Humanitarian Law Center

Report on war crimes trials in Serbia in 2012

Humanitarian Law Center

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Acronyms and Abbreviations

BIA – Security Intelligence Agency

BiH – Bosnia and Herzegovina

CC – Criminal Code

ECHR – European Convention on Human Rights

FRY – Federal Republic of Yugoslavia

HLC – Humanitarian Law Center

ICTR – International Criminal Tribunal for Rwanda

ICTY – International Criminal Tribunal for the former Yugoslavia

JNA – Yugoslav People's Army

KLA – Kosovo Liberation Army

KZJ – Criminal Code of Yugoslavia

LAPBM – Liberation Army of Preševo, Bujanovac and Medveđa

MUP – Ministry of the Interior of the Republic of Serbia

PJP – Special Police Units

RTS – Radio-Television Serbia

SAO Krajina – Serbian Autonomous Region of Krajina

SJB – Police station

SUP – Secretariat for Internal Affairs of the Republic of Serbia

TO – Territorial Defence Force

TRZ – Office of the War Crimes Prosecutor

VBA – Military Intelligence Agency

VJ – Yugoslav Army

VRS – Army of Republika Srpska

VSS – Supreme Court of Serbia

VTO – Military Territorial Detachment

CPC – Criminal Procedure Code

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Introduction

The Belgrade High Court (War Crimes Chamber) heard 13 cases of war crimes in 2012 and delivered judgements in seven[1], convicting 37 and acquitting eight of the accused persons. The remaining six cases are ongoing.[2]

During 2012, the Belgrade Court of Appeals (War Crimes Department) delivered four judgements on appeals against decisions of the High Court in Belgrade, confirming the conviction of four defendants[3], and finally clearing two accused individuals of criminal charges.[4]

In 2012, the courts of general jurisdiction heard two cases involving war crimes against the civilian population - the *Orahovac/Rahovec* case, tried in the High Court in Požarevac and the *Kušnin/Kushnin* case, tried in the High Court in Niš. Proceedings against Miloš Lukić, who is charged with murder, are still underway before the High Court in Prokuplje.

In the reporting period, the Office of the War Crimes Prosecutor indicted seven persons for war crimes against the civilian population and/or war crimes against prisoners of war.[5]

The Humanitarian Law Center (HLC) represented the victims in four cases tried by the War Crimes Chamber at the Belgrade High Court – *Ćuška/Qushk, Skočić, Lovas* and *Tenja II*. HLC observers monitored the trial proceedings in other cases heard by this Court as well as the trial proceedings in the cases heard by the courts of general jurisdiction – *Orahovac/Rahovec, Kušnin/Kushnin* and *Miloš Lukić*.

1 *Beli Manastir, Bijeljina, Bytyqi, Prizren, Lički Osik, Lovas* and *Gnjilane group* cases.

2 *Bosanski Petrovac, Ovčara V, Skočić, Tenja II, Tuzla Column* and *Ćuška/Qushk* cases.

3 *Medak, Rastovac* and *Zvornik III/IV* cases.

4 *Prijedor* and *Zvornik III/IV* cases.

5 The accused are as follows: Neđeljko Sovilj and Rajko Vekić, who are charged with committing a war crime against the civilian population (*Bosanski Petrovac* case); Mark Kashnjeti, charged with committing a war crime against the civilian population (*Prizren* case); Petar Ćirić, charged with committing a war crime against prisoners of war (*Ovčara V* case); Božo Vidaković, charged with committing a war crime against the civilian population and a war crime against prisoners of war and Žarko Čubrilo, charged with a war crime against the civilian population (*Tenja II* case); and Dejan Bulatović, charged with a war crime against the civilian population (*Ćuška/Qushk* case).

I Findings

1. Few indictments

The Office of the War Crimes Prosecutor indicted just seven persons during 2012. This was the lowest number of indictees in a year since the establishment of the Office of the War Crimes Prosecutor.[6] From this number, only *Prizren, Tenja II* and *Bosanski Petrovac* were new cases. The indictments in the *Ovčara V* and *Ćuška/Qushk cases* resulted from proceedings that had already been conducted before the War Crimes Chamber of the Belgrade High Court. Nor were the *Tenja II* and *Bosanski Petrovac* cases the result of the independent work of the Office of the War Crimes Prosecutor: the *Bosanski Petrovac* case was referred to the Office of the War Crimes Prosecutor by the Cantonal Court of Bihać (BiH) and the *Tenja II* case was referred by the State Prosecutor's Office of the Republic of Croatia. It should also be noted that the HLC filed a criminal complaint with the Office of the War Crimes Prosecutor in November 2011, requesting the prosecution of the persons responsible for the crimes committed in Tenja.[7]

The only encouraging sign is that the Office of the War Crimes Prosecutor widened the indictments in the *Ćuška/Qushk* case to include crimes committed in the villages of Plavljane/Pavlan and Zahać/Zahaq (Peć/Pejë municipality). The HLC filed a criminal complaint with the Office of the War Crimes Prosecutor regarding the crimes committed in these villages, as far back as August 2010.[8]

2. "Big fish" still escape justice

Serbian Justice Minister Nikola Selaković said, immediately after taking office, that "big fish" would no longer escape justice in the fight against organised crime and corruption, and added: "We have seen the big fish slip through the net and the small ones being caught."[9] While the Minister's criticism of the Serbian justice system has been addressed, with regard to the

[6] In 2011 the Office of the War Crimes Prosecutor indicted nine individuals, and between 2003 and 2012 a total of 151 individuals.

[7] See the HLC Press Release: "The HLC files a criminal complaint against more than 30 individuals for war crimes committed in Croatia in 1991", of 13 October 2011.

[8] See the HLC Press Release: "Criminal complaint filed against members of Yugoslav Army and Ministry of the Interior of the Republic of Serbia Serbia accused of war crimes against Albanian civilians in the villages of Zahać/Zahaq and Pavljane/Pavlan" of 25 August 2010.

[9] "Selaković:'Big fish' will not escape justice any more", *Večernje novosti*, 1 August 2012 http://www.novosti.rs/vesti/naslovna/aktuelno.289.html:390953-SelakovicquotKrupne-ribequot-vise-nece-izmicati-pravdi

prosecution of organised crime, the same can not be said for the Office of the War Crimes Prosecutor.

From its founding in 2003 to the present day, the Office of the War Crimes Prosecutor has shown readiness only to indict immediate perpetrators, and not mid-ranking and high-ranking Yugoslav People's Army, Yugoslav Army and Ministry of the Interior of the Republic of Serbia (MUP) officials, who ordered crimes or whose subordinates committed crimes that they, as their superior officers, knew of.

To date, the Office of the War Crimes Prosecutor has only indicted two low-ranking officers and one mid-ranking officer.[10] Lack of willingness on the part of the Office of the War Crimes Prosecutor to prosecute high-ranking members of the Yugoslav People's Army, Yugoslav Army and MUP, despite the existence of clear evidence against them, and the continuing practice of bringing them to court only as witnesses, was particularly obvious in the *Lovas* case. For the first time since the beginning of processing of war crimes in Serbia, the Office of the War Crimes Prosecutor's practice was criticised by the trial panel handling this case. Explaining the reasoning behind the judgement reached on 26 June 2012, the presiding judge in the Lovas case stated that the panel found that the Second Proletarian Guard Mechanized Brigade of the Yugoslav People's Army was to be held primarily responsible for the attack on Lovas and everything that had happened during the attack, adding that a valuable body of evidence had been presented during the trial, which "leaves open the possibility for the prosecutor to seek justice for family members of the victims, by bringing charges against individuals who were included in the original indictment, but left out of the amended indictment." "We have heard in this courtroom", the judge added, "the full names of some other actors involved in the critical events, some of them even appeared before us as witnesses, so the prosecutor should fulfil the promise he gave in his closing argument and look into their criminal responsibility as well, if we are to ensure fairness both to the victims and the accused." She added that an important segment of the events in Lovas – Croatian civilians moving out of the area controlled by Yugoslav People's Army – had been omitted from the indictment.

So far, the Office of the War Crimes Prosecutor has brought no charges for command responsibility. However, in 2010 the trial chamber presided over by judge Tatjana Vuković,

[10] The accused are as follows: 1) Miodrag Dimitrijević, appointed by the Sectoral HQ of Valjevo TO as coordinator of combat operations in the village of Lovas in 1991, sentenced in 2012 by a trial court (subject to appeal) to 10 years imprisonment for war crimes against the civilian population, and 2) Toplica Miladinović, commander of the 177th VTO in Peć, who is on trial for a crime against the civilian population in the village of Ćuška/Qyshk committed in 1999, 3) Radoslav Mitrović, commander of the 37th detachment of the PJP, who, in 2010, was acquitted by a final judgment of charges of committing a war crime against the civilian population (*Suva Reka/Suharekë* case).

delivered a judgement in the *Zvornik II* case in which the actions of the accused Branko Popović were described as *aiding and abetting by omission*, and found him criminally responsible for the actions performed by his subordinates, thus bridging the gap that exists given the Office of the War Crimes Prosecutor's unwillingness to bring indictments on the basis of the command responsibility doctrine.[11] However, since that judgement was delivered, the Office of the War Crimes Prosecutor has brought no further indictments using the term "aiding and abetting by omission."

3. Politically-motivated arrests of ethnic Albanians from south Serbia

On 4 May 2012, two days before the general election in Serbia and pursuant to an order from the Office of the War Crimes Prosecutor, the MUP arrested five ethnic Albanians, citizens of Serbia who are registered as resident in Bujanovac – Elhami Salihi, Mustafa Limani, Sherif Abdir, Nedir Sefedini and Sevdai Emurlahi – on suspicion of having committed, as members of the Liberation Army of Preševo, Bujanovac and Medveđa (LAPBM), a war crime against the civilian population in Bujanovac region in 2001.

The following day the Office of the War Crimes Prosecutor ordered an investigation into these individuals and a judge at the High Court in Belgrade ordered them into custody.

On 29 May 2012, the same judge rescinded the detention order, on the instructions of the Office of the War Crimes Prosecutor. According to the War Crimes Prosecutor, Vladimir Vukčević, the Office of the War Crimes Prosecutor decided to discontinue the prosecution of the five ethnic Albanians after they had found out that an Amnesty Law, passed as far back as 2002, had granted pardons for two criminal offences – terrorism and seditious conspiracy. The very purpose of this law was to grant amnesty to members of the LAPBM for those criminal offences.[12]

The HLC notes that neither the Amnesty Law nor any other law envisages an amnesty for war crimes. The Office of the War Crimes Prosecutor's explanation for dropping the charges against individuals suspected of the commission of war crimes on the basis of the Amnesty Law, which grants pardons only for terrorism and seditious conspiracy, is unacceptable. It remains unclear

[11] In the *Zvornik II* case, Branko Popović, was convicted and sentenced to 15 years in prison for a criminal offence under Article 142 (1) and Articles 22 and 24 of the KZJ. He was found guilty as charged because of his omission to act - as the commander of the TO in Zvornik, he deliberately failed to issue an adequate order to the persons guarding hostages and take appropriate measures to protect the life and physical integrity of hostages, as a result of which omission, the hostages were murdered or physically injured. The Court of Appeal in Belgrade confirmed the conviction in 2012.

[12] *Politika*, interview with Vladimir Vukčević: "Politics is sometimes stronger than justice", 7 June 2012.

how it is possible that a person elected to such an important judicial office and who heads the government body whose task is to strictly and unreservedly implement the law, was unaware of the details of this law.

A second reason why the Office of the War Crimes Prosecutor dropped the charges, according to Vukčević, was the decision by the Serbian government of 2000-2002 to treat the LAPBM as a terrorist organisation rather than a party to the armed conflict. Consequently, the criminal offences committed by the LAPBM cannot be considered war crimes, because in order for an act to be considered a war crime it must fulfil the necessary requirement of having been committed during an armed conflict.

However, contrary to prosecutor Vukčević's claims, offences committed in 2000-2001 in south Serbia, both by members of the LAPBM and members of Serbian forces may be treated as war crimes because an internal armed conflict between the LAPBM and Serbian forces was ongoing, something which can be clearly inferred from the ceasefire agreement in southern Serbia, brokered by Peter Faith, the Special Envoy of the NATO General Secretary, and signed by the LAPBM and the Serbian authorities in 2001. Article 3 of this agreement states as follows: "The parties to the agreement recognise and abide by the Additional Protocol to the Geneva Conventions (Protocol II) of 12 August 1949 relating to the protection of victims of non-international [internal] conflicts."

Many of the circumstances surrounding these arrests indicate that they were politically motivated: they took place two days before the Serbian general election and gained the Minister of the Interior, Ivica Dačić, who ran for President of Serbia, a lot of publicity during the blackout period. Contradictory, inadequate and divergent public statements made by representatives of various institutions on this occasion, reveal that the arrests were hastily organised. And the Office of the War Crimes Prosecutor, in acting the way it did, not only 'went on the campaign trail' but also sent a poor message to the victims of the gravest human rights violations and the general public – that prosecution of war crimes in Serbia depends not just on evidence and applicable laws but also on politics.

4. Inadequate protection of and support for witnesses

2012 saw no improvement in Serbia's witness protection system. Addressing serious flaws in the witness protection programme, which have been pointed out for years by domestic and international organizations[13], was not on the agenda of Serbian institutions.

Since 2006 Serbia a special law governing protection of participants in criminal proceedings, with a special focus on witness protection has been in effect.[14] This law defines persons eligible for protection, the manner of entering the protection programme, the institutions and bodies responsible for granting protected status and the protective measures for persons under protection. Several CPC[15] provisions additionally contain standards regarding witness protection. Moreover, this matter is regulated by the Rule Book of the Belgrade High Court, which envisages the establishment of a victim and witness assistance and support service.[16]

Protection of persons in the programme is the responsibility of the Witness Protection Unit operating under the Directorate of the MUP. The HLC's Report on War Crimes trials for 2011 notes that several witnesses have had serious and well-founded complaints concerning the work of both this Unit and the Office of the War Crimes Prosecutor.[17] The biggest problem seems to be the protection of the insider witnesses who in 1998-1999 were part of the MUP and who are expected to testify on crimes committed by their ex-colleagues – members of the MUP – against Kosovo Albanians.[18]

Nor can the performance of the Witness Assistance and Support Service be considered satisfactory. The founding act of this Service envisages that it should be staffed by just three persons, who must fulfil certain general requirements[19]. Those requirements do not include

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13 Report by Thomas Hammarberg, Commissioner for Human Rights of the Council of Europe, following his visit to Serbia from 12 to15 June 2011; Report by the Committee on Legal Affairs and Human Rights of the Council of Europe, "The protection of witnesses as a cornerstone for justice and reconciliation in the Balkans", 2011; *Irregularities and abuse of power in war crimes proceedings in the Republic of Serbia*, HLC Report, 2010; *Report on War Crimes Trials in Serbia in 2011*, HLC, 2012.

14 The Law on the Protection Programme for Participants in Criminal Proceedings ("Official Gazette of the RS ", No 85/2005)

15 CPC, Articles 102 and 111 ("Official Gazette of the RS ", Nos 72/2011 and 101/2011).

16 Rule Book on internal organization and position classification in the High Court in Belgrade, SU No 9/10 – 2 of 30 April 2010.

17 Report on War Crimes Trials in Serbia in 2011, HLC, pp. 12-13.

18 See *Irregularities and abuse of power in war crimes proceedings in the Republic of Serbia*, HLC Report, 2010.

19 Rule Book on internal organization and position classification in the High Court in Belgrade, SU No 9/10 – Article 14.

adequate education or relevant previous experience working with people who have experienced serious traumas. As a result, victims who are expected to testify do not receive adequate assistance and are often exposed to secondary victimisation, affecting the quality of the proceedings and the facts to be established on the basis of their testimonies. The *Skočić* case best illustrates the effects of the poor performance of this service in 2012.

