying that Serbia actually does not want to convict war criminals[202], and that its legal system does not work.

Selection of charges

Despite the Srebrenica crime being classified by international and regional courts as genocide,[203] or a crime against humanity,[204] the OWCP instead charged the accused with committing a war crime. The OWCP did the same thing in an earlier case, which also concerned killings that took place as part of the Srebrenica genocide – the *Scorpions* Case.[205]

The legal community justifies the OWCP decision not to bring charges of genocide by saying that the existence of the requisite "specific intent" in a genocide case is extremely hard to prove. In the present case, the prosecutor would have to prove that the accused killed the captured men of Bosniak ethnicity with the specific intent to destroy, in whole or in part, Bosniaks as an ethnic group. However, the HLC is of the opinion that instead of charging the defendants with a war crime, an offence that does include the main elements present in the acts of the accused – their systematic character and their massive scale – other legal strategies could have been used. More specifically, the OWCP could have charged them with genocide, but under accessory liability, as this mode of liability does not require the specific intent to destroy a group, in whole or part, to be proven, but only a contribution to the commission of the crime, and an awareness that the key perpetrators and planners of the crime possessed the specific intent to destroy a group.[206] In a very similar case heard by the Court of BiH, which also involved low-ranking members of the Republika Srpska Special Police and the killing of Bosniak men in the warehouse in Kravice, the defendants were convicted of genocide as accessories.[207]

202 Daily newspaper *Blic*, 12 December 2016, "Majke Srebrenice: Srbija ne želi da procesuira ratne zločince" [Mothers of Srebrenica: Serbia does not want to prosecute war criminals], available (in Serbian) at http://www.blic.rs/vesti/drustvo/majke-srebrenice-srbija-ne-zeli-da-procesuira-odgovorne-za-ratne-zlocine/4xvmxx6, accessed on 23 January 2017.

203 See, e.g., Judgment of the Court of BiH in *Jakovljević Slobodan et al. (Kravica)*, S1 1 K 014263 13 Krž (X-KRŽ-05/24); ICTY Judgments in *Zdravko Tolimir* (IT-05-88/2) and *Radisav Krstić* (IT-98-33).

204 See, e.g., ICTY Judgment in *Dragan Obrenović* (IT-02-60/2).

205 See OWCP Indictment in *Scorpions*, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2005_10_07_eng.pdf, accessed on 16 March 2017.

206 See, e.g., ICTY Appeal Judgment in Krnojelac, para. 70; ICTY Appeal Judgment in *Vasiljević*, para. 142; ICTY Appeal Judgment in *Tadić*, para. 229; second-instance judgment of the Court of BiH in *Jakovljević Slobodan et al. (Kravica)*, S1 1 K 014263 13 Krž (X-KRŽ-05/24), of 9 September 2009, para. 571.

207 See the second-instance judgment of the Court of BiH in *Jakovljević Slobodan et al. (Kravica)*, S1 1 K 014263 13 Krž (X-KRŽ-05/24) of 29 April 2014, available at http://www.sudbih.gov.ba/Case/2429/show

Alternatively, the OWCP could have qualified the acts as a crime against humanity, which incorporates the key characteristics of the acts of the accused - their being a part of a systematic, widespread attack against the civilian population. The OWCP has never charged anyone with a crime against humanity. The usual argument advanced by the legal community in support of this unjustified practice is that charging crimes against humanity would breach the prohibition of the retroactive application of laws, as this offence was introduced into Serbia's national law only in January 2006, when the Criminal Code of the Republic of Serbia of 2005[208] came into effect. The above argument is not tenable for several reasons. First, the Constitution of Serbia provides that international law is applied directly to the Serbian legal system,[209] and crimes against humanity are established in international law and have been prosecuted ever since the Nuremberg trials.[210] Second, the European Convention for the Protection of Human Rights and Fundamental Freedoms allows for an exception to the principle of non-retroactivity,[211] where if an act "at the time when it was committed, was criminal according to the general principles of law recognised by civilised nations."[212] The International Covenant on Civil and Political Rights also stipulates such an exception.[213] Relying on the above-cited ECHR article, the European Court solved this OWCP "dilemma" five years ago in the Case of *Šimšić v. BiH.* In this case, this court ruled that BiH had not violated the principle of non-retroactivity by convicting Šimšić of a crime against humanity, although this crime, just like in Serbia, was not criminalized by the BiH's national law at the time it was committed.[214]

Since the OWCP's decision to categorise the acts committed by the defendants in this case as a war crime has not been determined by domestic or international law or by the relevant case-law, it is safe to say that the OWCP treats the Srebrenica crime the same way the Serbian political leadership treats it – from the position that there was no genocide in Srebrenica[215] and that the crimes were not carried out in a systematic manner. [216]

208 Criminal Code of the Republic of Serbia, Article 371. (Official Gazette of the RS nos. 85/2005, 88/2005, - corr., 107/2005, 72/2009, 111/2009, 121/2012, 104/2013, 108/2014, 94/16).

209 Constitution of the Republic of Serbia, Article 16, Official Gazette of the RS no. 98/2006.

210 See, e.g., ECtHR Judgment in *Šimišić v. BiH,* para. 23, p. 2-6.

211 The *nullum crimen nulla poena sine lege* ("no crime without law") principle lays down that a person cannot be found guilty of or punished for an act if that act was not criminalised, by a law or other regulation based on law, at the time it was committed.

212 European Convention for the Protection of Human Rights and Fundamental Freedoms, Article 7.

213 International Covenant on Civil and Political Rights, Article 15.

214 Judgment of the European Court of Human Rights in *Boban Šimšić v. Bosnia and Hercegovina*, available (in Serbian) at http://www.mhrr.gov.ba/ured_zastupnika/novosti/default.aspx?id=2920&langTag=bs-BA, accessed on 19 January 2017.

215 Declaration of the National Assembly of the Republic of Serbia condemning the Srebrenica crime, 31 mart 2010, available (in Serbian) at http://www.slobodnaevropa.org/a/Skupstina_Srbije_Deklaracij_Srebrenica/1998622.html accessed on 16 March 2017.

216 See, e.g., RTS, "Nikolić se izvinio zbog Srebrenice"[Nikolić apologises for Srebrenica], 25 April 2013, available (in Serbian) at http://www.rts.rs/page/stories/sr/story/9/politika/1312408/nikolic-se-izvinio-zbog-srebrenice.html accessed on 16 March 2017.

Selective indictment

As is its wont, the OWCP again indicted only low-ranking individuals. Namely, the first and the highest-ranking defendant in this case was a platoon commander at the time of the crimes. As early as 2010, the HLC filed a criminal complaint with the OWCP against several high-ranking members of the VRS over the Srebrenica genocide. These people live in Serbia, move freely in public places and even appear on television shows,[217] and are therefore available to the state authorities.[218] The subjects of the complaint included, among other people: Petar Slapura, formerly a VRS Colonel and the Head of the Intelligence Administration of the VRS Main Staff; Milorad Pelemiš, Commander of the 10th Sabotage Unit of the VRS Main Staff, for whom an international wanted notice has been issued; and Dragomir Pećanac, a VRS Major and Deputy Commander of the Military Police of the Bratunac Light Brigade which belonged to the VRS Drina Corps. So far, none of these individuals have been indicted.

Regional cooperation

The Prosecutor's Office of BiH had previously issued a genocide indictment against Milidragović and Golijanin. The Court of BiH confirmed the indictment in July 2012. However, the two men could not be arrested and tried in BiH, because they had been living in Serbia since the end of the war in Bosnia in 1995. On the basis of the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, signed between the OWCP and the Prosecutor's Office of BiH in 2013, the two prosecutor's offices exchanged information and evidence on this case. It was as a result of this cooperation that the Serbian judiciary launched the prosecution into the Srebrenica crimes.

217 See, e.g., Milorad Pelemiš's interview for the "Goli život" talk-show in 2014, available (in Serbian) at https://www.youtube.com/watch?v=BPQUlH78yhI

218 HLC press release, "Criminal complaint against persons suspected of having committed a criminal act of genocide in Srebrenica", 16 August 2010, available at http://www.hlc-rdc.org/?p=13072&lang=de.

VI. Case Bosanski Petrovac – Gaj[219]

CASE INFORMATION
Stage of the proceedings: first-instance proceedings
Date of indictment: 10 October 2014
Trial commencement date: 15 June 2015
Prosecutor: Snežana Stanojković
Defendant: Milan Dragišić
Criminal offence charged: war crime against the civilian population

Chamber	Judge Vladimir Duruz (presiding) Judge Vera Vukotić Judge Vinka Beraha Nikićević

Number of defendants: 1	
Defendant's rank: low – no rank	**Number of trial days in the reporting period:** 6
Number of victims: 5	**Number of witnesses heard in the reporting period:** 11
Number of witnesses heard: 19	

Key developments in the reporting period:

Main hearing underway

219 *Bosanski Petrovac – Gaj* case trial reports and documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac_gaj.html,

The course of proceedings

Overview of proceedings up to 2106

Indictment

The defendant, Milan Dragišić, a member of the VRS, is charged with killing three and having wounded two Bosniak civilians on 20 September 1992 in the Bosanski Petrovac Gaj settlement. After the body of his brother Dragan Dragišić, who died on the battlefield, had been brought back, he armed himself with an automatic rifle and went out into the street shouting obscenities about their "Turkish and Muslim mothers" at his Bosniak neighbours who were in the street. He shot several of them.[220]

Defendant's defence

When taking the stand in his own defence, the defendant said he did not feel guilty. He said that while the body of his brother was being brought in, he took a loaded automatic rifle from the trunk of the car. Then he heard a burst of fire, but he could not remember what happened. He was "out of his mind" and "everything had turned black" before his eyes, from the moment he discovered that the body of his deceased brother had been completely massacred. Therefore, he does not know if he killed his neighbours.[221]

Witnesses

Muhamed Kavaz gave evidence about how the defendant wounded him and killed his father Asim, after the Kavazes, who lived next door to the defendant, having heard crying and wailing from the defendant's house, went out to see what was going on.[222] Witness Branko Srdić, an eyewitness to the incident, confirmed that the defendant killed Asim.[223]

Witnesses Mirko Velaga and Edin Bašić were not eyewitnesses to the event, but their indirect knowledge corroborated the account of the injured party Muhamed Kavaz about the murder of his father, and that the defendant, after killing Asim Kavaz, was moving around Gaj shooting at Bosniak civilians.[224]

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220 OWCP Indictment KTO no. 7/14 of 10 October2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_Milan_Dragisic_10_10_2014.pdf, accessed on 4 January 2017.

221 Trial report of 15 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Izvestaj_sa_sudjenja_u_Caseu_Bosanski_Petrovac_Gaj_15_06_2015.pdf, accessed on 4 January 2017.

222 Trial report of 14 July 2015 available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_14.07.2015.pdf, accessed on 4 January 2017.

223 Trial report of 18 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_18.11.2015.pdf, accessed on 4 January 2017.

224 Trial report of 8 October 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_08.10.2015.pdf, accessed on 4 January 2017.

Overview of proceedings, year 2016

Most of the witnesses had no direct knowledge of the relevant event, but only heard from village residents that the defendant, after the body of his killed brother had been brought, embarked on a shooting spree in Bosanski Petrovac, killing three local Bosniak residents, and wounding two. Witness Milorad Radošević, who was present when the bodies of killed VRS fighters were brought to Bosanski Petrovac, said that among the people who gathered there he saw the defendant, wailing and crying over the death of his brother. His friends and relatives were holding him, and eventually put him into a car with great difficulty. Witnesses Željko Kuburić and Duško Karanović, who went over to the Dragišić house to offer them their condolences, said that the defendant seemed lost and abstracted and not aware at all of the witnesses' presence.[225]

The presentation of evidence continues with examination of the remaining witness.

HLC Findings

Regional cooperation

This case is another good example of successful cooperation between Serbia and Bosnia and Herzegovina in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of BiH signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. As the defendant, being a citizen and resident of the Republic of Serbia was not available for the BiH authorities; the Prosecutor's Office of BiH referred this case to the OWCP.

Armed conflict qualification

In this indictment, the OWCP classified the armed conflict in BiH as a "non-international armed conflict", without explaining the reasons behind its decision. Instead, the indictment stated only that at the time of the crime a decision of the Presidency of Bosnia and Herzegovina declaring a state of war was in force, and that the defendant violated the provisions of the Fourth Geneva Convention relative to the Protection of Civilian Persons in Time of War and the provisions of the Protocol (II) additional to this Convention.

225 Trial report of 15 September 2016 available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/09/Bosanski_Petrovac__-_Gaj_-_Izvestaj_sa_sudjenja__15.09.2016..pdf, accessed on 4 January 2017.

VII. Case Trnje[226]

CASE INFORMATION
Stage of the proceedings: first instance proceedings
Date of indictment: 4 November 2013
Trial commencement date: 24 February 2015
Prosecutor: Mioljub Vitorović
Defendants: Pavle Gavrilović and Rajko Kozlina
Criminal offence charged: war crime against a civilian population

Chamber	Judge Mirjana Ilić (presiding) Judge Dejan Terzić Judge Zorana Trajković

Number of defendants: 2	
Defendants' rank: low and middle	**Number of trial days in the reporting period:** 6
Number of victims: 27	**Number of witnesses heard in the reporting period:** 10
Number of witnesses heard: 7	**Number of expert witnesses heard:** 2

Key developments in the reporting period:

Main hearing.

226 *Trnje* case trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/trnje.html.

Course of the proceedings

Overview of proceedings up to 2016

Indictment

The defendants are charged with having participated, as members of the 549th VJ Motorised Brigade, in killing at least 27 Albanian civilians, including 12 women and four children[227], in the village of Trnje/Terrnje (in the municipality of Suva Reka/Suharekë, Kosovo), on 25 March 1999. Gavrilovic, in his capacity as the Commander of the Logistics Battalion of the 549th MtBr, immediately before the attack on the village assembled his subordinate officers, including the defendant Kozlina, and gave them an order that "no one should be left alive", pointing his hand in the direction of the village. The indictment further alleges that Kozlina, a sergeant and commander of a combat group at the time, acting pursuant to the Gavrilovic's order, killed Voci Maliqi by firing a shot from his automatic rifle into his back, following which he turned to the others saying, "This is how it should be done". Kozlina is charged with killing another 16 civilians.

Defendants' defence

Both defendants denied committing the crime they are charged with. Gavrilović stated that his battalion had participated in a task of a larger scale, which included "blocking the territory in the area of the village of Trnje", but it had never entered the village, nor had he issued the order referred to in the indictment. Kozlina said exactly the same thing when presenting his defence.[228]

Witnesses

18 witnesses, including seven injured party witnesses, and two medical experts, were heard during the evidence-presentation process. The injured party witnesses recounted the attack on their village and the killings of their family members and other village residents.[229] They all said that the army entered their village, but were not able to recognise the defendants as the persons who had been in Trnje on

227 OWCP indictment KTO no. 7/2013 of 4 November 2013, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2013_11_04_eng.pdf, accessed on 15 February 2017.

228 Trial transcript of 24 February 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/03/07-24.02.2015..pdf, accessed on 15 February 2017.

229 Transcript of the main hearing of 27 October 2015, p. 6, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdf, accessed on 15 February 2017; Transcript of the main hearing of 28 October 2015, p. 20, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/14-28.10.2015.pdf, accessed on 2 December 2015.

the relevant day.[230] Several witnesses stated that police forces had also been present in the village on the day of the attack, and that some policemen had participated in killing the civilians. Even though several witnesses identified one policeman who had participated in the crime, he was not included in the indictment.[231]

Overview of proceedings, year 2016

None of the former members of the 549th VJ Motorised Brigade who gave evidence about the role of the defendants in the attack on Trnje implicated Pavle Gavrilović in the crime. However, several of these witnesses accused Rajko Kozlina of killing the civilians. Thus witness Dejan Milošević said that Kozlina took a 70-year-old man out a house and killed him in the yard by shooting him in the head, and that several Albanian civilians were in the yard at the time. As he was leaving the yard, the witness heard a burst of automatic gunfire. When he turned around, he saw all the civilians on the ground and Kozlina with his rifle pointed in their direction. This witness further said that they had found a group of 25-30 civilians sitting by the river, and that the defendant Kozlina ordered the women from the group to get up and run. When the men tried to do the same, they were shot. The order to shoot the civilians was issued by the defendant Kozlina, according to this witness.[232] The witnesses Ervin Markišić[233] and Bojan Gajić,[234], also former members of the 549th VJ Motorised Brigade, corroborated Milošević's account of the killing of the old man and other civilians in the yard.

As the defendants repeatedly failed to attend the main hearing, citing their poor health as an excuse for non-attendance, the court sought a medical opinion regarding their fitness to stand trial. A court-appointed psychiatric expert, Dr Branko Mandić,[235] found that both defendants were fit to stand trial and that their cognitive abilities were not impaired by the hypertension they both suffered from. The other expert witness, Dr Vladan Marković,[236] an internal medicine specialist, confirmed that they were fit to stand trial. Both expert witnesses based their findings solely on the medical documentation obtained from two military hospitals – the Military Medical Academy (VMA) in Belgrade and the Military Hospital in Niš. When asked by the Presiding Judge whether such frequent hospitalizations

230 Transcript of the main hearing of 27 October 2015, p. 6, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdf accessed on 15 February 2017; Transcript of the main hearing of 28 October 2015, p. 20, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/14-28.10.2015.pdf, accessed on 15 February 2017.

231 Transcript of the main hearing of 27 October 2015, p. 6, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdf, accessed on 15 February 2017.

232 Transcript of the main hearing of 7 June 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/22-07.06.2016..pdf, accessed on 15 February 2017.

233 Ibid.

234 Transcript of the main hearing of 6 June 2016, pp. 50-120, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/21-06.06.2016..pdf, accessed on 15. February 2016.

235 Transcript of the main hearing of 20 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/19-20.05.2016..pdf, accessed on 15 February 2017.

236 Ibid.

of the defendants were indeed necessary, the experts said that they were justified, "**judging by this documentation** [documentation of the military medical institutions]**.**"[237]

The trial will be continued with hearing of the witnesses for the defence.

HLC Findings

Inactivity of the OWCP

The defendants were charged over the crime in Trnje only in late 2013, 11 years after the information on their involvement in the crime had become available to the public. In 2002, at the trial of Slobodan Milošević before the ICTY, protected witnesses K-41[238] and K-32[239] gave evidence which pointed to the defendants' responsibility for the crime in Trnje. Besides, eight years ago (in 2008), the HLC filed a criminal complaint concerning the crime in Trnje.[240]

The prosecution's case was poorly prepared

Over the course of the proceedings it became evident that the indictment was seriously flawed in several respects. First, it did not include all the victims of the crime charged in it, while listing a living person as a victim. Also, although several witnesses stated that some policemen had also participated in the crime, these were not charged in the indictment. The Presiding Judge severely criticized the OWCP for these failures, requiring it to amend the indictment and submit the evidence supporting the charges. [241] However, at the time of writing, the OWCP had not yet done so. The Presiding Judge also criticized the Pre-trial Chamber for confirming such a flawed indictment.

237 Ibid, p. 6.

238 Transcript of the testimony of protected witness K-41, available at http://www.hlc-rdc.org/Transkripti/Milosevic/Transkripti/Transkripti%20sa%20sudjenja%20Slobodanu%20Milosevicu%20%2811%29/Transkript%20sa%20sudjenja%, accessed on 15 February 2017.

239 Transcript of the testimony of protected witness K-32, available at http://www.hlc-rdc.org/Transkripti/Milosevic/Transkripti/Transkripti%20sa%20sudjenja%20Slobodanu%20Milosevicu%20%289%29/Transkript%20sa%20sudjenja%2, accessed on 15 February 2017.

240 HLC press release on filing the criminal complaint in May 2008, available at http://www.hlc-rdc.org/?p=12923&lang=de, accessed on 2 December 2016.

241 Transcript of the main hearing of 28 October 2015, pp. 75-78, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/14-28.10.2015.pdf, accessed on 15 February 2017.

Inefficient trial

In the three years since the beginning of the trial, only eight trials days have actually been held,[242] with **seven trial days** and several preliminary hearings having been postponed,[243] usually on account of the supposed ill health of the defendants. To justify their absences, the defendants have regularly produced medical certificates confirming their inability to attend the trial, which were all issued by military medical institutions. The defendants were, without fail, hospitalised a day before or on the very day of the main hearing.[244] This led the Presiding Judge to make the following observation: "It happens very often that he [Pavle Gavrilović] is admitted to a hospital, spends two or three days there before the hearing, and then his treatment ends right after the hearing has been postponed."[245] Because Rajko Kozlina was "obviously avoiding attendance at the trial," the OWCP moved in April 2016 that the Court place him in detention.[246] Namely, according to the ZKP, detention may be ordered against a defendant if he is "clearly avoiding attendance at the trial."[247] At the same hearing at which the OWCP made this motion, the Court dismissed it as premature.[248]

Because of their repeated absences from hearings, the Presiding Judge sought a medical opinion about their state of health. However, instead of examining the defendants themselves, the medical experts **based their findings solely on the documentation of the very same military medical institutions that regularly issued medical certificates to both defendants**. As a result, their finding was that "judging by this documentation", the hospitalisations of the defendants were justified.[249]

Defendants' status in the Army of Serbia

At the time of the indictment, both defendants were serving active-duty members of the VS, and they are almost certainly still employed by the VS, despite the fact that they are standing trial for a war crime against civilians.

The HLC urged the Chief of the VS General Staff, Ljubiša Diković, to suspend Gavrilović and Kozlina from military service during the course of the proceedings, under the Law on the Serbian Armed Forces. This Law stipulates that a member of professional military personnel may be removed from

242 Hearings held on 24 February and 27 and 28 October 2015, and 18 January, 20 May, 6 and 7 June and 11 October 2016.

243 Transcript of the main hearing of 20 May 2016, p. 11, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/19-20.05.2016..pdf, accessed on 15 February 2017.

244 HLC press release "Trial for the crime in Trnje – Justice delayed is justice denied ", 5 October 2015, available at http://www.hlc-rdc.org/?p=30330&lang=de.

245 Transcript of the main hearing of 25 February 2016, p. 4, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/03/17-25.02.2016..pdf, accessed on 15 February 2017.

246 Transcript of the main hearing of 19 April 2016, p. 3, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/18-19.04.2016.pdf, accessed on 15 February 2017.

247 ZKP, Article 211, paragraph 1, sub-paragraph 1.

248 Ibid, p. 4.

249 Transcript of the main hearing of 20 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/06/19-20.05.2016..pdf, accessed on 15 February 2017.

duty if he has been charged with an offence "of such a nature that it would be harmful to the interests of the service that such an individual should remain on duty."[250] The HLC has not yet received any reply to its request.

The HLC therefore requested the Ministry of Defence, under the Law on Free Access to Information of Public Interest, to provide it with information as to whether or not Kozlina and Gavrilović were still serving members of the VS. The Ministry denied the request on the grounds that the information sought was classified as being personal information and information "relevant for the defence of the state."

After examining the complaint filed by the HLC against the above decision, the Commissioner for Information of Public Importance dismissed the arguments advanced by the Ministry and ordered it to provide the HLC with the information requested. After the Ministry failed to comply with this decision, the Commissioner issued two more decisions between April and June 2016 concerning this matter, imposing several fines on the Ministry, which totalled RSD 200,000. As the MoD failed to give effect to the Commissioner's decisions even after the fines, on 18 June 2016 the Commissioner turned to the Government of the Republic of Serbia, requesting it to force the MoD to comply with his decisions. At the time of this writing, the Government had not taken any action with regard to the Commissioner's request.[251]

Allowing war crimes indictees to remain in military service for the duration of proceedings sends out all the wrong signals to the institutions responsible for prosecuting war crimes, and devalues the judicial proceedings which, among other things, are expected to restore the public's trust in Serbian state institutions. Providing a kind of state shelter to war crimes indictees breeds mistrust among the victims belonging to other ethnic communities, and discourages them from taking part in the proceedings conducted by the Higher Court in Belgrade.

250 The Law on the Army of Serbia, Official Gazette of the Republic of Serbia no. 116/2007, 88/2007, 101/2010 - dr. Law 10/2015 and 88/2015 - decision of the Constitutional Court, Article 77.

251 HLC press release: "Ministry of Defence withholding information on active-duty members of Army of Serbia indicted of war crimes", 1 August 2016, available at http://www.hlc-rdc.org/?p=32497&lang=de, accessed on 15 February 2017.

VIII. Case Ćuška[252]

CASE INFORMATION
Stage of the proceedings: first-instance proceedings (retrial)
Date of indictment: 10 September 2010
Trial commencement date: 20 December 2010
Prosecutor: Dragoljub Stanković
Defendants: Toplica Miladinović, Milojko Nikolić, Dejan Bulatović, Abdulah Sokić, Srećko Popović, Siniša Mišić, Slaviša Kastratović, Boban Bogićević, Veljko Korićanin, Vladan Krstović, Lazar Pavlović and Milan Ivanović
Criminal offence charged: war crime against a civilian population

Chamber	Judge Vladimir Duruz (presiding) Judge Vinka Beraha Nikićević Judge Vera Vukotić

Number of defendants: 11	
Defendants' rank: low and middle	**Number of trial days in the reporting period:** 5
Number of victims: 141	**Number of witnesses heard in the reporting period:** 11
Number of witnesses heard: 116	

Key developments in the reporting period:

Main hearing in the retrial

252 *Ćuška* Case trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/cuska.html

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

The defendants, members of the VJ 177th Military Territorial Detachment (177th VTO), are charged with displacing and killing Albanian civilians in the villages of Ljubenić/Lubeniq, Ćuška/Qyshk, Pavljane/Pavlan and Zahać/Zahaq (in the municipality of Peć/Pejë, Kosovo). During April and May 1999, they killed at least 121 civilians, robbed and then expelled to Albania hundreds of other civilians, and burned down several dozen houses in the villages mentioned. [253]

First-instance judgment

On 11 February 2014, the War Crimes Department of the Higher Court in Belgrade[254] handed down a judgment, finding the defendants guilty of a war crime against the civilian population and sentencing them to imprisonment for periods ranging from two to 20 years. Two of the defendants – Radoslav Brnović and Veljko Korićanin – were acquitted because of lack of evidence.[255]

Defendant Toplica Miladinović, the Commander of the 177th VTO based in Peć, was found guilty of ordering Nebojša Minić (now deceased), the Commander of the Quick Reaction Platoon of the 177th VTO in Peć, to carry out an attack against Albanian civilians and relocate them, despite knowing that unit members would kill the civilians and destroy and loot their property, which they did. He had direct knowledge of all these events as he was at the entrance of the village of Ljubenić at the time of the attack on this village, and maintained constant radio contact with Nebojša Minić during the attacks on the villages of Ćuška, Pavljane and Zahać. Under the command of Nebojša Minić, the defendants killed at least 42 civilians and seriously wounded another 11 civilians in Ljubenić on 1 April 1999; killed at least 41 civilians in the village of Ćuška on 14 May 1999; killed 10 civilians in the village of Pavljane on 14 May 1999, and burned their bodies and houses. During this attack, the 13-year-old G.N. was raped. The chamber also established that 20 civilians were killed during

253 OWCP indictment KTRZ no. 4/10 of 10 September 2010, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents_en/2016-05/o_2010_09_10_eng.pdf, accessed on 10 February 2017. The first indictment which charged the defendants with a war crime against a civilian population, was brought on 10 September 2010. Over the course of the trial, the OWCP amended this indictment several times, dropped the charges against some of the accused, brought charges against persons who were not included in the initial indictment and added new charges against the defendants. For more details about the amendments, see: Humanitarian Law Center "Report on War Crimes Trials in Serbia in 2012" (Belgrade: HLC, 2013), pp. 15, 16 and 17.

254 Chamber composed of Judge Snežana Nikolić Garotić (presiding) and Judges Vinka Beraha Nikićević and Rastko Popović.

255 Judgment of the Higher Court in Belgrade no. K Po2 48/2012 of 11 February 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/06/prvostepena_presuda_Cuska.pdf, accessed on 10 February 2017.

the attack on the village of Zahać on 14 May 1999. The attacks were accompanied by large-scale destruction and looting of property.

Second-instance judgment

On 26 February 2015, the Court of Appeal upheld the appeals of all the defendants, quashed the first-instance judgment and remanded the case to the First Instance Court for retrial. The Court of Appeal found the first-instance judgment to be in breach of statutory procedural requirements, as its "operative provision is incoherent and self-contradictory", not containing sufficient reasons in relation to the decisive facts, with the reasons provided being vague and rather contradictory. The court also found that the First Instance Court had made an incomplete finding of the facts.[256]

Retrial

The retrial commenced on 8 June 2015. The case against the defendant Ranko Momić, who was still at large, was severed from the case. Also, the proceedings against the former police officers Vladan Krstović, Lazar Pavlović and Milan Ivanović in the *Ljubenić* Case, who were charged with involvement in the events of 1 April 1999 in Ljubenić, were merged with the *Ćuška* Case.[257]

Witness Zoran Rašković, who had appeared as a protected witness at the initial trial, stood by his earlier testimony in its entirety. He said that the defendants Krstović and Ivanović were in Ljubenić on the relevant date, but was not sure if Pavlović was there too. Describing the attack on Ljubenić, Rašković said that between 60 and 100 men, ethnic Albanian civilians, were killed. He also said that the Commander of the "Šakali" [Jackals] unit ordered that all men over 12 years of age be separated from the assembled group of Ljubenić residents. The men thus separated were later executed.[258]

Overview of the proceedings, year 2016

On 25 January 2016, the case against the defendant Dejan Bulatović was severed from the *Ćuška* Case because he was no longer able to participate in the proceedings owing to his ill health.[259]

256 Ruling of the Court of Appeal in Belgrade no. Kž1 Kpo2 6/14 of 26 February 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 10 February 2017.

257 OWCP indictment KTO no. 8/13 of 7 April 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Optuznica_za_Krstovic,Lazarevic_i_Ivanovic_7.4.2014.pdf, accessed on 10 February 2017.

258 Transcript of the main hearing of 23 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/03/04-23.11.2015.pdf, accessed on 10 February 2017.

259 Transcript of the main hearing of 25 January 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/03/05-25.01.2016.pdf, accessed on 10 February 2017.

During the presentation of evidence, two witnesses called by Vladan Krstović's and Lazar Pavlović's defence attorneys were examined. They stated that at the time of the crimes the defendants were with them in a restaurant. The court also heard witnesses who had previously given evidence in this case.

HLC Findings

Inefficient trial

This trial has been going on for over six years and will certainly last much longer, as the end of the retrial is not in sight. **Out of the nine trial days scheduled during 2016, only five actually took place**. The other four were postponed mostly because of the absence of witnesses from Kosovo.

The HLC finds these increasingly longer pauses between hearings to be very worrisome, as they disrupt the continuity of the trial and make it difficult for the public to follow the hearings. **During 2016, hearings were scheduled 40 days apart on average,** in contrast to 2011, when they were scheduled 12 days apart.

Incomplete indictment

No prosecution of senior army officers

Although a large amount of evidence presented since the beginning of this trial have implicated certain individuals who held higher ranking positions in the VJ than the defendants in these crimes, none of them have faced charges.

The Judge who presided over the Chamber mentioned this when pronouncing the judgment: "The rules of military hierarchy compel us to conclude that there must have been someone else as well, besides Toplica Miladinović; however, we could only deal with what was set out in the indictment". This was confirmed by the Prosecutor in his closing arguments: "…It was not determined at what level all this was planned, but that was not the subject of this case...".

The OWCP took a step forward towards determining the accountability of more senior army officers for the crimes covered by the indictment in the *Ćuška* Case, by deciding in August 2014 to put Dragan Živanović under investigation. Živanović was the Commander of the 125th VJ Motorized Brigade, whose area of responsibility included the villages where the crimes tried in the *Ćuška* Case took place.

MUP's role was left unexplained

The judgment failed to explain the part played by the MUP in organising, executing and covering up the crimes of which the defendants were found guilty. During the presentation of evidence, several

witnesses and some of the defendants who took the stand in their own defence referred to the role of police forces in the crimes.[260] Furthermore, the war diary of the Military Recruitment Office in Peć, which was also presented as evidence, contains an entry which states that two MUP companies were attached to the 177th VTO. Also, several victims, and the defendants as well, testified that not only military personnel, but also many police officers were present in the villages at the time of the commission of the crimes. This point was highlighted by the Presiding Judge while she was pronouncing the judgment: "The court is certain and convinced that the victims distinguished blue uniforms from green uniforms, and they say that someone else was there..."[261]

Witness protection

The testimony of the protected witness Zoran Rašković has been one of the most striking testimonies presented before the War Crimes Department to date. Not only did it contribute to determining the facts of the case, it also draw attention to one of the main problems besetting all the war crime trials in Serbia - the inefficient protection of insider witnesses, i.e. former or active members of security forces. During the first trial in this case, Rašković repeatedly pinpointed the shortcomings in the witness protection programme[262] by speaking about the threats he had received, including those made by the very policemen responsible for his security.[263] At the retrial, he spoke about the difficulties he persistently faced, such as not being able to obtain a personal ID, which prevented him from living a normal life.[264] A detailed analysis of this problem can be found in the HLC's War Crimes Trial Report for 2011[265] and the Analysis of the Prosecution of War Crimes in Serbia.[266]

The Court of Appeal's biased interpretation of evidence intended to raise doubts regarding the involvement of the VJ in the crimes

The Court of Appeal in its judgment upheld the appeal lodged by the defendant Toplica Miladinović's lawyer, challenging the factual finding on the basis of which it was determined that Miladinović had given the order for attacking the civilians. According to the findings of the Court of Appeal, the Trial

260 Witnesses Miličko Janković, Marko Vukotić and Zoran Rašković, and defendants Toplica Miladinović, Srećko Popović and Radoslav Brnović.

261 Transcript of the judgment pronounced on 11 February 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/04/93-11.02.2014_objava_presude.pdf, accessed on 10 February 2017.

262 "Pretnje iz policije, poniženja iz Tužilaštva" [Threats by police, humiliation by Prosecutor's Office], E novine, 4 February 2012, available (in Serbian) at http://www.e-novine.com/mobile/srbija/srbijatema/58452-Pretnje-policije-ponienja-Tuilatva.html, accessed on 12 January 2016.

263 Transcript of the trial of *Ćuška* Case, 25 January 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf, accessed on 10 February 2017.

264 Trial report of 23 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Cuska-glavni_pretres-23.11.2015.pdf

265 For more details, see: Humanitarian Law Center, "Report on War Crimes Trials in Serbia in 2011" (Belgrade: HLC, 2012), pp. 99, 100 and 101.

266 Analysis of the Prosecution of War Crimes in Serbia 2004-2013, p. 70.

Court's conclusion that Miladinović had given the order in question was based on the testimonies of witnesses who had only indirect knowledge of the event, and on the war diary of the 177th VJ VTO, whose authenticity the Court of Appeal assessed as disputable.

At the same time, the Court of Appeal found it indisputable that Miladinović's alleged order had been passed on by the late Nebojša Minić in the following manner: "Guys, let's get ready, we're leaving in 10 minutes, it's the village of Ćuška, we need to drive some Germans out, torch some houses, tear up some documents, and do everything else that's necessary." Also, the Court of Appeal did not offer an alternative conclusion such as that, for example, Minić might himself have made up the wording of the order as he was leaving the meeting with Miladinović, and passed it on in that changed form. Nevertheless, the Court of Appeal challenged the content of the alleged order passed on in the above cited form, by stating: "It is unclear as to how the First Instance Court became satisfied that this order had referred to the execution of the attacks on the ethnic Albanian civilian population in the said villages and their displacement, and why it ruled out the possibility that the order might have referred to a legitimate military operation directed against fighters of the opposite side in the armed conflict, or aimed at uncovering KLA members and disarming them."[267]

The Court of Appeal disregarded the finding of the First Instance Court that the KLA had not been present in the said villages at the relevant time, which rendered its interpretation of the meaning of the said order entirely ungrounded. Finally, the court's suggestion that torching houses or tearing up documents might be understood as a call for a legitimate military operation is nothing if not a biased interpretation of the factual findings, particularly in the light of the fact that a number of judgments have found so far that this was the usual *modus operandi* of the Serbian forces during the Kosovo war when it came to ethnic Albanian civilians.

The Court of Appeal also disagreed with the finding of the First Instance Court that Toplica Miladinović had direct knowledge of the crimes, stationed as he was at the very entrance to the village of Ljubenić during the attack on this village. Two findings made by the Court of Appeal supported this disagreement with the earlier finding. Firstly, other evidence did not corroborate the statement of the witness who gave evidence about Miladinović's presence. Secondly, "none of the women, children and elderly people heard during the proceedings noticed that the defendant Miladinović was present at the village entrance, and they, being forced to leave the village, had to pass through the village entrance; nor had they noticed that anyone with a rank higher than that of the late Minić participated in the attacks on the village […]"[268] The HLC opines that giving decisive weight to victims' ability to observe certain details, such as the presence of a person unknown to them at the village entrance or

267 Ruling of the Court of Appeal in Belgrade no. Kž1 Kpo2 6/14 of 26 February 2015, p. 9, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 10 February 2017.