The International Criminal Tribunal for the former Yugoslavia and International Criminal Tribunal for Rwanda established important victim and witness protection mechanisms but neither the same nor similar practices have been used in war crimes trials in Serbia. Elsewhere in the region, the Croatian Ministry of Justice has established a Division for Probation and Victim and Witness Support whose units and departments offer adequate support to victims and witnesses and the effects of this are visible during the examination of witnesses in Croatia.

5. Court of Appeal (War Crimes Chamber) in Belgrade an example of promptness and efficiency

In 2012 the War Crimes Chamber of the Court of Appeal in Belgrade delivered five judgements following appeals of first-instance rulings of the High Court in Belgrade and onethe ruling of Court of Appeal in Belgrade. As in 2011[20] the Court of Appeal again acted promptly and reached decisions on appeals in all the cases in which first-instance and second-instance rulings had been delivered in 2011.

6. Sentencing policy

Sentencing policy in proceedings for war crimes in Serbia, except in cases conducted by the courts of general jurisdiction, is established by the Court of Appeal in Belgrade and its judgments are final. In 2012 this court handed down four decisions on merits, whereby these cases were conclusively adjudicated. Sentencing by courts hearing war crimes cases is generally poor. The courts, almost as a rule, tend to give far too much weight to mitigating circumstances and not enough to aggravating circumstances. Also, the courts frequently make use of the option of penalty reduction, which although available to them under the legislation, is not an obligation, and doing so runs contrary to lawmakers' intentions, which was to use this option only in exceptional circumstances. It is quite inappropriate therefore to consider the aggregate weight of mitigating circumstances found as the equivalent of one particularly mitigating circumstance. Additionally, at least two such particular circumstances must be identified, with each of them being special and not being an essential element of the crime charged. Hence, it can be concluded

[20] Report on War Crimes Trials in Serbia in 2011, HLC, p. 9.

that the courts are unjustifiably imposing lighter penalties than the relevant statutory minimum. When giving reasons for the penalties imposed, the courts describe mitigating and aggravating circumstances in general terms only.

Imposing lenient penalties on war crimes perpetrators in post-conflict societies is certainly not helping to create the conditions necessary for the prevention of the recurrence of such crimes.

7. Unprofessional conduct demonstrated by defense counsels

Most defense counsels in war crimes cases do not behave professionally and ethically. Their activities are primarily aimed at obstructing and delaying proceedings by addressing trivial issues, engaging in petty politics and speculation about what lies behind the Office of the War Crimes Prosecutor's decision to bring an indictment against their clients. In doing so, defense counsels fail to properly fulfil their function of defending the interests of the accused and do not contribute to the quality of the proceedings.

In their dealings with prosecutors and victims' representatives they often display scorn and offensive behaviour, in doing so severely violating the counsel's code of ethics. The way in which some of the lawyers in the *Ćuška/Qushk* case treated Mustafa Radoniqi, a lawyer from Kosovo who was representing the victims in this case, is the most striking example of such behaviour: when the prosecutor in one of the hearings mentioned evidence gathered by the ICTY, defense counsel Goran Petronijević chimed in saying, "I trust Mustafa more than I trust the Hague Tribunal."

As in previous years, defense counsels were not seen to be adhering to the practices of the ICTY in defense of their clients.[21]

8. Proceedings conducted by courts of general jurisdiction fail to meet fair trial standards

In 2012 the courts of general jurisdiction had three ongoing war crime cases – *Orahovac/Rahovec*, *Kušnin/Kushnin* and *Miloš Lukić.* The common feature of all these proceedings is that they have been unduly prolonged, something which can be attributed to inactivity on the part of the prosecution service and the courts, and the toleration of defense counsels' abuses of procedure with the aim of delaying the proceedings. The clearest example is

[21] Report on War Crime Trials in Serbia for 2011, HLC, p.11.

the case against Miloš Lukić, both in terms of the specifications of the offence he was charged with and the decisions handed down that are currently available to the HLC.

The HLC believes that the serious deficiencies in these cases can only be remedied by referring these cases to institutions specialized in prosecuting and trying persons accused of war crimes, the Office of the War Crimes Prosecutor and the war crimes departments of the High Court and Court of Appeal in Belgrade.

9. Application of new Criminal Procedure Code in trials for war crimes

On 15 January 2012, courts began applying the new Criminal Procedure Code to cases dealing with war crimes and organised crime; application of this Code to all other criminal proceedings is planned to start on 15 January 2013. [22]

The new code brings numerous innovations and introduces a completely fresh concept of criminal proceedings. The preliminary proceedings-investigation is now entrusted almost entirely to the prosecution service, and the previously-existing investigative judges have become judges at preliminary proceedings, intervening in the investigation process conducted by the prosecutor's office only in exceptional circumstances. The principle of 'equality of arms', which presupposes that parties to the proceedings are given equal procedural opportunities to present their case in the course of criminal proceedings, has been consistently observed in the new code. While a mixed (adversarial and inquisitorial) system is still prevalent in criminal proceedings, there has been a noticeable shift towards fully adversarial proceedings, particularly in the pre-trial phase. The burden of proof still rests on the prosecution, but the new CPC has removed the requirement for courts to establish so-called 'material truth'. The court now examines evidence only following motions by the parties. In the absence of such motions it does so only exceptionally. This should make prosecutors prepare their cases more thoroughly, now that they cannot expect the court to play a part in securing witnesses and evidence to prove the allegations set out in the indictment. Additionally, new practices have been introduced in witness examination at the trial phase, such as the practice of cross-examination, which has appeared for the first time in national legislation and court practice.

In the context of transitional justice, the decision of legislators to give counsels a monopoly over the representation of victims in war crimes cases has deprived victims of the opportunity to be represented by human rights experts, and has not been well received.[23]

[22] Criminal Procedure Code ("Official Gazette of the RS, Nos 72/11 and 101/11)

Examining the conduct of proceedings and the interpretation of the new code's provisions, judges seem to have been best prepared for the implementation of the new CPC. The Office of the War Crimes Prosecutor, in contrast, still remains passive and offers insufficient, unconvincing evidence to corroborate allegations in its indictments. For that reason, the courts have assumed a leading role in establishing the facts of a case (even though the CPC does not require them to do so), either by encouraging parties to propose evidence or by the taking of evidence *ex officio*. Prosecutors and defense counsels seldom use the new procedural means envisaged in the CPC, such as cross-examination of witnesses and therefore do not sufficiently use leading questioning techniques in cross-examination.24

That the Office of the War Crimes Prosecutor was not adequately prepared for the application of the new procedural rules became apparent in the *Tenja 2* case. The indictment against Boža Vidaković and Žarko Čubrilo, was the first indictment that the Office of the War Crimes Prosecutor brought in accordance with new rules. The Office of the War Crimes Prosecutor announced this 'first' in a press release issued on that occasion. Following receipt of the indictment, dated 8 February 2012, the Belgrade High Court returned it to the Office of the War Crimes Prosecutor as the section concerning the particulars of the indictees had not been drafted in accordance with the law. After the Office of the War Crimes Prosecutor had corrected these deficiencies, the Court again sent it back because the prosecutor had failed to list specific evidence with respect to each of the essential elements of the criminal offences charged. They added the information required and filed the indictment again on 11 June 2012. The Court again returned it because of ambiguities with respect to the commission of the offences charged.

10. Courts fail to act in accordance with the Law on Free Access to Information of Public Importance

In the reporting period, the High Court in Belgrade denied a request from the HLC to access some non-final court rulings, which had been made in accordance with the Law on Free Access to Information of Public Importance. The reason given for its refusal was that sending the requested rulings might seriously impede further conduct and conclusion of court proceedings. The HLC found this unacceptable, particularly because all court proceedings are open to the public.

Thus, the HLC filed two complaints regarding decisions of the High Court in Belgrade with the Commissioner for Information of Public Importance and Personal Data Protection. In August 2012 the Commissioner accepted one of the complaints and ordered the High Court to make the requested ruling in the *Medak* case available to the HLC. The Commissioner's decision in this matter states that the High Court in Belgrade "failed to offer a valid argument justifying the

23 Report on War Crime Trials in Serbia for 2011, HLC, p.14.

24 Article 98 (3) of the CPC ("Official Gazette of the RS", Nos 72/11 and 101/11)

decision to restrict access to the requested information, that is, it had failed to explain how access to requested information – copies of rulings – could seriously impede further conduct and conclusion of court proceedings."

Decisions made by court administration and management departments that regulate this matter are inconsistent. The Supreme Court of Cassation, for example, in Article 4 of its guidelines for data change and removal (anonymization) in court decisions, passed on of 27 May 2010, expressly prescribes that the personal data of accused and convicted individuals should not be anonymized in court decisions rendered in war crimes, organised crime or money laundering cases. The Court of Appeal in Belgrade, on 26 April 2012 amended its procedures on anonymization by amending the guidelines for minimum anonymization of court decisions, adopting a method identical to that used by the Supreme Court of Cassation. Unlike these institutions, the High Court in Belgrade has not posted new guidelines on its website, so it remains unclear if they exist or not.

The Office of the War Crimes Prosecutor is an example of good practice in this respect. Immediately after bringing an indictment, the Office of the War Crimes Prosecutor posts the text of the indictment on its website, featuring the names of the accused (but withholding their other particulars in order to protect their privacy) and the names of witnesses and other participants in the proceedings.

11. Media reporting on war crimes trials in Serbia

Impartial, thorough and analytical reporting on war crimes trials is essential to the process of facing the past and reconciliation. This process will succeed only if society is properly informed of the facts regarding victims and perpetrators of crimes as established by the courts. In this sense, the media have not only social and ethical but also legal responsibility.[25]

That said, media reporting on war crimes trials in Serbia falls well short of this ideal. As in previous years, in 2012 the media in Serbia paid very little attention to war crimes trials conducted before domestic courts. Newspaper report covering this topic are very short, providing only essential facts, in the form of short straight news stories. Reporting is selective and varies depending on whether Serbs are victims or perpetrators. Press releases from government institutions are carried in a completely uncritical manner. Victims of crimes and their fates are

[25] Article 51 (1) of the Constitution of the Republic of Serbia: "Everyone shall have the right to be informed accurately, fully and timely about issues of public importance. The media shall have an obligation to respect this right."

almost entirely ignored[26], with attention being focused primarily on perpetrators. Details of the private lives of individuals tried both by the ICTY and domestic courts, and the statements of their lawyers get much more media attention.

Leading daily newspapers have at times published incorrect information and statements by parties containing false information without critical comment or distance. Media reports on sentencing in the *Gnjilanska grupa (Gnjilane Group)case* is an example. Despite the fact that the defendants were cleared of the murder charges listed in the indictment, the daily newspapers *Politika* and *Večernje novosti*[27] reported that some of the defendants had been found guilty of "...torturing 47 civilians to death..." *Blic*[28] went one step further, providing a detailed account of the torture and murders for which the defendants had been found not guilty.

In the same case, on 7 September 2012, following the closing arguments, the Office of the War Crimes Prosecutor issued a press release containing an unproven allegation that the chief defendant in the *Gnjilane Group case* Agush Memishi, had made threats to the Deputy War Crimes Prosecutor, Miroljub Vitorović.[29] All of Serbia's daily newspapers carried that press release and in their later texts repeated the information on the alleged threats[30], whereas the statements of the presiding judge and an HLC observer who attended the closing arguments, in which they denied that Memishi made threats, were carried only by *E-novine*.

Another example of sensationalism and irresponsible reporting was the programme titled *Crime Anatomy*, broadcast on 10 September 2012 on RTS. During the programme, footage was aired showing a testimony given by a cooperative witness of the Office of the War Crimes Prosecutor, who allegedly took part in the harvesting of organs from Serbs in Kosovo. This footage, the accuracy of which has yet to be established in court, deeply disturbed and upset the audience, in particular the family members of potential victims.

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[26] With the exception of statements by the family members of victims from Lovas which were carried by a range of media, as the families attended sentencing in Belgrade.

[27] „Gnjilanskoj grupi" 116 godina ("Gnjilane Group" gets 116 years), *Politika*, 19 September 2012. http://www.politika.rs/rubrike/Hronika/Gnjilanskoj-grupi-116-godina.lt.html , "Gnjilanskoj grupi 116 godina robije" ("Gnjilane Group gets 116 years' jail"), *Večernje novosti*, 19 September 2012, http://www.novosti.rs/vesti/naslovna/aktuelno.292.html:397603-Gnjilanskoj-grupi-116-godina-robije

[28] „Osuđeno 11 pripadnika "Gnjilanske grupe", prvooptuženom Memišiju 12 godina zatvora" (11 members of "Gnjilane Group" get convicted, chief defendant Memishi gets 12 years' imprisonment) Blic, 19 September 2012. http://www.blic.rs/Vesti/Hronika/343536/Osudjeno-11-pripadnika-Gnjilanske-grupe-prvooptuzenom-Memisiju-12-godina-zatvora -

[29] For more details see the analysis of the *Gnjilane Group* case.

[30] See e.g. B92 website: http://www.b92.net/info/vesti/index.php?yyyy=2012&mm=09&dd=19&nav_category=64&nav_id=644220 (accessed on 30 December 2012), or the print editions of Politika and Večernje *novosti* from 20 September 2012.

II Cases

1. First-instance trials

1.1. *Ćuška /Qushk*

In 2012, the Higher Court in Belgrade heard the case against the following indictees: Toplica Miladinović, Srećko Popović, Slaviša Kastratović, Boban Bogićević, Zvonimir Cvetković, Radoslav Brnović, Vidoje Koričanin, Veljko Koričanin, Abdulah Sokić, Zoran Obradović, Milojko Nikolić, Ranko Momić, Siniša Mišić and Dejan Bulatović,[31] all were charged with committing a war crime against the civilian population. The court sat for 20 days and 19 witnesses were heard.

Course of proceedings

On 9 September 2010, the TRZ[32] brought an indictment against the following individuals: Toplica Miladinović, commander of the 177th VTO in Pec.; the late Nebojša Minić a.k.a 'Mrtvi' (Dead man), commander of the first platoon of the 177th VTO which was known as the 'Šakali' (The Jackals); members of the 'Šakali' – Srećko Popović, Slaviša Kastratović, Zvonimir Cvetković and Boban Bogićević, other unidentified members of the 177th VTO in Peć, members of the TO, among whom were Veljko Koričanin and Zoran and Vidoje Jasović, who are being tried separately[33], and members of the reserve and active police forces, among whom were Vidoje Koričanin and Radoslav Brnović, who voluntarily joined the "Šakali" unit. Ranko Momić, Zoran Obradović, Milojko Nikolić, Siniša Mišić, Siniša Dunđer and Predrag Vuković, also members of the 'Šakali'and Veljko Koričanin and Zoran and Vidoje Jasović, also of the 177th VTO are being tried separately. The indictment alleged that during the armed conflict in Kosovo, specifically on 14 May 14 1999, the accused carried out an armed attack against the entire civilian population of the village of Ćuška/Qushk (Peć/Pejë municipality) with the aim of expelling the Kosovo Albanian population from the area and establishing full control over the entire territory of Kosovo and creating ethnically cleansed areas. The indictment further alleges that the accused, during the attack, committed individual and group killings and intimidated and

[31] Following the issuing of a separate indictment against Zoran Obradović, Milojko Nikolić, Ranko Momić and Siniša Mišić, the criminal proceedings against them were merged with those previously initiated against Toplica Miladinović *et al.*

[32] Deputy War Crimes Prosecutor Dragoljub Stanković.

[33] The TRZ dropped the charges against Saša Džudović, Vidoje and Zoran Jasović , and on 2 September 2011 the court issued a ruling dismissing the proceedings against them.

terrorized the inhabitants by destroying and torching their houses, ancillary facilities and vehicles. In consequence, 44 civilians were killed, more than 40 family houses and more than 40 ancillary facilities were destroyed, as were three trucks, five cars and three tractors. The indictment further alleged that the accused seized property from Kosovo Albanian civilians, taking their money (a total of more than 125,000 DM), jewelry and valuables of undetermined value, and appropriated a number of passenger cars and two trucks. In addition, it is further alleged that the accused forced the surviving civilians from their homes, with the aim of deporting them to the Republic of Albania, expelling more than 400 women, children and elderly people from the village of Ćuška/Qushk.

In 2012, having examined evidence presented by the TRZ, the court interviewed defense witnesses. In their testimonies, for the most part, the witnesses claimed to have seen those persons accused in Ćuška/Qushk case in other locations, away from the village, in an attempt to raise doubts among the chamber's members about the accused persons` presence in Ćuška/Qushk on 14 May 1999.

Expert witnesses Ana Najman (a clinical psychology specialist) and Dr Branko Mandić (a psychiatrist), both reiterated their findings and their opinions, which had been provided previously in written form, regarding protected witness Zoran Rašković.[34] According to their statements, the witness did not have a mental illness, mental retardation, a temporary or any other, more serious, mental disorder. Furthermore, they established that he was not prone to create false memories and scored a very low rating in the so-called "lie scales" test.[35]

On 26 September 2012, the TRZ indicted Dejan Bulatović for the criminal offense of a war crime against civilians.[36] According to the indictment, on 1 April and 14 May 1999, in the area of the municipality Peć/Pejë, the accused, as a member of the 1st platoon of the 177th VTO, under the command of the late Nebojša Minić, a.k.a. 'Mrtvi' (Dead man), together with other members of that platoon, committed killings and expelled members of the Kosovo Albanian civilian population from the villages of Ljubenić/Lubeniq, Ćuška/Qushk and Zahać/Zahaq, intimidated and terrorized the inhabitants of the villages, unlawfully destroyed civilian property by torching houses and ancillary facilities, with the aim of making the residents leave their houses and villages and move to the Republic of Albania.

[34] During his testimony at the main hearing in December 2012, witness Zoran Rašković refused further protection measures. Until that point, he had been referred to in court proceedings as protected witness PS.
[35] A test to determine propensity to lie.
[36] Article 142 (1) of the CC of the FRY, as a co-perpetrator, and Article 22 of the CC of the FRY.

The case against Dejan Bulatović was joined with the proceedings being conducted against Toplica Miladinović *et al*.

The next day, on 27 September 2012, the TRZ expanded the indictment against all indictees, except Toplica Miladinović and Zvonimir Cvetković, without changing the nature of the offences they were charged with. The expanded indictment alleges that on 1 April and 14 May 1999, the accused, together with other unidentified members of the 177th Pec VTO, in the villages of Ljubenić/Lubeniq, Pavljane/Pavlane and Zahać/Zahaq, killed civilians, expelled the civilian population by intimidating and terrorizing them, and unlawfully destroyed the property of civilians by torching their houses and ancillary facilities with the aim of making them permanently leave their homes and villages and move to the Republic of Albania.

The Trial Chamber confirmed the expanded indictment in a ruling on 14 November 2012, after which the TRZ issued a consolidated, amended indictment against all indictees, except Zvonimir Cvetkovic, who had charges against him dismissed.

In its consolidated indictment, the TRZ charged the accused[37] with expelling the Kosovo Albanian population in the territory of the municipality Pec/Pejë, from the villages of Ljubenić/Lubeniq, Ćuška/Qushk, Pavljane/Pavlane and Zahać/Zahaq, by intimidating and terrorizing them, unlawfully destroying the property of civilians by torching their houses, ancillary facilities and vehicles. The accused were also charged with having unlawfully seized property from civilians, taking their money, jewelry, valuables and vehicles as well as with having committed individual and group killings with the aim of making others leave their homes permanently and move to the Republic of Albania. It was alleged therefore that on 1 April 1999, in the village of Ljubenić/Lubeniq, the accused killed at least 36 civilians, destroyed at least 11 family houses by torching them, and seriously injured 11 others, occasioning entry and exit wounds. It was further alleged that on 14 May 1999, at least 44 civilians were killed in the village of Ćuška/Qushk, more than 40 family houses and more than 40 ancillary facilities were destroyed, more than 250 civilians were deported to the Republic of Albania, one vehicle was destroyed and another two were unlawfully seized. On that same day, at least 10 civilians were killed in the village of Pavljane/Pavlane and at least 4 family houses were set on fire. Later that day, 14 May 1999, the accused moved into the village of Zahać/Zahaq and killed at least 21 civilians, set fire to at least 4 family houses, destroying them, and unlawfully appropriated at least 30 vehicles. In doing so, according to the amended indictment, the accused committed a war crime against the civilian population.[38]

[37] Toplica Miladinović, Srećko Popović, Abdulah Sokić, Slaviša Kastratović, Boban Bogićević, Ranko Momić, Zoran Obradović, Milojko Nikolić, Siniša Mišić and Dejan Bulatović, all members of the 177th VTO Peć, Veljko Korićanin, a member of the TO, and Vidoje Korićanin and Radoslav Brnović, members of the MUP.
[38] Article 142 (1) of the CC of the FRY, as a co-perpetrator, and Article 22 of the CC of the FRY.

Analysis of proceedings

Defense witnesses who testified in the course of the trial in 2012 came across as unconvincing and biased, particularly given that evidence presented earlier clearly showed that the majority of the accused were members of the 177th VTO, present at the places where the offences were committed.

Particularly striking were the testimonies of the then officers and members of the VJ, who, at the time of the 1999 armed conflict in Kosovo, belonged to the same military formations as the accused, who nevertheless attempted to present themselves as completely uninformed about events or any particular crimes committed on the territory of the municipality of Peć/Pejë. Minimizing their own roles and clearly worried that they might find themselves linked with the events that the accused were charged with, they emphasized that they had acted in accordance with the rules of engagement. Consequently, all of them claimed not to have heard at the time about the events that occurred in the village of Ćuška /Qushk and to have learned of them only from the media, in the aftermath of the conflict in Kosovo. Some even claimed to have learnt about the events only upon the commencement of criminal proceedings against the defendants. Their veracity of their testimonies is further called into question given that the job descriptions of some of these witnesses included field monitoring and information collection, given the positions they held in the military formation. An example which illustrates this was the testimony of Dejan Bulatović, commander of the Security Service of the Military Department of Peć, at the time of the 1999 conflict. He testified that the security office he managed was a sort of secret service tasked with collecting information on unlawful engagement of VJ units and responding to such conduct. Despite the fact he was a defense witness for the accused Popović, he claimed to have never met him and not to know anything about the crimes committed on the territory of the Peć/Pejë municipality. The accused then asked him: “Who are you protecting?” while his lawyer said in surprise: “The man knows nothing, such an intelligence officer should lose his job!”

In 2012, the indictment was expanded to include the events that occurred on 1 April and 14 May 1999 in the villages of Ljubenić/Lubeniq, Pavljane/Pavlane and Zahać/Zahaq. A decision to do this was expected from the TRZ, given the evidence presented in this case but revealed certain omissions in the work of the TRZ. It is unclear why the TRZ took nearly one year to expand the indictment, given that the testimonies of protected witness Zoran Rašković taken in December 2011 and January 2012, made it clear that the indictment needed to be expanded. Even the way in which it was done – the deputy prosecutor filed the expanded indictment only at a hearing held on September 27, after three months of summer break, and then filed the consolidated, amended indictment at a hearing on 17 December – reflects the tardiness of action on the part of TRZ. Thus six months were lost due to the delay in taking procedural actions that could have been

completed in a much shorter time. Such conduct on the part of the TRZ negatively affected the already weak motivation of potential witnesses from Kosovo to come to court and take part in judicial proceedings.

The trial chamber in this case has acted in a highly professional manner, showing an in-depth familiarity with the case files, has decisively dealt with various procedural issues that have arisen and successfully managed these complex proceedings.

1.2. *Skočić*[39]

The Higher Court in Belgrade[40] have been conducting the criminal proceedings against Damir Bogdanović, Zoran Stojanović, Tomislav Gavrić, Đorđe Šević, Zoran Alić, Zoran Đurđević and Dragan Đekić for committing the criminal act of war crime against the civilian population.[41] In 2012, 15 trial days were held, over the course of which 26 witnesses were heard.

Course of proceedings

On 4 December 2012, the TRZ[42] filed an amended indictment,[43] according to which the defendants are alleged, as members of the 'Simini četnici' (Simo's Chetniks) unit, fighting on the Serbian side in the BiH conflict under the command of the late Simo Bogdanović, to have, on 12 July 1992, in the village of Skočić (in the municipality of Zvornik), destroyed the mosque and the house of Hamdija Ribić, a Roma, with explosives and rounded up villagers of Roma ethnicity, including children, women and adult men. The defendants then took away all their valuables, and beat them with their fists, feet, rifle butts and other objects, killing one man. Two men – a grandfather and his grandson – were ordered to undress and perform oral sex on one another while injured parties 'Alfa', 'Beta' and 'Gama', two of whom were minors, were repeatedly raped. In the end, all of them were taken on a truck to the neighboring village of Malešić (in the municipality of Zvornik) where 'Alfa', 'Beta' and 'Gama' were separated from the group, forced into slave labor and sexually abused until January 1993. The remaining 28 Roma civilians were

[39] KPo2-42/10.
[40] Members of the trial chamber: judge Rastko Popović (presiding), judge Vinka Beraha Nikičević and judge Snežana Nikolić-Garotić.
[41] Article 142 (1) of the CC of the FRY, as a co-perpetrator, and Article 22 of the CC of the FRY.
[42] Deputy War Crimes Prosecutor Milan Petrović.
[43] The amended indictment provided a more detailed description of the particular actions carried out in the commission of the crime by each of the accused and increased the number of victims from 22, listed in the initial indictment, to a total of 28. All of the killed family members of the injured party Zija Ribić were included – parents, a brother and six sisters. In addition, the consolidated indictment included three earlier versions as the defendants Zoran Alić, Zoran Đurđević and Dragana Đekić were indicted only later, in the course of the trial.

taken to a pit in the Hamzići area, in the village of Šetić, where they were taken from the truck one by one and killed with firearms. Their bodies were then thrown into the pit. Twenty-seven civilians were killed in this incident, including seven children and one woman in the later stages of pregnancy. Eight-year-old Zija Ribić, an injured party in the case, was wounded.[44]

In 2012, following the issue of an indictment against Zoran Đurđević[45] and Dragana Đekić[46], the criminal proceedings against them were merged with proceedings previously initiated against Simo Bogdanović *et al.*

Testifying in their own defense, Zoran Đurđević and Dragana Đekić, denied having committed the criminal acts that they were charged with. Zoran Đurđević argued that he had joined 'Simo`s Chetnics', stationed in Malešić at the time, after being released from prison in Bijeljina in the second half of June 1992, at the request of the late Simo Bogdanović. He claimed not to have participated in any actions, as he had served in the unit for only one month before leaving for Serbia.

Dragana Đekic stated that she had joined 'Simo`s Chetnics' in May or June 1992, as a nurse. At that time, Simo Bogdanović, the commander of the unit, and indictees Zoran Alić and Đorđe Šević were already with the unit, whereas Damir Bogdanović joined in August 1992. Đekić did not remember other members of the unit. Three girls, Sena,[47] Dina and Munevera, were held in captivity by the unit, but Đekić could not explain how they got there. She stated that members of the unit raped and ill-treated them,something she had been told by the injured parties themselves. When Đekić asked them who had done that to them, they replied "all of them." In the witness's opinion, Sena, Dina and Munevera were the protected witnesses 'Alfa', 'Beta' and 'Gama', since there had been no other women prisoners at the time.

The proceedings against the indictee Simo Bogdanović ended following his death on 28 August 2012.

The most important witnesses questioned in 2012 were the protected witnesses/injured parties 'Alfa', 'Beta' and 'Gama', whose detailed and moving account of the events in the village of Skočić and the rapes and sexual abuse they endured in Malešić, contributed greatly to establishing the factual background and corroborated the testimony of the injured party, Zija Ribić, about the events in Skočić. Describing the rapes they endured on a daily basis, the protected witness 'Alfa' stated: "They made me watch them rape my nieces, 'Beta' and 'Gama',

[44]In 2008, the HLC submitted to the TRZ a criminal complaint against Sima Bogdanović *et al*, for the criminal offense of war crime against the civilian population, which contained the statement of the sole survivor, Zija Ribić.
[45] On 4 June 2012, the same court delivered a first instance judgment in the *Bijeljina* case, sentencing Zoran Đurđević to 13 years in prison for a war crime against the civilian population, committed on 14 June 1992 in Bijeljina.
[46] On 22 December 2011, the TRZ filed an indictment for the same criminal offense against Zoran Đurđević and Dragana Djekic, who were subsequently identified.
[47] Senija Bećirević, now the common-law partner of indictee Tomislav Gavrić.

who were both underage at the time; I was raped by five people every single day and 'Trcko'[48] was pimping me out to other men in exchange for a pack of cigarettes, letting them abuse me freely." The injured parties confirmed the allegations in the indictment about the destruction of the mosque in Skočić, the murder of Arif Nuhanović, the physical torture and rape of captives as well as the taking of all the ethnic Roma to the village of Malešić, where the three women were separated from the rest of the group who were taken to an unknown place. They also confirmed the allegations in the indictment of repeated rape, physical abuse and being forced to do the laundry, cook and undertake housework at the places where they were held. Giving her testimony on the ethnic Roma who were taken by the defendants from Skočić and subsequently shot dead, protected witness 'Alfa' stated that a brother and sister of the injured party Zija Ribić were among them, thus contributing to determining the identity of all the victims.

Injured party 'Alfa' recognized Đorđe Šević, Dragana Đekić, Zoran Stojanović, Zoran Alić and Simo Bogdanović in the courtroom. During her testimony, injured party 'Beta' asked to be shown into the courtroom and confronted with the indictees, so that she could "look them in the eye"; she recognized Simo Bogdanović, Zoran Alić and Zoran Stojanović. She became so distressed during this 'confrontation' that she had to leave the courtroom.

The testimonies of the protected witnesses were marked by inappropriate conduct of the indictees, who used vulgar language and asked questions which were aimed at showing disdain and causing additional trauma to the victims. The presiding judge warned them he would not tolerate such behavior.

Expert witness Dr Miodrag Blagojević, who conducted a psychiatric examination of Zoran Alić, was questioned during the main hearing. He stated that, at the time of the crime, the indictee was able to understand its meaning and consequences.

Another expert witness, Dr Đorđe Alempijević, was also questioned. On the basis of medical documentation – the record of the exhumation, autopsy and examination of the exhumed remains, compiled by expert witnesses from BiH – he conducted a forensic examination of the mortal remains of the injured parties exhumed from a mass grave at the 'Crni vrh' (the Black Peak), near Zvornik, between 28 July and 3 October 2003. He confirmed that the mass grave at 'Crni vrh' was a primary mass grave, but did not exclude the possibility that the injured parties might have been killed in other location and subsequently buried in the primary mass grave. The fact that only remains of skeletons were found, made him conclude that a long period of time was likely to have passed since the moment of death of injured parties, which could possibly have occurred July 1992. For the majority of injured parties, it could be safely said that their deaths were violent as evidenced by injuries found on the skeletal remains, and which were possibly inflicted by a firearm or fragments from an explosive device. In relation to the injured parties on whose skeletal remains no injuries were found, and for whom therefore the cause of death could not be

[48] 'Trcko' is the nickname of indictee Zoran Stojanović.

conclusively determined, he stated that in no case would he exclude the possibility that injuries inflicted to their soft tissue by a firearm could have caused their death.

Expert witnesses Dr Branko Mandić and Ana Najman, who conducted psychiatric and psychological examination of protected witnesses 'Alfa', 'Beta' and 'Gama', stated that the injured parties employed defense mechanisms, such as repression, withdrawal and denial. When reliving a traumatic experience, they did not add new images but simply recollected past events and re-experienced the trauma. The protected witnesses` capacity for perception, calling to mind and retelling what they remembered had been preserved, even after such a long period of time, and they showed no propensity for false memories or memory disorder.