268 Ruling of the Court of Appeal in Belgrade no. Kž1 Kpo2 6/14 of 26 February 2015, p. 9, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 10 February 2017.

his rank insignia, at moments when they are struggling for their lives, is in effect an attempt to shift the burden of proof to the victims and thus traumatise them further, and another proof of the Court of Appeal's bias in favour of the VJ.

The Court of Appeal also held that the First Instance Court "failed to establish with absolute certainty the organisational structure of the 177th VTO based in Peć."[269] Therefore it remained uncertain whether its Quick Reaction Platoon actually existed, whether Miladinović was its Commander and whether he had the authority to order military actions".[270] The "uncertainties" found by Appellate Court are problematic for several reasons. **For determining Miladinović's criminal responsibility, it is completely irrelevant whether the order was issued to the Quick Reaction Platoon of the 177th VTO or to an armed group under a different name**. However, the suggestion that the very existence of the Quick Reaction Platoon was not proved would lead one to conclude that the crimes in Ljubenić, Ćuška, Pavljane and Zahać were not committed by official armed forces but some informal armed groups. Whether or not Miladinović possessed the commanding authority and the authority to give orders is also irrelevant for determining his criminal responsibility, because "ordering" as a mode of criminal liability does not require that the order must be issued by a person acting in any official capacity.

269 Ruling of the Court of Appeal in Belgrade no. Kž1 Kpo2 6/14 of 26 February 2015, p. 11, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 10 February 2017.

270 Ruling of the Court of Appeal in Belgrade no. Kž1 Kpo2 6/14 of 26 February 2015, pp. 11-12, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 10 February 2017.

IX. Case Lovas[271]

CASE INFORMATION
Stage of the proceedings: first-instance proceedings (retrial)
Date of indictment: 28 November 2008
Trial commencement date: 17 April 2008
Prosecutor: Dušan Knežević
Defendants: Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević, Darko Perić, Radovan Vlajković, Radisav Josipović, Jovan Dimitrijević, Saša Stojanović, Zoran Kosijer and Petronije Stevanović
Criminal offence charged: war crime against the civilian population

Chamber	Judge Zorana Trajković (presiding) Judge Mirjana Ilić Judge Dejan Terzić

Number of defendants: 10	
Defendants' rank: low and middle	**Number of trial days in the reporting period:** 8
Number of victims: 70	**Number of witnesses heard in the reporting period:** 1
Number of witnesses heard: 193	

Key developments in the reporting period:

Main hearing in the retrial

271 Higher Court in Belgrade, *Lovas*, K.Po2 1/14, available (in Serbian) at http://www.hlc-rdc.org/Transkripti/lovas.html, accessed on 28 November 2016.

The course of proceedings

Overview of proceedings up to 2106

Indictment

The indictment charges the defendants with an attack against the civilian population in the Lovas area and in the village of Lovas (Croatia) in October and November 1991, with inhumane treatment, torture, physical abuse and killing of the civilians, which resulted in the death of 69 civilians and in 12 being severely or lightly wounded.

The defendants are: Ljuban Devetak, Milan Devčić and Milan Radojčić (members of the self-established local civilian-military government in Lovas); Željko Krnjajić (Tovarnik Police Station commander); Miodrag Dimitrijević, Darko Perić, Radovan Vlajković and Radisav Josipović (members of the Valjevo Territorial Defence Force whose units served as part of the 2nd Proletarian Guard Motorized Brigade (2nd PGMBr) of the JNA; and Petronije Stevanović, Aleksandar Nikolajidis, Dragan Bačić, Zoran Kosijer, Jovan Dimitrijević and Saša Stojanović (members of the "Dušan Silni" [Dušan The Great] volunteer armed group).[272]

The amended indictment of 28 December 2011, reduced the number of civilians killed from the initial 69 to 44.[273]

First-instance judgment

On 26 June 2012, the War Crimes Department of the Higher Court in Belgrade[274] rendered its judgment, finding all the defendants guilty of committing a war crime against the civilian population as co-perpetrators. They received sentences ranging from four to 20 years' imprisonment.[275] A detailed analysis of the first-instance judgment can be found in the HLC's Report on War Crimes Trials in Serbia in 2012.[276]

272 Amended indictment KTRZ no. 7/07 of 2 September 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/09/Lovas_Precizirana_optuznica_02.09.2014..pdf, accessed on 28 November 2016.

273 Amended indictment KTRZ no. 7/07 of 28 December 2011, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optuznica-Lovas.pdf, accessed on 28 November 2016.

274 Sitting as a Chamber composed of Judge Olivera Anđelković (presiding) and Judges Tatjana Vuković and Dragan Mirković (members).

275 Judgment of the War Crimes Department of the Higher Court in Belgrade, K.Po2 22/2010 of 26 June 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/01/P-R-E-S-U-D-A.pdf, accessed on 1 March 2017.

276 Humanitarian Law Center, (Belgrade, 2013) "Report on War Crimes Trials in Serbia in 2012" available at http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, pp. 53-63, accessed on 1 March 2017.

Judgment on appeal

On 9 December 2013, the War Crimes Department of the Court of Appeal in Belgrade[277] reversed the judgment of the War Crime Department of the Higher Court in Belgrade and sent the case back to the First Instance Court for retrial and reconsideration.[278] The Court of Appeal found that the First Instance Court had failed to provide clear grounds for finding the defendants guilty as co-perpetrators, and had failed to specify which specific acts committed by each of the defendants constituted co-perpetration. It is noteworthy that the Court of Appeal found that the first-instance judgment had in effect convicted the defendants of command responsibility. However, instead of providing clear arguments for finding such a mode of accountability, the First Instance Court opted to treat command responsibility as a mode of responsibility that fits within the overly broad definition of co-perpetration. This is something domestic courts often do. At the same time, the first-instance judgment does not establish or explain the link between the acts of higher ranking defendants and the acts of the immediate perpetrators and their consequences.

The HLC offered a more detailed analysis of the judgment of the Court of Appeal in its Report on War Crimes Trials in Serbia in 2013, where it criticised the insufficient and unclear statement of the reasons for reversing the first-instance judgment, errors in the court's finding of facts, and the responsibility of the defendants.[279] The HLC especially criticised the Court of Appeal for finding that "it is unclear what precisely the term 'cleansing the villages of members of the ZNG and the Croatian Ministry of the Interior, as well as of its hostile citizens …' means", despite the opinion of a military expert that the order issued was contrary to the Geneva Conventions and, as such, should have been disobeyed by every soldier.

Retrial

The retrial[280] opened with a preparatory hearing on 4 March 2014 before another Presiding Judge, Vinka Beraha Nikićević, after the previous Presiding Judge, Olivera Andjelković, had been appointed to the Court of Appeal. The defence lawyer of Ljuban Devetak informed the court that his client had suffered a massive stroke, so the court sought an expert opinion on his fitness to stand trial. In the meantime, and the case against him was separated from the *Lovas* Case.

277 Sitting as a Chamber composed of Judge Sonja Manojlović (presiding), and Judges Sretko Janković, Miodrag Majić, Omer Hadžiomerović and Vučko Mirčić (members).

278 Decision of the War Crimes Department of the Court of Appeal in Belgrade, no. Kž1 Po2 3/13 of 9 December 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/Lovas_Resenje_Apelacionog_suda_09.12.2013..pdf, accessed on 1 March 2017.

279 Humanitarian Law Center (Belgrade, HLC, 2014), "Report on War Crimes Trials in Serbia in 2013", pp. 66-75, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-onwar-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 1 March 2017.

280 Higher Court in Belgrade, *Lovas* retrial, case number K. Po2 1/14.

In separate proceedings conducted against Ljuban Devetak, a medical expert found that he was no longer able to participate in the trial, for which reason the court dismissed the indictment against him on 12 May 2014.[281]

On 28 May 2014, the Presiding Judge Vinka Beraha Nikićević sought to step down from the proceedings, stating that it was not appropriate for her to hear the case because she had sat on the pre-trial chamber, which in 2008 had decided on an objection filed by the defendants against the original OWCP indictment. The President of the Higher Court ruled on 30 May 2014 to grant her request and assigned another judge to preside over the chamber. [282]

The main hearing in the retrial opened before a new chamber[283] on 2 September 2014, when the OWCP filed an amended indictment.[284] Taking into account the opinion presented in the judgment of the Appellate Court regarding the need to specify more precisely the criminal acts performed by each of the defendants charged of acting as co-perpetrators, the OWCP specified those actions more precisely, without making any substantial changes to the indictment.

The main hearing was postponed to give the defence lawyers time to prepare their case in relation to the amended indictment. Owing to the lawyers' strike that followed, all trials were suspended until the end of 2014.

The main hearing continued on 29 January 2015. The court decided to try the defendant Milan Radojčić separately from this case, because he was unable to appear before the court for health reasons. The proceedings were discontinued against the defendants Aleksandar Nikolaidis and Dragan Bačić, who had both died in the meantime.

The military expert was questioned once again. He adhered to his previous testimony, adding that on the basis of the available documentation he had concluded that the JNA command structure was in complete disarray at the time, not only in Lovas, but in the whole area of responsibility of the 2nd Division. The commander of the Division, Dušan Lončar, commanded all units, and was also obliged to control the implementation of all his orders, which he failed to do. The expert did not find information that Dušan Lončar had ever been in Lovas. Following the incident in the minefield, he was supposed to make a report thereon, which he did not do either.[285]

281 Higher Court in Belgrade, *Lovas*, severed case against the defendant Ljuban Devetak, case number K.Po2 8/14.
282 Decision of the Higher Court in Belgrade no. VII Su 39/14-183 of 30 May 2014.
283 Composed of Judge Bojan Mišić (presiding) and Judges Mirjana Ilić and Dragan Mirković (members).
284 Amended indictment KTRZ 7/07 of 2 September 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/09/Lovas_Precizirana_optuznica_02.09.2014..pdf, accessed on 1 March 2017.
285 Transcript of the main hearing of 25 September 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/21-25.09.2015.pdf, accessed on 28 November 2016.

The defendant Miodrag Dimitrijević hired a military expert consultant, who maintained that the defendant Dimitrijević did not possess command authority, thus challenging the previous findings of the military expert.[286]

Overview of proceedings, year 2016

The closing arguments were scheduled to take place in January 2016. However, according to the Higher Court's Annual Work Schedule for 2016,[287] the Judge presiding over the chamber in this case, Bojan Mišić, was transferred to the first-instance criminal department, and one more chamber member was also replaced, so the case was assigned to a new judge again.

Because of changes to the president and members of the chamber, the main hearing started anew on 2 March 2016. Over its course, the military expert Boško Antić was heard once again. He reversed his previous finding, saying that he found the attack on Lovas to be justified.[288]

HLC findings

Delays in proceedings

Lovas is one of the most complex and comprehensive cases ever tried before the War Crimes Department, as it involves a large number of defendants belonging to various military formations and a huge number of witnesses, and concerns several different events. And while its complexity justifies its long duration, there were other factors, such as errors committed by the OWCP and the court, which additionally and unnecessarily prolonged the proceedings.

The original OWCP indictment included 69 victims, but the OWCP did not produce enough evidence on how they had been killed. Because of that and in order to determine the circumstances of the deaths of some of the victims, the court ex officio called and questioned a large number of witnesses. It was already incumbent on the OWCP to clarify these circumstances and the responsibility of the defendants for their deaths during the investigation stage, and produce evidence in that respect.

It was only after three years of trial that the OWCP amended the indictment in December 2011 and reduced the number of victims to 44. However, the amended indictment did not fully specify the way the civilians had been killed or the defendants' responsibility for the deaths of certain victims. As a

286 Transcript of the main hearing of 2 July 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/18-02.07.2015.pdf accessed on 13 November 2016.

287 Higher Court in Belgrade Work Schedule for 2016, available (in Serbian) at http://www.bg.vi.sud.rs/images/GODISNJI-RASPORED-POSLOVE-ZA%202016-god.pdf, accessed on 28 November 2016.

288 Transcript of the main hearing of 27 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/33-27.12.2016..pdf accessed on 1 March 2017.

result, in its judgment of 26 June 2012, the Court found the defendants guilty beyond doubt only for killing 41 victims.

The Presiding Judge, Vinka Beraha Nikičević, also caused unnecessary delay in the proceedings, by requesting to step down from the proceedings five months after being given the case, although the reasons for her recusal existed and were known at the time she was assigned to this case.

Finally, the decision of the Court President, just prior to closing arguments, to replace the Presiding Judge after eight years of proceedings can only be understood as a deliberate move to drag out the process. As the Court President, when preparing a court's annual work schedule, is required to take care about efficiency and costs of proceedings.[289]

Due to the excessive duration of the proceedings, caused by both the OWCP and the court, this trial failed to fulfil its fundamental purpose – to provide the victims with a sense of justice by processing at least the key defendants. Instead, the indictment against the first defendant Ljuban Devetak had to be dismissed because of his illness, and after he died, the proceedings against him were terminated. A large number of witnesses, and also some of the defendants, pointed to Devetak as the person who bears greatest responsibility for the crimes set forth in the indictment.

As the proceedings against Devetak were also terminated, the OWCP had to remove from the amended indictment all the victims linked to the charges against Devetak. The proceedings against the defendants Aleksandar Nikolaidis, Milan Radojčić and Zoran Bačić were discontinued owing to their deaths. As a result of the excessive length of the proceedings and dismissal of the charges against **Ljuban Devetak, the victims, their families and many witnesses from Lovas have lost faith in the Serbian judiciary and no longer want to testify**.

Selective indictment

Absence of charges against superior officers

Although it became evident during the proceedings that far more persons had been involved in the crimes charged in the indictment, the OWCP made no effort whatsoever to collate evidence regarding their responsibility. The consequence of the OWCP's inactivity was that the final version of the indictment did not include all the victims who had been killed in the events described in it. And it was not disputed between the parties that a total of 70 civilians had been killed in Lovas in the period relevant to the indictment.[290]

289 Courts Rules of Procedure, Official Gazette of the RS nos. 110/09, 70/11, 19/12 and 89/13, Article 46, paragraph 3.

290 Civilian Milan Latas, for instance, for whose death no one has been charged, died in the JNA artillery attack on Lovas of 10 October 1991, as was stated in the previous indictment on page 15, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Lovas-Optuznica-Ljuban-Devetak-i-dr..pdf, accessed on 12 April 2016.

These proceedings were characterised by the OWCP's and Trial Chamber's profound divergence of opinion regarding the responsibility of high-ranking members of the JNA for the events in Lovas. In his closing argument, the Deputy War Crimes Prosecutor stated that during the proceedings, no evidence was presented that could give rise to a reasonable suspicion that "the events in Lovas were inspired, organised and carried out by persons at senior political, police or military levels; this conclusion applies also to command and other structures, including the 1st Proletarian Guard Motorized Division, 2nd Proletarian Guard Motorized Brigade and members of the Zone Headquarters of the Valjevo Territorial Defence".[291] The Presiding Judge, in contrast, said the following when pronouncing the judgment: "As regards the attack on Lovas, the way it was carried out and all other events that happened during the attack, this Chamber holds that it is the command of the 2nd Brigade who bears the greatest responsibility for it ".[292]

The court's opinion seems completely reasonable if one takes into account the evidence presented during the proceedings. The evidence pointed to the responsibility of the commander of the 2nd Brigade, Colonel Dušan Lončar, who, giving the orders to attack Lovas, said, among other things, that the village "must be cleansed of its hostile population". 22 civilians were killed in this attack. When providing opinion evidence at the main hearing, the military expert stated that the said part of the order was in breach of Article 13 of the Second Additional Protocol to the Geneva Conventions.[293] The expert consultant of the defendant Miodrag Dimitrijević also spoke about Lončar's responsibility. However, in spite of the evidence presented and the court's conclusions regarding this point, the OWCP did not prosecute the persons who issued the order, nor any members of the JNA who were senior to the perpetrators in the chain of command.

Because of this lack of initiative on the part of the OWCP, the HLC in November 2016 filed a criminal complaint against Dušan Lončar over the crimes in Lovas.[294] At the time of the writing of this report, the OWCP had not brought charges against him.

291 Transcript of the main hearing of 24 April 2012, pp. 21-22, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/06/188-24.04.2012.pdf, accessed on 12 April 2016.

292 Transcript of judgment pronouncement of 26 June 2012, p. 18, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf accessed on 26 November 2015.

293 Transcript of the main hearing of 16 December 2011, pp. 1-2, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/01/174-16.11.2011.pdf, accessed on 12 April 2015.

294 HLC press release "Criminal Complaint for Crime in Lovas Committed in 1991", 3 November 2016, available at http://www.hlc-rdc.org/?p=32894&lang=de, accessed on 15 March 2017.

Absence sexual violence charges

The rapes that took place in Lovas were not charged in the indictment. Despite the fact that witnesses Vikica Filić,[295] Snežana Krizmanić[296] and Josip Sabljak[297] said in their testimonies that rapes took place in Lovas in the relevant period, the OWCP did not amend its indictment to include rape charges as well. But the court also failed to react to these testimonies, sticking doggedly to the indictment. Each time a witness mentioned rape; the court would immediately divert the conversation by asking the witness whether she had been beaten. When the witness misunderstood the court's request to provide further explanation, and said she would rather not talk about it, believing that the court referred to the rape, the court explicitly stated the following: "I do not want you to return to the issue of rape. I want to hear about beatings and whether you were beaten or mistreated."[298]

It the *Croatia v. Serbia* Case before the International Court of Justice, which concerned the application of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia has, among other things, presented evidence of instances of rape in *Lovas*. However, the court did not have enough evidence to adjudicate on this matter.[299]

No charges for forced displacement

Forced displacement of Croatian civilians was not included in the indictment either, although many Lovas residents testified to it, including Đuro Filić,[300] Lovro Gerstner,[301] Vikica Filić,[302] Josip Sabljak,[303]

295 Transcript of the main hearing of 27 March 2010, pp. 4 and 16, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/51-27.03.2009.pdf, accessed on 26 November 2016.

296 Transcript of the main hearing of 30 June 2009, p. 19, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/61-30.06.2009..pdf, accessed on 26 November 2016.

297 Transcript of the main hearing of 27 November 2009, pp. 73-74, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas/75-27_11_2009.pdf, accessed on 26 November 2016.

298 Transcript of the main hearing of 27 March 2010, pp. 4 and 16, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/51-27.03.2009.pdf, accessed on 26 November 2016.

299 Judgment of the International Court of Justice in *Croatia v. Serbia* case regarding the application of the Convention on the Prevention and Punishment of the Crime of Genocide, 3 February 2015, paras. 325-330.

300 Transcript of the main hearing of 16 December 2008, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/35-16.12.2008..pdf, accessed on 26 November 2016

301 Transcript of the main hearing of 23 February 2009, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/44-23.02.2009.pdf, accessed on 26 November 2016.

302 Transcript of the main hearing of 27 March 2010, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Case%20LOVAS/transkripti/51-27.03.2009.pdf, accessed on 26 November 2015.

303 Transcript of the main hearing of 27 November 2016, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas/75-27_11_2009.pdf, accessed on 26 November 2016.

Josipa Balić[304] and others. The commander of the 2nd Detachment of the Pančevo Territorial Defence also testified about civilians being forced to leave. On arriving at Lovas, he said, he saw a document that was distributed to the Croatian residents of Lovas who were being forced out of Lovas. They were requested to sign this document, which stated that they should leave all their property to the Lovas municipal government.[305] In his testimony before the ICTY in the *Vukovar Troika* Case, Petr Kypr spoke about the intent to displace Croats from Lovas. Kypr was a member of the European Community Monitoring Mission at the time, and in that capacity visited Lovas on 16 October 1991.[306] When pronouncing its first judgment, the court also said that the OWCP ought to have dealt also with the forced displacement of the Croatian population from Lovas.[307]

Expert consultant

Lovas is the first war crime case in which an expert consultant has been used by a party. Expert consultants were first introduced by the new ZKP,[308] in which an expert consultant is a person possessing expert knowledge in the field in which expert examination has been ordered. His/her role is to enable the party, which hired him/her to discuss knowledgably the opinion, and findings of an expert witness, and thus help in the assessment of expert evidence.

In this case, it was the defendant Miodrag Dimitrijević who hired an expert consultant. It was a retired JNA colonel, with a Master's in Military Sciences and extensive practical experience. While he is indeed an expert in the relevant field, the opinion he provided was rather biased and unacceptably subjective. For instance, he assessed the testimony of a witness as "deliberate manipulation".[309] Moreover, he shifted blame for the incident in the minefield with which Dimitrijević is charged onto the defendant Perić. However, Perić has never been charged with this, nor was there any evidence implicating him in these events.[310] The expert consultant thus acted as another defence attorney for the defendant Miodrag Dimitrijević, which is something he is not supposed to do. His testimony is yet to be assessed by the Trial Chamber.

304 Transcript of the main hearing of 26 May 2011, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas%20za%20sajt/transkripti/151-26.05.2011..pdf, accessed on 26 November 2016.

305 Transcript of the main hearing of 24 June 2010, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas%20za%20sajt/transkripti/103-24.06.2010.pdf, accessed on 26 November 2016.

306 Transcript of the ICTY open session in *Vukovar troika* **(IT-95-13)** of 24 March 2006, available at http://www.icty.org/x/cases/mrksic/trans/en/060324IT.htm, accessed on 26 November 2016.

307 Transcript of judgment pronouncement of 26 June 2012, p. 69, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf accessed on 26 November 2015.

308 ZKP, Article 125.

309 Transcript of the main hearing of 2 July 2015, p. 11, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/18-02.07.2015.pdf, accessed on 25 November 2015.

310 Transcript of the main hearing of 24 September 2015, p. 5, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/20-24.09.2015.pdf, accessed on 26 November 2015.

Military expert's partiality

During his last testimony, the court-appointed military expert showed a partiality that disqualified him from serving further as an independent expert witness in this case. Namely, he reversed his previous opinion, saying that on the basis of some new pieces of information he had obtained in the meantime from the defence attorneys, through some "private channels" or "by searching the Internet" in order to verify certain information and ascertain certain facts, he had concluded that "the people accused here had nothing to do with the events in question."[311]

Unlawful denial of request for recording

The HLC requested permission to record the main hearings in the *Lovas* Case, scheduled for 17 and 18 January 2017, with a view to broadcasting them. On 5 December 2016, the Court President, with whom the request was filed, informed the HLC that its request had been denied, on the grounds that only members of the media are allowed to record court proceedings. Citing provisions of the Law on Public Information and Media, the President of the Higher Court said that the HLC, not being a media organisation, is not authorised to file such a request.[312] The HLC appealed against this decision with the Court of Appeal, on the following grounds: the Higher Court in Belgrade applied the relevant provisions of the Law on Organisation and Competence of Government Authorities in War Crimes Proceedings restrictively; the cases concerned are highly sensitive and important and, as such, they are something that the public has a legitimate interest in knowing about; the fact that the HLC filed the request for permission to record the hearings does not mean that the request was filed by an entity not authorised to file such requests, because, as set forth in the law, the right to file such requests is not limited to the press. The HLC also made a reference to the case-law of the European Court of Human Rights, where non-governmental organisations and the press are treated equally, that is, as enjoying equal rights when it comes to access to information of public interest.[313] By its decision of 20 December 2016, the Higher Court in Belgrade dismissed the HLC's appeal on the grounds that the incumbent decision is not appealable.[314]

311 Transcript of the main hearing of 27 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/02/33-27.12.2016..pdf accessed on 1 March 2017.
312 Decision of the Higher Court in Belgrade no. Su VIII br. 42/16-133 of 5 December 2016.
313 See, e.g., European Court of Human Rights, *Tarsasag a Szabadsagjogokert v. Hungary*, 14 April 2009.
314 Decision of the Higher Court no. Su VIII br. 42/16-133 of 20 December 2016.

First instance proceedings before courts of general jurisdiction

I. Case Grupa Pauk [Spider Group]

CASE INFORMATION	
Stage of proceedings: first-instance proceedings (retrial)	
Date of indictment: 4 May 2000	
Prosecutor: Darko Đurović	
Trial commencement date: 4 July 2000	
Chamber: Vladan Ivanković, Presiding Judge	
Defendants: Jugoslav Petrušić, Milorad Pelemiš, Slobodan Orašanin, Branko Vlačo and Rade Petrović	
Criminal offences charged: espionage, extortion, murder and illegal possession of firearms and ammunition	
Number of defendants: 5	
Defendants' rank: low – no rank	**Number of trial days in the reporting period:** 7
Number of victims: 2	**Number of witnesses heard during the reporting period:** 7
Number of witnesses heard: unknown	

Key developments during the reporting period:

Main hearing

The course of proceedings

Indictment

The defendants Pelemiš and Petrović were charged with killing two unknown Kosovo Albanians[315] in mid-May 1999 near Dečani (Kosovo), on Petrušić's orders. The defendants Petrušić, Pelemiš, Vlačo and Petrović were charged with extorting 20,000 German marks from two unidentified Kosovo Albanians with death threats in early May 1999.

All defendants were charged with joining a French intelligence agency during the war of 1999 with the intention to later join the VJ as volunteers. In addition, the defendants Pelemiš, Orašanin and Vlačo were charged with illegal possession of various types of firearms and ammunition.

Defendants' defence

The defendants denied having committed any of the crimes with which they were charged, with the exception of illegal possession of firearms.

First first-instance trial

The trial commenced on 4 July 2000. The court decided to exclude the public during the entire main hearing. Over the course of the proceedings, the Prosecution amended the indictment to specify the identity of the victims of the extortion, naming them as Mirsad and Sadik Nimonaj, and the identity of the killed civilians, naming them as Rahman Idrizi and Hamid Neziri.

On 13 November 2000, the District Court handed down a judgment acquitting the defendants of the charges of killing Idrizi and Neziri, and of espionage. The defendants Petrušić, Pelemiš, Vlačo and Petković were found guilty of extortion, the defendant Pelemiš of illegal possession of firearms and ammunition, and the defendant Orašanin of illegal possession of firearms and ammunition. Petrušić, Vlačo, Petrović and Orašanin were sentenced to one year in prison, and Pelemiš to a year and a half in prison.[316]

315 Indictment of the Office of the District Public Prosecutor in Belgrade of 4 May 2000, no. KT 640/99, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Grupa_Pauk-Jugoslav_Petrusic_i_dr.-Optuznica_04.05.2000.pdf, accessed on 23 March 2017.

316 Judgment of the District Court in Belgrade in *Spider Group* Case of 13 November 2000, K-no. 192/2000, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Prvostepena_presuda_13.11.2000.pdf, accessed on 23 March 2017.

Judgment on appeal

After hearing the appeals lodged by the defence lawyers and the Prosecutor, the Supreme Court of Serbia quashed the judgment in 2002 and remanded the case to the court of first instance for retrial.

Conflict of jurisdiction

On receiving the case, the District Court in Belgrade declared itself not competent to hear it, stating that the Military Court had subject-matter jurisdiction over espionage, and therefore referring the case to the Military Court.[317] The Military Court also found itself not competent to proceed in this matter, considering that the matter fell within the competencies of the District Court, and asked the Federal Court to resolve the conflict of competences between the courts.[318] After the coming into force of the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutor's Offices and the Military Attorney on 1 January 2005, the case was sent back to the Military Department of the District Court in Belgrade.

However, the Military Department of the District Court again rejected the case, with the explanation that it was not competent to hear it because the act of espionage was not directed against military facilities and military personnel. The case files were then sent to the War Crimes Chamber of the District Court in Belgrade in 2005, which informed the District Court in 2006 that the OWCP did not accept to represent the Prosecution on the indictment brought by the District Prosecutor's Office in 2000, considering itself not competent. Eventually, the case was again returned to the District Court in Belgrade for retrial.

The retrial had hardly begun when the Higher Court in Belgrade ruled to terminate it because of insufficient evidence. The case was returned to the competent investigative judge of the Higher Court in Belgrade, in order for him to perform some additional investigative actions.

During the retrial, former members of the military and police were questioned again as witnesses; none of them gave evidence against the defendants. Nataša Kandić was also questioned as a witness. She had no direct knowledge of the impugned event, but it came to her knowledge through the statements of injured parties during her research. Kandić said that the brothers Mirsad and Sadik Nimonaj had told her that while being held in custody, 20,000 German marks were demanded of them in exchange for their release. They also said that they were threatened with death if they testified.

317 Decision of the District Court in Belgrade of 8 July 2002, KV. 1272/02.
318 Submission of the Military Court in Belgrade of 13 March 2003, Kv. 26/03.

HLC findings

Exclusion of the public and removal of HLC representative from courtroom

At the first main hearing, the court decided to exclude the public during the whole hearing, presumably because certain members of State Security and Military Security were to be questioned as witnesses.

Although the retrial was held in open court, the Presiding Judge removed a representative of the HLC from the main hearing in 2013. Rade Petrović's defence lawyer asked the court to remove the HLC representative from the courtroom so that he would be able to call her to give evidence later in the proceedings, allegedly because the HLC had filed criminal charges over extortion, which was an offence being tried in the present case. This action of the Defence constituted an abuse of procedural powers, and was based purely on personal animosity towards the HLC. The Presiding Judge, Milan Londrović, supported this abuse by granting the motion without requesting the defence lawyer to produce any evidence in support of his allegations.

After the Presiding Judge had been replaced, the defendants and their lawyers again requested that the HLC observers be removed from the courtroom, but the Chamber denied the request. The Defence then filed a motion requesting that the whole Chamber be removed from the case, but the Court President denied the motion.

Wrong classification of offence

Bearing in mind that there was an armed conflict in the territory of Kosovo during the time relevant to the indictment, that the defendants were members of a conflicting party, namely the VJ, that is to say, its 125th Motorized Brigade, and that the victims were Albanian civilians, the acts of the defendants met all the main requirements to be prosecuted as a war crime against civilians and should have been classified as such. Also, it is quite unclear why the OWCP declared itself not competent for this case. The OWCP's written decision on this matter was not available to the HLC.

Leaving aside the wrong classification of the criminal offence, the indictment issued by the Office of the District Prosecutor was vague and unsubstantiated. As regards the espionage charges, the Prosecution did not specify which acts of the defendants were considered to constitute espionage. When it came to the extortion and murder charges, as the identity of the four victims was not established in the indictment, it had to be established in the course of the proceedings. Moreover, at the moment of raising the indictment, the Prosecution only possessed sufficient evidence regarding the criminal act of illegal possession of firearms and ammunition.

Unreasoned, unclear and offensive first-instance judgment

Over the course of the first-instance proceedings, the witnesses – high-ranking members of the VJ

– testified in favour of the defendants, and the court accepted their testimonies in their entirety. The witness Aleksandar Savović, who was the Head of Security of the 125th Motorized Brigade at the time and the defendants' commanding officer, said that he considered the defendant Petrušić "a great patriot and nationalist",[319] who had fought in "various actions at Košare". Savović also said that the security services still retained the information and intelligence the defendants acquired about the targets NATO was planning to bomb, adding that this information was "valuable".[320] The witnesses Momir Stojanović, a VJ colonel who at the relevant time served as the Head of Security of the Priština Corps, Stevan Đurović, a VJ colonel who worked for the military security services, and Miodrag Pantović, also a VJ colonel, and working at the Security Directorate of the Military Police, testified that all the defendants actively fought on the front lines.[321] Having accepted their testimonies, which focused on the fact that the army made use of their services during the war, the court found there was no evidence that the defendants had committed the criminal act of espionage and therefore acquitted them.

Moreover, the court praised the defendants for their patriotic participation in the Kosovo war:[322]

[Sic: When bearing in mind the testimonies of nearly twenty witnesses heard so far who have spoken solely about the way the defendants left, as members of the Yugoslav Army from the Grocka recruitment centre, for Kosovo, where, as has been determined, they acted as patriots, as confirmed by their immediate superiors during the main hearing, that they acted, (more precisely, since the whole case concerns the role of key defendant Petrušić, as the others were under his command), in such a way that they revealed the positions of terrorist Albanians, that they received information which they transmitted to the Security Service of the Yugoslav Army and the Supreme Command of the Second Army about which targets would be hit by the NATO aggressor, that that helped the relocation of military bases, weaponry and personnel alike, for many many targets which were attacked, the information they received from Petrušić prevented a catastrophic outcome.]

None of the high-ranking members of the VJ who testified as witnesses knew anything about the killing of the two Albanian civilians with which the defendants were charged. It was the witnesses Savanović and Tešić who blamed the defendants for this murder. The court took the view that the indictment was based on the testimonies of Stanko Savanović[323] and Dragan Tešić, who had a grudge against the defendants, that Tešić had no direct knowledge of the events and that their testimonies only provided circumstantial evidence that the defendants had killed two Albanian civilians, which was not sufficient evidence for the court to convict them.

319 Judgment of the District Court in Belgrade in *Spider Group* Case, K-no. 192/2000 of 13 November 2000, p. 27, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Prvostepena_presuda_13.11.2000.pdf, accessed on 23 March 2017.

320 Ibid.

321 Ibid. p. 28.

322 Judgment of the District Court in Belgrade in *Spider Group* Case, K-no. 192/2000 of 13 November 2000, p. 42.

323 Savanović, a former member of the 10th Sabotage Squad of the VRS, was finally convicted by the Court of BiH for a crime against humanity committed in Srebrenica, namely the execution of Bosniak civilians at the Branjevo Farm.

Yet, the court did find the defendants guilty of extortion, since the defendant Vlačo himself said during the investigation that a bounty of 20,000 German marks had been offered on the two Albanian civilians' heads, and that he was sent to the Kelebija border crossing together with Pelemiš to collect the money. The witness Jović confirmed Vlačo's accounts, saying he acted as intermediary in the delivery of the money. The statements of the defendants Mirsad and Sadik Nimonaj, who said they had been blackmailed, were also accepted. The court did not question them directly in the courtroom, but used the statements they had given to the HLC, which the HLC officially delivered to the court.

In the judgment, the court referred to the victims and their nation as "shiptar" (with small case 's') and to their language as "the shiptar language". Since these terms are used in a pejorative sense in Serbia and are widely considered to be an offensive and discriminating term for people belonging to the Albanian nation, no court should use these terms if it wants to be regarded as unbiased.

Nowhere in the judgment does the court explain the sentences passed or whether some mitigating or aggravating circumstances were taken into account during sentencing. The judgment only states that the sentences "will achieve the purposes of punishment: they will serve the purpose of general deterrence and, when it comes to the defendants themselves, they will discourage them from committing this and similar acts in the future."[324]

In the acquittal part of the judgment regarding espionage, the court insisted that it was not established that the defendants had collected and transmitted "confidential military, economic or official information". However, the defendants were charged under Article 128, paragraph 3, of the Criminal Code of the FRY, which stipulates: "Whoever joins a foreign intelligence agency, collects information for it or otherwise assists its work, shall be punished with imprisonment from one to ten years." According to this article, joining a secret service is *in itself* an incriminating act, which does not necessarily imply collecting information or transmitting it to the service. The defendant Petrušić admitted having worked for a French intelligence agency, and the court accepted his testimony.[325] This being the case, his acquittal should have been properly explained in the judgment.

Excessive length of the proceedings

The fact that the proceedings in this case have lasted for more than 16 years, owing to delays caused by numerous procedural issues raised over their course, clearly manifests the lack of will of the relevant institutions to finalize this case.

Jugoslav Petrušić claimed violation of his right to a fair trial. On 20 April 2016, the Higher Court in Belgrade issued a decision finding that his right to a fair trial had been violated.[326]

324 Judgment of the District Court in Belgrade in *Spider Group* Case, K-no. 192/2000 of 13 November 2000, p. 41.
325 Judgment of the District Court in Belgrade in *Spider Group*, K-no. 192/2000 of 13 November 2000, pp. 41-42.
326 Decision of the Higher Court in Belgrade, no. P4 K.br. 19/16 of 20 April 2016.

Second instance proceedings before the War Crimes Department of the Appellate Court in Belgrade

I. Case Gradiška[327]

CASE INFORMATION
Stage of the proceedings: appeal proceedings
Date of indictment: 8 April 2014
Trial commencement date: 6 March2015
Prosecutor: Snežana Stanojković
Defendant: Goran Šinik
Criminal offence charged: war crime against the civilian population

Chamber	Judge Vladimir Duruz (presiding) Judge Vinka Beraha Nikićević Judge Vera Vukotić

Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 4
Number of victims: 1	**Number of witnesses heard in the reporting period:** 2
Number of witnesses heard: 5	

Key developments in the reporting period:

First-instance judgment.

327 *Gradiška* case, trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/gradiska.html accessed on 25 November 2016.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

The defendant, Goran Šinik, former VRS member, is charged with killing, in an undetermined manner, Croatian civilian Marijan Vištica, near the municipal landfill in the hamlet of Bok Jankovac (the municipality of Gradiška, BiH) on 2 September 1992. Late that afternoon, the defendant took Marijan Vištica off a bus travelling from Gradiška to Croatia and shoved him into a car parked nearby. Nebojša Prčić was at the wheel of the car and Predrag Sladojević was sitting in the front passenger seat. After that, they drove to Bok Jankovac and stopped near the municipal landfill on the banks of the River Sava. The defendant and Vištica climbed out of the car, and Prčić and Sladojević drove back to Gradiška.[328]

The mortal remains of Marijan Vištić have never been found.