Analysis of proceedings

The proceedings revealed serious flaws in the work of the Victim and Witness Assistance and Support Service of the Higher Court. The injured parties had the status of protected witnesses and testified under code names at main hearings which were closed to the public. These measures were necessary, but proved insufficient, because the Assistance and Support Service failed to properly do their work. The Service did not even provide appropriate conditions for the victims/protected witnesses during their stay in Belgrade. One of the victims, who came to testify from abroad, where she lived, was provided only with bed and breakfast, without lunch, despite the fact that her testimony was lengthy and she was going back home immediately upon testifying. Also, none of the victims/witnesses received adequate assistance to become familiar with the procedure for testifying. More importantly, none received psychological support. During their testimony, all three of the injured parties/witnesses were under great stress and their testimonies had to be interrupted to provide them with medical assistance. They were clearly confused, unfamiliar with the audio and video equipment and the sequence and manner of questioning.

These injured parties, as victims of sexual violence, of whom two were underage at the time of the crimes, are considered especially vulnerable and they were inevitably exposed to secondary victimization while testifying, which affected their testimonies. Bearing in mind the importance of the testimonies of victims of sexual abuse in war crimes trials, specific mechanisms for the protection of such witnesses have been developed in practice. International criminal courts have established procedures in order to adequately cater for the special needs of this category of victim encompassing special protection measures, special procedures to adduce evidence, provision of assistance and psychological support by trained experts throughout testimony. Some countries in the region have adopted these procedures. Despite the fact the Law on Organization and Jurisdiction of Government Bodies in the Prosecution of War Crimes provided the legal

framework for the implementation of such mechanisms, in practice, the Higher Court in Belgrade does not use these mechanisms to a sufficient degree.

1.3. *Tenja II*[49]

During 2012, the Higher Court in Belgrade conducted proceedings against Božo Vidaković and Žarko Čubrilo, who were accused of a war crime against prisoners of war[50] and a war crime against the civilian population.[51] During the four trial days held in 2012 eight witnesses were heard.

Course of proceedings

The TRZ,[52] in its indictment brought on 22 June 2012,[53] charged Božo Vidaković, in his capacity as commander of the 4th company of the Tenja TO, and Žarko Čubrilo, as a member of the Tenja TO, with the commission of a war crime against a prisoner of war and 18 civilians, between 7 July and the end of August 1991, on the territory of the municipality of Tenja (RH).

Božo Vidaković is charged that on 7 August 1991 in Tenja, he murdered of a prisoner of war, Đuro Kiš, a member of the MUP of the RH. The accused allegedly took the victim out of the TO HQ, made him walk, with his hands tied with a barbed wire, to the 'Partizan' movie theater and shot him dead in the hallway of the building. The indictment further alleges that between 7 July and the end of August 1991 in Tenja, the accused unlawfully confined seven Croatian civilians – Marija and Marko Knežević, Manda Banović, Franjo Fuček, Nedeljko, Elizabeta and Andrija Gotovac – in the house of Pero Ćosić and held them there until the end of August. He then he put them in a white van and took them to an unknown destination, after which they disappeared without trace until February 1992, when witness Đoko Bekić recognized the bodies of Nedeljko, Elizabeta and Andrija Gotovac among bodies that had been found in a field behind Branko Radičević Street in Tenja, and the bodies of the other victims were found and exhumed from a grave at Betin Dvor on 26 February 1998.

Žarko Čubrilo is charged with the unlawful detention and murder of 11 Croatian civilians in mid-July 1991. Allegedly, with the assistance of Jovo Ličina and Savo Jovanović, members of the

[49] K-Po2 -1/12.
[50] Article 144 (1) and Article142 (1) of the KZ of FRY.
[51] This case was transferred to the Republic of Serbia under the Agreement on Mutual Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, signed by the Office of the War Crimes Prosecutor of the RS and the Office of the Attorney General of the Republic of Croatia.
[52] Deputy War Crimes Prosecutor, Snežana Stanojković.
[53] Full text of the indictments available at www.hlc-rdc.org.

Tenja TO, the accused took Ivan Valentić, Marija Cerenko, Ana Horvat, Katica Kiš, Pera Mamić, Josip Medved, Stipe and Evica Penić, Josip Prodanović, Vladimir Valentić and Franjo Burč from a makeshift prison in Tenja, after which he ordered Ličina and Jovanović to tie the civilians' hands, ordered the civilians to get on a truck with their hands tied and drove them to a livestock burial site, close to the neighboring village of Bobota. Upon arrival, it is alleged that he ordered Ličina and Jovanović to open the tarpaulin covering the truck and then ordered the civilians out of the truck, shooting them one by one in the head as they got out of the truck.[54]

The trial of the accused commenced on 29 September 2012.[55]

The accused denied committing the offences for which they were charged.[56]

In the course of the proceedings so far, eight witnesses have been heard, the most important being Milan Macakanja, who, at the time of the events, was a member of the Tenja TO. His testimony fully supported all the allegations in the indictment relating to Žarko Čubrilo. The witness said that he knew the civilians detained in the movie theater in Tenja, among whom was Ana Horvat, the mother-in-law of his child. On 13 July 1991 he came to the TO HQ to ask if someone was going to Silaš, because he wanted to visit his wounded son who was in Bobota at the time. There he saw Čubrilo, (now deceased), Savo Jovanović and Jovo Ličina, who asked him if he had a rope. He told them to go to the janitor for a rope. Outside the movie theater he saw the civilians whose hands were tied, being loaded on a truck owned by Branimir Knežević. He then brought a chair to help them onto the truck. With a rubber baton he happened to have with him, he then hit his child's mother-in-law Ana Horvat and Marija Cerenko, allegedly in jest. There were 13 civilians in the truck, said the witness, five of whom were men. He believed they were being taken in order to be exchanged. He then set out on foot for Bobota. In Silaš he again saw the truck carrying the civilians and joined them to get to Bobota. They stopped in Silaš for about two hours before continuing the trip towards Bobota. When they got to Bobota, Čubrilo got out of the truck, went to a nearby house and returned carrying a different weapon – he replaced his usual weapon with a 'Heckler' with a silencer. Savo drove the truck, following Čubrilo's instructions. They headed towards Pačetin, and then turned into a field of tall corn, passed through the field and stopped in the middle of a forest. Čubrilo, Savo and the witness got out of the truck cabin. The witness turned around and saw Savo pushing the civilians out of the truck and Čubrilo shooting them as soon as they hit the ground. After that, they returned to Bobota where the witness visited his son and Čubrilo picked up his weapon again and left the 'Heckler' behind. The witness told Čubrilo that he should at least bury the bodies. The next day the witness informed

[54] This was the first indictment brought under the new CPC.
[55] Members of the trial chamber: judge Dragan Mirković (presiding), judge Olivera Anđelković and judge Tatjana Vuković.
[56] For more details regarding the defense case of Vidaković and Čubrilo, see HLC daily reports on war crimes trials at www.hlc-rdc.org.

Jovo Rebrača about what had happened and Rebrača seemed upset. Čubrilo visited the witness on two occasions while the latter lived in Montenegro – in 1997 and 2000 and told him to keep what he had seen to himself, threatened him, asked him to testify that he had delivered the prisoners to regular army troops. On 10 November 2007, the witness wrote a letter describing everything he knew about the crime and addressed it to institutions in Serbia, Croatia and Montenegro, in case something should happen to him. With respect to the murder of war prisoner Đuro Kiš, of which Božo Vidaković is accused, the witness said that on 7 July 1991, Đuro Kiš was confined in the movie theater in Tenja. The witness went on to say that he had heard volleys of gunfire while walking by the movie theater. When he asked a passer by what the noise had been, the latter replied that Božo Vidaković had just killed Đuro Kiš.

Witness Savo Šarčević, a member of the Tenja TO at the time, stated that on 7 July 1991 he saw Đuro Kiš being captured during the attack on Tenja. Later he heard that Đuro Kiš had been killed by Vidaković and that Milan Macakanja had also killed some civilians. He claimed that he did not know who had told him that.

In his testimony, witness Dragutin Makarić, who lived in Tenja at the time, refuted the claims by Čubrilo's defense that Čubrilo had left Tenja on 8 July 1991, saying that he met Čubrilo in Tenja on 12 or 13 July 1991. Čubrilo on that occasion, was wearing a blue working overall and carried a 'Thompson' rifle. Witness Miroslav Momčilović, a policeman in Tenja at the time, said that Đuro Kiš had been taken prisoner on 7 July 1991 and confined in the movie theater. He had been in a yard, some 10-15 meters from the theater, when a shot rang out. He saw Božo Vidaković leave the movie theater in the company of Boško Surla, who said: "This idiot has killed the man", referring to Vidaković. He had never heard that anyone else had killed Đuro Kiš.

The other witnesses, mainly members of the TO and civilian defense force in Tenja said they had no knowledge of the events in question.

Analysis of proceedings

The trial will continue with the examination of more witnesses. Unique to this case so far is the fact that the Court returned the indictment to TRZ three times to correct errors and omissions, before it eventually confirmed it.

1.4. *Tuzlanska kolona (Tuzla Convoy)*[57]

A retrial of the *Tuzla Convoy* case continued into 2012 at the Higher Court in Belgrade. During the seven court days, presentation of evidence continued with the hearing of seven witnesses and one expert witness.

Course of the proceedings

The indictment brought by the TRZ[58] on 9 November 2007 [59], and amended on 18 September 2009, alleges that the accused, Ilija Jurišić, on 15 May 1992 in Tuzla (BiH), as a member of the Bosnian and Croatian party to the conflict, and in his capacity as a duty officer at the Operational Staff of the SJB in Tuzla with order-issuing authority over all armed formations deployed in the territory of Tuzla, upon receiving an order to attack from his superior officer (Meša Bajrić, commander of the Operational Staff and Chief of SJB), personally ordered, over the radio, an attack on a JNA convoy at the moment when the second element of the convoy was peacefully passing along Skojevska Street at the intersection known as *Brčanska malta*. The attack resulted in the death of as many as 51 and wounding of at least 50 JNA members. It is alleged that as the attack had been planned beforehand and prepared on the ground, its execution constituted a breach of existing agreements on the peaceful withdrawal of JNA units from the entire territory of BiH and therefore, Tuzla. These agreements gave reassurance to JNA forces that they could safely leave Tuzla.

The first trial of this case commenced on 22 February 2008 before the District Court in Belgrade. On 28 September 2009, upon the conclusion of the evidence presentation process, the trial chamber, presided over by judge Vinka Beraha Nikićević, delivered its judgment,[60] sentencing Ilija Jurišić to 12 years imprisonment.

Accepting an appeal by the defense, on 11 October 2010, the Court of Appeal in Belgrade handed down a decision[61] overturning [62] the trial court judgment, with the instruction that the case be remanded to the trial court and retried by a chamber composed of members other than those who had adjudicated at the first trial[63].

The retrial commenced on 6 July 2011. The court sat for five days in 2012, and, for the most part re-examined witnesses, pursuant to instructions by the Court of Appeal with regard to the accurate and comprehensive establishment of the facts.

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[57] K-Po2 53/2010.
[58] Deputy War Crimes Prosecutor Milan Petrović.
[59] The full version of the indictment is available on the TRZ website at: www.tuzilastvorz.org.rs
[60] Judgment KV. No 5/2007.
[61] Decision of the Court of Appeal KŽ1 Po2 5/10.
[62] For the analysis of the Court of Appeal's decision, see *Report on War Crimes Trials in Serbia in 2011*, HLC, p. 48.
[63] Members of the trial chamber: judge Dragan Mirković (presiding), judge Olivera Anđelković and judge Tatjana Vuković.

Witness Asija Popović spoke about facts and circumstances which have become common knowledge – that the event in Tuzla occurred on 15 May 1992, when during the withdrawal of a JNA convoy some soldiers were killed or wounded. On the day in question she was at the out-patient clinic in Požarnica, which received numerous wounded and killed JNA soldiers. She also spoke about the prevailing atmosphere in Tuzla right before the event.

Other witnesses questioned during the retrial had been direct participants in the event which is the subject of these criminal proceedings. The Court of Appeal found that their testimonies regarding decisive facts were entirely at odds with each other, as was indicated by the Court of Appeal. Witnesses' statements contradicted each other in respect of the existence of an agreement on peaceful withdrawal of the JNA from the territory of BiH, and an agreement concluded between Mile Dubajić and senior officials of Tuzla's government on withdrawal of the JNA. For example, witness Ugo Nonković, a JNA officer at the time, stated that on 15 May 1992 Mile Dubajić and the local authorities of Tuzla concluded an agreement on the withdrawal of the JNA, which did not specify the date of withdrawal. The witness emphasized that he was present when the agreement was being made, and that JNA members were fully confident that it would be kept. Other witnesses said they were not aware of the existence of either the agreement on peaceful withdrawal of the JNA from the territory of BiH nor the agreement concluded between Mile Dubajić, commander of the 'Husinska buna' barracks, and the authorities of Tuzla on a JNA withdrawal.

Witnesses' also gave contrasting statements about the amount of time that elapsed between the firing of the first shot and Ilija Jurišić's words: "Respond to fire with fire." Their estimates range from just a few moments to a couple of minutes, to even 20 minutes, according to the testimony of witness Nikola Slavuljica. These differences are not necessarily a consequence of malicious intent on the part of the witnesses, but may have to do with the fact that 20 years have passed since the event in question, as well with different understanding and perception of the witnesses.

For example, witness Benjamin Fišeković, a police officer with the SJB in Tuzla at the time of the incident, stated that he heard shots after crossing the intersection, when some 150-200 meters past the intersection. Blagoje Stankić, also a police officer at SJB Tuzla, who was driving the car carrying Fišeković, said they had rolled down a window after which they heard gunfire more clearly from somewhere behind them. They turned up the radio receiver and heard someone reporting: "We are being shot at." Then they heard the same cry once again, immediately followed by the instruction "Respond to the fire!"

Witness Niko Jurić, who on 15 May 1992 was serving as commander of the 2nd manoeuvring unit of the Tuzla police department and was on the route used by the JNA convoy for its withdrawal, said that after five of six vehicles of the second element of the convoy had passed the intersection, he heard Ivica Divković, commander of the 1st manoeuvring unit announcing: "Watch out, they're shooting." According to Divković, they opened fire from an army truck. Shortly afterwards he heard the same information from Selim Šabanović and then from Ekrem

Selimović, who were also on the route of the JNA convoy, after which a massive small arms barrage broke out, followed by the order to return fire.

Witness Budimir Nikolić, who, at the time of the event, was in an office with Jurišić, stated that he, Ilija Jurišić and Meša Bajrić were watching the convoy leaving Tuzla on TV when he heard the first call by Ivica Divković over the radio, reporting that they were being shot at, and then repeating it twice more. After the third call Meša Bajrić told Ilija Jurišić to pass on his order to return fire. The first and the last calls for help were not more than five minutes apart.

Witness Jasmin Imamović was, at the time of incident, in a car in the JNA convoy, together with Blagoje Stankić and Benjamin Fišeković. He heard calls for help over the radio and the phrase "Respond to fire with fire" when gunfire was already underway.

Witness Nikola Slavuljica stated that, immediately before and during the event in question, he was at the premises of the Tuzla SJB and heard calls from reserve police stations over the radio – that soldiers were shooting at the police, buildings and civilians. He said that, to the best of his memory, 20 minutes passed between the first and the last call. He did not hear the phrase "Respond to fire with fire".

Witnesses Refik Plavšić, Hamdija Jahić and Mirzet Toromanović were direct participants in the events at Brčanska malta on 15 May 1992. According to their testimonies, the army convoy leaving the barracks was the first to open fire. They had no knowledge of other decisive facts crucial to these criminal proceedings.

Military expert, Professor Mile Stojković gave an interesting testimony regarding the existence of an "insidious" plan to attack the convoy, at the main hearing, held on 27 September 2012. This witness testified in line with his findings and opinions given earlier, at the first trial. He stated that the attack was planned beforehand by one or more persons who had received excellent military training. In such attacks, said the witness, plans usually include cutting off parts of the convoy and the use of snipers. Preparations for such an attack usually take three to four hours. The forces that attacked the convoy might have done so just to clearly demonstrate their military superiority, in order to deter the JNA forces from engaging with them. Yet, after being asked a number of questions, he added that he could not rule out the possibility that it had all happened because the things had got out of control. In his opinion, "it made no sense to sacrifice such high-ranking officials such as those from the Tuzla Town Hall who were in the convoy in order to ensure the safe retreat of the army, unless it was the case that some informal group had launched the attack on its own."

1.5. *Orahovac/Rahovec*[64]

During 2012, no hearings were held in the trial of Boban Petković and Đorđe Simić at the Higher Court in Požarevac. Petković and Simić are charged with murder.[65]

Course of proceedings

The indictment brought by the Office of the District Prosecutor in Požarevac on 12 November 1999 [66] against Boban Petković alleges that the accused, at the time a member of the Serbian MUP , on 9 May 1999, at a place known as *Ria*, outside Orahovac/Rahovec, on the road toward the village of Velika Hoca/Hoçë e Madhe, after catching up with Ismail Derguti, an ethnic Albanian who was fleeing from the region of combat operations, knocked him to the ground and shot him once in the head with a handgun he had earlier got from Đorđe Simić (the co-accused), causing Derguti's immediate death. Petković then headed to a nearby house. When he saw ethnic Albanian civilians Sezair Miftari and his wife Shefkie coming out of their house, he fired several shots from an automatic weapon in their direction. Both Sezair and Shefkie Miftari were hit and died instantly. The Prosecutor's Office in charge of the case defined Petković's acts as a murder, and his co-defendant Simić's acts as aiding and abetting murder.

On 19 July 2000, the District Court in Požarevac issued a judgment[67] sentencing Boban Petković to a single sentence of 4 years and 10 months in prison for the criminal act of murder, and defendant Đorđe Simić, who was tried *in absentia*, to one year in prison for aiding and abetting in the murder of Ismail Derguti. Petković was also ordered to undergo mandatory psychiatric treatment at liberty. On 18 December 2001, the VSS quashed[68] the judgment and remanded the case for a new trial.

The retrial opened on 28 February 2003. The District Prosecutor's Office in Požarevac filed revised criminal charges against the accused – replacing the previous charge of murder with war crime against the civilian population. On 21 August 2003, the District Court in Požarevac sentenced the accused Boban Petković[69] to five years in prison and mandatory psychiatric treatment upon release. Đorđe Simić was acquitted. On 25 May 2006, the VSS quashed[70] the first-instance judgment and again remitted the case to the trial court for a retrial.

[64] Higher Court in Požarevac, 2K 25/11.
[65] Article 142 of the CC of the FRY.
[66] Indictment of the District Prosecutor's Office in Požarevac KT No 118/99-108 of 12 November 1999.
[67] District Court in Požarevac, judgment K No 96/99 of 19 July 2000.
[68] VSS, decision KŽ I 1955/00 of 18 December 2000.
[69] District Court in Požarevac, judgment -K No 17/02 of 21 August 2003.
[70] VSS, decision KŽ I 1399/05 of 25 May 2006.

The second retrial commenced on 22 January 2008 at the District Court in Požarevac. [71] Following a change in the composition of the trial chamber, the trial began anew on 20 September 2011 before a chamber of the Higher Court in Požarevac, presided over by Judge Dragan Stanojlović.[72]

The trial chamber scheduled only one day's hearings in 2012, which did not take place because defendant Simić failed to appear in court. On 28 February 2012, the presiding judge notified the parties that the EULEX Mission, acting upon a letter rogatory from the Ministry of Justice of the Republic of Serbia, obtained the consent of injured parties from the Derguti family for the exhumation and autopsy of the mortal remains of Ismail Derguti. The other injured party, the Miftari family, did not give their consent for an autopsy of the remains of Sezair and Shefkije Miftari.

On 3 October 2012, EULEX delivered to the court the results of the autopsy performed on Derguti and a DNA report along with a Serbian translation of these documents. The said documents were sent to the parties on 11 October 2012. The trial will be scheduled once the parties have viewed the documents and given their statements thereon.[73]

Analysis of proceedings

In its conduct of the *Orahovac/Rahovec* case, the Court has seriously breached one of the fundamental procedural safeguards – trial within a reasonable time.[74] This case, formally speaking, is an ongoing case, as there exist participants to the proceedings, there exists the subject of the proceedings. However, there are hardly any procedural actions being taken. The proceedings have been ongoing since 1999, and after two quashed trial judgments and the change of the composition of the trial chamber, it still seems that there is no end in sight to this relatively simple case. During 2011, just one trial day was held[75] and in 2012 none. The Court, as an institution entrusted with conducting criminal proceedings, is to be held primarily responsible for such a situation. The right of every accused person to a defense that he or she considers most appropriate for him or her is indisputable. However, the court has a duty to *ex oficio* punish defendants who fail to appear at a trial and in so doing apparently misuse the procedural rules, according to which a trial cannot be held if a defendant is absent.

[71] During 2008 two main hearings were held, whereas in 2009 and 2010 there were no hearings in this case.
[72] One main hearing was held in 2011, during which the court heard the accused.
[73] Letter from the Higher Court in Požarevac addressed to the HLC, Su. VII-42 3/12 of 14 November 2012.
[74] Article 14 of the CPC and Article 6 (1) of the ECHR.
[75] Report on War Crimes Trials in Serbia in 2011, HLC, p. 63.

1.6. *Ovčara V*

During 2012, proceedings against Petar Ćirić were initiated before the Higher Court in Belgrade for a war crime against prisoners of war[76] and two trial days were held.

Course of proceedings

On 18 June 2012, the TRZ[77] filed an indictment against Petar Ćirić for a war crime against prisoners of war. Ćirić is alleged to have, on 21 November 1991, as a member of the TO in Vukovar, which operated as a part of the JNA, killed and ill-treated prisoners of war from the Vukovar Hospital – members of the Croatian armed forces as well as persons accompanying those forces although not formally a part of them. After they surrendered to the JNA, the prisoners of war were handed over to the Vukovar TO and transported to a storage building at the Ovčara farm near Vukovar (Republic of Croatia). The prisoners were forced to run a gauntlet to enter the building, during which Ćirić punched and kicked them in different parts of the body. After the prisoners of war were logged and transported, in groups, on tractors to Grabovo, about one kilometre from Ovčara, the accused, together with other members of Vukovar TO, shot them dead. After returning from Grabovo, the accused participated in the execution of the last remaining group of prisoners of war taken to the building at the Ovčara farm, in which at least 193 of them their lost lives.

Following a preliminary hearing held on 1 October 2012 before the Higher Court in Belgrade,[78] the main hearing was held on 15 November 2012, during which defendant Petar Ćirić took the stand in his own defense.

The accused said that he had arrived in the Vukovar war zone from Novi Sad. He responded to the JNA call-up papers addressed to his twin brother. In Vukovar he was quartered in the suburb of Petrova Gora. He came to Vukovar as a member of the JNA and then joined the Vukovar TO. He saw buses transporting people from Vukovar Hospital, but did not know who they were or where they were taken. He denied having committed the offence with which he was charged. He said he did not know where Ovčara was and claimed to have learned of the crime committed there a couple of days after the fall of Vukovar. The accused stated that everyone was speaking about some prisoners having been killed but he was not interested in the story.

The following trial day, 3 December 2012, was closed to the public, at the request of the TRZ and prosecution witnesses in order to protect the privacy of the latter.

[76] Article 144 of the CC of the FRY.
[77] Deputy War Crimes Prosecutor, Dušan Knežević.
[78] Members of the Chamber: judge Rastko Popović (presiding), judge Vinka Beraha Nikićević and judge Snežana Nikolić Garotić.

Analysis of proceedings

The TRZ has so far initiated three criminal cases in relation to the crime at Ovčara, all of which have been finally and conclusively decided. Of the 20 persons accused, 15 have been convicted by final and binding judgments, and five were cleared of the charges. The case against Petar Ćirić resulted from the facts established in the proceedings in which final judgments were reached. The indictment filed by the TRZ against Ćirić states that the accused committed the crime together with a large number of other persons who had already been tried and whose trials had been concluded by final decisions, as well with other, unknown, persons[79].

1.7. *Bosanski Petrovac*[80]

During 2012, the Higher Court in Belgrade[81] heard a case against Neđeljko Sovilj and Rajko Vekić[82] who were accused of a war crime against the civilian population.[83]

Course of proceedings

According to the indictment filed by the TRZ[84] on 6 August 2012, the accused, on 21 December 1992, as members of the VRS – APO 7463 in Petrovac, on a local road connecting Jazbine and Bjelaj, Bosanski Petrovac municipality (BiH), in the forest known as Osoje, came across civilians Mile Vukelić and Mehmed Hrkić. They ordered Vukelić to continue on and held Mehmed Hrkić back, taking him deeper into the forest and killing him, by firing at least three shots at him.

The trial of the accused opened on 13 November 2012. Over the course of three trial days held before the end of 2012, the accused presented their case and two witnesses were questioned.

The accused denied having committed the crimes with which they were charged. Testifying in their own defense, they said that on the day in question Neđeljko Sovilj had gone to the house of his cousin, Rajko Vekić. Later, they headed off together towards Sovilj's house in the hamlet of

[79] Full text of the indictment available on the TRZ website: www.tuzilastvorz.org.rs
[80] K Po2-1/12.
[81] Chamber members: judge Dragan Mirković (presiding), judge Olivera Anđelković and judge Tatjana Vuković.
[82] A first indictment against Neđeljko Sovilj and Rajko Vekić was filed by the Cantonal Court in Bihać (BiH) on 31 October 2011. As Sovilj and Vekić are citizens of the Republic of Serbia, where they have registered residence, the case was transferred to the Republic of Serbia through international legal assistance.
[83] War crime against the civilian population under Article 142 (1) of the CC of the FRY, as co-perpetrators, in conjunction with Article 22 of the CC of the FRY.
[84] Deputy War Crimes Prosecutor Snežana Stanojković.

Cimeše. On the way there, they came across Mehmed Hrkić and Mile Vukelić. They only exchanged hellos with them and continued on. Hrkić and Vukelić were walking and talking to each other, and Vukelić carried a semi-automatic-rifle over a shoulder. A month later, when fresh soldiers came to their battle line, the accused heard that Mehmed had been killed. They had known Hrkić from before the conflict and there was no bad blood between them and Hrkić. Hrkić's brother and nephew were with them on the same battle line, as members of the VRS. The accused believed that Mile Vukelić incriminated them because he saw Mehmed with them immediately before the murder.

Witness Branko Romić, who at the relevant time worked as a police inspector with the SJB in Bosanski Petrovac, stated that he examined the crime scene after the station duty officer had informed him about the murder of Hrkić. During the examination, he attempted to interview local people from the village of Bjelaj, but no one wanted to say who had killed Mehmed. The witness noted that in the period in question several Muslim civilians had been killed to avenge the murder of 18 members of VRS's Petrovac brigade killed earlier.

Witness Rade Sovilj, father of the accused Neđeljko Sovilj, stated that he learned of the murder of Mehmed Hrkić from his neighbors and claimed not to know anything else about the event. Before Hrkić was killed, the witness had heard about the killing of 15-16 fighters of the Petrovac Brigade. He had lived in the village of Bjelaj until 1995, when he left the village and moved to Serbia together with other villagers. He visited Bjelaj in 1998 with the idea of coming back to in his village once more, but the village had been burned. While in the village, he spotted "You killed Mehmed" daubed on Mile Vukelić's house.

1.8. *Miloš Lukić*[85]

Criminal proceedings are being conducted before the Higher Court in Prokuplje.[86] against Miloš Lukić for the murder of Hamdija Maloku on 24 April 1999 in Podujevo/Podujevë. During 2012, one trial day was held during which two victims and two witnesses were heard.

Proceedings of the case

On 14 June 1999, District Prosecutor's Office in Prokuplje indicted Miloš Lukić for murder.[87] Lukić was charged with murdering ethnic Albanian Hamdija Maloku on 24 April 1999 in Rahman Morina Street in Podujevo/Podujevë (Kosovo). According to the indictment, the accused, on meeting Maloku, ordered him to halt. Maloku failed to obey and instead started to step backwards and stood behind a tree. When Maloku put his hand in a pocket, the accused,

[85] Higher Court in Prokuplje, K No 1/10.
[86] The presiding judge was Ivan Rakić.
[87] Article 47 (1) of the CC of the RS.

believing that Maloku had a handgun, fired three shots at him from his service pistol. Maloku died instantly as a result of a wound sustained to the head.

Although Lukić was a member of the MUP at the time, that fact was omitted from the indictment.

In the Course of proceedings, the accused admitted to having committed the crime as charged. On 25 June 1999, the District Court in Prokuplje[88] delivered its judgment[89] finding Lukić guilty and imposed on him a suspended sentence of two years in prison with three years' probation.

On 23 March 2000, the VSS reversed the first-instance judgment and returned the case for retrial. The judgment was reversed on grounds of substantial violations of the CPC provisions – the disposition of the judgment was not understandable and contradictory in itself as to the reasons behind the judgment delivered, and the decisive facts were not supported by sufficiently clear reasoning. The decision reversing the judgment states that given the circumstances of the case, the court should have not imposed a suspended sentence, because there were no legal grounds for such a decision.

The District Prosecutor's Office in Prokuplje amended the indictment on 10 August 2000, by describing in greater detail the conduct of the late Hamdija Maloku during the event in question. According to the amended indictement, the accused asked to see the victim's identity documents, and when Maloku took his ID and medical insurance card out of a pocket and moved towards the accused in order to hand him the documents, the accused unholstered his gun and shot him. Other parts of the indictment remained unchanged.

Following the retrial at the District Court in Prokuplje, on 7 July 2001, Miloš Lukić was found guilty and sentenced to 18 months in prison.

On 2 April 2002, the VSS set aside this judgment because of the court's failure to state its reasoning concerning the decisive facts and for the vagueness of the disposition[90].

At a hearing held on 17 September 2012, the court heard witness-victims Agim and Ejup Maloku (Hamdija's sons) and witnesses Ibhadete Mehanja and Halim Cikaj.

Agim Maloku said that he and his family had moved to Priština/Prishtine before the onset of the conflict in Kosovo and stayed there until 4 May 1999, when they left for Macedonia. On15 June 1999, while still in Macedonia, he learned from his brother that their father had been killed by a

[88] Trial chamber members: judge Branislav Niketić (presiding), judge Aleksandar Stojanović, lay judge Marko Koprivica, lay judge Dragomir Nikolić and lay judge Jovan Severović.
[89] The judgment issued by the District Court in Prokuplje K No 58/99 is available on the HLC website at: www.hlc-rdc.org.
[90] The HLC has no information on the course of this trial between 2002 and 2012.

local police officer and buried at a cemetery near a brick factory. Agim's cousin Ibhadete, who was with his father at the time of his murder, gave him a more detailed account of the circumstances surrounding his murder.

Ejup Maloku said that at the relevant time he was in the village of Šajkovac/Shajkoc (Podujevo/Podujevë municipality), where his two sisters lived with their husbands. His father Hamdija and mother Zebhana had remained in their home in Podujevo/Podujevë. On the first day of bombing, his parents came to Šajkovac/Shajkoc. A couple of days later, the police told them they should leave the village because it was not safe any more, owing to the clashes between the police and the KLA. They left as instructed by the police and went to Priština/Prishtinë. Several days later, the police allowed them to go back to Šajkovac/Shajkoc and they did so later that day. Hamdija and his wife then returned to Podujevo/Podujevë, leaving the other members of the family in Šajkovac/Shajkoc. Ejup last saw his father one day before his death when he came over to visit them. Hamdija told them that he needed to go to city hall to inquire about the fate of his daughter-in-law who had gone missing and that he would come back to see them the next day. When Hamdija failed to show up the next day, the family became worried and started asking around for him. From his uncle's sons Isuf and Shefqet Maloku, Ejup found out that his father had been killed by a police officer named Miloš, and that he was buried in a cemetery near a brick factory. Isuf and Shefqet told Ejup that they learned about what had happened to Hamdija from a distant cousin Bajram Maloku. On a later date, Ejup learned more details about the event from his cousin Ibhadete.