Defendant's defence

Goran Šinik denied having committed the crime with which he is charged, claiming that on the relevant day he was not in Gradiška, but somewhere else, together with the military unit he belonged to. Šinik also denied having known the victim.[329]

Witnesses

The wife of Marijan Vištica, Anica Vištica, said that on the relevant day she and her husband intended to leave Gradiška with their daughters and go to Croatia. When they approached the bus they planned to take, she saw the defendant and two other persons in uniforms standing next to the bus, "like hawks on the lookout for prey".[330] She recognised the defendant because he used to come to their flat and threaten them. After they had boarded the bus, someone called on his husband to get off the bus. Anica has never seen him since. She did not see the defendant get on the bus.

Prosecution witness Nebojša Prčić confirmed that he drove the defendant and one more man, who he later discovered was the deceased Vištica, to a brickyard located a kilometre and a half from

328 OWCP indictment, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-10/sinik_mediji.pdf, accessed on 25 November 2016.

329 Trial report of 18 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Gradiska_Izvestaj_sa_sudjenja_18_06_2015.pdf, accessed on 7 October 2015.

330 Trial report of 13 July 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Gradiska-Izvestaj_sa_sudjenja_13.07.2015.pdf, accessed on 25 November 2016.

Gradiška, and right after that returned to Gradiška with Sladojević.[331] Prosecution witness Nikola Kolar confirmed that the defendant came to the bus carrying the civilians who intended to leave Gradiška, and called on the late Vištica to step out of the bus. The defendant and Vištica then got into a car in which Nebojša Prčić and Predrag Sladojević were sitting and "drove off".

Overview of the proceedings, year 2016

Witness Đorđe Raca said the late Ranko Račić once told him that the body of Marijan Vištica was located on the River Sava bank. Raca went to that place together with Nikola Maljčić, Borislav Balta and Slavko Radonjić, where they saw, from a distance of some 30 metres, a male corpse lying prone; but the witness did not go near the corpse. He did not know Marijan Vištica.[332]

First instance judgment

On 13 October 2016, the Higher Court acquitted the defendant.[333] The Court held that the OWCP had failed to prove that the defendant killed the victim. The defendant denied committing the crime, and the mere fact that he, together with Sladojević and Prčić, drove him to Bok Jankovac was not by itself sufficient for the Court to draw the conclusion that the defendant actually killed him. The court did not accept the evidence given by the late Račić, who was the only person who claimed to have recognised the body of the victim, because his evidence was at odds with evidence given by other witnesses. Račić said that the witnesses Raca, Balta, Radonjić and Maljčić, who were with him at the time, had also seen the body. Raca, however, said that what he had seen was the body of a man unknown to him lying prone. Other witnesses mentioned by Račić denied being present at the scene when the body was discovered. Also, the witnesses Sladojević and Prčić denied that the defendant had ever showed any aggressive behaviour towards the victim that would indicate that he intended to kill him.[334]

HLC Findings

Deficient indictment

The OWCP did not provide sufficient factual allegations in its indictment, and factual allegations are

331 Trial report of 25 September 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Gradiska-Izvestaj_sa_sudjenja_25.09.2015.pdf, accessed on 25 November 2016.

332 Trial report of 13 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Gradiska-Izvestaj_sa_sudjenja_13.04.2016.pdf, accessed on 15 February 2017.

333 First instance judgment of the Higher Court in Belgrade in *Gradiška*, K.Po2 6/2014 of 13 October 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Prvostepena_presuda_13.10.2016..pdf, accessed on 15 February 2017.

334 Report on the judgment pronouncement of 13 October 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Gradiska_-_Izvestaj_sa_objave_presude_13.10.2016.pdf, accessed on 15 February 2017.

the key element of any indictment.[335] Namely, neither from the factual description of the offence with which the defendant was charged nor from the statement of reasons for the indictment was it possible to determine the exact time of the crime, how it was committed, or to establish a causal relation between the defendant's acts and the death of the victim. The inadequacy of factual allegations was caused by the lack of evidence. The HLC analysed this indictment in detail in its "Report on War Crimes Trials in Serbia during 2014 and 2015.[336]

This was just one of the many deficient OWCP indictments which resulted in acquittals.[337] This situation indicates that the OWCP does not have a clear strategy for prosecuting war crimes, and that by bringing so many indictments, even unfounded ones; it is making a pretence of successfully performing its duty. This not only wastes time and resources, but also exposes the victims and their families to further anguish.

Judgment of acquittal

The judgment of acquittal came as a logical consequence of the deficient indictment. The indictment charged Goran Šinik with "killing Marijan Vištica in an undetermined manner". In order for the court to find the defendant guilty, the OWCP had to prove a causal connection between the defendant's acts and the death of the victim. However, the OWCP did not produce valid evidence to support the charges, but only several pieces of circumstantial evidence. The only facts proven beyond doubt were that the defendant took the victim off a bus that was about to depart from Gradiška and took him to Bok Jankovac. Only one of the witnesses, namely the deceased Račić, said that he had seen the victim's body on the River Sava bank, however this account was uncorroborated by any other witnesses. As Vištica's body has never been found, there is no evidence of the time and manner of his death. As only one witness said that he had seen the body at the Sava River bank, the place of the victim's death also remained open to dispute. The fact that the victim was last seen alive in Bok Jankovac, in the company of the defendant, gave grounds for suspecting that the defendant may have been involved in his death, but is not sufficient to prove beyond reasonable doubt that he actually killed him. That being the case, the Court had no option but to deliver a judgment of acquittal.

Unlawful denial of request for recording

The HLC requested permission from the President of the Higher Court in Belgrade to record and publicly broadcast the pronouncement of the judgment in the *Gradiška* Case, scheduled for 13 October 2016. In its letter dated 7 October 2016, the administration department of the Higher

335 ZKP, Article 332 paragraph 2.

336 Humanitarian Law Center "Report on War Crimes Trials in Serbia During 2014 and 2015" (Belgrade, HLC, 2016), pp. 46-49, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 15 February 2017.

337 Judgments of acquittal in the completed cases of *Tenja II*, *Čelebići*, *Luka Camp*, *Pizren.*

Court in Belgrade informed the HLC that its request had been refused. The HLC complained against this decision to the Court of Appeal, stating, inter alia, that the Higher Court in its notice did not explain the rationale behind its decision. In its letter of 15 November 2016 addressed to the HLC, the administration department of the Court of Appeal in Belgrade stated that it had reminded the Higher Court in Belgrade of its obligation to provide a rationale for its decisions and ordered it to do so in the future.[338]

338 Decision of the Court of Appeal in Belgrade no. Su VI-1330/16 of 15 November 2016.

II. Case Bosanski Petrovac[339]

CASE INFORMATION	
Stage of the proceedings: appeal upon retrial	
Date of indictment: 6 August 2012	
Trial commencement date: 13 November 2012	
Defendants: Neđeljko Sovilj and Rajko Vekić	
Prosecutor: Snežana Stanojković	
Criminal offence charged: war crime against the civilian population	
Chamber	Judge Dragan Mirković (presiding) Judge Mirjana Ilić Judge Zorana Trajković
Number of defendants: 2 **Defendants' rank:** low rank – no rank **Number of victims:** 1 **Number of witnesses heard:** 13	**Number of trial days in the reporting period:** 5 **Number of witnesses heard in the reporting period:** 1
Key developments in the reporting period: First instance judgment upon retrial.	

339 Case *Bosanski Petrovac*, trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac.html. This case was transferred to the OWCP by the Cantonal Court in Bihać through International Legal Assistance.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

According to the indictment, the accused, members of the VRS at the time, on 21 December 1992 stopped civilians Mile Vukelić and Mehmed Hrkić near the hamlet of Jazbine (in the Bosanski Petrovac municipality, BiH), ordered Vukelić to continue his way, and took Mehmed Hrkić into the nearby forest known as "Osoje" and killed him there, by firing at least three shots.[340]

Defendants' testimonies

The accused denied having committed the offence, saying that on the relevant day they did see Mile Vukelić and Mehmed Hrkić, but only exchanged hellos with them and continued their way.

First instance judgment

On 11 March 2013, the Higher Court passed a judgment of conviction, sentencing each of the accused to eight years' imprisonment.[341] The judgment confirmed all the counts of the indictment.

Second instance judgment

Ruling on the appeal by the Defence, the Court of Appeal on 20 December 2013[342] granted the Defence's grounds for appeal, set aside the first instance judgment and sent the case back to the First Instance Court for a retrial.[343] The Court held that the First Instance Court had failed to provide clear conclusions with regard to some decisive facts. The First Instance Court's findings of fact were based on the testimonies of witnesses Mile Vukelić and Jelka Plećaš, and on an autopsy report. Mile Vukelić testified via a video-conference with the Court of BiH. The Court of Appeal instructed the First Instance Court to have witness Mile Vukelić examined again, this time in the courtroom, preferably at the main hearing, and confront him with the defendants. Also, the Court of Appeal requested that

340 OWCP Indictment KTO no. 3/12 of 6 August 2012, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2012_08_06_eng.pdf, accessed on 5 January 2017. This case was transferred to the OWCP by the Cantonal Court in Bihać through International Legal Assistance.

341 Judgment of the Higher Court in Belgrade in *Bosanski Petrovac* of 11 March 2013, no. K.Po2 6/12, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Nedjeljko-Sovilj-i-Rajko-Vekic-Presuda-11.03.2013..pdf, accessed on 5 January 2017.

342 The Chamber composed of Judge Siniša Važić (presiding), and Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović, and Miodrag Majić (members).

343 Ruling of the Court of Appeal in Belgrade of 20 December 2013, case no. Kž1 Po2 5/13, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/bosanski_petrovac_drugostepena_odluka.pdf, accessed on 5 January 2017.

Vukelić's wife be examined as witness too, and that a ballistics expert be called to testify in order to explain whether it can be determined, on the basis of the autopsy report, if the victim's injuries were caused by a burst of fire or single shots. This request was because the witness Jelka Plećaš said that she had heard two single shots with a pause between them, whereas the autopsy report stated that the victim' injuries were caused by a burst of fire.

First instance retrial

The retrial was due to begin in 2014, but the main hearing scheduled for May 2014 was not held owing to the absence of a chamber member who was ill. Nor could it be held later that year, because of the lawyers' strike.

Over the course of 2015, the Court heard ballistics and medical experts, who were expected to determine how the wounds of the victim Hrkić had been produced and what caused them, and also the cause of his death. However, the experts testified that on the basis on the available documents – a crime scene report and an autopsy report, which the experts assessed as insufficiently detailed, superficial and unprofessional – it was not possible to determine how the victim's wounds were produced and the cause of his death. None of the following facts could be determined: whether one or more bullets produced his wounds, whether the wounds were penetrating or perforating, or whether they were caused by individual or automatic fire.[344]

Witnesses Jelka Plećaš and Mile Vukelić were questioned again.[345] They both repeated their testimonies given at the initial trial. On that occasion, Mile Vukelić recounted as follows: on the relevant date he left the house of the Plećaš family and headed home, together with Mehmed Hrkić; while walking home, the two men came across the accused, who were armed with automatic rifles; the accused stopped them, ordered him to continue home and kept Hrkić, saying they wanted a word with him; two hours later, the accused came to Vukelić's house and said to him that they had killed Hrkić; a neighbour, whose name he did not reveal, told him he knew who had killed Mehmed; another neighbour, Jelka Plećaš, said that the defendants boasted around the village about having killed Hrkić. At the retrial, Vukelić said that the neighbour who told him about the murder of Mehmed was Milorad Kolundžija.

Witness Jelka Plećaš in her prior testimony confirmed that on the relevant day Mile Vukelić was not armed, and that he had left her house together with Mehmed Hrkić. Soon after they left, she received a phone call from her mother-in-law, who told her that she had heard a shot and Hrkić crying for help and screaming, "No, let me go!" After that, the witness herself heard two shots. When testifying for the second time, she denied telling Vukelić that rumours circulated around the village that the accused had killed Mehmed Hrkić.

344 Transcript of main hearing held on 27 January 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/27.01.2015.pdf, accessed on 5 January 2017.

345 Transcript of main hearing held on 3 April 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 5 January 2017.

Mahmut Hrkić[346], the son of Mehmed, was also questioned, but he did not have any direct knowledge of how his father was murdered. Milorad Kolundžija, who also appeared as a witness, contradicted what the key witness for the Prosecution, Mile Vukelić, had said about him – that he knew something about Mehmed Hrkić's murder.

Another controversy was also resolved at the retrial - the time of the death of Zoran Škorić, whose death is taken to be the motive behind Hrkić's murder. Škorić's death certificate states 28 January 1993 as the date of his death, whereas his headstone has 1992 as his year of death. So the court called on Škorić's sister to testify on this point. She said that her brother died in December 1992 and was buried by the end of that month.

Overview of proceedings, year 2016

First instance judgment upon retrial

On 19 July 2016, the Higher Court delivered its judgment[347] following the retrial, finding the defendants, Neđeljko Sovilj and Rajko Vekić, guilty, as co-perpetrators, of the criminal offence of a war crime against the civilian population. They were each sentenced, for the second time, to eight years in prison. Their defence was not accepted for the same reasons as those stated in the first judgment, so the Court did not find it necessary to explain them again, or to state the reasons behind the punishment passed upon the defendants.

This judgment is not analysed in this report because the Higher Court refused to deliver it to the HLC.

HLC findings

Perfunctory first instance proceedings

The First Instance Court conducted the proceedings rather carelessly. At the preliminary hearing, the parties agreed to treat some important facts as undisputed. These include; the existence of an armed conflict during the period relevant to the indictment; the fact that the defendants were fighters of a party to the armed conflict; their mental capacity, and; the fact that the victim was a civilian. In addition, the defendants did not deny seeing the victim on the day in question, nor that he was in the company of the witness (Mile Vukelić), saying that they had just said hello and walked past them. Hence the only disputable fact was whether or not the defendants killed Mehmed Hrkić. Nevertheless, the First Instance Court failed to provide clear conclusions with respect to decisive

346 Ibid.

347 Report on the pronouncement of verdict of 19 July 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/07/Bosanski-Petrovac-Izvestaj_sa_objavljivanja_presude_19.07.2016.pdf, accessed on 5 January 2017.

facts, one of them being the motive for the crime. Furthermore, some of the reasons underlying the Court's judgment proved to be unacceptable. For example, the Court drew the conclusion that more people were with the victim at the time of his murder, that shot him dead, and these people were the defendants. This conclusion was drawn from witness Jelka Plećaš' testimony that her mother-in-law had heard Mehmed cry out, "No, let me go!" (the verb "let" was used in plural form - "Ne pustite me!") As regards the motive, the Court's conclusion that the possible motive for this crime could be revenge was based on the testimony of witness Vukelić, who said that the defendants were enraged by the death of their coeval Zoran Škorić, who had been killed a couple of days before the critical event. The Court had accepted his account as true, without verifying it. During the appeals proceedings, the Defence produced evidence that Zoran Škorić had been killed after the criminal act charged in the indictment. All this amounted to an incomplete finding of fact, for which reason the Court of Appeal rightly quashed the first instance judgment and ordered a retrial.

A detailed analysis of the first instance judgment in this case can be found in the HLC's "Report on War Crimes Trials in Serbia in 2013".[348]

Unconvincing evidence produced by the OWCP

At the retrial, the First Instance Court followed the instructions of the Court of Appeal and again heard the witnesses Mile Vukelić and Jelka Plećaš and confronted them. The opinions of a ballistics expert and a medical expert were obtained, and Milorad Kolundžija, whom witness Mile Vukelić had mentioned in his testimony, was examined as a witness. The retrial raised reasonable doubts as to whether the evidence presented by the OWCP was compelling enough for the Court to establish beyond reasonable doubt that the defendants had committed the offence with which they were charged. The testimony of the key prosecution witness, Mile Vukelić, upon which the first instance judgment was largely based, was discredited by the detailed testimonies of the witness Jelka Plećaš and Milorad Kolundžija. Witness Jelka Plećaš categorically denied the allegations of witness Vukelić that she and her husband told him there was a rumour in the village that the defendants had killed Hrkić. Witness Kolundžija, who Vukelić claimed had told him he knew that the defendants had killed the victim,[349] denied it. Kolundžija said that witness Vukelić told him he would suggest him as a witness, as he was charged with the murder of Hrkić.[350] The findings of a medical expert and a ballistics expert did not confirm the allegations in the indictment that the defendants had fired at least three shots at the victim thus causing his lethal wounds, as it was impossible for the experts to determine how the wounds were produced or what the cause of the victim's death was. The death of Zoran Škorić, which

348 Humanitarian Law Center, "Report on War Crimes in Serbia in 2013" (Belgrade: HLC 2014), pp. 50-53, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 5 January 2017.

349 Transcript of main hearing held on 3 April 2015, p. 16, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 5 January 2017.

350 Trial report of 25 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Bosanski_Petrovac-Ponovljeni_postupak-Izvestaj_sa_sudjenja_25.11.2015.pdf, accessed on 5 January 2017.

was held to be the motive for the murder, was not explained thoroughly enough to be considered as the motive. A mere temporal coincidence between the two events does not suffice to prove beyond reasonable doubt that one event was motivated by the other.

Higher Court's non-compliance with the Law on Free Access to Information of Public Importance

The first instance judgment is not analysed in this report, because the HLC had no access to it at the time of writing. The Higher Court refused to make it publicly available, stating that the case was under appeal and the decision of the Court of Appeal was still pending. However, the Higher Court does have the judgment in electronic format, so it is obvious that the reason given by the Court does not hold water and that it was merely used as a pretext to avoid its obligations under the Law on Free Access to Information of Public Importance. The Court's refusal to disclose its judgment directly opposes the opinion of the Commissioner for Information of Public Importance regarding public access to non-final judgments of the Higher Court. Specifically, the Commissioner had previously declared the Higher Court's refusal to provide the HLC with its non-final judgment unlawful.[351]

351 Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-00625/2012-03 of 14 October 2013.

III. Case Skočić[352]

CASE INFORMATION
Stage of the proceedings: appeal proceedings
Date of indictment: 30 April 2010
Trial commencement date: 14 September 2010
Prosecutor: Milan Petrović
Defendants: Damir Bogdanović, Zoran Đurđević, Zoran Alić, Đorđe Šević, Tomislav Gavrić and Dragana Đekić
Criminal offence charged: war crime against the civilian population

Chamber	Judge Siniša Važić (presiding) Judge Sretko Janković Judge Nada Hadžiperić Judge Omer Hadžiomerović Judge Miodrag Majić

Number of defendants: 6	
Defendants' rank: low rank – no rank	**Number of trial days in the reporting period:** 3
Number of victims: 32	**Number of witnesses heard in the reporting period:** 1
Number of witnesses heard: 46	

Key developments in the reporting period:

Appeal proceedings commenced.

352 *Skočić* case trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/skocici.html.

Course of the proceedings

Overview of proceedings up to 2016

Indictment

According to the indictment, the defendants, as members of the paramilitary unit "Sima's Chetniks", on 12 July 1992 destroyed with explosives a mosque in the village of Skočić (municipality of Zvornik, BiH). Next, they assembled Roma residents of the village, including children, women and elderly men, in a house, robbed them of all their valuables, beat them and killed one man; they ordered a grandfather and his grandson to undress and perform oral sex on each other, after which the defendant Sima Bogdanović cut off the grandson's penis with a knife; they repeatedly raped the victims "Alpha", "Beta" and "Gamma", of whom two were minors, after which the defendant Sima Bogdanović pulled out two of "Alpha's" gold teeth with a pair of pliers. The indictment further alleges that the defendants then took all the assembled people to the village of Malešić, where they separated "Alpha", "Beta" and "Gamma" from the group; then they drove the rest of the group to a pit near the village of Šetići, in the place known as Hamzići, where they took them one by one from the vehicle and killed them with knives or firearms, after which they threw their corpses into the pit. 22 civilians were killed, and an eight-year-old boy, Zijo Ribić, was wounded on that occasion. The victims "Alpha", "Beta" and "Gamma" were forcibly confined in Malešić, and then taken by the defendants to the villages of Klis, Petkovci and Drinjača, where they were forced to work, beaten, raped, and otherwise sexually tortured until January 1993.[353]

After another three members of Sima Bogdanović's paramilitary unit had been identified, the OWCP brought two new indictments for the crime in Skočić: against Zoran Alić[354], on 23 February 2011, and against Zoran Đurđević and Dragana Đekić[355], in December 2011. Charges against all the defendants were joined in one single indictment and all the defendants were tried together.

As the defendant Sima Bogdanović died in August 2012, the criminal proceedings against him were discontinued.[356]

353 OWCP indictment KTRZ no. 7/08 of 30 April 2010, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2010_04_30_eng.pdf, accessed on 10 January 2017.

354 OWCP indictment KTRZ no. 11/10 of 23 February 2011, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2011_02_23_eng.pdf, accessed on 10 January 2017.

355 OWCP indictment KTRZ no. 11/11 of 22 December 2011, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Optuznica-protiv-Dragane-Djekic-i-Zorana-Djurdjevica.pdf, accessed on 10 January 2017.

356 OWCP indictment no. KTRZ 7/08 of 4 December 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/12/Izmenjena-Optuznica-Skocici1736.pdf, accessed on 10. January 2017.

First instance judgment

The War Crimes Department of the Higher Court[357] handed down a judgment on 22 February 2013, finding the defendants guilty and sentenced them as follows: Zoran Stojanović and Zoran Đurđević each to 20 years in prison, Zoran Alić and Tomislav Gavrić each to 10 years in prison, Dragana Đekić to five years and Damir Bogdanović to two years in prison. Đorđe Šević, who had been convicted of a war crime in another case[358], received a concurrent sentence of 15 years in prison.[359] As regards the defendant Stojanović, who, according to the indictment, forced the victims Mehmed and Esad Aganović (a grandfather and his grandson) to undress and perform oral sex on each other in Hamdija's house in Skočić, he was charged with engaging in inhumane treatment and outrage on personal dignity. However, the Court held that this charge was not proven. Also, the defendant Đorđe Šević was acquitted of charges of raping the victims "Alpha" and "Beta" and taking part in the killings at Hamzići, because they were not proven during the proceedings.[360]

A detailed analysis of the first instance judgment in this case can be found in the HLC's Report on War Crimes Trials in Serbia in 2013.[361]

Second instance judgment

On 14 May 2014, a Court of Appeal's chamber[362] dismissed as unfounded the appeal lodged by the OWCP against the first instance judgment, discontinued the proceedings against Zoran Stojanović who had died in the meantime, quashed the first instance judgment in respect of the other defendants and sent the case back to the First Instance Court for a retrial.[363]

The first instance judgment was quashed because the Court of Appeal found its operative part to be incomprehensible, internally contradictory, and insufficiently reasoned, because of which, the Court of Appeal held, the facts of the case were inadequately and wrongly determined.

357 Chamber composed of Judge Rastko Popović (presiding) and Judges Vinka Beraha Nikićević and Snežana Garotić Nikolić (members).

358 The District Court in Belgrade (judgment K.no. 1419/04 of 15 July 2005) finally sentenced Đorđe Šević to 15 years in prison for the criminal offence of a war crime against the civilian population, which he committed after the crime in Skočić.

359 Judgment of the Higher Court in Belgrade in *Skočić* no. K.Po2 42/2010 of 22 February 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf, accessed on 10 January 2017.

360 More on the first instance judgment: HLC, "Report on War Crimes Trials in Serbia in 2013" available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf.

361 For a detailed analysis of the judgment, see Humanitarian Law Center "Report on War Crimes Trials in Serbia in 2012" (Belgrade, HLC, 2013), available at http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, pp. 53-63, accessed on 10 January 2017.

362 Composed of Judge Siniša Važić (presiding) and Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović, Miodrag Majić (members).

363 Judgment of the Court of Appeal in *Skočić* no. Kž1 Po2 6/13 of 14 May 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 15 April 2015.

The court assessed as particularly unacceptable the First Instance Court's understanding of co-perpetration, as a form of participation of the defendants in the commission of the crime. In the Court of Appeal's view, the operative part of the first instance judgment did not clearly specify particular actions taken by the defendants, which actions need to be closely related to the commission of the crime. The Court of Appeal disagreed with the conclusion of the First Instance Court that the defendants' not opposing the commission of the crime and not protecting or helping any of the victims showed that they agreed with the crime. If this opinion were correct, mere presence at the scene by a member of the unit and his inaction could amount to a war crime.

Another reason for quashing the first instance judgment was that the inhumane treatment, of which the defendants were convicted, had been inadequately analysed form the legal point of view.

Finally, the Court of Appeal held that the decision to impose maximum punishments on the defendants Zoran Alić and Dragana Đekić had not been sufficiently reasoned. At the time of the crime, Alić and Đekić were minors and as such subject to the Law on Juvenile Offenders and the Protection of Juveniles under the Criminal Justice System. This law prescribes the maximum punishment for juvenile offenders, which is five years; a sentence of up to 10 years may be imposed on a juvenile offender but only for offences carrying a statutory punishment of twenty years imprisonment or more.[364] Since the court sentenced them to maximum prison terms, it had a duty to provide detailed reasons for so deciding.

Retrial

The retrial, which commenced on 2 September 2014, ended in 16 June 2015 with the acquittal of all the defendants.[365] When giving reasons for the acquittals, the Court stated that there was no evidence to prove that the defendants committed the crime they were charged with.[366]

Overview of proceedings, year 2016

The OWCP lodged an appeal against the above judgment. After considering the appeal, the Court of Appeal found that the events in the villages of Malešić, Petkovci and Drinjača (in the municipality of Zvornik, BiH), with which some of the defendants were charged, had not been fully clarified at the retrial. Therefore the Court decided to open the main hearing in order to obtain the testimonies of the protected witnesses "Alpha", "Beta" and "Gamma", which it considered necessary for clarifying

364 Law on Juvenile Offenders and the Protection of Juveniles under the Criminal Justice System, Official Gazette of the RS no. 85/2005, Article 29.

365 Judgment of the Higher Court in Belgrade in *Skočić* K. Po2 11/14 of 16 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Prvostepena_presuda_u_ponovljenom_postupku_16.06.2015..pdf

366 Judgment of the Higher Court in the retrial of the *Skočić* case, no. K Po2 11/14 of 16 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 10 January 2017.

the events at issue. At the main hearing held on 27 April 2016, the protected witness "Alpha" gave evidence.

As the protected witness "Beta", who said she was willing to testify, was prevented by health reasons to attend the hearing, her willingness to testify via a video link, and the time of her testimony, remained to be determined. As regards the third protected witness, "Gamma", the court did not manage to get in contact with her, so the OWCP was given a deadline by which to provide her contact details to the court.

HLC Findings

Inadequate protection of sexual violence survivors

The first instance proceedings were marked by the very harrowing testimonies of all the victims, including the turbulent emotional reactions of the witnesses "Alpha", "Beta" and "Gamma" during their testimonies. The examination of the protected witnesses was marked by the inappropriate behaviour of the defendants, who heckled them in a vulgar manner and asked them questions intended to disparage and traumatize them further. Despite being required by law to protect the witnesses' integrity, the Presiding Judge did not punish this behaviour of the defendants, but only reprimanded them informally.

Also, the much-needed psychological support was altogether lacking throughout the proceedings, because the Higher Court War Crimes Department's Service for the Support and Assistance to Victims does not have a psychologist, and its staff working with witnesses is not trained to deal with sexual violence victims.[367]

The victim and protected witness "Gamma" eventually refused to testify before the Court of Appeal, which was a clear indicator of the inadequacy of the witness and victims protection system in place. The victims in the *Bijeljina II* case made the same decision as the witness "Gamma".

The acute problem with co-perpetration

This was yet another case where, during the last couple of years, a First Instance judgment has been set aside because the Court of Appeal found that the First Instance Court failed to particularize the actions of each of the defendants when assessing their participation, as co-perpetrators, in the commission of the offence.[368]

367 More on support provided to victims and witnesses at the War Crimes Department of the Higher Court can be seen in "Ten years of war crimes prosecution in Serbia – Contours of justice (analysis of war crimes prosecution 2004-2013)", HLC 2014, pp. 54-61, available at http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf, accessed on 10 January 2017.

368 First instance judgments in *Lova, Beli Manastir* and *Ćuška* were quashed for the same reason.

The Court of Appeal insisted that the actions of each defendant should have been clearly specified and thoroughly explained in the judgment. In its judgment, the First Instance Court stated that the defendants Alić, Đurđević and Đekić, together with other unknown members of their unit, destroyed a mosque in the village of Skočić, where "one part" of the unit took part in destroying the mosque, while the "other part", including the defendant Alić, kept guard. The judgment did not specify who was in the "other part", or what actions they took. As regards the defendant Alić, who, according to the judgment, kept guard at the crime scene, the Court of Appeal found that the judgment did not give a clear and coherent explanation of his role in the commission of the crime. This was especially important, bearing in mind that Alić stated that "there was no need to keep guard, because the village was surrounded by territory controlled by Serbian forces", and that this statement was not disproved in the judgment. Such a view of the Court of Appeal seems rigid, as it implies that co-perpetration may be found to exist only if all the actions of each co-perpetrator have been precisely determined.

Keeping guard is in itself an action, a role within the division of roles. The First Instance Court clearly set out that they "kept guard so that no fighters of the opposite side in the armed conflict could come to the scene".[369] Alić's statement that there was no need to keep guard because it was a Serb-controlled territory did not have to be disproved again in the judgment, because it had already been disproved in the part of the judgment relating to the defendant Stojanović, by citing the statement he gave in his defence, which reads as follows: "The order was to search the village to check whether any Muslim soldiers were there […] The order was given by the commander, that is, Sima Bogdanović."[370] Stojanović's statement clearly proved that there existed an order to act in a certain manner, as well as a division of roles, and that the defendants agreed with what was done by the others and accepted the crime as their own.

Racist views held by the Court of Appeal

In regards the defendant Dragana Đekić, the Court of Appeal held that the judgment did not offer clear evidence showing specifically which the actions she had taken that had amounted to inhumane treatment. The rationale provided in the First Instance Court in this respect – that she took some pieces of jewellery from "Beta" which had an emotional value to the latter, at the very same time as people were being raped, beaten and tortured, thus inflicting mental suffering on her and violating her personal dignity - was considered insufficient by the Court of Appeal. The Court of Appeal further stated, among other things, that "in his appeal, Đekić's Defence Attorney rightly asserts that the First Instance Court did not explain clearly why the jewellery had an emotional value to her; moreover, it did not try to ascertain the origin of the jewellery, especially given the fact that a nearby Serbian

369 Judgment of the Higher Court in Belgrade in *Skočić* no. K.Po2 42/2010 of 22 February 2013, p. 77, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf, accessed on 10 January 2017.

370 Judgment of the Higher Court in Belgrade in *Skočić* no. K.Po2 42/2010 of 22 February 2013, p. 22, available at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf, accessed on 10 January 2017.

village had been massacred in that period"[371]. This view of the Court of Appeal is racist because it suggests a priori that the jewellery taken away from the victim certainly did not belong to her but might have belonged to the allegedly massacred Serbs; thus portraying her and other victims as potential massacre perpetrators, or, at least, heartless thieving Roma who robbed the massacred Serb victims of their jewellery, and therefore could not have been emotionally attached to such a piece of jewellery. The Humanitarian Law Center reacted to this view by issuing a press release.[372]

This view of the Court of Appeal cannot be relativized in any way if one takes into consideration that the proceedings did not deal with the massacre at all, nor was any evidence regarding its existence or perpetrators ever put before the court, let alone evidence suggesting any connection between "Gamma", who was only 15 years old at the time, and the alleged massacre. The President of the Court of Appeal reacted to the HLC press release without actually saying anything about the part of his court's decision that drew criticism from the HLC. All he said was that the controversial statement had been "taken out of context" and that it was purely a legal issue.[373]

Inconsistent argumentation of the Court of Appeal

Besides not being based on legal standpoints, the Court of Appeal's arguments for setting aside the judgment are inconsistent as well. Thus, when it comes to the defendant Zoran Alić, this Court reproached the First Instance Court for not having explained in detail his keeping guard during the demolition of the mosque and the killing of 27 Roma civilians in the place known as Hamzići, given that Alić himself said there was no need to keep guard because "Skočić was surrounded by Serb-controlled territory." At the same time, the Court of Appeal did accept as credible the defence of the defendant Dragana Đekić, who said that "a Serbian village nearby was massacred", which implied that the whole surrounding area was not "under Serbian control". This shows that the Court of Appeal's reasons for setting aside the judgment were based on contradictory facts.

The First Instance Court took the path of least resistance

The judgment of acquittal handed down by the First Instance Court following the retrial is founded upon a simplified conclusion that there was no evidence to prove the criminal responsibility of the defendants**.** All the issues pinpointed as disputable by the Court of Appeal in the First Instance judgment, were at the retrial found as unproved by the First Instance Court. In doing so, this Court just shifted the burden of deciding this case onto the Court of Appeal, because the Court of Appeal

371 Judgment of the Court of Appeal in *Skočić* no. Kž1 Po2 6/13 of 14 May 2014, p. 13, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 10 January 2017.

372 Humanitarian Law Center press release of 14 July 2014,"Racist Positions of the Court of Appeals in the Judgment in the Skočić Case"**,** available at http://www.hlc-rdc.org/?p=27178&lang=de, accessed on 10 January 2017.

373 Press release of the President of the Court of Appeal in Belgrade of 15 July2014, "On the Humanitarian Law Center's press release regarding the Court of Appeal's Ruling in the case publicly known as *Skočić*", available (in Serbian) at http://www.bg.ap.sud.rs/cr/archive/vesti-i-saopstenja/2014/7 accessed on 10 January 2017.

had no alternative but to finally adjudicate the case, because a first instance judgment cannot be set aside twice.[374]

So the Court concluded that it was not proven that the defendant Zoran Alić kept guard while the mosque in Skočić was being destroyed. The Court found that "a guard is a group of armed people serving to protect people, facilities, and material and technical assets, posted according to a certain order, whose work is regulated by special rules of service,"[375] and ignored all other evidence suggesting that the unit acted pursuant to a set pattern[376] and that the attack on Skočić was carried out on the unit commander's orders. The Court accepted the defendant's defence that he was not mounting guard, but just standing by and smoking a cigarette. The judgment failed to provide a clear and logical explanation as to why the Court accepted this statement and did not accept his statement in which he denied being present at the scene while the civilians were being killed.

Lack of legal knowledge and sensitivity on the part of Judge

In its judgment following the retrial, the Court again found that it was not proven that taking the jewellery from the victim "Gamma", and the defendants' forcing of the victims to wash their clothes, prepare food and do the cleaning for them, was inhumane treatment. In the Court's view, these actions of the defendants could not be considered inhumane treatment, because it was not proven that they constituted an outrage on personal dignity and caused severe physical and mental suffering and "resulted in a severe humiliation and degradation" of the victims.[377] Moreover, in regard the victims' captivity in Malešić, the Court particularly emphasised that its conclusion on the non-existence of inhumane treatment was based on the fact that the victims also themselves ate the food that they prepared, and enjoyed the washed clothes and cleaned house:[378]

"As regards the circumstances that the victims occasionally prepared food, crepes and doughnuts, and that, as stated by "Alpha", no one prevented them from eating the food they prepared, and that they washed others' clothes, although it is logical that in these circumstances they certainly had to wash their own clothes too, and that they were responsible for the cleanliness of the houses in which they too stayed, the court holds that there is no evidence that these actions led to severe mental suffering."

The court completely ignored the context of the events in question – that the 15-year-old girl was robbed of her jewellery while her family members were being killed, or raped; in other words, that the victims were held captive, raped and otherwise physically abused on a daily basis, knowing that

374 ZKP, Article 455, paragraph 2.
375 Ibid, p. 39.
376 Transcript of the main hearing of 19 March 2015, pp. 6-8, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Transkript_19_03_2015.pdf, accessed on 10 January 2017.
377 Judgment of the Higher Court in the retrial of the *Skočić* case, no. K Po2 11/14 of 16 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 10 January 2017.
378 Ibid, p. 55.

members of that very unit had killed their loved ones. The above-cited finding of the First Instance Court is also contrary to the testimony of the witness Senija Bećirević to which the Court gave credence. This witness expressly stated that protected witnesses "Alpha", "Beta" and "Gamma" were forced to clean and cook: "You had to clean and wash, or you'd be beaten."[379]

Moreover, in its judgment the Court vaguely cited "the ICTY positions" on inhumane treatment, while drastically departing from ICTY practice and the practice of other bodies when it comes to proving inhumane treatment[380]. The judgment says: "In the opinion of this Court, not every action committed against the victims […] amounts to inhumane treatment; it is necessary that the actions […] caused severe mental suffering."