Witness Ibhadete Mehanja is a cousin of Hamdija. At the time of his death she was 15 years old. On the day of his murder, 24 April 1999, between 10:00-11:00 a.m., she and Hamdija were returning from town. They walked along Rrahman Morina Street, passed Halim Cikaj's bakery and arrived near a demolished building, where they saw a yellow 'Golf' and two apparently drunk individuals standing next to it, taking drinks out of the trunk, taking in a loud voice and laughing. At that moment Hamdija said to her: "We passed the previous patrol, but I'm not sure we will pass through this one." One of the men, the taller one (wearing camouflage fatigues), approached Hamdija and asked to see his ID card, using abusive language and hitting him with the tip of his gun. Hamdija began drawing back towards the entrance to the demolished building, asking the man to stop being abusive and beating him. Shortly, Hamdija fell to the ground and Ibhadete ran into a side street. The other man then fired his automatic rifle in her direction. After a minute or two, she heard two consecutive shots, from a handgun, she assumed, coming from the direction where Hamdija was, which made her believe that he had been killed. She went home and told her family about what had just happened. Later that day Ibhadete's family had to leave town because the police ordered them to. Three days later, some cousins confirmed Ibhadete's suspicion that Hamdija had been killed on that day. In the courtroom Ibhadete identified Miloš Lukić as the person in uniform who had beat Hamdija. She said she could never forget his eyes and that he had often come up in her dreams since the event.

At the time of Hamdija's murder, witness Halim Cikaj lived in Podujevo/Podujevë (and he still lives there). He and his son ran a bakery in Rrahman Morina Street. On the day ofHamdija's

murder, it was alleged that the same police officer who had killed Hamdija beat Halim and his son and cut their faces. The policeman arrived with blood on his hands, uniform, the barrel of his gun and a knife at his waist. Then, the deputy police commander came and he and another two policemen restrained him. A police officer named Boban took Halim and his son to the town hospital to get their wounds treated. On return from the hospital, they saw the body of Hamdija on the street. His head was blown off and his clothes were cut. While Halim did not see the murder, he later found out from fellow-townsmen that the same policeman who had beaten him had immediately before that killed Hamdija. He did not recognize the accused.

Analysis of proceedings

Proceedings against Lukić have been ongoing for more than 13 years. The length of the proceedings, and also the decisions that have been rendered so far, and made available to the HLC, draw severe criticism.

The indictment filed by the Office of the District Prosecutor in Prokuplje on 14 June 1999 was flawed in the part relating to the legal qualification of the offence charged: Lukić was charged with murder, although his actions contain all the essential elements of a war crime against the civilian population.[91] The crime the accused is charged with was committed on 24 April 1999, that is, in the course of the armed conflict and thereby it meets the temporal requirement, as one of the essential elements of the offence of war crime against civilians. Also, the offence was committed in Podujevo/Podujevë, which was, at the time of the commission of the offence, affected by the armed conflict. At the time of the crime, Lukić was a member of the MUP of the RS, one of the parties to the conflict. There is no doubt that killing of civilians, a protected category, in the circumstances described above does constitute a violation of international law.

The District Court in Prokuplje, which on 25 June 1999 delivered a first-instance judgment in this case, consistently adhered to the designation of the offence stated in the indictment, although it is well known that courts are not bound by a specific designation of the offence with which a person is charged. The trial chamber, presided over by judge Branislav Niketić, the then President of the District Court in Prokuplje, made some serious errors with respect to fact-finding, as the facts of the case, as presented in the judgment, are permeated with political views and contradictions. For example, the judgment describes Podujevo as a specific town, filled with terrorists attacking police. The accused was described as having a misconception that Hamdija (born in 1936) was a terrorist. Only later does it state that the accused 's misconception was not genuine, as the late Hamdija did not have a gun, and that this was not a case of self-defense because the accused was not attacked.

The chamber's decision to suspend Miloš Lukić's sentence amounts to a gross violation of the CC. The court suspended the sentence, even though the statutory requirements for such a

[91] Article 142 of the CC of the FRY.

suspension were not met, a view held by the VSS, given its decision of 23 March 2000 to reverse the judgment.

After the VSS reversed the first-instance judgment and ordered retrial, all that the District Prosecutor's Office in Prokuplje did was to change some factual allegations in the charges on 10 August 2000. Following the retrial at the District Court in Prokuplje,[92] Miloš Lukić was convicted on 7 July 2001 and sentenced to a prison term below the statutory minimum (18 months). This decision, in terms of the factual background established and its ambiguity and inconsistency, is in essence identical to the initial first-instance decision. In deciding upon appeals lodged both by the parties and *ex officio*, the VSS made the only right decision that could have been made, and ruled on 2 April 2002 to set aside this judgment. The documentation currently available to the HLC does not allow for any further analysis of proceedings.

It is not known whether the TRZ ever expressed interest in taking over the criminal prosecution in this case. It has become clear that the acts of the accused contain all the elements of the criminal offence defined as a war crime against the civilian population, the processing of which falls within the responsibility of the TRZ.[93] Regardless of the view of the TRZ, this situation could be changed if the Prosecutor's Office prosecuting this case, changes the legal qualification of the offence and if the courts hearing this case declare themselves as not having jurisdiction to adjudicate in this matter, something which could be done before the end of the proceedings.

2. Cases that resulted in first-instance judgments during 2012

2.1. *Bijeljina*[94]

On 4 June 2012, the Higher Court in Belgrade delivered a judgment convicting the accused - Dragan Jović, Zoran Đurđević and Alen Ristić - of a war crime against civilians[95] and sentencing Dragan Jović to 15 years, Zoran Đurđević to 13 years and Alen Ristić to 12 years in prison.[96]

[92] Chamber presided over by judge Aleksandar Stojanović.
[93] Articles 2 and 4 of the Law on Organisation and Jurisdiction of Government Bodies in the Proceedings against War Crime Perpetrators (Official Gazette of the RS No.s. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009).
[94] K.Po2 7/2011.
[95] Article 142 (1) of the CC of the FRY, in conjunction with Article 22 of the CC of the FRY.
[96] This case was transferred to Serbia from the judiciary of BiH.

Course of proceedings

As alleged in the indictment filed against them by the TRZ on 5 June 2011,[97] the accused, as members of a volunteer unit fighting for the Serb side in the conflict, on the evening of 14 June 1992 in Bijeljina (BiH), entered, together with Milorad Živković[98] and Danilo Spasojević[99], the house of the injured party Ramo Avdić seeking weapons from him. After he handed them weapons, they searched his house and took his money and jewelry. After that, they forced at Ramo's daughter Nizama and Daughter-in-law Hajreta at gunpoint to undress, and then raped and sexually abused them in the presence of Ramo's wife Fata and son Kurem. Dragan Jović then killed Ramo Avdić by placing a gun barrel into his mouth and pulling the trigger. Shortly thereafter, the accused left the house taking with them the injured parties Nizama and Hajreta and paraded them, naked and barefoot, through town until they reached the house of the injured party Dosa Todorović. They took Dosa Todorović's money, jewelry and a passenger car, got into the car, together with Nizama and Hajreta, and drove towards Brčko. Upon reaching the village of Ljeljenča, they stopped the car, took the injured parties out of the car and raped and sexually abused them one further time, after which they left the scene, leaving the injured parties by the side of the road.

Trial of this case commenced on 4 July 2011.[100] During the 11 trials days held so far, 10 witnesses have been heard.

Testifying in their own defense, the accused said they went to Bosnia as volunteers, under the auspices of the the Serb Radical Party. Having arrived in Bosnia, the VRS supplied them with uniforms and weapons. They admitted to having entered the house of Ramo Avdić, armed and uniformed. When asked about the reason, the accused said that Danilo Spasojević had told them that Ramo Avdić was a Muslim extremist possessing weapons and was "supplying weapons to the Muslims", so they wanted to take these weapons away from him. Dragan Jović admitted to having killed Ramo, but claimed it was an accident. Hearing screams from another room, he says, Ramo stepped towards him, and he got frightened and fired a shot from his rifle that "accidentally hit Ramo in the head". None of the accused admitted to raping and sexually abusing the injured parties Nizama and Hajreta or looting money and valuables. Zoran Đurđević stated that he did not see who had killed Ramo, but added that Jović told him that he had done it. At Ljeljenča he

[97] Deputy War Crimes Prosecutor Dušan Knežević.
[98] Defendant Milorad Živković is at large, and criminal proceedings against him were severed.
[99] A non-final judgment of the District Court in Bijeljina found Danilo Spasojević guilty of the offence and sentenced him to nine years in prison.
[100] Members of the trial chamber: judge Vinka Beraha Nikićević (presiding), judge Snežana Nikolić Garotić and judge Rastko Popović.

attempted to rape one of the victims but failed as he was drunk. Alen Ristić denied involvement in the rape, shifting blame to Đurđević and Jović.

During the presentation of evidence, the court heard the injured parties, namely Kurem Avdić, son of the late Ramo, Fata Avdić, Ramo's wife and Nizama Franc (née Avdić). They described very precisely what had happened to them, specifying the time of the crimes and the manner in which they were committed, as well as perpetrators. One of the injured parties, Hajreta Avdić, because of the trauma she endured (she had given birth to a baby only a couple of days before the incident) declined to take the stand before the Higher Court in Belgrade. Instead, she was interviewed by the presiding (lady) judge in the premises of the Serbian Embassy in Vienna, where she currently lives. Also questioned were witnesses Dušan Spasojević, a police inspector, and Milorad Lovre, a crime scene technician, both working at the Bijeljina SUP at the time. Immediately after the injured parties reported the crime, the two men performed an investigation of the scene of Ramo Avdić's murder, and obtained medical documentation for the injured parties Nizama and Hajreta. Also, a medical examination of Ramo, Nizama and Hajreta Avdić was performed to determine the injuries inflicted on them.

Having convicted the defendants, judge Vinka Beraha Nikićević, who presided over the chamber, outlined the reasons behind the judgment. She said that in the course of evidence presentation it had been proved beyond reasonable doubt that the accused had committed the crimes they were charged with. On the basis of their own testimonies, and the testimonies of witnesses, Dušan Spasojević and Ramo Fejzić, the court established that the injured parties were civilians and that victim Ramo Avdić was no Muslim extremist, but a reservist of the Bijeljina SUP, a wealthy and respected man, "actively involved in efforts towards a peaceful settlement of conflicts between Serbs and Muslims in Bijeljina". The court also determined that the accused, together with Milorad Živković (being tried separately), on 14 June 1992 in the 'Tref' café in Bijeljina, after being told by Danilo Spasojević, a local resident, that Ramo Avdić was a Muslim extremist who supplied weapons to the Muslims and stored weapons in his home, decided to go to Avdić's house. They came to Ramo Avdić's house, searched it and took away the weapons, for which he possessed all the required permits, as well as gold jewelry and money they found in the house. The court found that Dragan Jović killed Ramo Avdić by shooting him in the mouth. At the same time, the accused gang raped and sexually abused Avdić's daughter-in-law Hajreta, who had given birth just a couple of days earlier, and his daughter Nizama. After that, the court established that they had taken the women from the house and put them in a car they had stolen from the injured party Dosa Todorović, and drove them toward Brčko. They stopped the car in Ljeljenča and raped and sexually abused Nizama and Hajreta again, after which the accused left the scene leaving the victims without clothes or shoes by the side of the road.

The court did not accept the arguments of the defense, assessing them as insincere and aimed at helping their clients escape criminal responsibility, as well as being contrary to the testimonies of victims, witnesses, medical expert witnesses and medical records included in the case file. On the basis of mutually corroborating testimonies from the injured parties, Fata and Kurem Avdić, the wife and son of the injured party Ramo, the court determined that defendant Jović, while in their house, had placed his rifle barrel into the mouth of Ramo, who offered no resistance, and killed him firing one shot. Their testimonies were corroborated by the findings of expert witness Dr Đorđe Alempijević, who, after examining the autopsy report, confirmed that Ramo's death was caused by a bullet, fired from a rifle into his oral cavity, that exited through the back of victim's neck and that the victim was at the moment of firing in a standing position. The claims by Dragan Jović that Ramo was hit by accident were refuted by the expert witness, who said that there was little likelihood that Ramo was hit by a bullet accidentally fired while his mouth had been open. That the accused did rape and sexually abuse Hajreta and Nizama was determined on the basis of the honest, coherent and very convincing testimonies of the victims, to which the court gave full credence. Their testimonies were in part confirmed by defendant Zoran Đurđević, who, testifying in his own defense, said that Jović was "touching a women who recently gave birth" while they were in Ramo Avdić's house, adding that he himself attempted to rape one of the victims in Ljeljenča. The testimonies by the injured parties were also corroborated by findings of expert witness Dr Đorđe Alempijević, who established, upon reviewing the injured parties' medical documentation, that the injuries they had, were inflicted during a violent sexual attack. That the accused, took money and valuables while in the house Ramo Avdić and Dosa Todorović was established both on the basis of injured parties' testimonies and the testimony of witness Dušan Spasojević, who said that during the arrest[101] the police found money and gold jewelry on the accused and returned it to the injured parties.

Assessing the mental state of the defendants with regard to the offence, the court found that they committed the crime with direct intent.

The court also determined that in the commission of crime the defendants had displayed exceptional cruelty as they treated them in particularly humiliating way, by undressing them and taking turns raping and sexually abusing them in front of their closest family members, then parading them naked through town, all factors considered aggravating when considering sentence. As for mitigating circumstances, the court took into account the family circumstances and economic situation of defendants Dragan Jović and Zoran Đurđević and the fact that Alen Ristić was a young adult at the time of the crime. In court's view, the sentences imposed are

[101] The defendants were arrested by the Bijeljina Police Department following an incident and handed over to the Military Police who released them a couple of days later, after which the defendants went to an area in the Zvornik municipality, BiH and joined the paramilitary formation 'Simini četnici' (Simo's Chetniks).

proportionate to the seriousness of the offence committed, the degree of criminal responsibility of each defendant and the aim of punishment. The court remanded all defendants in custody pending an appeal, holding that the manner in which the crime was committed and its harmful consequences had upset the general public, and that if released from custody, the defendants could pose a threat to the fair and smooth running of this criminal trial.

Analysis of proceedings

At the time of writing it was not possible to make a more in-depth analysis of the judgment delivered in this case because the written judgment was not available to the HLC. The sentences pronounced can be deemed appropriate, particularly bearing in mind that the rapes, as one of the acts committed, have had serious and long-lasting consequences on the injured parties and their families.

2.2.*Lički Osik*

On 16 March 2012, the Higher Court in Belgrade delivered a judgment in the retrial of the *Lički Osik* case.[102] The accused - Čedo Budisavljević, Mirko Malinović, Milan Bogunović and Bogdan Gruičić – were found guilty of a war crime against the civilian population as co-perpetrators and sentenced as follows: Čedo Budisavljević and Mirko Malinović each to 12 years in prison, and Milan Bogunović and Bogdan Gruičić each to 10 years in prison.[103]

Course of proceedings

The TRZ[104] indictment of 25 June 2010, charged Čedo Budisavljević, Mirko Malinović, Milan Bogunović and Bogdan Gruičić, members of the MUP in SAO Krajina and the TO in Teslingrad, with the killing of five civilians in October 1991, on the territory of Teslingrad municipality (Lički Osik, RH). Defendant Čedo Budisavljević, as commander of a special unit of the MUP of SAO Krajina and deputy commander of the police station in Teslingrad, received an oral order from his superior officer, Dušan Orlović[105], to kill Mane Rakić and his sons Dragan and Milovan and daughter Radmila, who had been arrested on suspicion of possessing a radio transmitter and

[102] Members of the trial chamber: judge Vinka Beraha Nikićević (presiding), judge Snežana Nikolić Garotić and judge Rastko Popović.
[103] Following the issuing of this judgment, on 16 March 2011 the HLC issued a press release: "Defendants in the Croatian family murder in Lički Osik sentenced to 12 years each".
[104] The Office of the Attorney General of the Republic of Croatia transferred this case to the Office of the War Crimes Prosecutor of the Republic of Serbia in keeping with the Agreement on Mutual Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide.
[105] The court decided to try Dušan Orlović separately.

collaborating with Croatian forces, as along with their mother Lucija Rakić, who was not in detention. Together with defendants Mirko Malinović and Milan Bogunović, members of the TO in Teslingrad at the time, they, as they had previously agreed, went to Lucija's holiday house. While Malinović and Bogunović kept watch in the yard, Budisavljević entered the house and killed Lucija with a firearm, after which all three men burned her body and the holiday house. Several days later, defendant Čedo Budisavljević, together with defendants Mirko Malinović, Milan Bogunović, Bogdan Gruičić and Goran Novaković[106], went, as had been agreed, to the police station in Teslingrad, where Mane, Dragan, Milovan and Radmila Rakić were confined, duck taped their hands and mouth and then transported them to the Golubnjača cave, killed them with firearms and threw their bodies into the cave.

On 14 March 2011, the Higher Court in Belgrade found the defendants guilty, sentenced them each to 12 years in prison and remanded them in custody.

On 9 November 2011, the Court of Appeal in Belgrade, upon hearing appeals from both the TRZ[107] and the defense counsels of all the accused, delivered a ruling accepting the appeals, reversing the judgment and remanding the case to the trial court for a new trial.

During the retrial, which began on 12 March 2012, the court re-examined the defendants, who stood by their defense presented at the first trial, in its entirety

On 16 March 2012, the presiding judge, Vinka Beraha Nikićević, pronounced judgment, finding the defendants guilty of a war crime against the civilian population as co-perpetrators. Čedo Budisavljević and Mirko Malinović each were sentenced to 12 years in prison, and Milan Bogunović and Bogdan Gruičić were each sentenced to 10 years' imprisonment.

In the oral explanation of the judgment, the presiding judge said that the court had established beyond doubt that the defendants committed the offence that they were charged with. The defendant Budisavljević pleaded guilty to the crime and provided a detailed account of the role of each of the defendants in its commission, without downplaying his own responsibility at any moment. The court accepted his testimony in its entirety because it was corroborated by other evidence, such as the testimonies of witnesses Radomir Narandžić, commander of Teslingrad police station, Milan Mirić, a member of the TO in Teslingrad, and Milan Jakšić, an officer at the Gračac police station, as well as by physical evidence – autopsy and victim identification reports. Defendants Malinović, Bogunović and Gruičić denied committing the crime but did not deny having been present at the crime scene at the time of the crime. The court did not give credence

[106] The court decided to try Goran Novaković separately.
[107] Deputy War Crimes Prosecutor Dušan Knežević.

to their testimonies finding them to be unconvincing and aimed at either escaping criminal liability or minimizing it.

The court did not consider evidence regarding the existence of an order to kill members of the Rakić family, since the prosecution and the defendants at the preliminary hearing had agreed that this fact was not in dispute.[108] On the basis of Budisavljević's testimony, given in his own defense and the testimony of witness Đorđe Momčilović, an officer at the Teslingrad police station, who both confirmed that the defendants had socialized together and "acted as a clan", it was established beyond a reasonable doubt that there had been an agreement between the defendants to execute the members of the Rakić family. Assessing the defendants' mental attitude towards the crime, the court established that they had acted with direct intent. In determining the sentence for Budisavljević, the court accepted that his guilty plea, his contribution to the fact finding process, his family circumstances and lack of previous convictions should be taken in account for mitigation. Family circumstances, ill health and lack of lack of previous convictions were assessed as mitigating factors in the cases of indictees Malinović, Bogunović and Gruičić. The fact that the entire Rakić family was murdered, the ruthlessness that the defendants demonstrated by throwing the bodies of Mane, Dragan, Milovan and Radmila Rakić into a cave and the callousness that Budisavljević, Malinović and Bogunović demonstrated by torching the body and holiday house of Lucija Rakić were all assessed as aggravating factors for all the defendants. The court decided to release them from detention pending an appeal, holding that their release could not cause disturbance among the general public that could jeopardize the fair and smooth running of the criminal proceedings against the defendants.

Analysis of proceedings

An in-depth analysis of the judgment delivered following the retrial was not possible at the time of writing of this report, because the HLC, which monitored the trial, did not have access to the first-instance judgment in this case. Assessing the operative part of the judgment and the reasons behind the judgment presented during its pronouncement, the HLC holds that the trial court for the most part rectified the irregularities found by the Court of Appeal. As at the preliminary hearing, neither of the parties to the proceedings challenged the fact that there existed a verbal order to kill members of the Rakić family, issued by Dušan Orlović. This fact was taken as undisputed. In this way, the court removed the deficiencies with respect to exceeding the charges,

[108] According to Article 349 of the CPC, at a preliminary hearing the defendant pleads on the indictment and may contest some of its counts, stating which of the counts he/she contests, because only evidence relating to the contested counts of the indictment will be considered at the trial. Therefore the facts that have not been disputed by the defendant and the prosecution during the pre-trial stage are not examined at the trial stage.

violation of Budisavljević's right to defense and establishing the facts concerning the existence of the said order. Also, the court corrected the error regarding the fact that the victims of the murder were civilians who played no part in the hostilities, which is one of the elements of the offence, as an aggravating circumstance. This error was corrected in the judgment following the retrial.

In respect of the sentences imposed and all the circumstances the court took into account at sentencing, it could be said that the sentences are not proportionate to the type and seriousness of the offence committed, in particular with regard to the accused Čedo Budisavljević. He received 12 years in prison, and his guilty plea was considered a mitigating circumstance. In order for a guilty plea to be considered a mitigating circumstance, it should be not only formal, but reflect the defendant's mental attitude towards his acts, manifested by a sincere remorse and corresponding behaviour throughout the proceedings. In the case of Budisavljević, he showed arrogance when asking questions of his co-defendants and witnesses and in his tone of speech. He said he was sorry for the Rakić family, but when asked by the presiding judge whether there could have been other solutions to the problem, other than murder, he replied: "There was, that is what I am saying; the only thing I did wrong was that I didn't set up a court martial to bring them there, to Lički Osik, at noon, and execute them with a written order, so that when you brought me here and asked why I did it, I could show you the piece of paper and say – this is why". As it was apparent that the defendant felt no remorse for his acts, his guilty plea should not have been considered as a mitigating factor. Given that Budisavljević took a direct part in the cold-blooded and premeditated murder of five members of a family, the ruthlessness he showed in the execution of the crime and the fact that at the time of the occurrence he was deputy commander of the police station in Teslingrad, and it was his duty was to prevent criminal offences and protect every citizen, he should have been given a much stiffer sentence.

2.3.*Mark Kashnjeti*[109]

The Higher Court in Belgrade[110] found Mark Kashnjeti guilty of committing a war crime against the civilian population[111] and sentenced him to two years in prison.

Course of proceedings

An amended (reduced) indictment from the TRZ[112] of 11 May 2012 against Mark Kashnjeti alleged that Kashnjeti, having joined the KLA after 10 June 1999, on 14 June 1999, wearing a uniform and armed, in the company of a group of unidentified KLA members, stopped a vehicle

[109] K- Po2 -3/2012.
[110] Members of the trial chamber: judge Vinka Beraha Nikićević (presiding), judge Snežana Nikolić Garotić and judge Rastko Popović.
[111] Under Article 142 (1) of the CC of the FRY, in conjunction with Article 22 of the CC of the FRY.
[112] Deputy War Crimes Prosecutor, Dragoljub Stanković.

carrying Božidar Đurović and Ljubomir Zdravković in Alsani Durmishi Street in Prizren (Kosovo). Đurović and Zdravković were ordered from the car, frisked, had their their identity documents taken away and their hands with a rope. Kashnjeti, together with other members of the KLA, allegedly struck the two men with rifle butts to the head and body, and took them at gunpoint toward a yard where they kept them for several hours. After that, Kashnjeti drove the two men, along with Miroslav Jovanović, whom unidentified KLA members had confined earlier in the same yard, to Ortokol a suburb of Prizren, and ordered all three of them to go to Serbia, taking away their car and everything that was in it.

The trial of Kashnjeti commenced on 13 September 2012. Over the course of the four trial days held in 2012 eight witnesses were heard.

The accused denied having committed the offence and claimed to have never worn a KLA uniform and to have never been a member of the KLA. He said he had been in a bookstore owned by his friend Lir Bytyqi at the time of the event in question. As for a photograph published in a newspaper allegedly showing him as one of the of KLA members escorting the injured parties, he said he had seen it before but the soldier in the photograph was not him and he was a victim of mistaken identity. He visited Serbia several times after seeing the photograph, and had never had any problems until his arrest.

The court heard the injured parties Božidar Đurović and Ljubomir Zdravković and witnesses Miroslav Jovanović, Nenad Dimitrijević, Milan Petrović, Lir Bytyqi, Kemal Baca and Zef Kashnjeti.

The injured party Đurović did recognize the accused either during the investigation or the trial, but stated that the persons who had arrested them were between 25 and 30 years old, whereas the accused was 46 at the time of the event. Đurović was not able to describe what the accused looked like at the time of the event, nor could he explain how he could possibly recognize a person whom he was unable to describe.

Photo taken on 14 June 1999 that, according to the first-instance judgment, shows Mark Kashnjeti.

A photo of Mark Kashnjeti taken in 2004

The injured party Zdravković, who was with Đurović for the entire duration of the event in question, stated that he did not know the accused. He also said that he had not been beaten by anybody and that he had not noticed Đurović being beaten either. Witness Jovanović, who was with the injured party from the moment they came to the yard, also said he did not know the accused.

Witness Milan Petrović, former chief of the Criminal Police Department in Prizren, now an employee of the MUP's Department of War Crimes, had no knowledge of the event in question. He gave his assessment of the overall situation in Kosovo at the time of the event in question, although he said that he had left Kosovo, on 14 June 1999. He also said that the person in the photograph was Kashnjeti, and that he recognized him because, as a former policeman in Prizren, "my job was to remember people's faces" and because Kashnjeti had a look that was "not characteristic of an Albanian".

Witness Nenad Dimitrijević, a member of the Serbian MUP, said that while he was taking a statement from the injured party, Božidar Đurović, he saw that Đurović had the photograph of Kashnjeti published in newspapers. Witness Zef Kashnjeti, brother of the accused, said that his brother had never been a KLA member, nor had he worn its uniform or ever borne arms. Witnesses Lir Bytyqi and Kemal Baca, friends of the accused, stated that in the relevant period Kashnjeti had visited the bookstore in which they worked on an almost daily basis, and spent a

lot of time with them. To the best of their knowledge, the accused did not have a uniform and was not armed. They did not recognize any of the faces in the photograph the court presented to them.

After pronouncing the judgment, Judge Vinka Beraha Nikićević, who presided over the chamber, outlined the reasons the chamber was guided by in deciding on the judgment.

The court established that over the course of proceedings it had been established beyond doubt that the accused had committed the act for which he was indicted and in the manner specified in the amended indictment. The chamber did not accept the accused's defence, considering it unconvincing, contradictory to the testimonies of the injured parties and witnesses, and aimed at evading criminal responsibility. The chamber gave credence to the testimony of the injured party Đurović, who, at identification and confrontation, as well in the photograph published in the daily newspaper *Blic* and *Ilustrovana politika* magazine identified the accused as the person who had unlawfully detained and beat him, because his identification was corroborated by other witnesses. That the event occurred in the manner described by Đurović was confirmed by the testimony given by the injured party Zdravković. Witness Jovanović confirmed elements relating to the events that occurred during the confinement of the injured parties in the yard. Witness Milan Petrović, also identified the accused as the person shown on the photograph published in the press. The chamber did not give credence to the testimonies of witnesses Kemal Baca and Lir Bytyqi, friends and neighbors of the accused, considering them very vague, unconvincing and aimed at helping the accused, by corroborating his alibi, particularly so, given that witness Kemal Baca is an old and close friend of the accused. It was established that the accused, uniformed and armed, joined KLA members after they had moved into Prizren, although there was no evidence indicating that the accused was a KLA member. The court found the accused's participation in the detention of the injured parties, as civilians, to be unlawful and motivated solely by the ethnicity of the injured parties. By unlawfully detaining the injured parties and violating their bodily integrity, the accused treated them in an inhumane manner and thus violated international law.

Assessing the mental state of the accused with regard to the criminal act, the court reached a conclusion that the accused was aware of his act and intended to commit it, and therefore established the existence of a direct intent.

In determining sentence, the court did not find any aggravating circumstances. The accused's family situation, the fact that he is father of six adult daughters, that the injured party did not suffer from any harmful consequences and that 13 years passed since the commission of the act, were considered as particularly mitigating factors, and hence the accused was given a reduced sentence, even below the statutory minimum for this offence.

Analysis of proceedings

At the time of writing, a thorough analysis of the judgment could not be made as the HLC does not have this judgment in writing. However, analysis of the proceedings of this trial and the evidence presented, ithe HLC suggests that the court's decision, finding the accused guilty was based on the uncompelling testimony of the injured party Đurović and the MUP employee, Petrović, who had no knowledge of the event itself.

The initial indictment against Mark Kashnjeti included allegations that are more usually found in ICTY indictments of participation in a joint criminal enterprise. For instance, the initial indictment stated that the accused had committed the above described act "as a member of the KLA, with the intention of compelling the Serbian population by force and at gunpoint to leave the territory of Prizren municipality and thus contribute to attainment of a common goal: to bring the territory of Kosovo and Metohija under full KLA control and expel the Serbian population from that area". The explanatory section of the initial indictment does not set forth evidence supporting such allegations, so it cannot be ascertained how the accused's membership of the KLA was proved. There is also no evidence presented which supports the allegation of the existence of a common goal to expel the Serbian population from Kosovo or the accused's intention to contribute to the attainment of that goal. Nor is it possible to conclude on the basis of the charges set forth in the indictment who the third person taken, together with the injured parties Đurović and Zdravković to the Ortokol suburb was. That person, i.e. witness Jovanović is only mentioned in the explanation of the indictment.

In the course of presentation of evidence for the prosecution, following the examination of the injured parties and witness Jovanović, who had failed to confirm the allegations set forth in the initial indictment that Kashnjeti had threatened to kill them unless they left Prizren, or that Serb inhabitants of Prizen were by force and at gunpoint made to leave Prizren, the TRZ proposed calling Milan Petrović, the former chief of the Criminal Police Department of the Prizren SUP, and now an employee of the War Crimes Department of the Serbian MUP, as a prosecution witness. The TRZ explained that: "he is acquainted with the behaviour of the accused between 10 and 20 June 1999". The prosecutor called Petrović "a competent witness as he had served as a policeman in Prizren". Contrary to the TRZ's explanation, this witness said nothing about the circumstances he was called to testify about, but as a former policeman, gave his view of the overall situation in Kosovo at the time of the event in question.

Having, from the initial indictment, failed to prove the charges of participation in a joint criminal enterprise, the TRZ amended the indictment before the closing arguments were presented, and reduced it to "membership in the KLA and treatment of civilians that was not always humane". In his closing argument, the prosecutor said that he based his case on the testimony of witness Petrović, stating, among other things, that "the accused took up arms and joined the KLA upon his arrival in Prizren, something which, he said, can be inferred from the testimony of witness Petrović about the conduct of local Albanians at the time when the KLA moved into Prizren and

that the activities that the KLA took were the activities they were habitually taking in other locations in Kosovo".

It is debatable whether the chamber should have agreed to admit Petrović's identification of Kashnjeti at the main hearing into evidence. During Petrović's testimony, the chamber showed him a photograph which, according to the TRZ, showed Mark Kashnjeti. Petrović recognized Kashnjeti in the photograph. This identification of the accused by witness Petrović cannot have any probative value because the picture in question had appeared in almost all the media long before Petrović's testimony, with clear captions indicating that the person in the photograph was the person claimed by the TRZ to be Kashnjeti.

2.4. *Bytyqi*[113]

On 9 May 2012, the Higher Court in Belgrade[114] delivered a judgment in the *Bytyqi case* retrial, acquitting Sreten Popović and Miloš Stojanović of charges of committing a war crime against prisoners of war.[115]

Course of proceedings

On 23 August 2006, the TRZ indicted Sreten Popović and Miloš Stojanović[116] for a war crime against prisoners of war.