In addition to diminishing the suffering of the victims, the Court also disregarded the ICTY standards: "An outrage upon personal dignity […]does not have to directly jeopardize the victim's physical or mental well-being; it is enough to cause real and permanent suffering which stems from humiliation or ridicule."[381] Moreover, the International Committee of the Red Cross (ICRC) explains the meaning of inhumane treatment as follows: "It does not necessarily mean conduct which is an attack on physical integrity or health […] Certain measures like separation of civilians from the outside world, especially their families […], should be considered inhumane treatment."[382]

In the cases involving inhumane treatment, the ECtHR emphasised that the "level of suffering" is assessed on the basis of "all the circumstances of the case, such as the duration of the mistreatment, its physical or mental effects and, in some cases, the sex, age and state of health of the victim, etc."[383] Moreover, the ECtHR held: "With respect to a person deprived of his liberty, any recourse to physical force which has not been made strictly necessary by his own conduct diminishes human dignity."[384]

Finally, confinement of women in private houses and other premises for sexual exploitation and housework was not a rare occurrence during the war in BiH. In some cases the ICTY and the Court of BiH[385] classified such actions not only as inhumane treatment but also as enslavement i.e. a crime against humanity. The ICTY established that "indications of enslavement include elements of control and ownership; the restriction or control of an individual's autonomy, freedom of choice or freedom

379 Transcript of the main hearing of 19 March 2015, p. 13, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Transkript_19_03_2015.pdf, accessed on 10 January 2017.

380 Judgment of the Higher Court in the retrial of the *Skočić* case, no. K Po2 11/14 of 16 June 2015, p. 42, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 10 January 2017.

381 *The Prosecutor v. Zlatko Aleksovski*, case no. IT -95-14/1-T, Trial Judgment of 25 June 1999, para. 56.

382 ICRC Commentary on the III Geneva Convention MKCK, para. 627; ICRC Commentary on the II Geneva Convention, par. 268, ICTY Trial Judgment in *The Prosecutor v. Mucić et al.*, paras. 521-522.

383 ECtHR, *A v. United Kingdom*, Judgement 23 Sept. 1998, Eur. Ct. H.R., para. 20 (citing: *Costello-Roberts v. United Kingdom*, Judgement 25 March 1993, 247-C Eur. Ct. H.R. (Ser.A) 1993).

384 ECtHR, *Ribitsch v. Austria*, 21 EHRR 573, 1996, para. 38.

385 See, the Court of BiH: second-instance judgment in *Samardžić*; first-instance and second-instance judgments in *Janković*; first-instance and second-instance judgment in *Kujundžić*.

of movement […] Further indications of enslavement include exploitation; the exaction of forced or compulsory labour or service, often without remuneration and often, though not necessarily, involving physical hardship; sex; prostitution; and human trafficking."[386]

386 ICTY trial judgment in *The Prosecutor v. Kunarac et al.*, para. 542.

IV. Case Ovčara[387]

CASE INFORMATION
Stage of the proceedings: appeals process
Date of indictment: 4 December 2003
Trial commencement date: 9 March2004
Prosecutor: Dušan Knežević
Criminal offence charged: war crime against prisoners of war
Defendants: Miroljub Vujović, Ivan Atanasijević, Stanko Vujanović, Milan Lančužanin, Jovica Perić, Milan Vojnović, Predrag Milojević, Goran Mugoša, Đorđe Šošić, Miroslav Đanković, Predrag Dragović, Nada Kalaba and Saša Radak.

Chamber	Judge Sretko Janković (presiding) Judge Sonja Manojlović Judge Nada Hadži Perić Judge Omer Hadžiomerović Judge Miodrag Majić

Number of defendants: 13	
Defendants' rank: low and middle	**Number of trial days in the reporting period:** 0
Number of victims: 200	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 120	

Key developments in the reporting period:

Hearing before the Court of Appeal in the repeated appeals proceedings.

387 *Ovčara* case trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/ovcara.html

Course of the proceedings

Overview of proceedings up to 2016

Indictment

The defendants, members of the Territorial Defence Force or "Leva supoderica" Volunteer Unit attached to the JNA, are charged with killing 200 prisoners of war at the Ovčara farm on 20 and 21 November 1991. Before being killed, the victims, who had surrendered to the JNA, were physically abused and otherwise mistreated by the defendants.[388]

First trial (2005-2006)

On 12 December 2005, the District Court in Belgrade[389] sentenced eight of the defendants to 20 years in prison, Predrag Madžarac to 12 years, Goran Mugoša to five years, and Nada Kalaba to nine years in prison. The defendants Marko Ljuboja and Slobodan Katić were acquitted of all charges.[390] The Supreme Court of Serbia[391] on 18 October 2006 quashed this judgment and sent the case back to the First Instance Court for retrial.[392]

388 OWCP indictment KTRZ no. 4/03 of 24 May 2004, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-MILAN_LANCUZANIN_I_DR-24.05.2004.pdf, accessed on 26 January 2017; OWCP indictment KTRZ no. 4/04 of 26 May 2004, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-PREDRAG_DRAGOVIC-26.05.2004.pdf accessed on 26 January 2017; OWCP indictment KTRZ no. 3/03 of 4 December 2003, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-MIROLJUB_VUJOVIC_I_DR-04.12.2003.pdf, accessed on 26 January 2017. Proceedings regarding Mirko Vojnović, who died in 2004, were discontinued. The defendants Spasoje Petković and Božo Latinović were awarded the status of witness/collaborator with Justice. Proceedings against Milan Bulić were severed and completed separately owing to his illness – see Judgment of the Supreme Court of Serbia Kž I r.z. 2/06 of 9 February 2006. Milan Bulić was finally sentenced to two years in prison.

389 Chamber composed of Judge Vesko Krstajić (presiding) and Judges Gordana Božilović Petrović and Vinka Beraha Nikićević (members).

390 Judgment of the District Court in Belgrade K.V. 1/2003 of 12 December 2005, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/Presuda-Ovcara-12_12_2005_.pdf, accessed on 26 January 2017.

391 Chamber composed of Judge Janko Lazarević (presiding) and Judges Nikola Latinović, Slobodan Gazivoda, Dragomir Milojević and Sonja Manojlović (members).

392 Ruling of the Supreme Court of Serbia no. Kž. I. R.z. 1/06 of 18. October 2006, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/SR-BEOGRAD-OVcARA-18.10.2006..pdf, accessed on 26. January 2017.

Retrial (2009-2010)

At the retrial conducted by a new chamber,[393] Saša Radak[394] and Milorad Pejić,[395] against whom the OWCP in the meantime had brought an indictment for the same crime, were tried together with other defendants. On 12 March 2009, the District Court sentenced seven defendants, including Saša Radak, to 20 years in prison, Milan Vojnović to 15 years, Jovica Perić to 13 years, Nada Kalaba to nine years, Milan Lančužanin to six years, and Goran Mugoša and Predrag Dragović each to five years. Slobodan Katić, Predrag Madžarac, Vujo Zlatar were acquitted.[396]

Both parties appealed against the judgment. Having heard the appeals, the Court of Appeal in Belgrade[397] handed down its judgment in 2010, which reversed Nada Kalaba and Ivan Atanasijević's sentences, by increasing Kalaba's sentence by two years and reducing Atanasijević's sentence by five years.[398]

Constitutional appeal by Saša Radak

On 15 October 2010, the defendant Saša Radak lodged an appeal with the Constitutional Court against the first instance judgment of 2009 and the Court of Appeal's judgment of 2010. Radak submitted that the judgments had violated his rights, including the right to life, the right to inviolability of physical and mental integrity, the right to liberty and security, the right to a fair trial, the special rights of a defendant and the right to freedom and security in criminal law provided under the Constitution, as well as the right to a fair trial under Article 6, paragraph 1 of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Decision of the Constitutional Court of Serbia

On 12 December 2013, the Constitutional Court of Serbia[399] accepted Radak's appeal against the

393 Chamber composed of Judge Vesko Krstajić (presiding) and Judges Vinka Beraha Nikićević and Snežana Nikolić Garotić, (members).

394 OWCP indictment no. KTRZ 4/03 of 13 April 2005, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2005_04_13_eng.pdf, accessed on 26 January 2017.

395 OWCP indictment no. KTRZ 4/03 d 8 April 2005, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/Optuznica_Milorad_Pejic_08.04.2008.pdf, accessed on 26 January 2017.

396 Judgment of the District Court in Belgrade no. K.V. 4/06 of 12 March 2009, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/PRESUDA_Ovcara_prvostepena_u_ponovljenom_postupku.pdf

397 Chamber composed of Judge Siniša Važić (presiding) and Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić (members).

398 Judgment of the Court of Appeal in Belgrade no. Kž1 K.Po2 1/2010 of 23 June 2010, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/Ovcara_drugostepena_-presuda_u_ponovljenom_postupku_23.06.2010..pdf, accessed on 26 January 2017.

399 Chamber composed of Judge Dragiša B. Slijepčević (presiding), and Judges Olivera Vučić, Marija Draškić, Bratislav Đokić, Goran Ilić, Agneš Kartag Odri, Katarina Manojlović Andrić, Milan Marković, Bosa Nenadić, Dragan Stojanović, Sabahudin Tahirović, Tomislav Stojković and Predrag Ćetković (members).

decision of the Court of Appeal in Belgrade.[400] The court found that the decision of the Court of Appeal violated Saša Radak's right to have a fair trial i.e. the right to have his case decided upon by an impartial court, because Judge Siniša Važić sat on the Court of Appeal Chamber which affirmed Radak's conviction. Judge Važić was President of the District Court in Belgrade and ruled on motions seeking disqualification of judges hearing the *Ovčara* case, and at the same time he presided over the Pre-trial Chamber of the same court, and acting in this capacity he took part in making the decision to award the status of a witness/collaborator with Justice to the defendant Petković, and the decision to extend custody to all defendants, including Radak. In the opinion of the Court of Appeal, Judge Važić's engagement in several capacities in the first instance proceedings and the decisions he made at that time were circumstances that raised doubts as to his impartiality when serving as the President of the Chamber hearing the appeals in that very case.

So the Constitutional Court decided to order the Court of Appeal to reconsider Radak's appeal against the first instance judgment of the District Court in Belgrade, emphasising that this decision applied to all the other defendants as well. A detailed analysis of the Constitutional Court's decision can be found in HLC' "Report on war crimes trials in Serbia in 2013".[401]

Requests for the protection of legality

Following the decision of the Constitutional Court, the Defence Attorneys of Miroslav Đanković, Miroljub Vujović, Stanko Vujanović, Nada Kalaba, Đorđe Šošić, Predrag Milojević, Saša Radak, Milan Vojnović, Predrag Dragović and Milan Lančužanin filed requests for the protection of legality on behalf of their clients, on the grounds of violation of their clients' right to a fair trial.

On 19 June 2014, the Supreme Court of Cassation[402] ruled to accept the requests as well-founded. Moreover, the Court also decided that its ruling applied also to the defendants Ivan Atanasijević, Jovica Perić and Goran Mugoša, whose Attorneys did not even lodge requests for the protection of legality on behalf of their clients.[403] Also, the court quashed the final judgment of the Court of Appeal in Belgrade and remanded the case to this court for re-consideration.[404]

400 Decision of the Constitutional Court of Serbia no. Už -4451/2010 of 12 December 2013, published in the Official Gazette of the RS no. 54/2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/06/ODLUKA_Ustavnnog_suda_po_zalbi_Sase_Radaka.pdf, accessed on 26 January 2017.

401 "Report on War Crimes Trials in Serbia in 2013" (Belgrade: HLC, 2014), pp. 85-89, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 26 January 2017.

402 Chamber composed of Judge Dragiša Đorđević (presiding), Judges Zoran Tatalović, Radmila Dičić Dragičević, Maja Kovačević Tomić and Predrag Gligorijević (members).

403 According to Article 489, paragraph 2 of the ZKP, if the Supreme Court of Cassation finds that the reasons why it has issued a decision in favour of a defendant also exist for a co-defendant in respect of whom no request for the protection of legality was filed, it will act ex officio as if such a request did exist.

404 Judgment of the Supreme Court of Cassation no. K33 PZ 2/2014 of 19 June 2014, available at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Presuda_Vrhovnog_Kasacionog_suda_19_06_2014-.pdf, accessed on 26 January 2017.

Repeated appeals proceedings

On 1 December 2014, the Court of Appeal[405] re-opened the appeals process and decided to open the hearing process. At the hearings, which began on 15 June 2015, the defendants again presented their defence,[406] and four witnesses, including two witnesses/collaborators with Justice, were examined.

Overview of proceedings, year 2016

No hearings were held in 2016 because the Court did not obtain from the ICTY Residual Mechanism the record of the examination of witness P022 it had requested. Witness P022 appeared in the *Ovčara* case as "witness/collaborator with Justice 1". It was the Defence Attorneys who insisted that this document should be obtained.[407]

HLC Findings

13 years without justice

Three years after the final judgment in the most important and most complex case ever dealt with by the domestic judiciary had been delivered, the Constitutional Court set aside this judgment, not because a judge hearing the case was shown to be biased, but because of "the existence of a reasonable and justified doubt as to [his] impartiality".[408] After that, the Supreme Court of Cassation could not accept the requests for the protection of legality, and set aside the final judgments of the Court of Appeal, since one of the legal requirements for accepting a request for the protection of legality – violation of a defendant's right guaranteed by the Constitution - was found to have been met.[409]

This case, transferred from the ICTY, is the first and most complex war crime case to come before a Serbian court. The incompetence or unwillingness of the domestic judiciary to resolve this case in 13 years, and 25 years after the crime had been committed, is illustrative of the way war crimes cases are conducted in Serbia: complex cases involving many victims, such as *Ovčara*, *Ćuška*, *Lovas*, and *Skočić*, are protracted owing to all sorts of procedural issues, become incomprehensible over time and eventually invisible to the public eye. The families of victims, who reluctantly placed their trust in the

405 Chamber composed of Judge Sretko Janković (presiding), Judges Sonja Manojlović, Nada Hadži Perić, Omer Hadžiomerović and Miodrag Majić (members).

406 Trial report of 15 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/1.Ovcara-Izvestaj_sa_sudjenja_15.06.2015.pdf, accessed on 27 January 2017.

407 Trial report of 11 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/7.Ovcara-Izvestaj_sa_sudjenja11.05.2016.pdf, accessed on 26 January 2017,

408 For more details, see: "Report on War Crimes Trials in Serbia in 2013" (Belgrade: HLC, 2014), pp. 85-89, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 26 January 2017.

409 ZKP, Article 485 paragraph 1, sub-paragraph 3.

Serbian courts, are all that time left without information about what happened to their loved ones and who was responsible for the crimes committed against them.

Only low-ranking perpetrators have been prosecuted

In other proceedings conducted in Serbia and before the ICTY, facts have been established which indicate the responsibility of a large number of JNA officials for the crime in Ovčara. This was underlined also by Veselin Šljivančanin, who was convicted of the events in Ovčara before the ICTY. In his appeal to this court, Šljivančanin stated that officers were present at Ovčara "who had the material ability and were in a better position than him to take measures to stop the mistreatment of the prisoners of war," referring to Lieutenant-Colonel Milorad Vojnović, Lieutenant-Colonel Miodrag Panić, Captain Dragan Vezmarović and Captain Dragi Vukosavljević.[410] Despite all these, only direct perpetrators have been prosecuted over the crime at Ovčara.

410 ICTY Appeal Judgment in *The Prosecutor v. Mile Mrkšić and Veselin Šljivančanin* (IT-95-13/1-A) of 5 May 2009, para. 197, available at http://www.icty.org/x/cases/mrksic/acjug/bcs/090505.pdf, accessed on 27 January 2017.

Final judgments in cases before the War Crimes Departments

I. Case Srebrenica-Branjevo[411]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 22 January 2016	
Prosecutor: Snežana Stanojković	
Judge: Milan Dilparić, Judge for the preliminary proceedings	
Defendant: Brano Gojković	
Criminal offence charged: war crime against the civilian population	
Number of defendants: 1	
Rank of defendant: low rank – no rank	**Number of trial days in the reporting period:** 1
Number of victims: several hundred	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 0	

Key developments in the reporting period:

Judgment by which the Higher Court accepted the plea agreement reached between the defendant and the OWCP.

411 Case *Srebrenica-Branjevo* available at http://www.hlc-rdc.org/Transkripti/srebrenica-branjevo.html,accessed on 28 October 2016.

Course of the proceedings

Indictment

The OWCP indictment[412] against Brano Gojković alleges as follows: the accused, in his capacity as a member of the 10th Sabotage Detachment of the VRS, together with other members of the Detachment, executed several hundred Muslim civilians from Srebrenica who had earlier been taken prisoner; the prisoners were on 16 July 1995 transported on buses from the Cultural Centre in Pilica (in the municipality of Zvornik, BiH) to a farm in Branjevo, where the accused, together with other members of the 10th Sabotage Detachment, took them in groups of ten to a meadow near a warehouse, lined them up and executed them by firing from his automatic gun.

Judgment

On 27 January 2016, the Higher Court in Belgrade accepted the plea agreement entered between the defendant and the OWCP upon the defendant's plea of guilty to the criminal offence of a war crime against the civilian population, and sentenced him to ten year's imprisonment.[413]

This was the third plea agreement that the OWCP has concluded in war crimes cases.[414]

HLC findings

OWCP's selective approach to prosecuting war crimes suspects

Already in 2010, the HLC had filed a criminal complaint with the OWCP against several members of the 10th Sabotage Detachment, including its commander Milorad Pelemiš, for genocide committed in Srebrenica. All these former members of the detachment live in Serbia, appear in public and in the media,[415] and therefore are available to the authorities in Serbia.[416] The criminal complaint also included Brano Gojković, who the OWCP even then knew lived in Belgrade. Besides that, the HLC in 2011 published its dossier "The 10th Sabotage Detachment of the Main Staff of the Army of Republika Srpska", which depicted in detail the role of this detachment, including its member Brano Gojković,

412 OWCP Indictment KTO no. 1/16 of 22 January 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Optuznica%20_22.01.2016..pdf, accessed on 4 January 2017.

413 Judgment of the Higher Court in Belgrade in *Srebrenica-Branjevo*, Spk.Po2 no. 1/16 of 27 January 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/10/Spk_Po2_1-16_opt_Gojkovic_Brano.pdf, accessed on 28 October 2016.

414 The first plea agreement in a war crime case the OWCP concluded with Milan Škrbić in 2013. The second was with Marko Crevar in 2015 and earlier agreements were concluded with persons accused of harbouring Hague indictees.

415 See, e.g., Milorad Pelemiš's appearance in the show "Goli život" 2014, available at https://www.youtube.com/watch?v=BPQUlH78yhI

416 FHP press release, "Krivična prijava za genocid u Srebrenici" [Criminal Complaint for Crime in Srebrenica], 16 August 2010, available at http://www.hlc-rdc.org/?p=13072

in the crime set out not only in the OWCP indictment, but also in the capture of Srebrenica.[417] As the OWCP has taken no action with regard to the HLC complaint for six years now, it can reasonably be assumed that the OWCP would not have indicted Gojković either if BiH had not requested his extradition or already prepared a case against him.

This lack of willingness of the OWCP to prosecute those responsible for the execution of the men from Srebrenica is illustrated also by the fact that a large number of persons about whom there is abundant evidence implicating them in these crimes live in Serbia. The OWCP opted for a concluding plea bargain with Gojković, which did not significantly contribute to the fight against impunity, or to informing the public about this crime (as information on the role Brano Gojković played in the Srebrenica genocide has been publicly available for 15 years), nor did it bring satisfaction to victims' families. Instead of the plea agreement, the OWCP should have sought an agreement whereby the defendant would testify in court and thus help the prosecution of the co-perpetrators in this crime.[418]

Violating regional agreements on war crimes prosecution

The Prosecutor's Office of BiH requested from Serbia that Brano Gojković to be extradited and tried in BiH for the same criminal offence, as BiH had issued an international arrest warrant for Gojković in 2010. The plea agreement with Gojković was signed immediately after BiH had filed the request for his extradition.[419] As stated in the OWCP indictment itself,[420] Gojković, does not have Serbian but BiH citizenship, the offence was committed on the territory of BiH, and many witnesses and other evidence are also located in BiH. Besides, the Court of BiH have already tried this case and passed final convictions on Franc Kos, Stanko Kojić, Zoran Goronja and Vlastimir Golijan, who received prison terms of 35, 32, 30 and 15 years, respectively;[421] And also on Marko Boškić, who entered a plea agreement in relation to the same crime and was sentenced to ten years in prison as a result.[422] Dražen Erdemović, another person involved in this crime, was sentenced to five years' imprisonment

417 FHP, Dossier: The 10h Sabotage Detachment of the Main Staff of the Army of Republika Srpska, available at http://www.hlc-rdc.org/images/stories/publikacije/Dosije_eng.pdf.

418 Press release of the Prosecutor's Office of Bosnia and Herzegovina, "Tužilaštvo BiH nije zadovoljno sporazumnim priznanjem u Caseu protiv Brane Gojkovića koji je sklopilo tužilaštvo u Beogradu" [BiH Prosecutor's Office is not satisfied with plea agreement concluded between Brano Gojković and the Prosecutor's Office in Belgrade], 5 February 2016, available (in B-Cr-Sr) at http://www.tuzilastvobih.gov.ba/?id=3181&jezik=b accessed on 2 November 2016.

419 Marija Ristić, Denis Džidić, "Serbia Jails Bosnian Serb Soldier for Srebrenica Massacre", Balkan Insight, 4 February 2016, available at http://www.balkaninsight.com/en/article/serbia-jails-bosnian-serb-soldier-for-srebrenica-02-04-2016.

420 OWCP Indictment KTO no. 1/16 of 22 January 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Optuznica%20_22.01.2016..pdf, accessed on 4 January 2017.

421 Judgment of the Appellate Chamber of the Court of Bosnia and Herzegovina no. S1-1 K003372 Krž 13 of 15. February 2013.

422 Judgment of the Court of Bosnia and Herzegovina no. X-KP-10/928 of 19 July 2010, available at http://www.sudbih.gov.ba/, accessed on 2 November 2016.

by the ICTY after pleading guilty.[423] Bearing in mind all these facts, the HLC believes that this case should have been referred to the BiH judiciary, as that would have enhanced regional cooperation and victims' confidence in the institutions,

The Prosecutor's Office of BiH issued a press release commenting on the plea agreement and judgment passed in this case, which underlined that justice would have been served more effectively had the case been tried by the Court of BiH.[424]

Unreasoned judgment

When passing its judgment, which confirmed the plea agreement concluded between the defendant, Brano Gojković, and the OWCP, the Higher Court failed to provide a detailed explanation of the reasons for its decision. Instead, the Court just listed the ZKP articles on the basis of which it concluded that the plea agreement contained all the necessary elements required by law, that all legal requirements were met in relation with the evidence attached to the agreement, that the punishment was consistent with the provisions of the Criminal Code, and that there were no legal obstacles in place that would prevent the conclusion of the plea agreement in the instant case. This Court makes a practice of not providing the reasons for its decisions confirming plea agreements in war crimes cases.[425]

Unreasoned decision on sentence

The Higher Court sentenced Brano Gojković to ten years' imprisonment. The ZKP stipulates that a court will accept a plea agreement if it determines that the penalty proposed by the agreement is in line with the Criminal Code. However, in the decision accepting the agreement, the Court did not explain on what basis it had concluded that the prison term of ten years was in line with the Criminal Code, especially given the seriousness of the crime - several hundred civilians murdered, and the relentlessness and ruthlessness which the defendant displayed when killing so many victims. The Higher Court and the Court of Appeal in Belgrade imposed much harsher punishments in war

423 ICTY Judgment in *Dražen Erdemović* (IT-96-22), available at http://www.icty.org/x/cases/erdemovic/tjug/bcs/erd-tj980305b.pdf, accessed on 2 November 2016.

424 Press release of the Prosecutor's Office of Bosnia and Herzegovina, "Tužilaštvo BiH nije zadovoljno sporazumnim priznanjem u Caseu protiv Brane Gojkovića koji je sklopilo tužilaštvo u Beogradu" [BiH Prosecutor's Office dissatisfied with plea agreement concluded between Brano Gojković and the Prosecutor's Office in Belgrade], 5 February 2016, available (in B-Cr-Sr) at http://www.tuzilastvobih.gov.ba/?id=3181&jezik=b accessed on 2 November 2016.

425 See: Judgment of the Higher Court in Belgrade no. SPK P02 2/13 of 13 September 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/SR-Beograd-opt.Milan_Skrbic-13.09.2013.F89753.pdf, accessed on 26 October 2016; Judgment of the Higher Court in Belgrade no. SPK Po2 1/15 of 18 February 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_15-18.02.2015.pdf, accessed on 26 October 2016.

crimes cases involving a large number of victims.[426] BY way of illustration, the sentence passed in the *Srebrenica-Branjevo* case should be compared with the sentence passed on the cooperating defendant in the *Sotin* case, for example. The latter received nine years for killing 13 civilians, although he had discovered the location of a mass grave holding the mortal remains of the victims and helped the court to establish the criminal responsibility of other defendants for the execution of the 13 Croatian civilians.

Excessive anonymisation

The names of all the other co-perpetrators have been redacted in the judgment, although these persons have been convicted by the ICTY and the Court of BiH, and their names and other particulars have been publicly available for a long time. Namely, information concerning their convictions can be found both at the ICTY website and the website of the Court of BiH, as well as in the press.[427] With this excessive anonymization, the Higher Court disobeyed a decision of the Commissioner for Information of Public Importance, according to which the names of persons accused and convicted of war crimes should not be anonymised,[428] and departed from the Law on Free Access to Information of Public Importance, which stipulates that information which is already publicly available is not to be anonymised.

426 Judgment of the Court of Appeal in Belgrade in *Ovčara* V, Kž1.Po2 8/13 of 3 November 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_3.11.2014..pdf, accessed on 26 October 2016; Judgment of the Court of Appeal in Belgrade in *Suva Reka,* Kž1 Po2 4/11 of 6 June 2011, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Drugostepena_presuda_u_ponovljenom_postupku-06.06.2011.pdf, accessed on 26 October 2016; Judgment of the Court of Appeal in Belgrade in Kž1 Po2 6/12 of 25 February 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Drugostepena-presuda.pdf, accessed on 26 October 2016.

427 N1 News of 4 February 2016, "Brano Gojković priznao krivicu za ubistva Srebreničana" [Brano Gojković pleads guilty to killing of Srebrenica men], available (in Bosnian) at http://ba.n1info.com/a80448/Vijesti/Vijesti/Brano-Gojkovic-osudjen-na-10-gofina.html, accessed on 26 October 2016; RTV 7 BiH, 4 February 2016 "Gojković priznao ubistvo više stotina Srebreničana"[Gojković pleads guilty to killing several hundred Srebrenica men], available at http://rtv7.ba/arhive/65006, accessed on 28 October 2016.

428 See, e.g., Decision of the Commissioner for Information of Public Importance no. 07-00-01258/2014-03 of 15 December 2014.

II. Case Luka Camp[429]

CASE INFORMATION
Stage of the proceedings: final judgment delivered
Date of indictment: 31 March 2014
Trial commencement date: 2 June 2014
Prosecutor: Milan Petrović
Defendant: Boban "Pop" ("The Priest") Kostić
Criminal offence charged: war crime against the civilian population

Chamber	Judge Siniša Važić (presiding) Judge Nada Hadži-Perić Judge Sretko Janković Judge Omer Hadžiomerović Judge Miodrag Majić

Number of defendants: 1	
Defendant's rank: low rank – no rank	**Number of trial days in the reporting period:** 1
Number of victims: 1	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 4	

Key developments in the reporting period:

On 28 March 2016, the Court of Appeal in Belgrade affirmed the judgment of the Higher Court in Belgrade that acquitted Boban "Pop" Kostić of the charge of committing a war crime against the civilian population.

429 Case *Luka Camp*, trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/brcko.html, accessed on 2 November 2016.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

Boban "Pop" Kostić, a former VRS member, is charged with having beaten and tortured Muhamed Bukvić in the "Luka" detention camp in Brčko (BiH) on 10 May 1992. According to the indictment, the defendant came to the camp in which Muhamed was detained and took him into an office. He then ordered him to write down on a sheet of paper his name and the date on which he would like to be executed, following which he punched Bukvić in the face and head with his right fist, on which he wore a brass knuckle, while holding a knife in his left hand.[430]

Defendant's defence

The defendant admitted being a VRS member and visiting the above-mentioned camp at the relevant time, but denied committing the criminal offence with which he was charged. He said that he came to the camp to look for some family members from Brčko, as his mother was a Muslim, and denied ever hurting anyone in the camp, adding that he was not authorized to question camp detainees.

Witnesses

Prosecution witness Džafer Deronjić, a former camp detainee, confirmed that in May 1992 he met the injured party, Muhamed Bukvić, in the camp, but Bukvić's face was so swollen and deformed that he did not recognize him, although he knew him well. It was only in 1999 that Muhamed told him that he had been beaten in the camp by a man called "The Priest".

Another prosecution witness, Konstantin Simonović, who was responsible for the posting and relieving of the guards in the Luka camp, claimed that he knew nothing of the beating of the injured party, Mehmed Muhamed Bukvić, adding that he had never even met him.[431]

The injured party, Muhamed Bukvić, being of advanced age, seriously ill and living in Australia, could not give evidence in the courtroom. He also refused to give evidence by video link from Australia, fearing that it would put at risk his personal safety and that of his family in Brčko. Hence the court decided to have his testimony, given before the Cantonal Court in Tuzla in 1997, read in the courtroom.

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430 OWCP indictment KTO no. 1/14 of 31 March 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/08/optuznica_Boban_Pop_Kostic-Brcko.pdf, accessed on 13 October 2016.

431 Witness Konstantin Simonović was sentenced by the Basic Court of Brčko District (KP-218/05) of 18 October 2015 to six years in prison for a war crime against the civilian population committed in the Luka Camp, which included inflicting bodily injuries on Muhamed Bukvić, the injured party in the *Luka Camp* case.

In this testimony, given in the proceedings against Konstantin Simonović, and in the statement he gave to the Australian Federal Police in 2010, Bukvić identified the defendant, Boban "Pop" Kostić, as a person who, together with Konstantin Simonović, questioned and ill-treated him in the camp.

The testimony of Hasan Kamberović given to the Office of the Public Prosecutor of the Brčko District was also read in the courtroom, because this witness had passed away in the meantime. Kamberović also saw the injured party in the camp, but the latter was left so utterly unrecognisable by the beating that Kamberović only recognised him when Bukvić spoke to him. Bukvić did not tell Kamberović who had beaten him.

Psychiatric examination of injured party

The Trial Chamber granted the motion by the Defence Attorney to obtain medical records on the injured party, as he suffers from schizophrenia, and to order a psychiatric evaluation of his mental fitness to testify. A commission of the Psychiatric Clinic of the Clinical Centre of Serbia found no psychopathological processes in the injured party, despite his suffering from a mental disorder, and concluded that at the moment of testifying he was fit to testify.

First instance ruling

On 20 March 2015, the Higher Court[432] found the defendant guilty[433] of a war crime against the civilian population and sentenced him to two years' imprisonment. In determining the punishment, the court took into account the defendant's family situation i.e. the fact that he has a family and supports a minor, absence of previous convictions and the amount of time elapsed since the commission of the crime as mitigating circumstances. No aggravating circumstances were found. The court found these mitigating circumstances to be particularly mitigating and therefore punished Kostić with a sentence less than the statutory minimum.

Second instance ruling

On 10 June 2015, the Court of Appeal[434] quashed the first instance judgment and remitted the case to the First Instance Court for retrial.[435] The Court of Appeal found that the first instance judgment violated essential procedural requirements, as it was based upon inadmissible evidence, namely

432 Chamber composed of Judge Vera Vukotić (presiding), and Judges Vinka Beraha Nikićević and Vladimir Duruz (members).

433 Judgment of the Higher Court in Belgrade, K.Po2 br. 5/14 of 20 March 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf, accessed on 13 October 2016.

434 Chamber composed of Judge Siniša Važić (presiding), and Judges Sretko Janković, Omer Hadžiomerović, Miodrag Majić and Nada Hadži Perić (members).

435 Court of Appeal ruling Kž1.Po2 1/15 of 10 June 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Resenje_Apelacionog_suda_u_Beogradu.pdf, accessed on 13 October 2016.

on the testimony the injured party had given in other proceedings, conducted before the Cantonal Court in Tuzla. Furthermore, the court found an infringement of the principle of immediacy and infringement of the right to defence, as the First Instance Court denied the defendant his right to examine a prosecution witness. In doing so, the Court of Appeal found, the First Instance Court had violated a provision of Article 6 of the ECHR which guarantees the right of a defendant to examine witnesses against him, as one of his minimum rights.

Retrial

At the retrial, the injured party, Muhamed Bukvić, gave evidence from Australia via video-conference, in a hearing held *in camera* with the use of face-distortion techniques. Bukvić said that on 9 May 1992, in the detention camp, was where he was first beaten by "Kole" (Konstantin Simonović). The following day he was beaten by "Kole" and the defendant Kostić, who was wearing a camouflage uniform and a metal knuckle-duster at the time. Kostić punched him in the head, breaking his nose and teeth, and "Kole" beat his torso with a bat, breaking his ribs. Throughout the torture, which lasted for an hour, Bukvić remained conscious. "The Priest" Kostić and "Kole" made him write down when he wanted to be killed. The next day Bukvić was beaten by Goran Jelisić.[436]

The testimony of Bukvić was monitored by a court-appointed forensic psychiatrist. Assessing his testimony, the psychiatrist said that a person receiving severe injuries, such as injuries to the head resulting in a broken nose, teeth and ribs, would have suffered great physical pain and fear, which would significantly reduce his capacity to observe and remember. Therefore, in the opinion of the expert, the injured party could not possibly be able to notice and remember the details he mentioned in his testimony.

First instance judgment upon retrial

On 5 November 2015, the Trial Chamber acquitted the defendant on the grounds of insufficient evidence. The Chamber did not accept the testimony of the injured party. Namely, in order to assess the credibility of his evidence, the Court compared the testimony he gave via video-conference at trial with his previous two testimonies, and found them contradictory, and hence unreliable. The Court found that in the three testimonies, the injured party gave conflicting accounts in respect of the decisive facts. These facts concerned the way in which he got to know the defendant, the uniform the defendant was wearing when he came to the camp, the injuries he sustained from the beating, whether or not he lost consciousness during the beating, and who took him out of the camp. In assessing the injured party's evidence, the court took into account the opinion of the forensic psychiatrist that Bukvić would not be able to remember as many details of the relevant event as he mentioned during

436 In its final judgment, the ICTY sentenced Goran Jelisić to 40 years in prison for killing and inflicting bodily harm on detainees in the Luka Camp (IT-95-10).

his testimony at the trial, while, according to his own words, he was being beaten with a knuckle duster on the head and having his nose, teeth and ribs broken.

Also, none of the witnesses heard had direct knowledge of the relevant event, and the defendant denied having committed the offence. Additionally, the court found that the defendant had not committed the act of torture with which he was charged, namely forcing Bukvić to write down on a sheet of paper his name and the date on which he wanted to be killed, because it was Konstantin Simonović who did it and was convicted of it, as was stated in the final conviction passed on him by the court of the Brčko District.[437]

Overview of the proceedings in 2016

Second instance proceedings upon retrial

On 28 March 2016, the Court of Appeal[438] issued a judgment[439] dismissing the OWCP's appeal as unfounded and confirming the acquittal. This Court found that the First Instance Court had made correct and complete findings of fact and acted properly in not accepting the testimony of the injured party as evidence.

HLC findings

Poor handling of case by OWCP and First Instance Court

The acquittal in the retrial, which was confirmed by the Court of Appeal, was indicative of the poor handling of this case by the OWCP and, to a large extent, by the First Instance Court too. It was obvious that the indictment was not based upon a diligent selection of evidence sufficient to substantiate the charges. The Trial Chamber paid no attention to the quality of evidence when confirming the indictment. During the First Instance proceedings, and the passing of the initial First Instance judgment, the court made a number of errors which included: violating the defendant's defence rights, an unjustified reduction of the sentence to a level below the minimum sentence prescribed by law, unclear and offensive language in the judgment, an unreasoned armed conflict qualification, etc. All these errors led to the judgment being set aside and the case being sent back to court for retrial.

437 Judgment of the Court of Brčko District in *Konstantin Simonović*, Kp.br. 218/05 of 18 October 2005.

438 Chamber composed of Siniša Važić (presiding), and Judges Sretko Janković, Omer Hadžiomerović, Miodrag Majić and Nada Hadži Perić (members).

439 Judgment of the Court of Appeal in *Luka Camp*, Kž1Po2 8/15 of 28 March 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/09/Drugostepena_presuda_u_ponovljenom_postupku__28.03.2016..pdf, accessed on 13 October 2016.

It was only in the retrial that the Court corrected the errors identified by the Court of Appeal, and delivered a judgment that was confirmed. This would not have happened had the evidence process been conducted conscientiously enough. By passing two completely opposing rulings in the space of three months (the acquittal in March 2015 and the conviction in June of the same year), the Chamber of the First Instance Court demonstrated not only its irresponsibility, but also an overall lack of professionalism, which resulted in an unnecessary delay in the proceedings.

Violation of defendant's defence rights

The Court of Appeal rightly set aside the first instance guilty verdict, because it was only based on the read statement the injured party had given before the Cantonal Court in Tuzla in a case against another defendant. By not giving the defendant a chance to examine the injured party during the proceedings, the First Instance Court violated defendant's defence rights, which are a constituent part of the right to a fair trial. Article 14(3)(e) of the International Covenant on Civil and Political Rights and Article 6(3)(d) of the ECHR both guarantee the right of the defence to "examine witnesses."[440] Not allowing the defence to cross-examine a witness for the prosecution is something that undoubtedly amounts to a violation of the right to a fair trial,[441] especially given the fact that the judgment largely relied on the very testimony of that witness.

Had the Defence been given an opportunity to examine witnesses at the investigation stage, inability to examine witnesses at the trial stage would not have necessarily constituted a violation of ECHR provisions.[442] Not only was the defence deprived of the opportunity to examine witnesses during the investigation process, but also the testimonies given in other proceedings were incorrectly admitted as evidence in this trial.

While it is not always possible to secure the personal presence of a witness at a trial, it is highly desirable, as the "courts have a duty to take the necessary steps to ensure that witnesses can be cross-examined."[443] Therefore, the First Instance Court should have given the Defence an opportunity to cross-examine witnesses, above all the injured party. Given that the injured party was sick and living in Australia, the Court should have already provided his testimony via a video-conference during the first first instance proceedings.

440 See, e.g., ECtHR, case of *Bricmont v. Belgium* (application no. 10857/84), para. 81.
441 See, e.g., *Dugin v. Russia*, Communication to the UN Human Rights Committee, no. 815/1998, UN Doc CCPR/C/81/D/815/1998 (2004), para. 6.3; and *Kulov v. Kyrgistan*, Communication to the UN Human Rights Committee no. 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para. 8.7.
442 See, e.g., ECtHR, *Unterpertinger v. Austria* (application no. 9120/80), paras. 28 and 33; *Balsyte-Lideikiene v. Lithuania* (application no. 72596/01), para. 62.
443 See, e.g., ECtHR, *Hulki Güneş v. Turkey* (application no. 28490/95), para. 95.

Punishment below the minimum prescribed by law

The First Instance Court sentenced the defendant to two years' imprisonment - that is to say, gave him a sentence much more lenient than the statutory minimum sentence of five years set for war crimes. In the instant case, the Court found that several ordinary mitigating circumstances - absence of criminal record, family situation and passage of time since the commission of the crime (which, as a rule, are found in respect of all war crimes indictees) – taken cumulatively constituted a particularly mitigating circumstance which warranted leniency. In the HLC's view, the Court acted contrary to the law in regarding the sheer sum of ordinary mitigating circumstance as particularly mitigating circumstances. Furthermore, the court did not set out any reasons for its decision, despite being obliged to do so.

Unclear and offensive language of the judgment

The best part of the "reasons for the judgment" segment of the first first instance judgment was taken up by reproductions of transcripts of the questioning of the parties and the content of the evidence presented. At the same time, the judgment paid disproportionately less attention to the factual and legal analysis of the case. Moreover, spoken language from the transcripts was inserted verbatim into certain parts of the judgment:[444]

[*SIC*: The expert then said that for anybody who deals professionally with investigation, the interrogation of people in court proceedings, simple madness, as well as a cough, cannot be easily hidden… probably a lay person, when there is a man in a deteriorated condition due to the mental illness he suffers from…- even a lay person can notice that.]

The above-cited sentence, in addition to being completely incoherent, refers to the mental illness of the injured party as insanity, which is, to say the least, a choice of language unbecoming for a court.

Armed conflict qualification

The OWCP indictment qualified the armed conflict in BiH as a "non-international armed conflict", without giving any reasons for such a qualification, apart from stating that this was "a well-known fact". However, the ICTY, which convicted Goran Jelisić of crimes committed in the very same Luka Camp, including, among other things, inflicting bodily harm on Muhamed Bukvić, the injured party in the instant case, qualified the conflict in BiH as an "international armed conflict".[445] The First Instance

444 Judgment of the Higher Court in Belgrade, K.Po2 no. 5/14 of 20 March 2015, p. 20, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf, accessed on 13 October 2016.

445 ICTY Trial Judgment in *Jelisić* (IT -95-10), para. 43.

Court, however, accepted the armed conflict qualification set out in the OWCP indictment,[446] stating that the parties themselves agreed at the preparatory hearing that the non-international character of the armed conflict in BiH was not under dispute.[447]

Excessive anonymisation

At the HLC's request, the Higher Court in Belgrade supplied this organisation with the transcripts of the proceedings, in which the names of witnesses had been fully anonymised. This made it impossible for a reader to view and understand the proceedings.[448] The HLC is of the opinion that redacting the names of witnesses who give evidence in open court is damaging to war crimes trials and lacking in legal grounding.

446 Judgment of the Higher Court in Belgrade, K.Po2 no. 5/14 of 20 March 2015, pp. 26-27, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf., accessed on 13 October 2015.

447 Judgment of the Higher Court in Belgrade, K.Po2 no. 5/14 of 20 March 2015, p.3, available at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf, accessed on 13 October 2015.

448 Transcript of the main hearing, 14 July 2014, available at http://www.hlc-rdc.org/wp-content/uploads/2016/11/02-14.07.2014.pdf, accessed on 13 October 2016.

III. Case Sanski Most – Kijevo[449]

CASE INFORMATION
Stage of the proceedings: final judgement delivered
Date of indictment: 9 April 2014
Trial commencement date: 24 April 2015
Prosecutor: Snežana Stanojković
Defendant: Mitar Čanković
Criminal offence charged: war crime against the civilian population

Chamber	Judge Mirjana Ilić (presiding) Judge Zorana Trajković Judge Dejan Terzić

Number of defendants: 1	
Defendant's rank: low rank – no rank	**Number of trial days in the reporting period**: 4
Number of victims: 1	**Number of witnesses heard in the reporting period:** 7
Number of witnesses heard: 7	

Key developments in the reporting period:

First instance judgment was handed down and determined as final

449 Trial reports and case documents pertaining to the *Sanski Most – Kijevo* case are available (in Serbian) at http://www.hlc-rdc.org/Transkripti/Sanaski_Most_Kijevo.html.

Course of the proceedings

Indictment

The indictment alleges that on 19 September 1995, Mitar Čanković, in his capacity as a member of the VRS, during the arrest and detention of civilians in Kijevo (in the municipality of Sanski Most, BiH), separated Ismet Bešić from a group of arrested civilians, seized his wallet and identity card, and killed him by firing at least three shots into his head and chest. [450]

Defendant's defence

The defendant denied committing the offence he was charged with, but did not deny being a member of the VRS at the relevant time and knowing the victim, since they were both from the same village.[451]

Witnesses in proceedings

Witness Izet Bešić, the son of the late Ismet Bešić, was 12 years old at the time of the crime. He testified to having seen soldiers come to the village, among them the defendant, whom he already knew. The defendant was wearing a camouflage uniform and carrying an automatic rifle. The soldiers took a group of men, including Izet's father. Izet then heard a shot, turned around, and heard two more shots. He saw his father fall face down and the defendant standing right next to him, holding his rifle pointed at him. After that, he saw the defendant firing two shots at his father. There were no other soldiers around.[452]

Medical expert Dževad Durmišević, who had carried out an autopsy on the victim, stated that the victim had gunshot wounds in the head and ribcage. At least three automatic rifle bullets were found in the victim's body. The cause of his death, according to Durmišević, was skull fracture caused by a point-blank shot.[453]

The court ordered forensic and ballistic examinations to ascertain whether there existed a causal link between the victim's injuries and the resulting consequences, the manner in which and the tools by which the injures were inflicted, and the severity and type of injuries. A commission of expert witnesses, made up of Miroslav Gusarčević, expert in ballistics and evidence tracing, and Dr Branimir Aleksandrić, medical specialist, examined the evidence and contradicted the findings and opinion of Dr Durmišević

450 OWCP Indictment KTO no. 4/14 of 9 April 2014, available at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2014_04_09_eng.pdf, accessed on 29 November 2016.
451 Trial transcript of 29 January 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/29.01.2016..pdf, accessed on 25. January 2017.
452 Trial transcript of 9 September 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/09.09.2015..pdf, accessed on 25 January 2017.
453 Ibid.

that the victim died from injuries caused by a bullet fired into his head. They found two concurrent causes of death in Bešić: a blow to the left side of the face with a blunt mechanical object, which caused cerebral contusion, and gunshot wounds in the ribcage area, which led to severe blood loss.[454]

The defendant said that his unit was positioned on Mount Grmeč, and that a group of 30 to 40 VRS fighters went down to Sanski Most and its neighbouring villages to see their families. On their return to Grmeč, the defendant said, they stayed a few days in the village of Lužani, where they found members of the Fifth Kozara Brigade of the VRS. Witnesses Predrag Marić and Željko Burić, former members of the VRS, corroborated his account,[455] and so did witness Dragan Žujić, also a former member of the VRS. However, none of the witnesses could say with certainty whether they had been with the defendant the relevant day and whether the defendant had been present at the scene of the crime.

First instance judgment

On 18 May 2016, a War Crimes Chamber of the Higher Court in Belgrade handed down a judgment[456] finding the defendant guilty of a war crime against the civilian population, and sentenced him to a prison term of nine years.[457]

The evidence that the defendant gave, saying that at the time of the commission of the offence he was at another location, was assessed by court as unpersuasive and an attempt to avoid criminal responsibility. The defendant's evidence was challenged by the injured party, Izet Bešić, the son of killed Ismet Bešić, who had known the defendant before the incident and who claimed categorically that it was the defendant who killed his father.

Also, the court did not accept as true the testimonies of the witnesses, the defendant's comrades-in-arms, because they did not confirm the accounts of the defence about how the men climbed down Mount Grmeč and arrived in the village of Lužani. The court found that these witnesses tailored their stories to help the defendant's case.

In determining the sentence, the court took account the mitigating circumstances of the defendant's personal and family situation. However, the court determined agrivating circumstances based on the fact that the crime was committed in the presence of the victim's son, who was just a child at the time and still suffers its effects.

454 Trial transcript of 1 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/01.04.2016..pdf, accessed on 25 January 2017.

455 Trial transcript of 26 October 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/26.10.2015..pdf, accessed on 25 January 2017.

456 Judgment of the Higher Court in Belgrade in Sanski Most – Kijevo KPo2 7/2014 of 18 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/Prvostepena_presuda_18.05.2016..pdf, 25 January 2017.

457 Report on the pronouncement of judgment on 18 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Izvestaj_sa_sudjenja-objava_presude_Sanski_Most-Kijevo,18.05.2016.pdf, accessed on 29 November 2016.

Second instance judgment

After hearing an appeal filed by the Defence, the Court of Appeal in Belgrade on 12 December 2016 upheld the first instance judgment dismissing the appeal as unfounded.[458]

HLC findings

Clear and precise judgment

The first instance judgment is clear, well structured and readable, without inessential repetitions. The court set out clear reasons for every finding of a fact it made and for every conclusion it reached concerning witnesses' testimonies on certain facts. At the same time, the court set out a thorough legal analysis of the facts found, dedicating a separate section to each of the following aspects: application of criminal law provisions and rules of international law, nexus between the criminal offence and the armed conflict, protected persons' status, and application of more lenient law.

Defendant's civil status improperly considered to be a mitigating circumstance

In determining sentence, the court took into account the defendant's personal and family situation as factors warranting mitigation. In the HLC's view, these factors should not be taken as mitigating circumstances in cases involving war crimes.

Proper assessment of aggravating circumstances

The Higher Court regarded the suffering that the injured party still endures at the loss of his father as an aggravating circumstance, thus setting a good example that it should copy in other proceedings too. It should be noted that the suffering inflicted upon the victim's surviving family members has not been regarded by domestic courts as an aggravating circumstance.[459] The only exception has been the *Bihać* case,[460] in which the Chamber was presided over by the same lady judge who presided over

458 Judgment of the Court of Appeal in Belgrade in *Sanski Most – Kijevo*, Kž1 Po2 3/16 of 12 December 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/01/Drugostepena_presuda_12.12.2016..pdf, accessed on 25 January 2017.

459 See, e.g., Judgment of the District Court in Belgrade in *Đakovica*, K.v.br 4/05 of 18 September 2006, p. 38; Judgment of the Higher Court in Belgrade in *Prijedor*, Kpo2 4/2011 of 28 November 2011, p. 37; Judgment of the Higher Court in Belgrade in *Stara Gradiška*, Kpo2 no. 32/2010 of 25 June 2010, p. 36; Judgment of the Higher Court in Belgrade in *Tenja (Radivoj)*, Kpo2 38/2010 of 17 November 2010, p. 48; Judgment of the District Court in Belgrade in *Ovčara II*, K.V no. 2/2005 of 30 January 2006, p. 50; Judgment of the Higher Court in Belgrade in *Zvornik II*, Kpo2 br. 28/2010 of 22 November 2010, pp. 301-303; Judgment of the District Court in Belgrade in *Suva Reka*, K.V. 2/2006 of 23 April 2009, pp. 188-190; Judgment of the District Court in Belgrade in *Podujevo II*, K.V 4/2008 of 18 June 2009 etc.

460 Judgment of the Higher Court in Belgrade in *Bihać* no. K. Po2 5/2013 of 6 February 2014, pp. 111-113, available at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Prvostepena_presuda_06.02.2014..pdf, accessed on 29 November 2016.

the Chamber in the instant case. Taking into account this factor as an aggravating circumstance is consistent with the practices of both the ICTY[461] and the Court of BiH.[462]

Access to judgments and transcripts requested by the HLC was denied

The First Instance Court refused to provide the HLC its requested access to the non-final judgment in this case, stating that it would hinder further conduct of the proceedings, without specifying exactly in what way providing access to the judgment would hinder the proceedings in the case in question. This decision of the Court is in flagrant defiance of the final decision of the Commissioner for Information of Public Importance and Personal Data Protection of 2013, which declared such practice of the Court unlawful.[463] After the case was finally disposed of, the HLC submitted a new request to the Court, this time seeking access to both first instance and final judgments, as well as transcripts. It is only recently that the requested documents have been delivered to the HLC. By dealing with an information request in such a way, the court is reverting to its previous, unlawful practice, which had been in place before the above-mentioned Commissioner's decision, and which now seems to have resurrected with the appointment of a new person in charge of dealing with requests for information of public importance. All this makes it clear the Higher Court has no procedure in place for handling such requests, as a result of which the requests are dealt with in a highly inconsistent manner. It seems that it is left to the discretion of the person responsible for dealing with requests for access to information of public importance at the Court to decide on a case-by-case basis whether or not to comply with the Law on Free Access to Information of Public Importance.

461 Trial Judgment in *The Prosecutor against Milan Lukić and Sredoje Lukić* (IT--98-32/1-T) of 20 July 2009, para. 1066; Trial Judgment in *The Prosecutor against Tihomir Blaškić* (IT -95-14-T) of 3 March 2000, para. 787.

462 *Novak Đukić*, Judgment of the Court of Bosnia and Herzegovina no. X-KR-07/394 of 12 June 2009; *Dragan Damjanović*, Judgment of the Court of Bosnia and Herzegovina no. X-KR-05/51 of 15 December 2007, *Mejakić Željko i dr*, Judgment of the Court of Bosnia and Herzegovina no. X- KR-06/200 of 30 May 2008.

463 Decision of the Commissioner for information of public importance and personal data protection no. 07-00-00625/2012-03 of 14 October 2013.

IV. Case Bijeljina II[464]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 4 June 2014	
Trial commencement date: 13 February 2015	
Prosecutor: Dušan Knežević	
Defendant: Miodrag Živković	
Criminal offence charged: war crime against the civilian population	
Chamber	Judge Siniša Važić (presiding) Judge Nada Hadži Perić Judge Omer Hadžiomerović Judge Sretko Janković Judge Miodrag Majić
Number of defendants: 1 **Defendant's rank:** low rank – no rank **Number of victims:** 3 **Number of witnesses heard:** 6	**Number of trial days in the reporting period:** 9 **Number of witnesses heard in the reporting period:** 0
Key developments in the reporting period: The defendant was finally acquitted upon retrial.	

464 *Bijeljina II* case, trial reports and case documents are available (in Serbian) at http://www.hlc-rdc.org/Transkripti/Bijeljina_II.html. The case against Dragan Jović, Zoran Đurđević, Alen Ristić and Miodrag Živković was transferred to the Republic of Serbia by BiH, under the Agreement on Mutual Legal Assistance in Civil and Criminal Matters signed between Serbia and Montenegro on one side and BiH on the other. Because Živković was at the time unavailable to the Serbian authorities, proceedings against him were severed.

Course of the proceedings

Overview of the proceedings up to 2016

The indictment alleged as follows: on the evening of 14 June 1992, the accused, at the time a member of a volunteer unit affiliated with the VRS, together with three other members[465] of the unit and a local resident,[466] searched the house of the injured party Ramo Avdić, in Bijeljina, and robbed him of the money and jewellery found in the house; after that, they forced Ramo's daughter N.F. and daughter-in-law H.A. to undress, threatening them with a gun, following which he and the other members of the unit present took turns to rape the two women, and forced them into acts of sodomy in the presence of Ramo's wife Fata and her sons. One of the members of the group killed Ramo Avdić by firing a rifle into his mouth; next, they left the house taking N.F. and H.A. with them, marched the women, naked and barefoot, through the town, and took them to the house of the injured party Dosa Todorović. From Dosa Todorović they stole money, jewellery, and a car which they got into together with N.F. and H.A, and drove out of the town. In the village of Ljeljenča, they pulled over and raped the women once again, then drove away from the scene, leaving N.F. and H.A by the side of the road.[467]

Defendant's defence

The defendant admitted to having been present at the crime scene but denied taking part in the crime. He claimed that he had asked Jović and Đurđević to stop raping the injured parties and left the house. He was wearing a white tracksuit that evening.[468]

Witnesses in the proceedings

The injured parties Fata and Hurem Avdić and N.F. refused to give a detailed account of the event, saying it would be too hard for them.[469] They stuck by their previous accounts given in the *Bijeljina* case, saying that five armed persons came to their house that evening, one in civilian clothes and the remaining four in uniforms. Fata Avdić and N.F. stated that the person in civilian clothes was "a

465 The Court of Appeal in Belgrade - Judgment K.Po2 6/12 of 25 February 2013 – finally sentenced Dragan Jović, Alen Ristić and Zoran Đurđević for the same offence as follows: Dragan Jović to 20 years, Alen Ristić to ten years, and Zoran Đurđević to thirteen years in prison. Available (in Serbian) at: http://www.hlc-rdc.org/wp-content/uploads/2013/07/Drugostepena-presuda.pdf, accessed on 25 October 2016. Proceedings against Živković were severed because he was not available to the Serbian authorities at the time.

466 The Supreme Court of Republika Srpska finally sentenced Danilo Spasojević to five years' imprisonment for this same offence.

467 OWCP Indictment KTO no. 6/14 of 4 June 2014, available (in Serbian) at: http://www.hlc-rdc.org/wp-content/uploads/2014/09/Optuznica_Bijeljina_II.pdf, accessed on 25 October 2016.

468 Transcript of the main hearing of 13 February 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/05/13.02.2015..pdf, accessed on 25 October 2016.

469 Transcript of the main hearing of 19 February 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/05/19.02.2015..pdf, accessed on 25 October 2016.

man from Bijeljina" (Danilo Spasojević, who was convicted of this crime), while Hurem Avdić only described him as a person in black jacket. The injured parties H.A. and Nedžad Avdić refused to give evidence. Notifying the court of their decision before the trial, they said they had a very difficult period after testifying the previous time and that it had taken H.A. nearly a year to recover from the trauma caused by her testimony at the previous trial.[470]

Witnesses Dušan Spasojević[471] and Dragoljub Lazić,[472] the police officers at the Bijeljina police station who took statements from the defendant and the co-perpetrators, did not confirm that the defendant was wearing a white tracksuit at the time. They were not sure about what he was wearing that evening, but witness Lazić said he did not think the tracksuit suit was plain white, because he would have remembered that: "If someone is dressed in white, that is something you notice."[473]

First Instance judgment

On 14 April 2015, the Higher Court[474] acquitted[475] Miodrag Živković for lack of evidence. The court established that the critical event undoubtedly took place, but there was no evidence to prove that the defendant raped and otherwise sexually abused the injured parties, as the injured party could not identify the defendant as a person who had raped them. When giving evidence at the previous trial, which resulted in the conviction of the other co-perpetrators in this crime, the injured parties were shown photographs in which they identified Dragan Jović, Zoran Đurđević and Alen Ristić as the persons who raped them. They referred to the rapists as persons in uniforms and one in plain clothes who came to their house, but never mentioned a person in a tracksuit.

The court accepted as true the defendant's testimony that he was present while the critical event was taking place but did not take part in it, and that he wore a tracksuit at the time.[476] The court established that witnesses Dušan Spasojević and Dragoljub Lazić confirmed the defendant's accounts that he did not wear a uniform but a tracksuit at the time. Also, the court came to the conclusion that there was no evidence to prove that the defendant acted as a co-perpetrator in the critical event or that his conduct at the time showed that he approved of the acts of the others and accepted them as his own.

470 Ibid.
471 Transcript of the main hearing of 9 April 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/05/09.04.2015..pdf, accessed on 25 October 2016.
472 Ibid.
473 Ibid, p. 17.
474 Chamber composed of Judge Vinka Beraha Nikićević (presiding), and Judges Vera Vukotić and Vladimir Duruz (members).
475 Judgment of the Higher Court in Belgrade in *Bijeljina II*, K.Po2 10/14 of 14 April 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/01/Prvostepena_presuda_14.04.2015.pdf, accessed on 25 October 2016.
476 Transcript of the pronouncement of the judgment, 14 April 2015, p. 6, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/05/14.04.2015..pdf, accessed on 25 October 2016.

Ruling of the Court of Appeal

On 28 September 2015, the Court of Appeal quashed the judgment of the Higher Court and referred the case back to the First Instance Court for a new trial and reconsideration.[477]

The Court of Appeal found that the First Instance Court had erred in its findings of fact and failed to explain adequately how it had reached the key conclusion upon which its judgment was based – that there was no reliable evidence to prove that Živković had committed the offence he was charged with.

Retrial and a new judgment

No new evidence was put before the court during the retrial. The defendant just repeated the testimony he had given at the first trial. The Court did not grant the OWCP's motion to examine, as witnesses, Dragan Jović, Zoran Đurđević and Alen Ristić, the persons convicted in the *Bijeljina* case (completed in 2013), explaining that a party to proceedings cannot not have different roles in the same proceedings, i.e. appear both as a defendant and a witness, which would be the case if the motion was granted.

On 24 November 2015, the Higher Court passed a judgment of acquittal,[478] for the second time, and again, due to lack of evidence. In the statement of reasons, the court merely repeated the reasons given for the first acquittal.[479]

Overview of the proceedings in 2016

Court of Appeal's ruling upon retrial

Upon hearing the appeal lodged by the OWCP, the Court of Appeal[480] ruled that the First Instance Court had erred in dismissing the OWCP's motion for examination of Dragan Jović, Zoran Đurđević and Alen Ristić as witnesses, because they were not co-defendants in the instant case and, therefore, could appear as witnesses. As they and the defendant, Miodrag Živković, had never been charged in the same indictment (even though they were all included in the request for an investigation and the decision to conduct an investigation), the Court of Appeal held that there were no procedural

477 Ruling of the Court of Appeal in Belgrade, Kž1 Po2 2/15 of 28. September 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/01/Ofluka_Apelacionog_suda_28.09.2015.pdf, accessed on 25 October 2016.

478 Judgment of the Higher Court in Belgrade in *Bijeljina II*, K.Po210/15 of 24 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Prvostepena_presuda_u_ponovljenom_postupku_24.11.2015..pdf, accessed on 21 November 2016.

479 Report on the pronouncement of the judgment, 24 November 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Bijeljina_II-Izvestaj_sa_objave_presude_24.11.2015.pdf, accessed on 25 October 2016.

480 Chamber comprising Judge Siniša Važić (presiding), and Judges Sretko Janković, Miodrag Majić, Omer Hadžiomerović and Nada Hadži-Perić (members).

obstacles precluding their examination as witnesses. So the Court of Appeal opened a main hearing and questioned them as witnesses.

Witness Dragan Jović said that when they came to the house of the injured party Ramo Avdić, he told Spasojević and Živković to stay outside the house, which they did. Jović also said he believed that Živković just "peeked into the hallway" and went out, while he, Ristić and Đurđević entered the house. As regards Živković's outfit, Jović was not sure but believed he had worn plain clothes. He denied that they had taken the injured parties with them after leaving the house and raped them during the journey.

Witness Zoran Đurđević said he dimly remembered the whole event, adding that he had never even met Živković.

Witness Alen Ristić denied that they had ever been in Ramo Avdić's house, claiming that they were arrested in a coffee shop in Bijeljina by military police. When told that his testimony did not match the statements of other parties, he said that the others gave such statements out of fear for the lives of their families, claiming that all of them had been subjected to torture and coerced into admitting something they had not done. Ristić also stated that Živković wore a uniform at the relevant time.

On 26 September 2016, the Court of Appeal rendered a judgment[481] dismissing the appeal lodged by the OWCP as unfounded and upholding the first instance acquittal.

The court assessed the testimonies of witnesses Jović and Đurđević as mutually inconsistent, extremely reduced and not implicating the defendant in the criminal offence. The testimony of witness Ristić was assessed as incredible and "not valid for the purpose of completing the determination of the facts". Their testimonies did not convince the court that the defendant Živković had taken part in the commission of the offence. The Court of Appeal found the First Instance Court had properly concluded that over the course of the proceedings, after all the evidence had been presented, it was not reliably proved that the defendant had committed the crime with which he was charged. Also, the Court of Appeal held that at the retrial, the First Instance Court correctly applied the concept of co-perpetration in finding that the evidence presented did not indicate that the defendant had the awareness of participating in a joint commission of the offence, and that no evidence was presented on the basis of which it could be inferred that the defendant had committed the rape.

481 Judgment of the Court of Appeal in Belgrade in *Bijeljina II*, Kž1Po2 of 26 September 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Drugostepena_presuda_26.09.2016..pdf, accessed on 21 November 2016.

HLC findings

Non-application of international standards of prosecution of sexual violence in war

Contrary to the definition of rape under international law and the relevant jurisprudence of international criminal courts and tribunals, the indictment in this case classified oral and anal rapes as the crime of sodomy. These forms of rape were classified in the same way by the domestic judiciary in two successfully prosecuted cases of war-related acts of sexual violence - *Lekaj* and *Bijeljina*.[482] The definition of rape under international law includes sexual penetration of any orifice of the victim, performed not only with a sexual organ, but also by insertion of any object. Accordingly, oral and anal penetration will constitute an act of rape as a crime punishable under international law.[483] Unlike its Serbian counterparts, the Court of BiH in similar cases, e.g. *Šimšić*[484] and *Pinčić,*[485] did apply the relevant international law provisions.

Undue delay caused by erroneous application of law

The First instance proceedings, which resulted in the acquittal of the defendant, had to be repeated because the First Instance Court had not provided clear and valid reasons for reaching the decision that there was no reliable evidence that the defendant had committed the offence with which he had been charged. An absence of valid explanation of decisive facts invariably leads to the setting aside of a judgment, even if the conclusion itself is correct. At the retrial, even though no new evidence was presented, the Court explained the decisive facts far more thoroughly, and provided extensive and valid reasons for its decision, which were accepted by the Second Instance Court. However, the Court erred in holding that the persons who had been previously convicted of the same offence should be considered co-defendants and therefore could not be examined as witnesses in the case at hand. This is why the Court of Appeal had to open the main hearing and question these individuals during the appeal proceedings.

482 Judgment of the District Court in Belgrade in *Lekaj*, Kv.br. 4/05, p. 3, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/06/Lekaj-presuda_KV_4-05-18_09_2006..pdf, accessed on 22 November 2016. Judgment of the Higher Court in Belgrade in *Bijeljina*, K.Po2 7/2011, p. 4, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Bijeljina-prvostepena-presuda-of-04.06.2012..pdf, accessed on 22 November 2016.

483 See: ICTR Trial Judgment in *Akayesu Jean Pol* (ICTR-96-4), para. 686, available at http://unictr.unmict.org/sites/unictr.org/files/case-documents/ictr-96-4/trial-judgements/en/980902.pdf, accessed on 22 November 2016; ICTY Trial Judgment in *Furundžija* (IT-95-17/1-T), paras. 174 and 185, available at http://www.icty.org/x/cases/furundzija/tjug/en/fur-tj981210e.pdf, accessed on 22 November 2016; ICTY Trial Judgment in *Kunarac et al.* (IT-96-23 & 23/1), para. 437, available at http://www.icty.org/x/cases/kunarac/tjug/en/kun-tj010222e.pdf, accessed on 22 November 2016; International Criminal Court, Elements of crimes, Art. 7 (1) (g)-1 (crime against humanity of rape), Art. 8 (2) (b) (xxii)-1 I 8 (2) (e) (vi)-1 (war crime of rape).

484 Trial judgment of the Court of BiH in *Šimšić*, no: X- KR-04/05, para. 99.

485 Trial judgment of the Court of BiH in *Pinčić*, no: X-KR-08/502, pp. 29-30.

Unprofessional conduct of Defence Attorney

During the closing arguments in the retrial, the Defence Counsel behaved unprofessionally by using the courtroom to present his political views. Thus, he thanked the Chamber for "having been brave enough to acquit a Serb of a war crime charge" in its previous judgment, adding that "according to this indictment, everyone was doing everything, as is often the case with the OWCP indictments, against Serbs". Ending his speech, he asked, "Who is paying for the guilty verdicts passed on Serbs?"[486] According to the ZKP, the court should have reprimanded the Attorney, and, should he have continued to act in the same way, ignoring the reprimand, the court should have interrupted his closing argument,[487] because he was insulting both the victims and the dignity of the court.

486 Trial report of 20 November 2015, available (In Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/11/BijeljinaII-Izvestaj_sa_sudjenja_u_pon.postupku_%2020.11.2015.pdf, accessed on 25 October 2016.

487 ZKP, Article 413, para. 6.

V. Case Sanski Most[488]

CASE INFORMATION
Stage of the proceedings: final judgment delivered
Date of indictment: 2 April 2013
Trial commencement date 12 June 2013
Prosecutor: Mioljub Vitorović
Defendant: Miroslav Gvozden
Criminal offence charged: war crime against the civilian population

Chamber	Judge Siniša Važić (presiding) Judge Nada Hadži-Perić Judge Sretko Janković Judge Miodrag Majić Judge Omer Hadžiomerović

Number of defendants: 1	
Defendant's rank: low ranking	**Number of trial days in the reporting period:** 1
Number of victims: 6	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 10	

Key developments in the reporting period:

The Court of Appeal in Belgrade on 22 February 2016 modified the sentence of the Higher Court in Belgrade, extending Miroslav Gvozden's prison term of ten years to 12 years.

488 *Sanski Most* trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/sanski_most.html,accessed on 2 November 2016.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

The indictment alleges that on 5 December 1992, the accused, together with other members of the VRS, namely Mile Gvozden,[489] Ostoja Gvozden, Bojan Gvozden and the underage Zoran Šimčić,[490] with whom he had made an agreement to avenge the murder of his brother Radoslav Gvozden, killed six Croatian civilians (Petar Topalović, MileTopalović, Mato Matoš, Marija Šalić, Dragica Šalić and Manda Matoš) and attempted to kill Piljo Šalić, in the villages of Tomašica and Sasine (in the municipality of Sanski Most, BiH).[491]

This case was referred to the OWCP by the Cantonal Court in Bihać following the signing of the Protocol on cooperation in war crimes prosecutions between Serbia and Bosnia and Herzegovina.

Defendant's defence

The defendant claimed not to have committed the crime of which he was accused, and denied that he had ever served as a VRS soldier. He admitted to having been at the crime scene at the relevant time, but denied having killed the civilians. Two days before the crime, he said, he went to his native village of Usorci (located some 10 kilometres from Sasine and Tomašica) to attend the funeral of his killed brother Radoslav Gvozden, a.k.a. "Crni" [The Black]. Miroslav's cousins Ostoja, Mile and Bojan Gvozden, and Zoran Šimšić were also at the funeral and were discussing revenge.[492] On the day of the crime, Mile Gvozden told Miroslav to get a rifle and go to the village of Sasine, together with Ostoja and Bojan Gvozden. The three men were in uniform at the time and carried rifles; the defendant was in plain clothes and had an automatic gun, which belonged to his late brother Radoslav. On entering Tomašica, they killed a man and a woman. There was a horse-cart nearby, with two men and a boy of 6 or 7 sitting in it. The men were killed, and the defendant told the boy to run. He did not shoot anyone. The whole event had such a strong emotional effect on him, as a civilian, that he could not remember who shot the civilians. He stayed there while the others went to a house, after which Miroslav heard shots, but said he did not know who fired them or if someone was killed in the house.

489 Inaccessible to Serbian authorities.

490 Ostoja Gvozden, Bojan Gvozden and Zoran Šimčić testified before the Cantonal Court in Bihać as "repentant witnesses" (the status they were given after they had agreed to testify against their accomplices in exchange for acquittal).

491 OWCP Indictment KTO no. 2/13 of 2 April 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/06/Optu%C5%BEnica.pdf, accessed on 3 October 2016.

492 Transcript of main hearing held on 12 June 2013, p. 21, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_12.06.2013..pdf, accessed on 6 October 2016.

Witnesses

Witnesses Bojan Gvozden and Zoran Šimšić incriminated the defendant, testifying that he shot at Piljo Šalić, who was sitting on the horse-cart, and also participated in the killing of a married couple by name of Matoš.[493] Witness Ostoja Gvozden provided a similar account of the events.[494]

The injured party and witness Marinko Topalović said that at the time of the event in question he, his father Milo Topalović and Piljo Šalić, were riding on a horse- cart. He recognised the defendant as a person who was present at the time of the crime, and said that he believed that he was the man who shot.[495]

Delays in the proceedings

Towards the end of 2013, the trial had to be put on hold after the Belgrade Bar Association informed the court in writing that Attorney Branimir Gugl, the Defence Attorney in his case, had been removed from the roll. As the defendant lacked the resources to hire a new lawyer, the Court appointed an attorney to represent him.

No main hearings were held in 2014. After receiving the indictment, the court-appointed Attorney requested that the investigation stage be repeated, as during the investigation the defendant was not represented by counsel, because Branimir Gugl, who acted as such, was no longer a practicing attorney at the time. The Chamber deciding upon the matter returned the case file to the OWCP, ordering it to issue an order for conducting an investigation in three days. The OWCP thought the Chamber's decision to be unlawful, since a caseonce an indictment takes effect, cannot be returned to the investigation stage, especially since the investigation in this case had already been conducted, on the order of the Cantonal Prosecutor's Office in Bihać. So the OWCP returned the case to the Chamber for reconsideration and the Chamber accepted the OWCP's point. However, the proceedings could not be continued in 2014 owing to the lawyers' strike. It was only on 23 February that the trial of this case resumed.

First instance judgment

On 10 September 2015, the Trial Chamber[496] handed down its decision,[497] finding Miroslav Gvozden

493 Summary of witness testimonies of Bojan Gvozden and Zoran Šimšić, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/06/1.-Sanski-Most-Izve%C5%A1taj-sa-su%C4%91enja-12.06.2013-lektorisano.pdf accessed on 6 October 2016.

494 Summary of witness testimony of Ostoja Gvozden, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/06/SanskiMost-14-06-2013.pdf, accessed on 6 October 2016.

495 Transcript of main hearing held on 11 September 2013, pp. 12-13, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_11.09.2013..pdf, accessed on 6 October 2016.

496 Composed of Judge Bojan Mišić (presiding), and Judges Mirjana Ilić and Dragan Mirković (members).

497 Judgment of the Higher Court in Belgrade in *Sanski Most* of 10 September 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/K-Po2_4-14_zasticeni_pofaci.pdf accessed on 3 October 2016.

guilty of killing three Croatian civilians - Mile Topalović, and the husband and wife Mato and Manda Matoš, and sentenced him to a prison term of 10 years. The Trial Chamber acquitted Gvozden of the charges of killing another three Croatian civilians, who were killed before in the yard of Petar Topalović's house, finding that he was not involved in the crime. The Chamber found that it was Mile Gvozden who shot them, while the defendant, although physically present in the yard, was not aware of or involved in it, nor was he there because he was following some plan that had been made. Only after this event did he develop an awareness of and wish to take part in the killings of civilians, the Trial Chamber concluded.

Overview of proceedings, 2016

Second instance judgment

Both the OWCP and the Defence appealed against the first instance judgment, the OWCP on the grounds of wrong factual findings and inadequate sentence, and the defendant and his Attorney on all grounds for appeal. Having heard the appeals, the Court of Appeal in Belgrade[498] on 22 February 2016[499] ruled to grant the part of the OWCP appeal relating to the length of sentence, and increased the sentence by two years. The appeals by the defendant and his Counsel were dismissed as unfounded, as was the part of the OWCP's appeal relating to the alleged incorrect findings of fact.

HLC findings

Higher Court's non-compliance with the Law on Free Access to Information of Public Importance

The Higher Court in Belgrade refused to grant the HLC access to its first instance judgement before the issuing of a final judgment. By so doing, the Court showed a complete disregard for the final and binding decision the Commissioner for Information of Public Importance had issued on this matter, denouncing such behaviour of the Court as unlawful.[500]

Also contrary to a decision of the Commissioner[501] was the Court's continued practice of excessive anonymisation. Namely, in the trial transcripts that the HLC requested and received from the Court, the names of all witnesses and victims were redacted. As a result, a reader cannot possibly figure

498 Chamber composed of Judge Siniša Važić (presiding), and Judges Sretko Janković, Omer Hadžiomerović, Miodrag Majić and Nada Hadži Perić (members)

499 Judgment of the Court of Appeal in Belgrade in *Sanski Most* no. Kž1Po2 7/15 of 22 February 2016, available at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Drugostepena_presuda_22.02.2016..pdf, accessed on 3 October 2016.

500 Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-00625/2012-03 of 14 October 2013.

501 Decision of the Commissioner for Information of Public Importance and Personal Data Protection no. 07-00-00337/2014-03 of 17 March 2014.

out who the witnesses were and, when it came to the injured party witnesses, which of their family members had lost their lives.[502] That is why the HLC, instead of trial transcripts, cites its daily trial reports and summarised witness testimonies as sources in this report. The Court did the same thing with the second-instance judgment. Furthermore, it refused to deliver transcripts of the retrial to the HLC.

Proceedings were unduly prolonged

Initially, the proceedings were held up owing to the professional misconduct of the Defence Counsel, Branimir Gugl, who deceived both his client and the Court. Gugl had been disciplined by being suspended from practice from 2009 to 2012, after which he did not apply to be restored to the roll. According to the Criminal Procedure Code, only an attorney[503] may act as defence counsel in criminal proceedings, and a defendant must have a defence counsel throughout the course of proceedings, if the proceedings that are being conducted against him involve a criminal offence punishable by a term of imprisonment of eight or more years.[504] In the case, the defendant was charged with the offence of war crimes against a civilian population, which is punishable by a prison term of 20 years,[505] therefore he ought to have had a defence counsel throughout the process. However, as he was represented by a person who had been suspended from practice, it was deemed that the defendant had no defence counsel at all. Therefore, the court held that all procedural actions performed while Gugl represented the defendant would have to be repeated in order to secure the right to counsel for the defendant.

Additionally, the decision of the new Defence Counsel to request a new investigation, and the unlawful decision of the Chamber deciding upon the matter to grant the request, caused further delay in the proceedings. The Chamber completely ignored two facts: that the ZKP allows for an indictment to be filed without an investigation,[506] and that at the investigation stage, the problem with the defence counsel did not exist, because Gugl appeared as Defence Counsel only after the investigation. This is something that the Chamber would have known had it carefully examined the case file.

OWCP and courts understand the concept of "co-perpetration" differently

The Higher Court and the Court of Appeal in Belgrade held that the OWCP did not produce enough evidence to prove that the defendant, Miroslav Gvozden, also acted as a co-perpetrator, together with Mile Gvozden, in the killings of Croatian civilians Petar Topalović, Marija Šalić and Dragica Šalić, as alleged in the indictment. Unlike other members of the group, the defendant did enter the yard with Mile Gvozden, took his rifle off his shoulder and held it levelled at the victims while Mile

502 Transcript of main hearing held on 14 June 2013, pp. 65-66, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_14.06.2013..pdf, accessed on 3 October 2016.
503 ZKP, Article 73, para. 1.
504 ZKP, Article 74, sub-para. 2.
505 KZ of the FRY, Article 142.
506 ZKP, Article 331, para. 5.

Gvozden shot them. Nonetheless, the courts held that the prosecution did not prove the existence of the required subjective element of co-perpetration, i.e. an appropriate mental state of the defendant, namely, that he wished for the commission of the crime as his own. The courts held that the defendant developed an awareness of the act and the wish to kill civilians only after being present during the killings of the three civilians.

Even though this charge was dismissed owing to absence of the subjective element of co-perpetration, the First Instance Court made a passing remark on *actus reus* – specific actions of the defendant with which he contributed to the act – by saying that as regards the defendant's own actions, "they made almost no difference, nor did they contribute, even in the least degree, to the commission of the crime, and as such do not amount to co-perpetration." [507] In the HLC's view, the Court downplayed the defendant's contribution to the crime, which could not be considered the same as the contribution of the group who remained outside the yard.

The HLC is of the opinion that the OWCP, and the court as well, should have considered changing the mode of liability from co-perpetration to aiding and abetting, as aiding and abetting requires a lower degree of contribution and awareness ("awareness of aiding and abetting" instead of "intent", and "contribution" instead of "significant contribution").[508]

Because of the differing views of the OWCP and the First and Second Instance Courts with regard to proving a form of liability, many judgments have resulted in reversals (see, e.g. the *Prijedor, Gnjilane Group, Lovas, Skočić, Ćuška* and *Beli Manastir* cases). The HLC therefore finds it necessary that all courts and the OWCP in their judgments and indictments always set out detailed reasons as regards offence qualification, and that the Court of Appeal provide clear and detailed instructions regarding proof standards for certain forms of participation in the commission of a criminal offence.

507 Judgment of the Higher Court in Belgrade in *Sanski Most* of 10 September 2015, pp. 43-44, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/K-Po2_4-14_zasticeni_pofaci.pdf, accessed on 3 October 2016.

508 Goran P. Ilić, Miodrag Majić, Slobodan Beljanski and Aleksandar Trešnjev, Komentar Zakonika o krivičnom postupku, treće izmenjeno i dopunjeno izdanje, [Commentary on the Criminal Procedure Code, the third, extended and revised edition] "Službeni glasnik" (2013), See also Gojko Pantović, *Co-perpetration in War Crimes Cases in Serbia* in "Analysis of Current Issues in War Crimes Proceedings", available at http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2016/11/Analiza-ratnih-zlocina-Book-ENG.pdf.

VI. Case *Sotin*[509]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 31 December 2013	
Trial commencement date: 4 February 2015	
Prosecutor: Dušan Knežević	
Defendants: Žarko Milošević, Dragan Mitrović, Mirko Opačić, Dragan Lončar and Miroslav Milinković	
Criminal offence charged: war crime against the civilian population	
Chamber	Judge Vera Vukotić (presiding) Judge Vinka Beraha Nikićević Judge Vladimir Duruz
Number of defendants: 5	
Defendants' ranks: low and middle	**Number of trial days in the reporting period:** 1
Number of victims: 16	**Number of witnesses heard in the reporting period:** 2
Number of witnesses heard: 16	

Key developments in the reporting period:

Final judgment

509 OWCP indictment KTO No. 9/13, 31 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Optuznica_Sotin.pdf, accessed on 4 January 2017.

The course of the proceedings

Overview of the proceedings up to 2016

Indictment

The defendants were charged with having killed 16 civilians of Croatian nationality, of whom 13 were executed on the basis of a previously drawn up execution list. They were charged with having committed this crime in the period from October to December 1991 in the village of Sotin and nearby areas (the Municipality of Vukovar, Croatia), as members of the Sotin Territorial Defence (TD), police and JNA.[510]

Defence of the defendants

The defendants Dragan Mitrović, Mirko Opačić, Dragan Lončar and Miroslav Milinković denied committing the crime they were charged with. In his defence, Mitrovic stated that he had not been in Sotin at all at the time of the events described in the indictment.[511] Lončar said that he had been in the place where 13 civilians were killed. However, he added that he had not taken part in the killing or seen who had been shooting, but assumed that Mirjana Raguž had been killed by the defendant Mitrović.[512] In his defence, Opačić said he had been the president of Sotin local community, but denied drawing up any execution list as described by the indictment. He heard about the killing of 13 civilians a few days after it had happened, but "did not ask how it had happened."[513] Milinković stated he had been the Commander of the Logistics Battalion of the 80th Motorized Brigade of the JNA placed in Sotin, and the commander of the area at the same time, as ordered by his superiors. He claimed he had not been in the village at the time of the killing. He thought the cooperating defendant had accused him because of the "campaign against members of the army."[514]

510 Indictment KTO No. 9/13 of 31 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Optuznica_Sotin.pdf, accesed on 4 January 2017.
511 Transcript from the main hearing dated 4 February 2015, pp. 8-38, available at http://www.hlc-rdc.org/wp-content/uploads/2015/03/02-04.02.2015.pdf, accessed on 5 October 2015.
512 Ibid, pp. 38-64.
513 Transcript from the main hearing dated 5 February 2015, pp. 2-29, available at http://www.hlc-rdc.org/wp-content/uploads/2015/03/03-05.02.2105.pdf, accessed on 5 October 2015.
514 Ibid, pp. 30-48.

During his testimony, the cooperating defendant, Žarko Milošević[515], described the above-mentioned events in detail, including his involvement, as well as those of the other defendants, in the way as stated by the indictment. When the Presiding Judge asked him about the motives for killing the Croatian civilians, the defendant replied that at the time "everybody in the village was full of hatred."[516]

First instance judgment

On 26 June 2015, the Higher Court passed a judgment[517] in which it was found that the defendant, Dragan Mitrović, and the cooperating defendant Žarko Milošević were guilty. Mitrović was sentenced to 15 years in prison and Milošević to 9. The defendants Mirko Opačićo, Miroslav Milinković and Dragan Lončar were acquitted.

The judgment determined that Milošević and Mitrović killed civilians Stjepan Šter and Snežana Blažević in October 1991 at the location called Vodice, on the banks of the Danube River, near Sotin, while they were "searching the area", as part of a group consisting of members of the TD and members of the police station. It was also determined that Milošević killed the civilian Marin Kušić in a vineyard by the Danube River near Sotin, in November 1991.

Finally, the court determined that Milošević and Mitrović killed 13 civilians on 27 December 1991, all of them Sotin inhabitants of Croatian nationality. According to the court, the killing was preceded by a decision made by Milošević and some other inhabitants to expel a certain number of Croatian civilians from Sotin, so that refugees of Serbian nationality, coming from Western Slavonija, could move into their houses. On the premises of the local community, Milošević chose 13 persons of Croatian nationality from the list of civilians. Those persons were to be transferred to the police station on the same day, and then, on the following day, they were to be taken to a location outside Sotin and killed. He then took the list and went to the police station, where he told the officers/persons present that they were immediately to arrest the mentioned civilians and detain them at the police station. The persons in the police station did what they were told. Also, he asked for a military truck and a driver from the defendant Milinković, who was the Commander of the Logistics Battalion of 80th Motorized Brigade and the commander of Sotin at the time. Milinković provided him with the truck, not knowing the purpose for which it was going to be used. Milošević informed the defendant Mitrović, a member of the police called "Cvole" (now deceased), two other members of the police (the

515 Judgment of the Higher Court in Belgrade – War Crimes Department, Po2-4/2013 dated 17 July 2013, awarded the status of a cooperating defendant to Žarko Milošević, who was previously a defendant. The court did so by accepting the Agreement on the testimony of the defendant, which was concluded between him and the OWCP. The defendant agreed with the OWCP to be given a 9-year sentence.

516 Transcript from the main hearing dated 6 February 2015, p. 10, available at http://www.hlc-rdc.org/wp-content/uploads/2015/03/04-06.02.2015.pdf, accessed on 5 October 2015.

517 Judgment of the Higher Court in Belgrade, K-Po2 No. 2/14 dated 26 June 2015, available at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 9 October 2015.

investigation against these two persons has now ceased) and unidentified members of the police and TD of his decision. All of them voluntarily accepted his decision.

The detained civilians were put into the cargo area of the military truck. Milošević sat next to the driver, an unidentified member of the JNA, and told him to drive in the direction of Tovarnik. The defendants Mitrović, Lončar and unidentified members of the JNA and TD followed them in several vehicles. Having passed the checkpoint without being identified or stopped, they turned into a field next to the "Vupik" vineyard in the village of Sotin and stopped a few hundred meters further, near the drainage channel. The civilians were then taken out and lined up. After a brief quarrel between Mirjana Raguž and Mitrović, the latter opened up with a burst of fire at her. All the others, apart from Lončar and the truck driver, shot the civilians. All 13 civilians were killed.

During the sentencing, the court evaluated the defendant Mitrović's family situation as mitigating circumstances - that is, the court took into consideration the fact that he is the father of two, one of whom is a minor, and the fact that the defendant supports them by doing part-time jobs. Another mitigating circumstance was the lapse of time since the criminal act. However, as to the aggravating circumstances, the court considered the seriousness of the crime, the consequences it entailed and the number of victims.

The court sentenced the cooperating defendant Žarko Milošević to nine years in prison. On 28 June 2013, the cooperating defendant had made an agreement with the OWCP regarding his testimony. On the basis of this agreement, the court sentenced him to the above-mentioned time period for the crimes against civilians. As a result of the CPC, the court was bound by the sentence agreement that the defendant had previously agreed to with the OWCP.[518]

The court acquitted Opačić, Lončar and Milinković. In the court's opinion, there was no evidence that proved that Opačić, being the local community president at the time, had made a decision together with Milošević to kill the 13 Croatian civilians from the list of people who were to be evicted from Sotin. The court also, did not find evidence that the defendant Milinković agreed with that decision or helped towards its realization by providing the military truck and the driver, by which 13 civilians had been driven to be executed. Finally, the court did not find any evidence that the defendant Lončar had known anything about Milošević's decision to kill the civilians or any evidence that could prove he had taken part in it.

The court made this decision and explained that the testimony of a cooperating defendant, who accuses all the other defendants, is not enough for a convicting judgment. Therefore, the cooperating defendant's testimony had to be verified and evaluated together with all the other evidence and testimonies of other defendants and witnesses. The court accepted the testimonies of defendants Lončar, Opačić and Milinković, evaluating them as logical, persuasive and supported by witnesses'

518 CPC, Article 326, para. 1.

testimonies. However, the court did not accept those parts of the testimony of the cooperating defendant in which only he accused the other defendants.

Overview of proceedings, 2016

Second instance judgment

Deciding on the appeals of the OWCP and Dragan Mitrović's defence counsel, on 18 November 2016 the Court of Appeals issued a ruling dismissing the appeals as unfounded and upheld the first instance judgment.[519]

The Court of Appeals accepted the view that the Court of First Instance could not base a conviction on the testimony of the cooperating defendant only, given that there was no other corroborating evidence pertaining to the actions of the defendants Lončar, Milinković and Opačić. Bearing in mind that the cooperating defendant had an interest in ensuring that he maintained his status [of cooperating defendant], his account, by the finding of the Court of Appeal, had to be subjected to an extremely serious and rigorous check, "inter alia, with the other evidence presented."[520]

HLC findings

Search for missing persons through war crimes prosecution

This is the first case of war crimes in Serbia which has resulted in the finding of missing persons. During the investigation in April 2013, on the basis of the information provided by the defendant Žarko Milošević, and in cooperation with the OWCP, the State Prosecutor's Office of the Republic of Croatia (hereinafter: the DORH) and the Commissions for Missing Persons of Serbia and Croatia, the mortal remains of the 13 victims from Sotin, who were killed on 27 December 1991, were found.[521] After that, Milošević made an Agreement on testifying with the OWCP, which was accepted by the court on 17 July 2013.

Bearing in mind the number of crimes committed during the wars in the former Yugoslavia and the number of their perpetrators, one cannot expect all of them to be prosecuted. Therefore the OWCP should have a strategy for the prioritization of the cases that it will prosecute. Given the fact that there

519 Appeals Court judgment No. Kž1 Po2 4/15, 18 November 2016, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2016/12/Drugostepena_presuda_18.11.2016..pdf, accessed on 29 December 2016.

520 Ibid, p. 5.

521 The OWCP, Press release for the *Sotin* Case regarding the finding of the place where the mortal remains of the killed civilians were located, 19 April 2013, available at: http://tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_04_19_CIR.pdf

are still over 10,000 persons missing from the wars in the former Yugoslavia,[522] the OWCP should focus, among other things, on the prosecution of those cases in which the victims are still missing, with the purpose of finding them. It is a moral obligation that Serbia owes to the victims, most of all to the families of missing persons who have been searching for their members for 20 years.

The presidents of Serbia, Montenegro, Croatian and BiH signed in 2014 the Declaration on the role of the state in resolving the issue of missing persons in connection with the wars and violations of human rights. In Article 7 of the Declaration, Serbia has committed to prioritize the prosecution of those perpetrators who are responsible for the forced disappearance of persons and their further concealment. With the exception of the *Sotin* Case, Serbia has not demonstrated a sincere commitment to this goal. Moreover, after the release of "Rudnica" Dossier, in which the HLC presented evidence indicating that units commanded by the current Chief of Staff of the Serbian Army, Ljubisa Diković, participated in crimes in Kosovo whose victims were missing for 15 years, and some of them up to this day, President Nikolić issued a warning through the media to the OWCP to "watch out what they are digging up in Serbia." Serbia will have to prove its intention of resolving the fate of the missing, first of all, through the prosecution of high-ranking perpetrators, because only they have the actual capacity to continue to prevent their discovery.

Applying the Agreement on testifying and the evaluation of the cooperating defendant's testimony

The Agreement on testifying by a defendant has been applied in war crimes cases since 2012.[523] So far, this is only the second agreement that has been made between the OWCP and war crimes perpetrators.[524] The aim of this instrument is to prove the indictment points more easily and quickly by means of the defendant's testimony, and to mitigate the sentence for the defendant. However, it seems that the application of this instrument in this case was not effective, since most of the defendants were acquitted by the first instance judgment. The reason for this was the fact that the court did not believe those parts of the testimony of the cooperating defendant Milošević in which he accused the defendants Opačić, Lončar and Milinković. Even though the Agreement on the testimony of the defendant did not completely confirm the charges in the indictment, it still gave significant results, as 13 missing persons have been found, and it contributed to the determination of the criminal responsibility of the accused Mitrović for his participation in the execution of the 13 civilians.

522 ICRC, „Missing persons in the Western Balkans", June 2015, available at https://www.icrc.org/en/document/missing-persons-western-balkans

523 Criminal Procedure Code "Official Gazette of the Republic of Serbia" No. 121/12, 32/13 and 45/13, Article 608.

524 The first Agreement on the testimony of the defendant was made in January 2013 between the OWCP and one of the defendants in the *Ćuška* Case.

Selective indictment

The indictment did not include the responsible persons or an important part of the events in Sotin during the relevant period – that is to say, the forced displacement of Croatian civilians. The testimonies of the defendants and of a large number of witnesses clearly showed that Croatian civilians were systematically expelled from Sotin in the relevant period. Croatian civilians were systematically expelled from other towns as well, as stated in the *Lovas* Case, for which purpose buses were secured, which passed undisturbed through checkpoints held by the JNA on their way to Šid. By not charging these crimes, the OWCP is de facto shielding former JNA members and other state officials from criminal responsibility.

Inappropriate mitigating circumstances at sentencing

The court can be criticized for evaluating the time lapse since the criminal act was committed and the family situation of the defendant Dragan Mitrović as mitigating circumstances. These, according to the HLC, are not circumstances that should be evaluated as mitigating when it comes to this type of criminal act.

VII. Case Beli Manastir[525]

CASE INFORMATION
Stage of the proceedings: final judgment delivered
Date of indictment: 23 June 2010
Trial commencement date: 1 November 2010
Prosecutor: Dušan Knežević
Defendants: Zoran Vukšić, Slobodan Strigić and Branko Hrnjak
Criminal offence charged: war crime against the civilian population

Chamber	Judge Siniša Važić (presiding) Judge Sretko Janković Judge Miodrag Majić Judge Omer Hadžiomerović Judge Nada Hadži-Perić

Number of defendants: 3	
Defendants' rank: lower ranking	**Number of trial days in the reporting period:** 1
Number of victims: 24	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 68	

Key developments in the reporting period:

On 12 February 2016, the Court of Appeal upheld the judgment passed by the Higher Court in Belgrade, which found the defendants guilty of a war crime against the civilian population.

525 *Beli Manastir*, HLC trial reports and other documents pertaining to the case available (in Serbian) at http://www.hlc-rdc.org/Transkripti/beli_manastir.html, accessed on 10 October 2016.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

Zoran Vukšić, Slobodan Strigić, Branko Hrnjak and Velimir Bertić, at the time members of the Special Purpose Unit of the Beli Manastir (Republic of Croatia) SUP, were charged with the unlawful confinement, violation of the bodily integrity, intimidation, terrorizing, and inhumane treatment of Croatian civilians in the period from August to December 1991 in Beli Manastir.[526]

The criminal acts alleged in the indictment included: (1) ill-treatment and torture of civilians at the premises of the Beli Manastir SUP; (2) an attack against the civilian population in the village of Kozarac[527] (killing Ivo Malek and wounding Josip Vido and Matilda Vranić); (3) the killing of Adam Barić and wounding of Ana Barić in Sudaraš; (4) the killings of Vinko Čičak and his three sons – Ante, Mate and Ivan – near "Karaševo", an abandoned homestead near Beli Manastir.

Defendants' defence

The defendants Zoran Vukšić, Slobodan Strigić and Velimir Bertić denied having committed the crime, whilst defendant Branko Hrnjak admitted to having committed the offence, but added that he did not do it willingly.

First-instance judgment

On 19 June 2011, the Trial Chamber[528] handed down a first instance judgment finding the defendants guilty on all counts of the indictment, and sentenced Zoran Vukšić to the maximum penalty prescribed for the offence, namely, 20 years' imprisonment. Slobodan Strigić received ten years, Branko Hrnjak five years, and Velimir Bertić a year and a half in prison.[529] In his sentencing remarks, the Judge who presided over the trials said that the defendants' superiors also bear the responsibility for the crimes, because they knew of some of them and yet failed to punish the perpetrators, thus facilitating the commission of the crime against the Čičak family, which took place later.[530]

526 OWCP Indictment KTRZ no. 5/09 of 23 June 2010, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Zoran_Vuksic_i_dr/Beli_Manastir_optuznica.pdf, accessed on 10 October 2016.

527 Kozarac is located 10 kilometres southeast of Beli Manastir.

528 Composed of Judge Dragan Mirković (presiding), and Judges Olivera Anđelković and Tatjana Vuković (members).

529 Judgment of the Higher Court in Belgrade in *Beli Manastir*, K.Po2 no. 45/2010, of 19 June 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Prvostepena-presuda.pdf, accessed on 10 October 2016.

530 Transcript of the pronouncement of the judgment of 19 June 2012, p. 15, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/39-19.06.2012-presuda1.pdf, accessed on 2 November 2016.

Course and outcome of appeal proceedings

Ruling on the appeals, the Court of Appeal on 29 March 2013 passed a second instance judgment, which upheld the first instance judgment in relation to the defendant Velimir Bertić, and overturned it in the part relating to the defendants Zoran Vukšić, Slobodan Strigić and Branko Hrnjak, and sent the case back to the trial court for a new trial.[531] Among other things, the Court of Appeal held that the decisive facts concerning the murder of Mate, Ante, Ivan and Vinko Čičak had not been sufficiently explained in the first instance judgment, that is, there was an unresolved inconsistency between the defence presented by Branko Hrnjak and the material evidence and the opinion of the medical expert.[532]

Retrial

The retrial commenced on 25 September 2013 before a new Chamber.[533]Seeking to ascertain all the details necessary for determining the manner in which the Čičak family was killed, on the basis of which the court would then assess the defence's and prosecution's allegations, two expert witnesses were examined: medical expert Dušan Dunjić and ballistics expert Milan Kunjadić.

The closing arguments of the parties were initially scheduled for February 2014, but the Trial Chamber decided to open the main hearing anew in order to examine the witness experts once again and obtain from them some additional explanations concerning their findings.

Both experts stood by their previous findings, and the ballistics expert provided an additional explanation specifying the type of ammunition used to kill the Čičaks.

First instance judgement upon retrial

On 29 May 2015, the Higher Court in Belgrade handed down a judgment[534] finding Zoran Vukšić, Slobodan Strigić and Branko Hrnjak guilty and sentencing them to the same prison terms they had received in the first trial: Zoran Vukšić to 20 years, Slobodan Strigić to ten years, and Brank Hrnjak to five years.

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531 Judgment of the Court of Appeal in Belgrade, Kž1 Po2 7/12 of 29 March 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Drugostepena-presuda.pdf, accessed on 10 October 2016.

532 Presenting his defence, Hrnjak claimed that the the defendant Vukšić stabbed Mate Čičak in the neck with a knife, but did not shoot him. Giving evidence about the wounds sustained by the late Mate, medical expert Dušan Dunjić said that Mate had a penetrating gunshot wound in the head. Furthermore, on the basis of the photographs taken at the murder scene during the on-site investigation, it could be concluded that all the victims were found at one single location, which contradicted Hrnjak's claims that Vukšić had killed the last member of the Čičak family at another location, 10 metres from their van, and that following the killings, the men had returned to Beli Manastir without having moved the corpses. This discrepancy betwen Hrnjak's accounts and the material evidence was not resolved by the trial court.

533 Composed of Judge Dragan Mirković (presiding), and Judges Mirjana Ilić and Bojan Mišić (members).

534 Judgment of the Higher Court in Belgrade in *Beli Manastir* K.Po2 of 29 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_u_ponovljenom_postupku_Beli_Manastir.pdf, accessed on 10 October 2016.

The HLC asked permission from the President of the Higher Court to record the pronouncement of the judgment, but the request was denied without explanation.

Zoran Vukšić was found guilty of killing Adam Barić and attempting to kill Adam's wife Ana Barić, of the attack against the civilian population in the village of Kozarac, which resulted in the wounding of civilian Josip Vid, and of inhumane treatment and violation of the bodily integrity of persons confined at the premises of the Beli Manastir SUP.

As regards the killing of Mate, Ivan, Vinko and Ante Čičak, it was established beyond doubt that the Čičaks, having being confined for some time at the Beli Manastir police station, were taken to the abandoned "Karaševo" homestead. The court also established that Vukšić and Madžarac first took Mate Čičak out of the vehicle, following which Vukšić stabbed him in the neck with a knife; after that, Vukšić, Madžarac, Strigić and Hrnjak took Ivan and Vinko out of the vehicle and took them to the place where Mate Čičak had been previously killed; there, the defendant Vukšić killed Ivan and Vinko by shooting them with a pistol; lastly, the four men took Ante Čičak out of the vehicle and brought him to the same place; Vukšić then shot him with his pistol; after Ante fell down, the defendant Strigić fired several shots at him from his automatic rifle, just as he had with the previously killed victims.

In determining the sentence, the court took into account the defendants' family status and the amount of time that had passed since the commission of the offence as mitigating factors in respect of all three defendants. The absence of prior criminal convictions was also considered to be a mitigating circumstance in respect of Strigić and Hrnjak. Additional mitigating factors for Branko Hrnjak were his admission of guilt and his sincere remorse. As for aggravating factors, they included the defendants' motives for committing the offence, the circumstances of the offence, and the resulting consequences. Vukšić's previous convictions were regarded as an aggravating circumstance. With respect to Hrnjak, no aggravating circumstances were found.

Overview of the proceedings in 2016

Second instance judgment

Ruling on the appeals, the Court of Appeal on 12 February 2016 confirmed the first instance judgment passed in the retrial in totality, finding that the first instance court had made correct and complete findings of fact, applied the substantive law properly and arrived at an appropriate sentence.[535]

535 Judgment of the Court of Appeal in Belgrade in *Beli Manastir*, Kž1Po2 6/15 of 12 February 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Drugostepena_presuda_12.02.2016.pdf, accessed on 10 October 2016.

HLC findings

Unduly long proceedings

The first instance judgment at the retrial was well structured and clear, without inessential details and repetitions, and containing a solid legal analysis.[536] It provided valid reasons as regards factual findings, and the penalties imposed were appropriate. However, it took a retrial to arrive at a good judgment that was upheld by the Higher Court. At the retrial, the Court, after the completion of evidence presentation, re-opened the main hearing in order to clarify certain facts. All these indicate that the first first instance proceedings were rather perfunctory and ill prepared, as a result of which they lasted an unduly long time. The main hearings in this case began in late 2010, and had the first instance court conducted the first instance proceedings thoroughly, the case would have been completed much earlier.

Recording of the pronouncement of judgment was not allowed

On 26 May 2015, the HLC sought permission from the President of the Higher Court in Belgrade to record the pronouncement of the judgment in this case. The request was made pursuant to the Law on the Prosecution of War Crimes, according to which "the recording of the main hearing for the purpose of public broadcast may be approved by the Court President upon obtaining the parties' opinions."[537] However, in his reply to the HLC's request, Aleksandar Stepanović, President of the Higher Court in Belgrade, only said that the recording of the public pronouncement of the judgment "has not been approved", without giving any explanation.

The Law on the Prosecution of War Crimes does not explicitly require that a decision, prohibiting recording of trials be reasoned. Yet, a reasoned court decision constitutes an unquestionable standard of the rule of law and the right to a fair trial. As stated in the ECtHR case caw, "It is only by giving a reasoned decision that there can be public scrutiny of the administration of justice."[538] Moreover, the Serbian Criminal Procedure Code (CPC) stipulates that "the Chamber's ruling on excluding the public must be reasoned and made public."[539] As prohibiting recording of trails held in open court is a form of restriction on the public character of the trial, the relevant provision of the ZKP should have been applied analogously in this case.

The changes introduced in the Law on the Prosecution of War Crimes in 2009 made it easier to record war crimes trials in comparison with some other trials, by acknowledging the need to inform the

536 Judgment of the Higher Court in Belgrade in *Beli Manastir* (K.po2 br. 9/13) of 29 May 2015, pp. 49-60, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_u_ponovljenom_postupku_Beli_Manastir.pdf, accessed on 16 October 2016.
537 Law on the Prosecution of War Crimes, Article 16a.
538 See, e.g. Judgment of the EctHR in *Suominen v. Finland* (application no. *37801/97*), 1 July 2003, para. 37.
539 Article 365 of the ZKP.

public of the facts and evidence regarding past war crimes. However, in over 12 years of domestic war crimes prosecutions, the public in Serbia have not had a chance to see a single testimony of a victim, perpetrator or witness participating in the trials, or to see a pronouncement of a judgment. Unlike Serbia, war crimes trials in BiH, Croatia and Kosovo are regularly recorded and reported upon by broadcast and printed media.[540]

Defendants' superiors were not included in the indictment

Even though the chamber, when pronouncing the first judgment, underlined that the defendants' superior officers also bore responsibility for the crime,[541] the OWCP did not amend the indictment to include them as well. Namely, the Trial Chamber concluded that the defendants' superiors knew of some of the crimes that had been committed but did nothing to punish the perpetrators, thus making the crime against the Čičak family members, which took place on a later date, possible.

Non-prosecution of high-ranking members of the armed forces has been a chronic problem of war crimes processing ever since its beginning ten years ago, and has undermined the credibility of the OWCP, and provoked major criticism from the international community.[542] Of all persons indicted by the OWCP to date, only six had held higher positions in the military, police or political hierarchies.[543] It is this situation that has provoked the above-mentioned reaction of the Trial Chamber in the *Beli Manastir* case, but also similar reactions of the Trial Chambers in the *Lovas* and *Ćuška*[544] cases during the pronouncement of judgments in these cases.

Lapse of time as a mitigating circumstance

In both first instance judgments, the Court took into account the amount of time that had passed

540 See HLC's report "Public's Right to Know of War Crimes in Serbia", pp. 34-38, available at http://www.hlc-rdc.org/?p=32972&lang=de

541 Transcript of the pronouncement of judgment of 19 June 2012, p. 15, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/05/39-19.06.2012-presuda1.pdf, accessed on 10 October 2016.

542 Fred Abrahams, Dispatches: In Kosovo, Justice Welcome, but Incomplete, 14 February 2014, available at: http://www.hrw.org/news/2014/02/18/dispatches-kosovo-justice-welcome-incomplete, accessed on 13 May 2014; Bogdan Ivanišević, Against the Current: War Crimes Prosecutions in Serbia (Belgrade: International Center for Transitional Justice, 2007), p. 8; European Commission, 2013 Progress Report on Serbia, 16 October 2013, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2013/package/brochures/serbia_2013.pdf, accessed on 10 October 2016. European Commission, 2015 Progress Report on Serbia, 10 November 2015, available at https://ec.europa.eu/neighbourhood-enlargement/sites/near/files/pdf/key_documents/2015/20151110_report_serbia.pdf, accessed on 10 October 2016.

543 Toplica Miladinović, VJ Lieutenant (*Ćuška* case); Pavle Gavrilović, VJ Captain (*Trnje* case); Slobodan Medić, Commander of the "Scorpions" Unit (*Scorpions* case); Radoslav Mitrović, Commander of the 37th Detachment of the Special Police Unit (*Suva Reka* case); Branko Grujić, leader of the Interim Government of the Municipality of Zvornik (*Zvornik II* case); and Miodrag Dimitrijević, VJ Lieutenant-Colonel (*Lovas* case).

544 Transcript of the pronouncement of the first-instance judgment in *Lovas*, available (in Serbian) at: http://www.hlc-rdc.org/wp-content/uploads/2012/12/197- 26.06.2012-objava.pdf; Transcript of the pronouncement of the first-instance judgment in *Ćuška* available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/04/93-11.02.2014_objava_presude.pdf, p. 33.

since the commission of the crimes as a mitigating circumstance. This factor was taken into account for mitigation in several other trials before the First Instance Court.[545] In its reports, the HLC has continuously insisted that the lapse of time since the commission of an act should not be regarded as a mitigating circumstance in war crimes cases, because war crimes are not subject to statutory limitations.[546] The Court of Appeal has adopted this view during appeals proceedings,[547] thus making a shift in the right direction and giving an important instruction to the First Instance Court on how to proceed in the future. Unfortunately, the Court of Appeal failed to provide the reasons for its decision. The reasons were absolutely necessary, given the large number of cases that had been completed before this change of attitude by the Court of Appeal, in which the amount of time that had passed since the commission of a crime had been considered a mitigating circumstance.

Failure to impose measures for securing unhindered conduct of proceedings

Slobodan Strigić, who on 12 February 2016 was finally sentenced to ten years in prison, was arrested on 12 April 2016 in Switzerland, on an arrest warrant issued by the Interpol Bureau in Zagreb. The Office of the Attorney-General of the Republic of Croatia transferred its evidence collected in this case to the OWCP, under the bilateral Agreement on Cooperation in Prosecuting Perpetrators of War Crimes, Crimes against Humanity and other Legal Goods Protected under International Law,

545 See, e.g., Judgment of the District Court in Belgrade in the *Đakovica* case, K.v.br 4/05 of 18 September 2006, p. 38; Judgment of the Higher Court in Belgrade in *Prijedor*, Kpo2 4/2011 of 28 November 2011, p. 37; Judgment of the Higher Court in Belgrade in *Stara Gradiška*, Kpo2 br 32/2010 of 25 June 2010, p. 36; Judgment of the Higher Court in Belgrade in *Tenja (Radivoj)*, Kpo2 38/2010 of 17 November 2010, p. 48; Judgment of the District Court in Belgrade in *Ovčara II*, K.V br 2/2005 of 30 January 2006, p. 50; Judgment of the Higher Court in Belgrade in *Zvornik, II*, Kpo2 br. 28/2010 of 22 November 2010, p. 301-303; Judgment of the District Court in Belgrade in *Suva Reka*, K.V. 2/2006 of 23 April 2009, p. 188-190; Judgment of the District Court in Belgrade in *Podujevo II*, K.V 4/2008 of 18 June 2009, p. 60-61; Judgment of the Higher Court in Belgrade in *Medak*, Kpo2 br. 36/2010 of 15 June 2010, pp. 46-47; Judgment of the District Court in Belgrade in *Slunj*, K.V. br. 4/2007 of 8 July 2008, p. 43; Judgment of the District Court in Belgrade in *Ovčara IV*, K.v: 9/2008 of 23 June 2009, pp. 57-58; Judgment of the District Court in Belgrade in *Ovčara I*, K.V. 4/2006 of 12 March 2009, pp. 249-250; Judgment of the District Court in Belgrade in *Grubišno Polje*, K.V. 5/08 of 27 May 2009, p. 29; Judgment of the District Court in Belgrade in *Zvornik I*, K.br. 5/2005 of 12 June 2008, p. 183; Judgment of the District Court in Belgrade in *Scorpions*, K.V. 6/2005 of 10 April 2007, pp. 116-117; Judgment of the District Court in Belgrade in *Stari Majdan*, K.V. 3/2009 of 7 December 2009, p. 36; Judgment of the Higher Court in Belgrade in *Rastovac*, K.Po2 47/2010 of 23 September 2011, p. 43; Judgment of the Higher Court in Belgrade in *Zvornik III i IV*, K.Po2 23/2010 of 8 December 2011, pp.123-124; Judgment of the Higher Court in Belgrade in *Lički Osik*, K. Po2 17/2011 of 16 March 2012, pp. 64-65; Judgment of the Higher Court in Belgrade in *Vukovar*, K.Po2 40/2010 of 1 November 2010, pp. 22-23; Judgment of the Higher Court in Belgrade in *Banski Kovačevac*, K.Po2 25/2010 of 15 March 2010, p. 35.

546 See in: Humanitarian Law Center, "Report on War Crimes Trials in Serbia in 2012", (Belgrade, HLC 2013) p. 62, available at http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, accessed on 10 October 2016; Humanitarian Law Center, "Report on War Crimes Trials in Serbia in 2013" (Belgrade, HLC 2014) p. 53, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, p. 53, accessed on 10 October 2016, Humanitarian Law Center, "Report on War Crimes Trials in Serbia during 2014 and 2015" (Belgrade, HLC, 2015) p. 14, available at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 10 October 2016.

547 Judgment of the Court of Appeal in Belgrade in *Beli Manastir*, Kž1Po2 6/15 of 12 February 2016, p. 12, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Drugostepena_presuda_12.02.2016.pdf, accessed on 10 October 2016.

concluded between Croatia and Serbia in 2016. According to the Agreement, the judiciary of the country transferring evidence to the other country does not close the case to which the evidence pertains, which explains why the arrest warrant for Strigić remained valid. This then brings up a question, "how was it possible that a convict sentenced to ten years' imprisonment for a very a serious criminal offence, which involved the murder of all male members of a family, was allowed to freely leave the country?". In other words, why were some of the measures aimed at securing unhindered conduct of the criminal proceedings, such as sending a person to prison to serve his sentence, not imposed on Strigić? If such persons had been prohibited from leaving their place of residence and if their passports had been seized, situations like the one with Strigić, which has undermined the credibility of the national judiciary, could have been avoided.[548]

548 See, e.g., Article 188 of the ZKP.

VIII. Case Tuzla Convoy[549]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 9 November 2007	
Trial commencement date: 22 February 2008	
Prosecutor: Milan Petrović	
Defendant: Ilija Jurišić	
Criminal offence charged: use of impermissible methods of combat	
Chamber	Judge Omer Hadžiomerović (presiding) Judge Sonja Manojlović Judge Nada Hadži Perić Judge Sretko Janković Judge Miodrag Majić
Number of defendants: 1	
Defendant's rank: mid-rank	**Number of trial days in the reporting period:** 0
Number of victims: at least 101	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 100	
Key developments in the reporting period: Judgment of acquittal of the Court of Appeal in Belgrade was made public.	

549 *Tuzla Convoy* trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/tuzlanska_kolona.html

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

The OWCP indictment brought against Ilija Jurišić on 9 November 2007 alleges that the accused, on 15 May 1992 in Tuzla (BiH), in his capacity as a duty officer at the Operational Staff of the Public Security Department in Tuzla, issued an order to attack the JNA convoy which was peacefully retreating from Tuzla. The attack, which resulted in the deaths of at least 51 and the wounding of at least 50 other JNA soldiers, was qualified by the OWCP as a use of impermissible methods of combat, because it was carried out in breach of an agreement on the peaceful withdrawal of JNA units from BiH, including Tuzla.[550] Specifically, the act was qualified as perfidy, i.e. "acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence".[551]

Defendant's defence

The defendant stated that he had been completely unaware of the existence of any agreement between the commander of the JNA barracks and the Tuzla authorities on JNA's withdrawal from Tuzla. He added that he had not had any command authority and only passed on the order of his superior Meša Bajrić: "If you are fired upon, fire back", which came after the police reported being fired upon from the army convoy.

Judgments upon first trial

The First Instance Court accepted all accounts of the indictment and on 28 September 2009 delivered its judgment, sentencing the defendant to a prison term of 12 years.[552] Because of the First Instance Court's failure to determine a number of key facts, such as the existence of the agreement on withdrawal and the defendants' authority, the Court of Appeal[553], considering the appeals by the Defence and the OWCP, had to open a main hearing to hear evidence the First Instance Court had omitted to hear.

550 OWCP Indictment KTRZ no. 5/04 of 9 November 2007, available (in Serbian) at http://www.tuzilastvorz.org.rs/upload/Indictment/Documents__en/2016-05/o_2007_11_09_eng.pdf, accessed on 17 October 2016. Amended, more precise, OWCP Indictment of 18 September 2009, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optu%C5%BEnica.pdf, accessed on 17 October 2016.

551 Article 37 of Additional Protocol I to the Geneva Conventions.

552 Judgment of the District Court in Belgrade in *Tuzla Convoy* no. KV.br.5/2007 of 28 September 2009, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_prvostepena_presuda-28.09.2009..pdf, accessed on 17 October 2016.

553 Chamber composed of Judge Siniša Važić (presiding), and Judges Sonja Manojlović, Omer Hadžiomerović, Sretko Janković and Miodrag Majić (members).

On 11 October 2010, the Court of Appeal ruled to grant the appeal of the Defence, set aside the first instance judgment, and send the case back to the First Instance Court for retrial, ordering that the case be heard by a chamber composed of judges other than those who had heard it in the initial trial.[554] The Court of Appeal found, among other things, that the existence of the withdrawal agreement had not been conclusively proved.

A detailed HLC analysis of the first trial can be found in its report on war crimes trials in Serbia in 2010.[555]

Retrial

On 2 December 2013, the War Crimes Department of the Higher Court[556] delivered its judgment upon retrial, which was exactly the same as the first one and for the second time sentenced the defendant to 12 years in prison.[557]

Having considered the appeal by the Defence, the Court of Appeal ruled to re-open the main hearing. Over the course of 2015, the court heard two expert witnesses.

Military expert Mile Stojković stood by his prior finding, saying that available evidence pointed to two possible scenarios: the first was that the attack on the army convoy was planned beforehand, partly in the form of a surprise attack; the second was that the action was intended to have a deterrent effect, and the opening of fire took place because things got out of hand.

Expert Slobodan Jovičić, who had analysed the sound recording of the exchange of fire at Brčanska Malta in Tuzla, also stood by his previous findings and opinion. Among other things, he found that the second burst of gunfire came only half a second after the first one and that the persons who fired "were taking aim at one another."

On 25 December 2015, the Court of Appeal in Belgrade acquitted iliju Ilija Jurišić[558] of the charge of committing the criminal offence of using impermissible methods of combat. The Court found that there was no direct evidence to prove that the defendant committed the act with which he was charged, and

554 Ruling of the Court of Appeal in Belgrade in *Tuzla Convoy* no. KŽ1 Po2 5/10 of 11 October 2010, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_drugostepena_ofluka.pdf, accessed on 17 October 2016.

555 See in: Humanitarian Law Center "Trials for War Crimes and Ethnically Motivated Crimes in Serbia in 2010 – Report" (Belgrade: HLC 2011), pp. 18-20, available at http://www.hlc-rdc.org/wp-content/uploads/2012/03/Reports-on-war-crimes-trials-in-the-Republic-of-Serbia-2010.pdf, accessed on 17 October 2016.

556 Composed of Judge Dragan Mirković (presiding), and Judges Mirjana Ilić and Bojan Mišić (members).

557 Judgment of the Higher Court in Belgrade in *Tuzla Convoy* no. K.Po2 53/10 of 2 December 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013..pdf, accessed on 17 October 2016.

558 Judgement of the Court of Appeal in Belgrade in *Tuzla Convoy* no. Kž1Po2 5/14 of 25 December 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Drugostepena_presuda_u_ponovljenom_postupku_25.12.2015.pdf, accessed on 17 October 2016.

that the facts which were established by the Court did not constitute strong circumstantial evidence capable of leading to the finding of guilt as the only possible conclusion.

This judgment was only made public on **4 March 2016.**

HLC findings

First Instance Court failed to resolve all factual issues

Not even at the retrial did the Court elucidate some of the facts that are fundamental to reaching a decision, although the Court of Appeal instructed it to do so when setting aside the initial judgment. Namely, it remained unclear whether on 15 May 1992 the local authorities of Tuzla and the Commander of the JNA barracks in Tuzla, Mile Dubajić, reached an agreement on the withdrawal of the JNA from the barracks in Tuzla and, if so, whether the defendant, Ilija Jurišić, knew about it. Nonetheless, the court concluded that such an agreement had existed, and that the accused was aware of its existence. The court offered the very same reasons for drawing this conclusion as those set out in its initial judgment, namely, that it was not logical that the defendant, being a member of the Operational Staff, did not know of the agreement on the withdrawal of the JNA from Tuzla. The court could not obtain the agreement at issue but held that the absence of written evidence did not imply that the agreement had not existed, because the JNA withdrawal from BiH was widely reported by the media and many JNA units withdrawing from BiH had passed through Tuzla in the days preceding the relevant day. The Court of Appeal, in contrast, concluded that the existence of this agreement had not been proven.

Also, it remained unclear how the First Instance Court established beyond doubt that the Operational Staff of the Tuzla Public Security Department had devised a perfidious plan to attack the army convoy. As afore mentioned, the military expert suggested two possible scenarios, firstly that an ambush was staged as a legitimate method of combat, or as a mere demonstration of power, or as a means of deterrence. The Court of Appeal found that the existence of a perfidious plan was an unproven fact.

That facts may be proven not only by direct but also by circumstantial evidence is beyond dispute. However, there is a rule that governs how facts are proved by circumstantial evidence. This rule, established through court practice, says that circumstantial evidence must be like a solid closed circle allowing for only one reasonable conclusion on a fact at issue, excluding all other conclusions.[559] In the trials of Ilija Jurišić, it was obvious that the First Instance Court did not abide by this rule and conducted both trials without thoroughly analysing all the evidence put before it. This also suggests that the reasons behind both judgments of conviction may have been political rather than legal.

559 Ibid, p. 25.

Erroneous application of the rules of international humanitarian law

The OWCP qualified the act in which Jurišić is charged is the war crime of "perfidy", explaining that there existed "a perfidious plan" and that "the agreement and decision [on peaceful withdrawal] instilled trust in the JNA commands that they would not be attacked during their withdrawal", and that there existed an "intent to betray that trust". The courts did not challenge this qualification. The courts found that the attack on the JNA convoy was a perfidious act because it violated the agreement on peaceful withdrawal of the JNA, which instilled trust in the JNA that they would not be attacked.

Article 37 of the Protocol I Additional to the Geneva defines perfidy as follows: "Acts inviting the confidence of an adversary that lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy." To illustrate this, the Protocol provides several examples of perfidious acts, such as feigning the incapacity to fight, feigning of civilian or other protected status, etc. All examples provided in the Protocol refer to betrayal of confidence in situations where certain categories of persons enjoy protection under the Geneva Conventions. Therefore, it is unclear whether this article can be at all applied to cases such as the *Tuzla Convoy* case, in which confidence was *not* based on any protected status but on a withdrawal agreement.

The rules of customary international humanitarian law make it clear that the Protocol's article on perfidy is not at all intended to apply to situations like this one. Namely, there are two distinct rules of customary international humanitarian law which refer to two different situations: 1) perfidy – which corresponds to the definition in Protocol I and the definition applied in this case[560] and 2) "concluding an agreement to suspend combat with the intention of attacking by surprise the enemy relying on that agreement"[561]. The fact that international law makes a distinction between these two situations clearly indicates that attacking an adversary after a cease-fire agreement has been concluded, as allegedly was the case with Tuzla convoy, is not the same as perfidy. The ICRC and the International Criminal Court share this view, stating that considering a violation of an agreement to suspend combat as perfidy is an unjustified broadening of the definition of perfidy.[562]

Therefore it is clear that the OWCP in its indictment relied on the wrong rule of international law and on the Protocol which is not applicable in this case, and the Court accepted it, thus violating the domestic criminal code and creating room for parties to seek ordinary and extraordinary remedies. The OWCP, the Higher Court and the Court of Appeal were undoubtedly bound to explain why they qualified the defendant's act as perfidy, set out its elements, and explain how the act qualified as such. Also, the OWCP should have cited the provisions of customary international law in its indictment.

560 International Committee of the Red Cross, Customary international humanitarian law database, Rule 65, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65.

561 Ibid, Rule 64.

562 International Criminal Court, Office of the Prosecutor, Situation in the Republic of Korea, Article 5 Report (2014), para. 55, available at https://www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf

Mens rea

Whether the act in question is perfidy or a conclusion of a cease-fire agreement with the intention of attacking by surprise the enemy relying on that agreement, in either case a specific intent must be proved, namely, that an agreement has been concluded, or another action taken, in order to win the trust of the adversary *with the intention* to attack it, or to reduce its combat and defence readiness, and then to attack it. But if the agreement is signed in good faith or even just partially in good faith, neither of the two crimes can be alleged to have been committed.[563]

Proving the mental element, which is a necessary element of both crimes, is extremely difficult, especially if the very existence of the agreement has not been proven either. Nonetheless, this element was not examined or explained either in the indictment or in the judgments. The indictment revealed that the OWCP did not know that in order for these crimes to be proved, a specific mens rea must also be proved. The indictment alleged that the defendant issued an order to attack "with the intent to betray the trust", and this is the only time that the indictment referred to the defendants' state of mind in respect to the act. For an act to qualify as one of the two above-cited offences, the intent must have existed at the time of signing the agreement, not during the execution of the attack. Nonetheless, the courts, in all three judgments, uncritically accepted the OWCP's wrong qualification of the offence.[564]

Unprofessional work of the OWCP and the First Instance Court

One of the "crucial" facts the Prosecution relied on throughout the proceedings was the existence of the agreement on the peaceful withdrawal of the JNA from the territory of BiH, which the defendant allegedly broke. However, the agreement was never submitted to the court. That the agreement never existed can be seen from the report of the then UN Secretary-General Boutros Boutros-Ghali of 30 May 1992, which states that a meeting between BiH and FRY representatives in Skopje did not result in an agreement.[565]

563 Ibid, para. 56

564 Judgment of the District Court in Belgrade in *Tuzla Convoy* no. KV.br.5/2007 of 28 September 2009, p. 142, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_prvostepena_presuda-28.09.2009..pdf, accessed on 17 April 2015; Ruling of the Court of Appeal in Belgrade in *Tuzla Convoy*, no. KŽ1 Po2 5/10 of 11 October 2010, pp. 5-6, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_drugostepena_ofluka.pdf, accessed on 17 April 2015; Judgment of the Higher Court in Belgrade in *Tuzla Convoy,* no. K.Po2 53/10 of 2 December 2013, pp. 41-42, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013..pdf, accessed on 17 October 2016.

565 Report of UN Secretary-General Boutros-Ghali S/24049 of 30 May 1992.

Moreover, the Deputy Prosecutor in this case, while giving evidence before the Westminster Magistrates Court in London in the extradition case of Ejup Ganić, admitted that such an agreement was never signed.[566] The Defence wanted to submit the judgment passed in this case as evidence, but both the First Instance and Second Instance Courts did not accept it.[567]

Regional cooperation

In this case, two investigations were simultaneously conducted, in Serbia and in BiH. Immediately following the defendant's arrest, the BiH Ministry of Justice requested his extradition and the transfer of his case to the BiH judiciary, but the request was denied.[568] Parallel investigations were conducted in other cases as well, e.g. *Dobrovoljačka Street.*[569] Apart from wasting judicial resources, parallel investigations as a rule are conducted for political purposes, such as creating a balance between cases that involve Serbian victims, and those involving non-Serbian victims. At the beginning of 2013, the OWCP and the Prosecutor's Office of BiH signed a Protocol on Cooperation, aimed, among other things, at putting an end to parallel investigations. The Protocol imposes the obligation on each party to inform the other party, within three months from the signing of the agreement, of all proceedings conducted against nationals of the other party, and to continue to keep the other party informed of any proceedings instituted against its nationals.[570]

566 Serbian translation of the decision of the Westminster Magistrates Court is available at http://www.slobofnaevropa.org/content/ejup_ganic_srbija_izrucenje_sud_presuda/2122565.html, para. 37, accessed on 17 October 2016.

567 Judgment of the Higher Court in Belgrade in *Tuzla Convoy* no K.Po2 53/10 of 2 December 2013, p. 43, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013..pdf, accessed on 17 October 2016; Judgment of the Court of Appeal in Belgrade in *Tuzla Convoy* Kž1Po2 5/14 of 25 December 2015, p. 26, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/05/Drugostepena_presuda_u_ponovljenom_postupku_25.12.2015.pdf, accessed on 17 October 2016.

568 See in: Humanitarian Law Center, "Report on War Crimes Trials in Serbia in 2008" at http://www.hlc-rdc.org/images/stories/pdf/izvestaji/Izvestaj_sudjenja_post_YU_knj_blok-BHS.pdf, accessed on 17 October 2016.

569 Office of the War Crimes Prosecutor, "Zahtev za sprovodjenje istrage protiv Ejupa Ganića i drugih" [Order to conduct an investigation against Ejup Ganić and others] (press release), 26 February 2009.

570 Protocol on Cooperation in Prosecuting Suspected Perpetrators of War Crimes, Crimes against Humanity and the Crime of Genocide between the Prosecutor's Office of Bosnia and Herzegovina and the Office of the War Crimes Prosecutor of the Republic of Serbia, signed on 31 January 2013 by the War Crime Prosecutor of the Republic of Serbia, Vladimir Vukčević, and the Deputy Chief Prosecutor of BiH, Jadranka Lokmić Misirača.

Final judgments in cases before courts of general jurisdiction

I. Case Kobre [Cobras][571]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 22 June 2012	
Trial commencement date: 24 September 2015	
Prosecutor: Ivan Stanojević	
Defendants: Shyqeri Maloku, Xhafer Gashi, Demush Gacaferi, Demë Maloku, Argon Isufi, Anton Quni, Alija Rabit and Rustem Berisha	
Criminal offence charged: terrorism	
Chamber	Judge Vera Milošević (presiding) Judge Ljiljana Miljković Judge Gordana Pavlović Judge Gorana Mitić Judge Slobodan Stojilković
Number of defendants: 8 **Defendants' rank:** low rank – no rank **Number of victims:** 12 **Number of witnesses heard:** 0	**Number of trial days in the reporting period:** 1 **Number of witnesses heard in the reporting period:** 0

Key developments in the reporting period:

The case was completed with a final second instance judgment.

571 *Kobre*, trial reports and case documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/grupa_kobre.html, accessed on 31 October 2016.

The course of the proceedings

Overview of the proceedings before 2016

Indictment

The Office of the Military Prosecutor issued the First Indictment in 1999. After the jurisdiction over military cases had been transferred to the competence of prosecutor's offices and courts of general jurisdiction, the Higher Public Prosecutor's Office in Niš repeatedly amended the indictment, the last time on 4 February 2016. The indictment charged the defendants, at the time members of the KLA terrorist unit "The Cobras", with laying land mines at the Yugoslav-Albanian border in September 1998, which killed one and injured four members of the VJ, when a military vehicle, travelling between the "Maja čoban" and the "Morina" border outposts drove over them on 30 September 1998. The indictment further alleges that the accused, on the same date, in the area of the "Košare" border outpost, killed five and injured two VJ soldiers in a surprise attack.[572]

As the accused, who resided in Kosovo, remained unavailable to the Serbian authorities and their presence at the proceedings could not be secured for a long time, they were tried *in absentia*. The first judgment delivered in this case was that of the Higher Court in Kosovska Mitrovica, of 15 November 2011. In it, the defendants were found guilty and sentenced each to 15 years in prison. Ruling on the appeal filed by the defence, the Court of Appeal in Niš quashed the first instance judgment and ordered a new trial. On 2 April 2013, the Supreme Court of Cassation designated the Higher Court in Niš as the court competent to proceed in this case.

The examined witnesses, mainly members of the VJ, recounted the relevant events and how the soldiers were killed in the surprise attack, but were not able to provide any information as regards the attackers.

During the presentation of evidence, the Court showed a documentary, "The attack of the Kosovo Liberation Army against the 'Košare' border outpost", which was obtained from the archive of the KLA "Agim Ramadani" 138th Brigade, and a video film "The lost traces of Agim Ramadani", which showed preparations for the attack and all the accused.

572 Amended indictment of the Office of the Higher Prosecutor in Niš no. KT 257/13 of 1 October 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Optuznica_Sicer_Maljoku_i_dr.pdf, accessed on 31 October 2016.

Overview of the proceedings, year 2016

First instance judgment

On 17 February 2016, the Higher Court in Niš[573] delivered a judgment[574] convicting the defendants of two acts of terrorism and sentencing them each to concurrent prison sentences of 15 years. In considering the sentences, the fact that the terrorist attack resulted in the deaths of several young people and the injuring of several others was taken as an aggravating circumstance, while no mitigating circumstances were found.

Second instance judgment

The defence appealed against the judgment. The Court of Appeal in Niš[575] dismissed it as unfounded and affirmed the first instance judgment.[576]

HLC findings

Backlog of "military cases"

This case is one of the hundreds of cases that were transferred to civilian prosecutor's offices after the abolition of the military judiciary in Serbia in 2004. Even though no comprehensive analysis of the backlog of military cases has been made to date, judging by the case against the KLA members, the transferred war crimes cases which seriously soured the relations between Serbia and Croatia,[577] and the opinions expressed by OWCP representatives,[578] a significant number of these so-called "military cases" do not meet the minimum legal standards and were often instituted for purely political purposes.

According to the 2004 Law on the Transfer of Jurisdiction from the Military Courts, Military Prosecutor's Offices and Military Attorney's Office, civilian prosecutor's offices were given jurisdiction over military cases. As a result, one hundred military cases classified as war crimes were transferred

573 Chamber composed of Judge Nebojša Žikić (presiding), and Judges Grozdanka Jovanović, Ljiljana Marković, Olivera Nikolić-Paskaš and Slaviša Stošić (members).

574 Judgment of the Higher Court in Niš in *The Cobras Unit*, 1 K.br. 184/13 of 17 February 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Prvostepena_presuda_17.02.2016..pdf, accessed on 22 November 2016.

575 Chamber composed of Judge Vera Milošević (presiding), and Judges Ljiljana Miljković, Gordana Pavlović, Gorana Mitić and Slobodan Stojilković (members).

576 Judgment of the Court of Appeal in Niš in *The Cobras Unit*, 1 Kž.1 br. 437/16 of 26 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Drugostepena_presuda_26.05.2016.pdf, accessed on 22 November 2016.

577 Analysis of the Prosecution of War Crimes in Serbia 2004-2013, p. 25.

578 Analysis of the Prosecution of War Crimes in Serbia 2004-2013, p. 21.

to the OWCP under this law, but many of them were soon to be dismissed, as it became evident that they had been clearly motivated by political rather than legal reasons, as stated by OWCP representatives.[579]

Legal categorisation of the offence

Even assuming that the case against the former KLA members does satisfy the substantive and procedural standards to be prosecuted by civilian prosecutor's offices, the acts alleged in the indictment can only qualify as a war crime, not acts of terrorism. If that is the case, the OWCP should have taken the case and examined whether the acts set out in the indictment are punishable under international humanitarian law, and depending on its finding, continue or discontinue the prosecution. The accused were fighters belonging to a party in the armed conflict - the armed conflict between the armed forces of the FRY and the KLA, which during the period relevant to the indictment, i.e. September 1998, was already under way in Kosovo. Therefore, in view of the aforesaid, the criminal offence committed by the defendants could only qualify as a war crime, not as an act of terrorism. Both the ICTY[580] and OWCP[581] have established that in September 1998 there existed an armed conflict in Kosovo.

Proceedings *in absentia*

As the accused were not accessible to Serbian justice, they were tried in their absence, pursuant to Article 381 of the ZKP, which permits *in absentia* trials if the accused is at large or not available to government authorities, but only if "there exist particularly justified reasons" for doing so. As for the case in question, the HLC does not think that such reasons existed.

The prohibition of *in absentia* war crimes trials has become a norm nowadays, a norm intended, among other things, to prevent political trials. Many national legal systems as well as many international courts and tribunals do not permit *in absentia* trials. Thus, for example, the United Nations Interim Mission in Kosovo (UNMIK), by its

579 Analysis of the Prosecution of War Crimes in Serbia 2004-2013, p. 21.

580 See the ICTY Trial Judgment in *Haradinaj et al.*, para. 100, available at http://www.icty.org/x/cases/haradinaj/tjug/en/080403.pdf.

581 See the OWCP indictment in *Ljubenić*, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_07_04_2014.pdf.

Regulation of 2001, prohibited *in absentia* trials for violations of international humanitarian law;[582] the ZKP of BiH imposed a complete ban on *in absentia* trials,[583] so did the Rome Statute of the International Criminal Court[584], etc.

According to Resolution (75) 11 of the Committee of Ministers of the Council of Europe on the criteria governing proceedings held in the absence of the accused, the accused must not be tried in his/her absence, if it is possible and desirable to transfer the proceedings to another state, or to another jurisdiction.[585] Bearing in mind the existence of the Protocol on Cooperation between UNMIK and FRY,[586] which provides for information- sharing in criminal matters and transfer of criminal files between the two countries, and the fact that the Kosovo Specialist Chambers have already been established to try crimes committed during the conflict in Kosovo,[587] the HLC thinks that the case against the eight KLA members should have been transferred to the Kosovo judiciary, more specifically, to the Office of the Specialist Prosecutor in Kosovo, to which Serbia has pledged its full cooperation.[588]

Lack of evidence and court's failure to set out reasons for convictions in the judgments

The defendants were convicted of two criminal acts of terrorism, as co-perpetrators, but the decisive facts upon which the convictions were based were not explained clearly and convincingly in the judgments. Instead of providing clear reasons behind the conviction, the courts provided only vague and non-specific phrases. The decision to convict was based solely on the video footages that showed the accused, alongside a large number of other, unidentified, KLA members. The only explanation offered regarding their culpability is that "all the accused are glorified and praised for the attacks carried out in the relevant period"[589] throughout the video footage, from which the First Instance Court inferred that "it is certain that they were actively involved in both terrorist attacks, alongside 30

582 UNMIK Regulation no. 2001/1 of 12 January 2001, available at http://www.unmikonline.org/regulations/2001/reg01-01.html, accessed on 31 October 2016.

583 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina, nos. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09 and 72/13, Article 247.

584 Rome Statute of the International Criminal Court, Article 63.

585 Resolution (75) 11 of the Committee of Ministers of the Council of Europe.

586 Protocol on police cooperation signed between UNMIK and the Federal Government of the Federal Republic of Yugoslavia and the Government of Serbia.

587 See the court's web page at https://www.scp-ks.org/en.

588 "Dačić obećao svu pomoć za tužilaštvo za zločine OVK" [Dačić pledges full assistance to Schwendiman], 10 November 2016, available at http://www.mfa.gov.rs/en/press-service/daily-news?year=2016&month=11&day=14&modid=62; "Formirana Radna grupa za rasvetljavanje zločina na KiM" [Working Group established to resolve crimes in Kosovo and Metohija], Tanjug News Agency, 19 October 2015, available (in Serbian) at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:572651-Formirana-Radna-grupa-za-rasvetljavanje-zlocina-na-KiM, accessed on 31 October 2016.

589 Judgment of the Higher Court in Niš in *The Cobras Group/Unit*, 1 K.br. 184/13 of 17 February 2016, p. 19, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Prvostepena_presuda_17.02.2016..pdf, accessed on 9 January 2017.

other unidentified members of the so-called KLA".[590] However, the judgment does not list the guilty acts performed by the accused, nor does it specify the individual criminal responsibility of each of the defendants. Hence, the first instance judgment does not explain their form of participation in the perpetration of the crime.

This unreasoned judgment not based upon facts was upheld as such by the Court of Appeal, also without explanation. "As regards the allegations in the appeal that acts performed by each one of the defendants have not been determined, this court holds that, from the evidence presented, it can be inferred that the defendants are guilty as co-perpetrators to the crime. Co-perpetration, pursuant to Article 22 of the Criminal Code of the FRY, exists where several persons jointly commit a criminal offence, by participating in the act of commission or in some other way."[591] Moreover, the Court of Appeal held that "it is of no particular importance to ascertain who of the defendants laid mines, who opened fire from firearms and rocket-launchers at the members of the VJ border guard, and who inflicted which injures on the injured parties, particularly given that the defendants carried out the incriminating acts together with over 30 other unidentified individuals."[592] This lack of concern on the part of the Court of Appeal for determining the individual criminal responsibility of each of the defendants not only departs from the domestic war crimes case law,[593] but also from the overall domestic criminal case law, which requires individualisation of the actions of each alleged co-perpetrator, i.e. that the Court precisely determine with which actions each co-perpetrator contributed to the commission of the crime.[594]

590 Ibid, p. 21.

591 Judgment of the Court of Appeal in Niš in *The Cobras Unit*, 1 Kž.1 br. 437/16 of 26 maja 2016, p. 7, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/11/Drugostepena_presuda_26.05.2016.pdf, accessed on 22 November 2016.

592 Ibid.

593 See judgments of the Court of Appeal in *Lovas*, *Beli Manastir* and *Ćuška*.

594 See, e.g., Supreme Court Decision Kž. 760/95 of 20 September 1996; Judgment of the Supreme Court of Serbia, Kž. 1515/97 of 20 October 1999 in *Simić*, Zbirka sudskih odluka iz krivičnopravne materije [Compendium of Court Decisions in Criminal Matters], Belgrade, 2000, Book 3, pp. 21-22 and 25. See also Gojko Pantović, *Co-perpetration in War Crimes Cases in Serbia* in "Analysis of Current Issues in War Crimes Proceedings", available at http://www.bgcentar.org.rs/bgcentar/wp-content/uploads/2016/11/Analiza-ratnih-zlocina-Book-ENG.pdf.

II. Case Kušnin/Kushnin[595]

CASE INFORMATION	
Stage of the proceedings: final judgment delivered	
Date of indictment: 19 July 2002	
Trial commencement date: 16 September 2002	
Prosecutor: Ivan Stanojević	
Defendants: Rade Radojević, Danilo Tešić and Mišel Seregi	
Criminal offence charged: war crime against the civilian population	
Chamber: Jude Jelena Pavlović (presiding)	
Number of defendants: 3	
Defendants' rank: low and mid-rank	**Number of trial days in the reporting period:** 2
Number of victims: 2	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 22	

Key developments in the reporting period:

The case resulted in a final judgment.

595 *Kušnin* case trial reports and documents available (in Serbian) at http://www.hlc-rdc.org/Transkripti/kusnin.html

Course of the proceedings

Overview of proceedings up to 2016

Indictment

The first indictment was issued on 19 July 1999 by the Office of the Military Prosecutor in Niš.[596] Over the course of the proceedings, the Office of the Higher Public Prosecutor in Niš amended the indictment on 26 June 2012 to give greater precision to the allegations set out in the original indictment.[597]

The defendants - Zlatan Mančić, Rade Radivojević, Danilo Tešić and Mišel Seregi – were charged with killing two Kosovo Albanian civilians and robbing other Kosovo Albanian civilians in early April 1999 in the village of Kushnin/ Kušnin (in the municipality of Prizren, Kosovo).[598]

First trial

Having completed the proceedings during which the defendants Mišel Seregi and Danilo Tešić admitted to committing the criminal offence as charged, the Military Court in Niš issued a judgment in October 2002, finding all the defendants guilty of the criminal act of a war crime against the civilian population and sentencing them to terms of imprisonment ranging from three to seven years.[599] The Supreme Military Court in Belgrade, which had jurisdiction to hear appeals by the parties at the time,[600] rendered its judgment in May 2003, imposing more severe prison sentences on the defendants,

596 Indictment of the Office of the Military Prosecutor in Niš no. VTK 2696/2000 of 19 July 2000, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-19.07.2002.-optuznica.pdf, and amended indictment of the Office of the Military Prosecutor in Niš no. VTK no. 2696/2000 of 16 September 2002, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-16.09.2002.-precizirana_optuznica.pdf, accessed on 10 February 2017.

597 Amended, more precise, indictment of the Office of the Higher Public Prosecutor in Niš no. KT 98/10 of 26 June 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/07/Kusnin-izmenjena-optuznica-26-06-2012.pdf, accessed on 10 February 2017.

598 Amended indictment of the Office of the Military Prosecutor Niš no. VTK 2696/2000 of 16 September 2002, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-16.09.2002.-precizirana_optuznica.pdf, accessed on 10 February 2017.

599 Judgment of the Military Court in Niš in *Kušnin* case, no. IK 258/2002 of 11 October 2002, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-11.10.2002.-presuda_Vojnog_suda_u_Nisu.pdf, accessed on 10 February 2017.

600 Military courts had jurisdiction over criminal offences committed by members of military personnel and certain offences committed by civilians which concerned national defence and security, as well as over disputes regarding the service in the Army of Yugoslavia, Law on Military Courts, Official Journal of the FRY nos. 11/95, 1/96, 74/99, 3/02, 37/02, Article 1. This Law ceased to have effect on 1 January 2005, when jurisdiction over military cases was transferred to the courts of general jurisdiction, Article 2 of the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutor's Offices and the Military Attorney, Official Gazette of the RS no. 137/04.

ranging from five to 14 years.[601] The defence lawyers took the case to the Supreme Court of Serbia, challenging the lawfulness of the final judgments. In November 2005, the Supreme Court granted the appeal[602] and set aside the judgments, after which the case was sent back to the Court of First Instance for a retrial.[603]

Retrial

The retrial commenced in June 2007 before the District Court in Niš.[604] Because the Presiding Judge and other members of the chamber dealing with this case were changed, the trial had to begin anew in 2010.

In August 2012, the Higher Court in Niš[605] handed down its judgment, finding the defendants guilty as charged and sentencing them to imprisonment as follows: Zlatan Mančić to 14 years, Rade Radojević to nine years, Danilo Tešić to seven years, and Mišel Seregi to five years.[606]

The judgment states that the defendants - Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregi – at the time members of the Yugoslav Army, killed two Kosovo Albanian civilians from the village of Kushnin/Kušnin, namely Miftar and Selman Temaj, in early April 1999. At the time of the crime, Zlatan Mančić was the commanding security officer, [607]Rade Radojević was the Commander of the 1st Rifle Platoon of the VJ 549th Motorised Brigade,[608] and Danilo Tešić and Mišel Seregi were soldiers of the 1st Rifle Platoon. Miftar and Selman Temaj were brought before Mančić, who questioned them and then ordered the defendant Tešić to kill them. He also ordered the defendant Radojević to choose another soldier who would kill the civilians together with Tešić. Tešić killed one of the civilians by shooting him in the back of the head with his automatic rifle, and Seregi shot the other one in the back. Tešić then walked up to the civilian who was still showing signs of life and shot him in the head. After that, Tešić and Seregi set the bodies of the victims on fire in an attempt to cover up traces of the murder.

601 Judgment of the Supreme Military Court in *Kušnin* case no. II K 45/03 of 22 May 2003, available (in Serbian) at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-22.05.2003.-presuda_Vrhovnog_vojnog_suda.pdf, accessed on 10 February 2017.

602 As of 1 January 2005 jurisdiction over military cases was transferred from the military courts to the courts of general jurisdiction, Article 2 of the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutor's Offices and the Military Attorney, Official Gazette of the RS no. 137/04.

603 Judgment of the Supreme Court of Serbia in *Kušnin* case no. Kzp. VP 3/05, 4/05 and 5/05, of 24 November 2005, available at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Presuda-Vrhovnog-suda-Srbije-24.11.2005.pdf, accessed on 17 February 2017.

604 Military courts were abolished in 2004 by the Law on the Transfer of Jurisdiction of Military Courts, Military Prosecutor's Offices and the Military Attorney to the Authorities of Member States. In Serbia, their jurisdiction is transferred to the District Courts in Novi Sad, Niš and Belgrade and the Supreme Court of Serbia.

605 As part of the judicial reform, the Law on the Organisation of Courts, which came into effect on 1 January 2010, gave the Higher Court a jurisdiction to hear first instance war crimes cases.

606 Judgment of the Higher Court in Niš in *Kušnin* case no. 2K 46/10 of 3 August 2012, available at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Prvostepena-presuda-Kusnin.pdf, accessed on 10 February 2017.

607 Active military officer with the rank of major.

608 Active military officer with the rank of sub-lieutenant.

The Defence appealed against the judgment. After considering the appeal, the Court of Appeal in Niš issued a decision in December 2013, quashing the judgment with the direction that the case be remanded to the First Instance Court for a retrial. Also, the court decided to terminate the proceedings against Zlatan Mančić, who had died in the meantime.[609]

The Appellate Court found that the First Instance Court had committed a serious procedural violation by failing to explain in its judgment the decisive facts upon which its decision was based and by its improper and incomplete finding of fact. Also, the Court of Appeal criticised the First Instance Court for relying on circumstantial evidence alone when determining the identity of the victims and the manner of their death. The Court of Appeal held that the First Instance Court should have obtained the record on the exhumation and autopsy of the mortal remains of Temaj Miftari, especially since the First Instance Court had accepted the defence that Tešić and Seregi presented at the military court, admitting the murder and saying that the victims had been killed by shots to their heads. Without the autopsy record, the Court of Appeal held, it was not possible to determine whether the victims had been killed by shots to their heads, and therefore it was not possible to verify the defendants' defence.

Request for the protection of legality

In August 2014, the Office of the Higher Public Prosecutor in Niš formally proposed that the Republic's Public Prosecutor's Office file a request for the protection of legality for the benefit of the defendants against the decision of the Court of Appeal, asserting a serious violation of provisions of criminal procedure and proposing that the decision be revoked and the case sent back to the Court of Appeal in Niš for retrial.[610] The Office of the Higher Public Prosecutor held that the Court of Appeal in Niš was obliged to hand down a final decision in this case, since the ZKP expressly prohibits a second instance court to twice quash a first instance judgment in the same case involving the same criminal event. The Republic Public Prosecutor's Office assessed the proposal as well-grounded and filed a request for the protection of legality.

In October 2014, the Supreme Court of Cassation dismissed as unfounded the request for the protection of legality.[611] The court found that the Court of Appeal in Niš could set aside the first instance judgment and direct a retrial.

609 Decision of the Court of Appeal in Niš in *Kušnin*, no, 7Kž.1.4373/12 of 13 December 2013, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Resenje_Apelacionog_suda.pdf, accessed on 10 February 2017.

610 Proposal of the Office of the Higher Public Prosecutor for filing a request for the protection of legality in *Kušnin* case, no. KTR I 67/14 of 20 August 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Zahtev_Viseg_javnog_tuzilastva_u_Nisu%20za_zastitu%20zakonitosti.pdf, accessed on 10 February 2017.

611 Judgment of the Supreme Court of Cassation no. Ktz 987/2014 of 14 October 2014, available (in Serbian) at w.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Vrhovnog_Kasacionog_suda_14.10.2014._o_ZZZ.pdf, accessed on 10 February 2017.

Overview of proceedings, year 2016

First instance judgment upon retrial

Having completed the retrial, the Higher Court in Niš handed down its judgment on 30 May 2016.[612] The defendants were found guilty and sentenced to imprisonment as follows: Rade Radojević to three years, Danilo Tešić to two years and a half, and Mišel Seregi to two years. Defendants' personal and family situations were taken into account as mitigating circumstances. The defendant Zlatan Mančić died during the retrial, so the proceedings against him were terminated.

Second instance judgment upon retrial

Both the Prosecution and Defence appealed against the first instance judgment. On 22 December 2016, the Court of Appeal in Niš dismissed both appeals as unfounded and upheld the first instance judgment.[613]

HLC findings

Incompetence of the courts of general jurisdiction

These proceedings dragged on for 14 years. The fault for the delay lay both with the Prosecutor's Office and the Court. This clearly shows that they do not have the capacity to deal with this type of criminal offence, and that the lawmakers made a bad decision by allowing them to continue prosecuting and hearing war crimes cases. Such excessively long proceedings violated the defendants' and the victims' right to have their cases heard within a reasonable time.

Downward departures from mandatory minimum punishments

All the defendants had their sentences reduced to a level below the minimum five-year prison term prescribed by law for a war crime. However, the Court failed to provide any explanation for the reduction of punishments imposed after the retrial.[614] According to the law, imposition of a sentence lesser than the statutory minimum is only possible where particularly mitigating circumstances are found to exist which indicate that the purpose of punishment may be achieved with a lesser sentence.[615]

612 Judgment of the Higher Court in Niš K.no. 130/14 of 30 May 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Prvostepena_presuda_u_ponovljenom_postupku_30.05.2016..pdf, accessed on 2 March 2017.

613 Judgment of the Court of Appeal in Niš Kž1no. 1162/16 of 22 december 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Drugostepena_presuda_u_ponovljenom_postupku_22.12.2016..pdf, accessed on 2 March 2017.

614 CC of the FRY, Article 142. para. 1.

615 CC of the FRY, Article 42.

However, nowhere in their judgments did the First Instance or Second Instance Court offer a single word of explanation as to which factors they considered to be particularly mitigating or which legal provisions they relied on for mitigation. Instead, in the operative part of their judgments, they only cited the provisions relating to mitigation limitations.[616] The first instance judgment merely lists the usual mitigating circumstances found to be present with respect to the defendants, such as absence of previous convictions, poor financial situation, family situation, etc.

The decision to impose a lesser than the mandatory minimum sentence is not only unlawful, but also contradictory to the Court's own findings. Namely, in respect to the defendant Rade Radojević, who at the time of the crime was an active military officer with the rank of major, the aggravated factors included "his degree of responsibility, the circumstances under which the crime was committed and its severe repercussions;" "because the victims were elderly persons who in no way posed a threat to the defendant, nor were they aggressive towards or disrespectful to him; further, the defendant, being a professional soldier and a superior army officer, had a duty to ensure that international law was observed and induce his soldiers to observe the rules of international law, which aggravated even more his criminal responsibility."[617] The facts that "the victims were elderly persons offering no resistance, and the manner in which the crime was committed, by shooting the victims in the back, after telling them they were free to go", were also seen by the Court as aggravating circumstances with respect to other defendants.[618] And yet, with all these aggravating circumstances, all the defendants were given sentences below the mandatory minimum of five years' imprisonment.

In the HLC's view, this sentencing decision is so unlawful and so difficult to understand that it should have been overturned - that is, the Court of Appeal should have modified it, which it failed to do.

616 Judgment of the Higher Court in Niš K.no. 130/14 of 30 May 2016, p. 3, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Prvostepena_presuda_u_ponovljenom_postupku_30.05.2016..pdf

617 Judgment of the Higher Court in Niš K.no. 130/14 of 30 May 2016, p. 34, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Prvostepena_presuda_u_ponovljenom_postupku_30.05.2016..pdf, accessed on 2 March 2017.

618 Judgment of the Higher Court in Niš K.no. 130/14 of 30 May 2016, p. 35, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2017/03/Prvostepena_presuda_u_ponovljenom_postupku_30.05.2016..pdf, accessed on 2 March 2017.

Proceedings on requests for recognition and enforcement of foreign judgments in war crimes cases

I. Case Novak Đukić – Tuzla's "Kapija"[619]

CASE INFORMATION	
Stage of the proceedings: request for recognition and enforcement of final and binding judgment is being considered	
Trial commencement date: 26 February 2016	
Prosecutor assigned to the case: Mioljub Vitorović	
Defendant: Novak Đukić	
Criminal offence: war crime against the civilian population	
Chamber	Judge Vinka Beraha Nikićević (presiding) Judge Vladimir Duruz Judge Vera Vukotić
Number of persons convicted: 1	
Convict's rank: high	**Number of trial days in the reporting period:** 2
Number of victims: 71	**Number of witnesses heard in the reporting period**
Number of witnesses heard: 0	

Key developments in the reporting period:

Proceedings upon the request for recognition and enforcement of the final and binding judgment of the Court of Bosnia and Herzegovina are underway.

619 See the case of *Novak Đukić* at the Court of BiH website: http://www.sudbih.gov.ba/Case/2472/show.

Course of the proceedings

First instance judgment of the Court of BiH

On 12 June 2009, the Court of Bosnia and Herzegovina[620] sentenced Novak Đukić to a 20-year prison term for a war crime against the civilian population under Article 173 of the Criminal Code of Bosnia and Herzegovina. Đukić, in his capacity as the Commander of the Ozren Tactic Group of the VRS, was found guilty of having ordered the artillery platoon under his command to shell the town of Tuzla on 25 May 1995, despite the fact that Tuzla had been declared a "safe area" by UN Resolution 824 of 6 May 1993. One artillery projectile hit Tuzla's central area known as "Kapija" [Gate], killing 71 people, most of whom were in their twenties, and wounding over 100.

Second instance judgment of the Court of BiH

The Appeals Chamber of the War Crimes Division of the Court of BiH on 6 April 2010 upheld the first instance judgment,[621] following which Novak Đukić began serving his prison sentence in BiH.

Decision of the Constitutional Court of BiH

Đukić lodged an appeal with the Constitutional Court of BiH, asserting that the judgment of the Trial Court had violated his rights guaranteed by the Constitution and the European Convention on Human Rights, which prohibit the retroactive application of the law. Namely, Đukić was tried under the Criminal Code of BiH, instead of the Criminal Law of the SFRY, which was in effect at the time of the commission of the crime in 1995.

The Constitutional Court of BiH granted his grounds of appeal and issued a decision on 23 January 2014, by which it quashed the secondinstance judgment and ordered the Lower Court to hand down a new judgment.[622]

As the Constitutional Court had quashed the final and binding judgment passed on Đukić, legal grounds for his serving the sentence ceased to exist, so the Court of BiH on 14 February 2014 issued a decision to release him.

Second-instance judgment upon retrial

On 11 April 2014, the Court of BiH reduced his sentence by five years, in accordance with the Criminal Law of the SFRY.

620 First instance judgment of the Court of Bosnia and Herzegovina no. X-KR-07/394 of 12 June 2009 in *Prosecutor's Office against Novak Đukić*.
621 Second instance judgment of the Court of Bosnia and Herzegovina no. X-KRŽ-07/394 of 6 April 2010.
622 Constitutional Court of BiH, Decision on the merits of 23 January 2014, case no. AP-5161/10.

BiH's request to Serbia for recognition and enforcement of final and binding judgment

Soon after Đukić's release, his Defence Counsel informed the Court in BiH that their client was receiving medical treatment in Serbia. When he failed to turn up to begin serving his term in BiH, the Court of BiH issued a warrant for his arrest. According to the Law on International Legal Assistance in Criminal Matters, Đukić, being a Serbian citizen, could not be extradited to BiH (Đukić has dual citizenship, Serbian and that of BiH).[623] So the Court of BiH in October 2015 sent a formal mutual legal assistance request to Serbia, requiring Serbia to recognize and enforce the final and binding judgment passed on Đukić.

The War Crimes Department of the Higher Court in Belgrade repeatedly postponed its decision-making in this case, because of Đukić's non-appearance in court owing to his supposed ill health.

Đukić's Defence Counsel moved that the letter of request be turned down, claiming that Đukić's trial before the Court of BiH was unfair, and later requested that the Court in Belgrade obtain Đukić's case file from the Court of BiH, which would support their claims. The Court granted this request. However, only a part of the documents requested had been delivered to the Court in Belgrade by the end of the reporting period.

Because of Đukić's repeated non-appearance in court owing to health reasons, the Chamber ordered that a medical expert evaluate his ability to attend the sessions and take part in the proceedings.

Reconstruction of the crime scene at the Serbian army's training grounds

At the request of Novak Đukić's Defence Counsel, an experiment – Reconstruction of crime scene in Tuzla's "Kapija" – was carried out at the Army of Serbia's Technical Testing Centre in Nikinci,[624] during 2014, 2015 and 2016. The reconstruction included a simulation of the impact of an artillery projectile on a scale model that was supposed to represent the buildings and other structures in Tuzla's "Kapija". On the basis of this experiment it was concluded that the civilians could not have been killed from a blast of a shell fired from the VRS positions on 25 May 1995, and that the facts established in the final judgment of the Court of BiH against Novak Đukić were hence untrue.[625]

623 Law on International Legal Assistance in Criminal Matters, Article 16, paragraph 1, sub-paragraph 1, Official Gazette of the RS no. 20/2009.

624 Reply of the VJ General Staff to HLC's request for information of public importance, 13 April 2016, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/04/Odgovor_na_zahtev_za_pristup_informacijama_od_javnog_znacaja,rekonstrukcija_dogadjaja_na_Tuzlanskom_trgu_25.05.1995,Generalstab_Vojske_Srbije.pdf, accessed on 16 February 2017.

625 *Večernje novosti* daily newspaper, 25 February 2016, "Srpska granata nije ubila ljude u Tuzli"[Serbian shell did not kill people in Tuzla], available (in Serbian) at http://www.novosti.rs/vesti/naslovna/hronika/aktuelno.291.html:592567-Srpska-granata-nije-ubila-ljude-u-Tuzli, accessed on 16 February 2017.

HLC findings

An attempt to influence court's decision

The results of the experiment at Nikinci were presented to the Serbian media. On 4 November 2016, a documentary "Mučni teret podmetnute krivice" [Painful Burden of Imputed Blame] based on this experiment was screened at Belgrade's Zvezdara Theatre.[626] The results were presented also at a public debate held at the Belgrade University Law School.[627] At the same time, an allegation was put out that expert witness Berko Zečević, who had testified at Đukić's trial before the Court of BiH, faced a criminal complaint for giving a false testimony at the trial.[628] This media campaign is undoubtedly aimed at influencing the Higher Court in Belgrade to refuse the request of BiH.

Unfair trial as grounds for refusing the request

According to the Law on International Legal Assistance in Criminal Matters, the Higher Court may grant or refuse a formal request for the recognition and enforcement of a foreign judgment, but in either case the court is **bound by the factual description of the offence set out in a foreign judgment**.[629] Hence in no case may the Higher Court open a hearing to hear and assess the results of the experiment conducted at Nikinci. Yet, it is certain that Đukić's Defence Counsel will make use of these results to support their allegations that Đukić had an unfair trial at the Court of BiH, which is grounds for refusing a request.[630] And while an unfair trail, according to the Law, is grounds for refusing to recognise a judgment, the Higher Court in Belgrade is not, in the HLC's view, an appropriate forum for assessing the fairness of the trial in question. As BiH is a State Party to the European Convention on Human Rights, Đukić's Defence could have taken the case to the European Court of Human Rights, had it considered that Đukić's right to have a fair trial had been violated by the Court of BiH. Finally, bearing in mind that the Court of BiH grounded its judgment not only on the findings of the criminal investigation, testimonies of insider witnesses from the VRS and several Tuzla residents who survived the attack, but also on the findings of two ballistics experts, who were examined, cross-examined and confronted in court, with Đukić having his own firearms and ballistics

626 *Večernje novosti* daily newspaper, 4.novembra 2016, "Dokumentarac o Tuzli: Prava istina o poturanju laži", [Documentary on Tuzla: Real truth about fabricating lies], available (in Serbia) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:633415-Dokumentarac-o-Tuzli-Prava-istina-o-poturanju-lazi, accessed on 16 February 2017.

627 *Večernje novosti* daily newspaper, 24 October 2016, "Laž razbijena 32 puta: Ljudi na "Kapiji" ubijani simultano iz više pravaca" [Lie debunked 32 times: People in Kapija killed simultaneously from different directions], available (in Serbian) at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:631462-Laz-razbijena-32-puta-Ljudi-na-Kapiji--ubijani-simultano-iz-vise-pravaca, accessed on 27 February 2017.

628 Blic online, 30 May 2016, available (in Serbian) at http://www.blic.rs/vesti/hronika/u-sredu-o-priznavanju-presude-generalu-novaku-djukicu/l6cbr5l, accessed on 27 February 2017.

629 Law on International Legal Assistance in Criminal Matters, Article 61, paragraph 4, Official Gazette of the RS no. 20/2009.

630 Ibid, Article 63, paragraph 1, sub-paragraph 4.

expert during the trial, the HLC thinks it is unlikely that Đukić's Defence can offer any compelling arguments to support its allegations of unfairness.

In the HLC's view, by recognizing the judgment of the Court of BiH, the War Crimes Department of the Higher Court in Belgrade would demonstrate not only its commitment to regional cooperation but its independence as well.

Violation of National Strategy for the Prosecution of War Crimes

In the HLC's opinion, the experiments in Nikinci, which denied the facts established by the Court of BiH regarding the responsibility for the attack on Tuzla's "Kapija", have two main aims: to exert pressure on the judiciary so that Đukić can avoid serving his sentence in Serbia, and to revise the recent wartime past. The announcement of a new experiment to be conducted at Nikinci, which would deal with the VRS attack on the Markale marketplace in Sarajevo, clearly suggests that the campaign aimed at denying the truth of the findings of the Court of BiH regarding the responsibility for the attack on Tuzla's "Kapija" is part of wider efforts for revising the historical record of the 1992-1995 war in BiH.[631]

The HLC considers that the involvement of state authorities in such endeavours runs contrary to the National Strategy for the Prosecution of War Crimes, in which Serbia undertook to provide "objective informing of citizens about war crimes trials" in order to raise "the level of general social awareness about the events in the former Yugoslavia and the need to detect, investigate and prosecute war crimes, and to punish their perpetrators, regardless of their national, ethnic and religious affiliation or their ranking."[632]

631 S. J. Matić, "Srbija u Nikincima ruši laž s Markala" [Serbia debunks Markale hoax at Nikinci], *Večernje Novosti,* 19 September 2016, available (in Serbian) at http://www.novosti.rs/vesti/naslovna/drustvo/aktuelno.290.html:625814-Srbija-u-Nikincima-rusi-laz-s-Markala

632 National Strategy for the Prosecution of War Crimes, p. 14, available at http://www.tuzilastvorz.org.rs/upload/HomeDocument/Document__en/2016-05/p_nac_stragetija_eng.PDF

II. Case Boban Arsić

CASE INFORMATION	
Stage of the proceedings: proceedings are underway with respect to a request for recognition and enforcement of a final and binding judgment received from Croatia	
Trial commencement date: 20 December 2016	
Prosecutor: Knežević Dušan	
Convict: Boban Arsić	
Criminal offence: war crime against the civilian population	
Chamber	Judge Vinka Beraha Nikićević (presiding) Judge Vladimir Duruz Judge Vera Vukotić
Number of persons convicted: 1	
Convict's rank: low	**Number of trial days in the reporting period:** 2
Number of victims: 2	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 0	

Key developments in the reporting period:

Proceedings for the recognition and enforcement of the final and binding judgment of the County Court in Split (Croatia) are underway.

Course of the proceedings

Formal request for recognition of judgment of County Court in Split

The Ministry of Justice of the Republic of Croatia sent a formal latter of request to the Higher Court in Belgrade, War Crimes Department, requiring the recognition of the final and binding judgment passed on Boban Arsić by the County Court in Split. This court sentenced Arsić to fifteen years in prison for a war crime against the civilian population.

Criminal proceedings before Croatian courts

Boban Arsić was tried and convicted *in absentia* before the County Court in Split. Arsić, a member of the Serb Volunteer Guard attached to the JNA, on 12 January 1992 killed a married couple, Mato and Marija Bačić, in the Croatian hamlet of Bačići, in Drinovci near Drniš, and ill-treated several other hamlet residents. The proceedings against him were completed on 10 September 2014, when the Supreme Court of Croatia upheld his conviction.

Compensation proceedings issued before Serbian Courts

The children of the Bačić married couple filed a compensation lawsuit against the Serbian Ministry of Defence. During the compensation proceedings, they were instructed to first make a request for the recognition of the final and binding judgment passed on the perpetrator of this crime.

At a session of the War Crimes Chamber, which was to decide on the request of the Croatian Ministry of Justice, the Deputy War Crimes Prosecutor assigned to the case called on the Court to refuse the request, because the legal requirements had not been met for recognition of the judgment. Boban Arsić was summoned to attend the session, but failed to appear in court.

HLC findings

Trial *in absentia* as grounds for refusal

The HLC is certain that the War Crimes Department of the Higher Court in Belgrade will refuse to comply with the request, on the grounds that Boban Arsić was tried *in absentia.* Namely, according to the Law on International Legal Assistance in Criminal Matters, a request for recognition of a foreign judgment will be refused if the judgment whose recognition is requested has been rendered in a defendant's absence.[633]

633 Law on International Legal Assistance in Criminal Matters, Article 63, paragraph 1, sub-paragraph 3, Official Gazette of the RS no. 20/2009.

Dismissed indictments

I. Case Tenja II[634]

CASE INFORMATION	
Stage of the proceedings: Indictment dismissed	
Date of indictment: 22 June 2012	
Trial commencement date: 29 October 2012	
Prosecutor: Snežana Stanojković	
Defendant: Božo Vidaković	
Criminal offence charged war crime against the civilian population	
Number of defendants: 1	
Defendant's rank: low	**Number of trial days in the reporting period:** 2
Number of victims: 24	**Number of witnesses heard in the report period:** 0
Number of witnesses heard: 0	

Key developments in the reporting period:

Indictment was dismissed as the defendant was found temporarily unfit to stand trial.

634 Higher Court in Belgrade, *Tenja II*, available (in Serbian) at http://www.hlc-rdc.org/Transkripti/tenja2.html, accessed on 4 January 2017. This case was transferred to Serbia under the Agreement on Cooperation in Prosecuting Perpetrators of the Criminal Offences of War Crimes, Crimes Against Humanity and Genocide, concluded between the Office of the War Crimes Prosecutor of the Republic of Serbia and the Office of the State Prosecutor of the Republic of Croatia.

Course of the proceedings

Overview of proceedings up to 2016

Indictment

The OWCP indictment[635] charged Božo Vidaković, in his capacity as Commander of the 4th company of the Tenja Territorial Defence (TO), with murdering war prisoner Đuro Kiš, a member of the Croatian Ministry of the Interior, on 7 August 1991, in a corridor of the cinema in Tenja (in the municipality of Osijek, Croatia). The victim's hands were tied with barbed wire at the time of his murder. Vidaković is also charged with the unlawful detention and killing of seven Croatian civilians. According to the indictment, he locked the civilians up in a house and held them captive there between 7 July and the end of August 1991, after which he put them in a white van and took them to an unknown destination, following which all trace of them was lost. Witness Đoko Bekić recognized some of the victims among the bodies he found in a field in Tenja in February 1992. The bodies of other civilians killed in Tenja were found and exhumed on 28 February 1998 from a grave in Betin Dvor, near Tenja.

Žarko Čubrilo, a member of the Tenja Territorial Defence, is charged by the same indictment with the unlawful detention and murder of 11 Croatian civilians in the first half of July 1991. Čubrilo took 11 Croatian civilians out of the hall of the "Partizan" Cinema in Tenja, which was used as a makeshift prison at the time, and then ordered two members of the Tenja Territorial Defence to tie the civilians' hands. With their hands tied, the civilians were then put onto a truck, which Čubrilo drove to a place near the fallen stock-disposal site in Bobota.[636] On arriving there, he ordered the civilians out of the truck. As they stepped out of the truck, Čubrilo shot each of them in the head. Their bodies have never been found.

Defendants' defence

Presenting their defence, the defendants denied committing the crimes they were charged with. Vidaković defended himself by saying he could not possibly have killed Đuro Kiš, since that day he did not come to the cinema in Tenja, where Kiš was held captive. He only heard about the Kiš's murder the day after, he claimed. He also denied having detained the seven civilians and taken them to an unknown destination.[637]

635 OWCP Indictment KTO no. 1/12 of 22 June 2012, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2012/10/Optuznica-TENJA-2.pdf, accessed on 4 January 2017.

636 Bobota is a village located 12 km from Tenja towards Vukovar.

637 Transcript of main hearing held on 29 October 2012, pp. 4.-37, available at http://www.hlc-rdc.org/wp-content/uploads/2012/12/01-29.10.2012.pdf, accessed on 4 January 2017.

Severance of defendants

On 17 April 2014, the court decided to sever defendant Božo Vidaković from this trial for reasons of efficiency. The decision was prompted by Vidaković's ill health (he suffered mobility problems and was waiting for a hips surgery).[638]

The trial of Žarko Čubrilo resulted in his acquittal on 23 December 2015.[639]

Dismissal of the indictment

After court-appointed medical experts found that Božo Vidaković was physically unfit to stand trial, the Higher Court, on 19 September 2016, issued a decision to dismiss the charges against him.

HLC findings

Efficient proceedings

The indictment was dismissed in respect of Božo Vidaković because circumstances occurred which temporarily precluded his prosecution. Should these circumstances cease to exist, the proceedings may be continued, upon the OWCP's request.[640]

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With its decision to separate the proceedings against Božo Vidaković, the Chamber prevented delays in the proceedings. As it seemed quite likely that Vidaković would not be able to appear in court for quite some time owing to his ill health, the decision to try the defendant Žarko Čubrilo separately was logical and justified. As a result, the trial of Čubrilo did not drag on too long but was completed within a reasonable time.

638 Criminal Procedure Code, Official Gazette of the Republic of Serbia, nos. 72/2011, 101/2011, 12/2012, 32/2013, 45/2014, Article 31, paragraph 1.

639 Judgment of the Court of Appeal in Belgrade in *Tenja II*, Kž1 Po2 3/15 of 23 December 2015, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2016/02/TenjaII-Drugostepena_presuda_23.12.2015.pdf, accessed on 4 January 2017. See also, *Tenja II* in "Report on War Crimes in Serbia During 2014 and 2015", pp. 137-142, available at http://www.hlc-rdc.org/wp-content/uploads/2016/03/Report_on_war_crimes_trials_in_Serbia_during_2014_and_2015.pdf.

640 ZKP, Article 417, paragraph 1, sub-paragraph 2.

II. Case Bihać II[641]

CASE INFORMATION
Stage of the proceedings: indictment dismissed
Date of indictment: 9 October 2014
Trial commencement date: 26 March 2015
Prosecutor: Snežana Stanojković
Defendant: Svetko Tadić
Criminal offence charged: war crime against the civilian population

Chamber	Judge Mirjana Ilić (presiding) Judge Zorana Trajković Judge Dejan Terzić

Number of defendants: 1	
Defendant's rank: low rank– no rank	**Number of trial days in the reporting period:** 1
Number of victims: 25	**Number of witnesses heard in the reporting period:** 0
Number of witnesses heard: 13	

Key developments in the reporting period:

Indictment was dismissed because of the defendant's temporary unfitness to stand trial.

641 Higher Court in Belgrade, *Bihać II*, K.Po2 12/14, available (in Serbian) at http://www.hlc-rdc.org/Transkripti/Bihac_II.html accessed on 30 November 2016.

Course of the proceedings

Overview of the proceedings up to 2016

Indictment

The indictment alleges as follows: the defendant, Svetko Tadić, member of the VRS at the time, together with other members of the army and the police of the Republika Srpska,[642] killed Safija Mešić, Ibrahim Mešić, Hava Mešić and Mina Hrnjic on 23 September 1992 in their house in the village of Mešići (in the municipality of Bihać, BiH). Later the same day, returning from Ibrahim Mešić's house, the defendant killed Rašid Šahinović in the yard of Šahinović's house. The indictment further alleges that on the same day in the afternoon, the defendant and other members of the VRS,[643] wearing stockings and caps over their heads to disguise their faces, went to the village of Duljci, where a group of Bosniak civilians were picking plums, as part of their so-called "labour duties". They discharged several burst of automatic fire at the civilians, killing a few of them; next, having seen that some of the civilians had taken shelter in a cowshed, they threw a hand grenade at the cowshed. Defendant Tadić and other co-perpetrators then burned the bodies of the killed civilians. A total of 18 civilians were killed in the plum orchard and cowshed.[644]

Medical examination of the defendant

Before the main hearing was opened, the defendant had undergone a psychiatric examination, to evaluate his mental fitness to stand trial. A court-appointed psychiatric expert found that his mental fitness was not impaired at that moment, but that some new circumstances might arise reducing his ability to take part in the trial, or making him altogether unfit to stand trial.

The trial commenced on 26 March 2015.[645] Commenting on the expert's opinion, the Defence lawyer, Smiljana Stojiljković, said it prompted the question as to how the Chamber and the Defence, as laymen, could tell when and if those new circumstances had arisen? As at that moment the defendant's ability was not impaired, the main hearing took place.

642 Goran Mihajlović was finally convicted for this crime by the Cantonal Court in Bihać.

643 Zoran Tadić, Jovica Tadić, Zoran Berga and Željko Babić, after entering a plea agreement, were finally convicted for this crime by the Cantonal Court in Bihać. Đuro Tadić was finally sentenced to 13 years in prison on 12 December 2014 by the War Crimes Department of the Court of Appeal in Belgrade in *Bihać*, case number: Kž1 Po2 4/14. At the time of the prosecution of Đuro Tadić, Svetko Tadić was not available to the authorities of the Republic of Serbia. Slobodan and Gojko Đurić, a father and son, were also in this group, but they lost their lives several days after the events in question.

644 OWCP Indictment of 9 October 2014 KTO no. 2/14, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Bihac_II_-optuznica_Svetko_Tadic.pdf, accessed on 23 October 2015.

645 Before the Chamber consisting of Judge Mirjana Ilić (presiding), and Judges Dragan Mirković and Bojan Mišić.

Defendant's defence

Presenting his defence, the defendant denied having committed the offence with which he was charged, stating that the charges against him were framed after the other participants in the crime, who were convicted by the Cantonal Court in Bihać, had falsely implicated him in order to downplay their own culpability.

Overview of proceedings, year 2016

Witnesses

Over the course of evidence presentation, a total of 13 witnesses were heard, including eight injured parties – family members of the victims. Of these, only one witness had direct knowledge about the killings of the civilians in Duljci, but not even she could identify any of the perpetrators or describe the whole event.

At the hearing held on 23 March 2016, witness Zoran Tadić, the nephew of the defendant, claimed his right not to give testimony against his close relative. At that moment, the defendant reacted strongly by bursting into tears, shouting and hitting his head with his hands. As he was no longer able to attend the hearing, the Presiding Judge decided to adjourn the trial, pending a psychiatric expert's evaluation of the defendant's ability to stand trial.

Dismissal of charges

Medical examination found that the defendant was temporarily unable to stand trial. For this reason, the Higher Court in Belgrade on 6 July 2016 made a decision to dismiss the charges against the defendant.

HLC findings

Regional cooperation

The proceedings against Svetko Tadić are a continuation of the trial for the war crimes committed in September 1992 in the Bihać area. Namely, Đuro Tadić was already convicted by the Court of Appeal on 12 December 2014[646] for the crime in Duljci, with which Svetko Tadić was charged in the instant case. At the time of the initiation of the proceedings against Đuro Tadić, Svetko Tadić was not available to the authorities of the Republic of Serbia.

646 Judgment of the Court of Appeal in Belgrade in *Bihać*, no. Kž1 Po2 4/14 of 12 December 2014, available (in Serbian) at http://www.hlc-rdc.org/wp-content/uploads/2015/02/Bihac_Drugostepena_presuda_12_12_2014.pdf, accessed on 28 November 2016.

This case, which was transferred to the Serbian judiciary by the Cantonal Court in Bihać, is an example that can serve to illustrate the benefits of regional cooperation, as it was thanks to regional cooperation that all the persons involved in the crimes set out in the indictment were prosecuted.

Repercussions of dismissal of charges

The indictment was dismissed because of the circumstances, which precluded criminal prosecution. These circumstances referred to the mental illness or disturbance or some other serious illness of the defendant, which made him unfit to stand trial.[647] These were temporary formal impediments, which precluded the court from making a decision on the merits of the case. Therefore the dismissal of the indictment in this case was not treated as a *res iudicata* (a matter already judged). Also, as the *ne bis in idem* principle (i.e. that no one may be prosecuted in connection with a criminal offence for which he has been finally convicted or acquitted)[648] does not apply to this situation, and once these impediments are removed, criminal proceedings can continue, at the OWCP's request.[649]

647 ZKP, Article 416, paragraph 1, sub-paragraph 3.
648 ZKP, Article 4.
649 ZKP, Article 417, paragraph 1, sub-paragraph 2.

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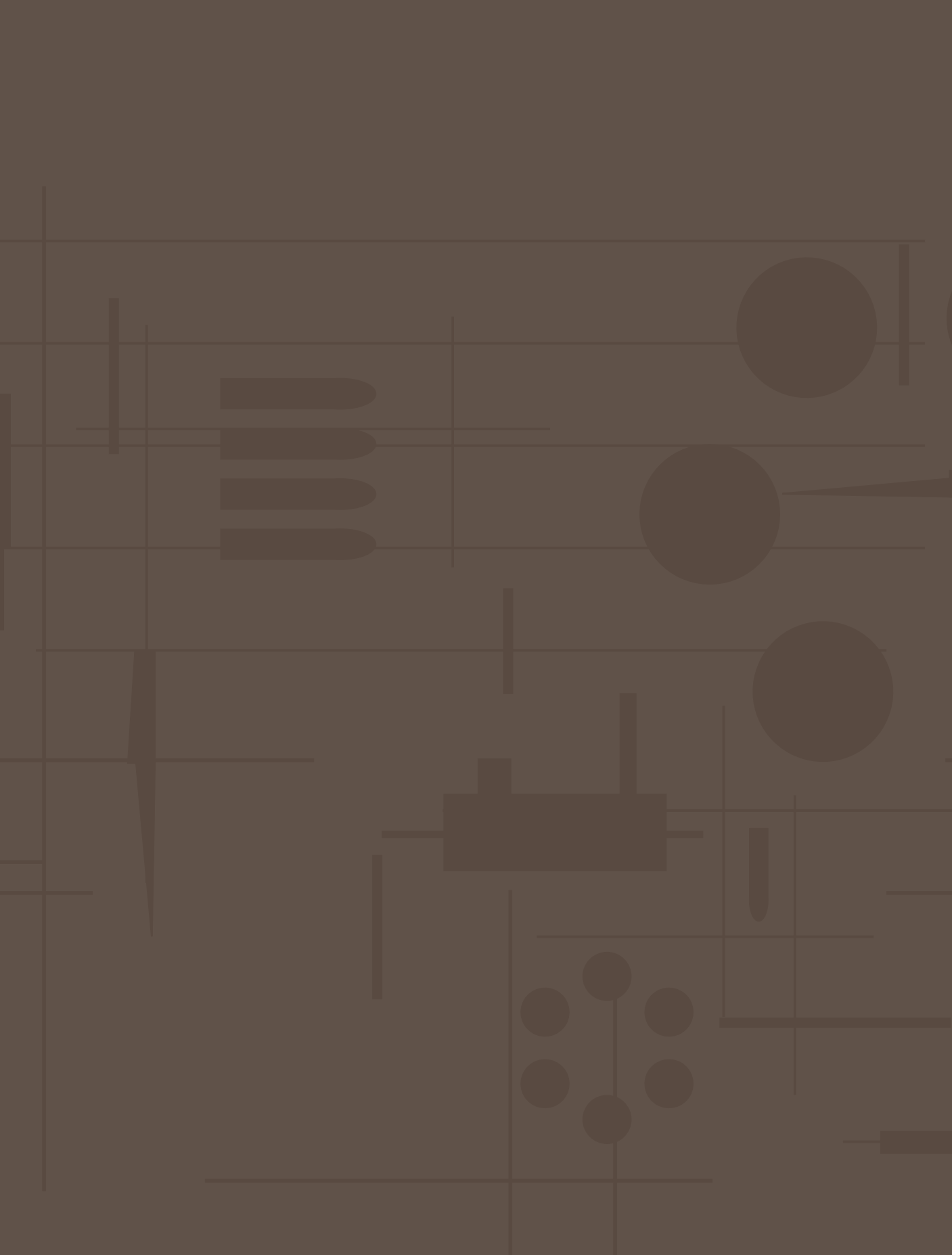

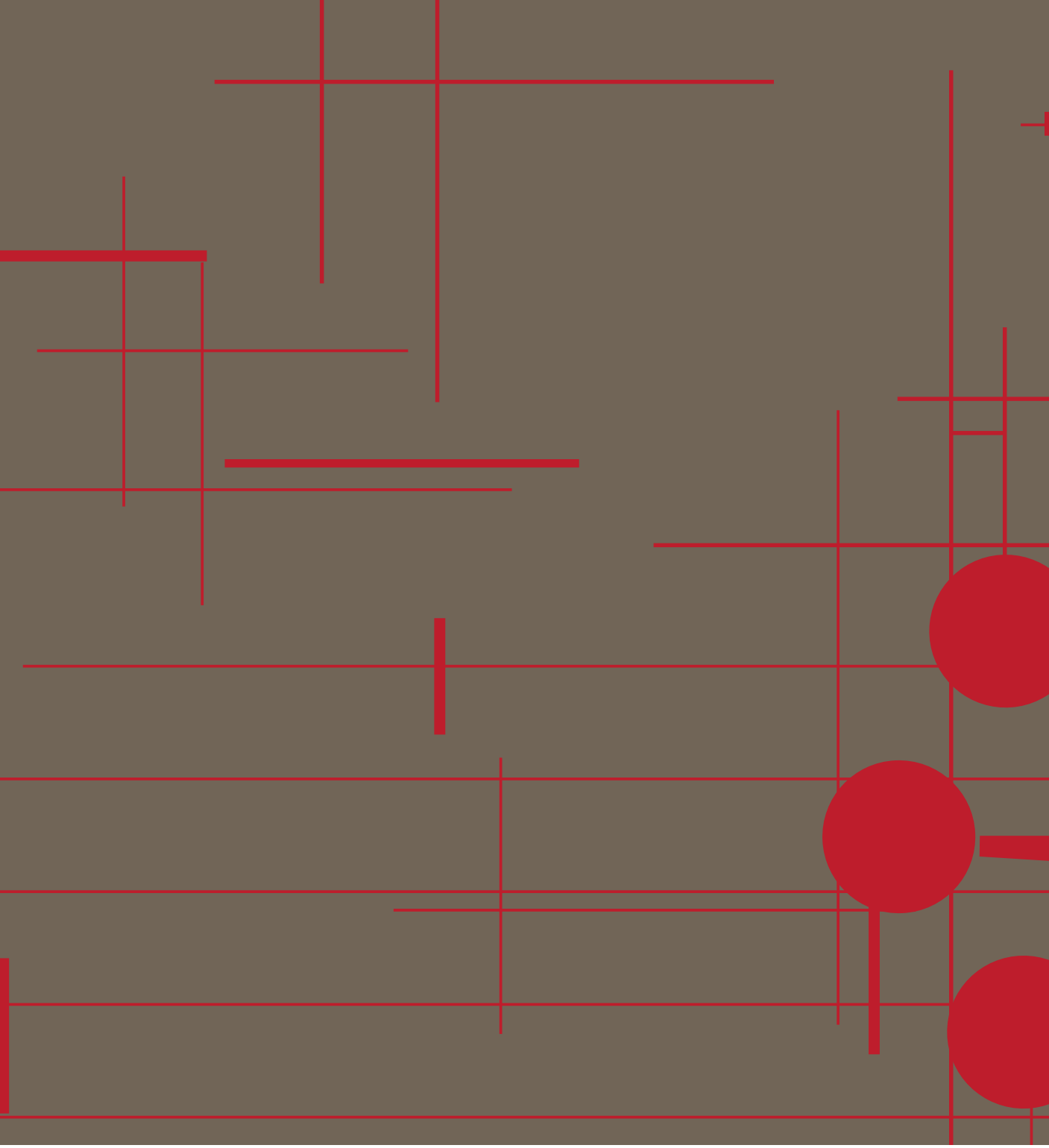

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