According to the indictment, Sreten Popović, who at the time was platoon commander of the Operational Pursuit Group (OPG), part of the 124th intervention brigade of the Serbian MUP's PJP, and Miloš Stojanović, commander of a squad in the same platoon, deprived the injured parties - brothers Agron, Ylli and Mehmet Bytyqi, members of the 'Atlantic Brigade' volunteer group, part of the KLA – of their right to a fair trial and subjected them to inhuman treatment and mental torture. Specifically, Sreten Popović, acting on orders received from his superior officer, Vlastimir Đorđević, a General in the Serbian MUP, ordered Miloš Stojanović to detain the victims on their release from the District Jail in Prokuplje, where they had served their prison term for a misdemeanour and transport them to the PJP training grounds in Petrovo Selo near Kladovo (eastern Serbia). Miloš Stojanović did so on 8 July 1999 and drove the victims to the training centre in Petrovo Selo, where he handed them over to Sreten Popović. Stojanović and Popović locked the brothers up in a warehouse facility within the centre, lacking basic sanitation, and without informing them of the reasons for confinement, because of which the victims felt unbearable fear for their lives and bodily integrity. Popović then handed the injured parties over

[113] K-Po2 51/2010.
[114] Members of the trial chamber: judge Rastko Popović (presiding), judge Vinka Beraha Nikićević and judge Snežana Nikolić Garotić.
[115] Aiding and abetting in the commission of a war crime against prisoners of war under Article 144 of the CC of FRY in conjunction with Article 24 of the CC of the FRY.
[116] Deputy War Crimes Prosecutor Dragoljub Stanković.

to unidentified members of the MUP and Special Anti-Terrorist Units (SAJ), although he could have known that they would kill the injured parties summarily, without trial. The members of the MUP and SAJ tied up the victims with wire, took them to a waste pit some 500 meters away from the centre and killed them by shooting them in the back of the head.

On 22 September 2009, the District Court in Belgrade[117] delivered a judgment acquitting the accused because it had not been proven that they had committed the offence for which they were indicted.

Having considered the appeal lodged by the TRZ, the Court of Appeal in Belgrade handed down a ruling accepting the appeal, reversing the trial court judgment and remitting the case to the trial court for a new trial.

Giving its reasons for its decision, the Court of Appeal stated that the trial court substantially violated the provisions of the criminal procedure in several respects: the disposition of the judgment was contradictory to the reasoning, the judgment failed to state the reasons regarding the decisive facts, and the reasons that were provided were unclear.

At a new trial, which began on 23 September 2011, the accused were heard again and 10 witnesses were questioned.

The TRZ further amended the indictment on 5 April 2012, redefining the acts of the accused as acts violating the norms of international law regarding the treatment of prisoners of war and intentional aiding and abetting of unidentified members of the police to deprive the victims of life thereby depriving them of the right to have a proper and unbiased trial.

On 9 May 2012, judge Rastko Popović, who presided over the trial chamber, read out a judgment acquitting the defendants in the *Bytyqi* case retrial. In his oral statement of the reasons behind the judgment, judge Popović said that the TRZ had failed to prove that the accused had committed the crime for which they were indicted or that the murder of the brothers Bytyqi had been committed in connection with the armed conflict, since the armed conflict ended on 20 June 1999 with the withdrawal of VJ and Serb police forces from Kosovo, and the brothers Bytyqi had been arrested on 26 June 1999. The chamber found that the accused were not aware that the injured parties were prisoners of war. "Owing to contradictions and incoherence in the indictment, it was not possible to ascertain when and where the victims were murdered, nor who murdered them; the only thing that was established is that their mortal remains were found in 2001 in a mass grave located in Petrovo Selo". The presiding judge emphasized that the Bytyqi brothers were arrested while performing a humane act – helping two Roma families get from Kosovo to Serbia, where they wanted to seek refuge. The presiding judge emphasized that it was up to the TRZ to find out who killed the Bytyqi brothers and on whose orders.

[117] Members of the trial chamber: judge Vesko Krstajić (presiding), judge Vinka Beraha Nikićević and judge Snežana Nikolić Garotić.

Analysis of proceedings

In the HLC's opinion, this case was marked by the MUP's efforts to deflect responsibility for this crime away from their former high-ranking officials and by half-hearted prosecution efforts.

The TRZ accused Popović and Stojanović of aiding and abetting the commission of the crime. The facts established during the trial suggest that taking the Bytyqi brothers from prison in Prokuplje and bringing them to the training centre in Petrovo Selo where they were handed over to some as yet unidentified members of the Serbian MUP and subsequently killed, was something that could not have been done without the knowledge of senior officials of the Serbian MUP. It follows that this was a well-organized action involving various individuals in the police line of authority.

The accused indeed had a supporting role in the commission of this crime, and commanding officers and direct perpetrators were not indicted. The TRZ failed to carefully look into the responsibility of Goran Radosavljević a.k.a. 'Guri', who at the time of the event was the commander of the training centre in Petrovo Selo. Although he was absent from the centre while the Bytyqi brothers were there, given the position he held, he ought to have known who came to the centre and when, on whose orders and how the mass grave in Petrovo Selo was created.

The Deputy Prosecutor assigned to the case said in his closing argument that he "regrets to say that the Serbian MUP is not even today willing to offer accurate information on the perpetrators of this crime" and that "the very same people who were involved in this crime are still with the MUP, some of them were even promoted". The HLC notes that the TRZ' is bound by law to prosecute perpetrators of crimes and not to voice its regret over the lack of willingness on the part of the MUP to disclose information, because the TRZ has mechanisms to prevent the MUP from doing so.[118] The unprofessional performance by the TRZ in this case is also reflected in the fact that the TRZ amended the indictment three times after the Higher Court and Court of Appeal had found it to be imprecise and contradictory.

There is a suggestion that this case was opened and tried purely for the purpose of offering some sort of satisfaction to the United States government which had demanded that the murder of the Bytyqi brothers, who were US citizens, be prosecuted. The final outcome of this trial, however, is a mockery of justice, aimed at protecting high-ranking officers of the Serbian MUP from criminal responsibility.

[118] Article 7 of the Law on Organisation and Jurisdiction of Government Bodies in War Crimes Processing stipulates that all government bodies and organisations are obliged, on the request of the TRZ, to submit any written document or evidence that they posses, or in any other way provide information that may help in the identification of war crimes perpetrators.

2.5. *Lovas*[119]

On 26 June 2012, the Higher Court in Belgrade[120] delivered a judgment, finding 14 defendants guilty of committing the criminal offense of a war crime against the civilian population[121], sentencing them to the following prison sentences: Ljuban Devetak (20 years), Milan Devčić (10 years), Milan Radojčić (13 years), Željko Krnjajić (10 years), Miodrag Dimitrijević (10 years), Darko Perić (5 years), Radovan Vlajković (5 years), Radisav Josipović (4 years), Jovan Dimitrijević (8 years), Saša Stojanović (8 years), Zoran Kosijer (9 years), Dragan Bačić (6 years), Petronije Stevanović (14 years) and Aleksandar Nikolaidis (6 years).

Course of proceedings

The TRZ[122] issued its first indictment for the crimes committed in October and November 1991 in Lovas (Croatia)[123] on 28 November 2007[124] and then amended it substantially on 28 December 2011.

The accused, Željko Krnjajić, is charged that, on 10 October 1991, in his capacity as commander of the Tovarnik police station (in the municipality of Vukovar), he was in command of an armed group, composed of some twenty officers from the police station in Tovarnik and a number of Lovas villagers and volunteers, which carried out an attack on Lovas, under the orders of the commander of the 2nd Proletarian Guard Motorized Brigade of the JNA, killing seven persons of Croatian ethnicity and torching seven houses.

Ljuban Devetak, Milan Devčić and Milan Radojčić were charged with establishing a new, self-proclaimed and *de facto* civilian-military government upon assuming control over Lovas. As a part of this structure, Ljuban Devetak, in his capacity as commander of the village and director of the Agricultural Cooperative, Milan Devčić in his capacity as commander of the police station, and Milan Radojčić as commander of the Lovas Territorial Defense Force, in the period between October and November 1991 undertook discriminatory measures against the Croat civilian population, ordering members of the TO, militia and the 'Dušan Silni' (*Dusan the Great)* volunteer group to unlawfully arrest, confine, interrogate and torture a number of Croat civilians, with Ljuban Devetak additionally ordering killings.It is additionally alleged that all three abetted these crimes by not preventing those events from happening. The consequences of this conduct were the killing of 18 civilians at the hands of members of all three armed groups, in various locations in Lovas.

[119] K-Po2-22/10.
[120] Members of the trial chamber: judge Olivera Andjelković (presiding), judge Tatjana Vuković and judge Dragan Mirković.
[121] Article 142 (1) of the CC of the FRY and Article 22 of the CC of the FRY.
[122] Deputy War Crimes Prosecutor Veselin Mrdak.
[123] Lovas is now a municipality in the Vukovar-Srem County in Eastern Slavonia, not far from Vukovar.
[124] A full version of the indictment is available on the TRZ website at: www.tuzilastvorz.org.rs

Ljuban Devetak, at the time an active military commander with the rank of lieutenant colonel and coordinator for combat operations of the Valjevo TO, and Miodrag Dimitrijević, the military officer holding the most senior rank in Lovas, were charged with having jointly made the decision on 17 October 1991 to confine a large number of civilians in the courtyard of the Agricultural Cooperative, where members of the *Dusan the Great* volunteer group physically abused them. Furthermore, the TRZ also charged Ljuban Devetak and Miodrag Dimitrijević with making a decision on 18 October 1991 to have an armed group composed of members of the Sabateurs Squad of the Valjevo TO and members of the *Dusan the Great* armed group undertake a search mission on the terrain, using detained Croat civilians as 'human shields' against potential attacks of Croatian forces.

The TRZ charged three members of the counter-diversion squad of the Valjevo TO - Darko Perić as commander, Radovan Vlajković as a company commander and Radisav Josipović, as commander of the first platoon of the same company, as well as members of the *Dusan the Great* volunteer unit, among whom were the accused Jovan Dimitrijević, Saša Stojanović, Dragan Bačić, and Zoran Kosijer - with participating, jointly with 40 members of the Valjevo TO and the *Dusan the Great* unit, in a search mission on 18 October 1991 during which they used 50 Croatian civilians as 'human shields'. The civilians were taken to a field of clover the accused suspected to have been mined and were ordered to enter it, pushing the clover apart. When one of the mines exploded, members of the Valjevo TO and the *Dusan the Great* group present at the time, opened fire on the civilians. In the resulting explosions and gunfire 18 civilians were killed and another 12 were wounded.

The TRZ charged Aleksandar Nikolaidis and Petronije Stevanović, as members of the *Dusan the Great* armed group, with unlawful detention and confinement of Croat civilians and having physically abused and harmed their human dignity between 10 and 18 October 1991. They were also charged with having participated in the murder of an unspecified number of civilians, pursuant to an order from the accused, Ljuban Devetak, between 14 and 18 October 1991 in the village of Lovas, when Aleksandar Nikolaidis killed at least one and Petronije Stevanović killed at least five persons.

The trial of this case commenced on 17 April 2008. Over the Course of the proceedings 194 witnesses were heard, the written testimonies of 36 witnesses, deceased or ill, were read out, military expert witness were examined and several thousand pages of written evidence were read out.

On 26 June 2012, Judge Olivera Anđelković, who presided over the chamber, said, in pronouncing the judgment, that the court had found that the attack on Lovas had been carried out on 9 October 1991, pursuant to an order from the command of the JNA's 1st Proletarian Guard Motorized Division, given to the command of the JNA's 2nd Proletarian Guard Mechanized Brigade, to "take care of the village of Lovas relying on their own forces". The order to attack Lovas, issued by the commander of the 2nd Proletarian Guard Mechanized Brigade of the JNA, Dušan Lončar, on that same day required that the "supporting forces" – the TO and militia in

Tovarnik, including the armed group *Dusan the Great* which formed a part of it – also participate in the attack alongside the 2nd Proletarian Guard Mechanized Brigade of the JNA, with the purpose of "cleansing the village of the Croatian National Guard (ZNG) and Croatian MUP members", as well from its "hostile residents". The howitzer battery of the 2nd Proletarian Guard Mechanized Brigade of the JNA also took part in the attack on Lovas on 10 October 1991, firing some ten shells. As a result of the artillery fire, one civilian was killed and another wounded.[125] During the "cleansing" of the village, carried out by the "supporting forces", 20 civilians died – all villagers of Croatian nationality, who were taken from their homes and killed on the street or in their yards. The trial chamber established beyond doubt that no members of the ZNG or the Croatian MUP had been present in the village of Lovas at the time. Furthermore, except for sporadic resistance, there was no organized defense in the village.

The chamber reached the conclusion that "the command of the Second Proletarian Guard Mechanized Brigade of the JNA was to be held primarily responsible for the attack on Lovas, the manner it was carried out and everything that had happened during the said attack, despite the fact that none of its members was indicted for it."

The court also found that the accused Željko Krnjajić took part in the attack on the village of Lovas on 10 October 1991 as commander of the Tovarnik police station, in command of an armed group, composed of some twenty officers from the police station in Tovarnik and a certain number of Lovas villagers and volunteers. The group controlled several streets in Lovas. During the assault, Krnjajić ordered members of the group to shoot at houses in a random and indiscriminate manner, while he himself did the same thing. He also allowed them to throw hand grenades at civilian facilities, which resulted in the houses of six Croatian villagers being burned. The court found that there was no evidence as to when, how and who set fire to the house of Ilija Baketa. The court also established that the accused, Krnjajić, during the attack on the village of Lovas, together with members of his group, forced civilians from their homes, took them to the Agricultural Cooperative, and threatened to murder some of them. Krnjajić was found responsible for the murder of seven civilians[126] who were taken from their homes and killed in their yards or the streets, by members of his group who had control over the said streets.[127]

The chamber found that a new local government had been established following the occupation of Lovas. Ljuban Devetak was appointed commander of the village and manager of the Agricultural Cooperative with broad powers in military and civil matters. He had the strongest *de facto* power in the village. The accused Milan Radojčić was appointed commander of the TO in Lovas and the accused Milan Devčić commander of the police station. The Lovas militia and TO included local Serbs and volunteers from the armed group *Dusan the Great*, who took part in the attack on the village or arrived later. During the events, the village was secured by reserve forces of the JNA from Serbia, one company of the Ljig TO and the Lajkovac TO, as well as a tank

[125] Serb Milan Latas was killed and Croat Marija Vidić was wounded.
[126] Mirko Grgić, Danijel Badanjak, Cecilija Badanjak, Josip Poljak, Vid Krizmanić, Ivan Ostrun and Pavo Đaković.
[127] Petra Preradovića Street, Marka Oreškovića (now Vukovarska)Street, Ive Lole Ribara (now Ante Starčevića) Street, Franje Račkog Street and Kralja Tomislava Street.

company of the 1st Armoured Battalion of the 2nd Proletarian Guard Mechanized Brigade of the JNA.

Between 10 and 18 October 1991, Milan Devčić and Milan Radojčić, with the support of the TO, the newly established militia and the *Dusan the Great* volunteer group, unlawfully arrested Croatian civilians and ordered humiliating and discriminatory measures be taken against them, obliging them to mark their houses with white cloths and making them wear white bands around their arms.

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The Court defined as inhuman treatment, the order of Ljuban Devetak to subject the Croat civilian population to work assignments, forcing them to work in the fields and to collect the corpses of their fellow nationals in the presence of those who had killed them, and throw the corpses into the ditch at the local cemetery, all under armed escort.

It was established that Devetak, Devčić and Radojčić, during October 1991, had subjected seven civilians to physical and mental abuse in order to extract from them information about whether their family members belonged to the Croatian armed forces.

The Court also established that Devetak, Devčić and Radojčić had taken part in the killing of the civilians. On an unspecified date in October 1991, Ljuban Devetak personally ordered members of the *Dusan the Great* group to kill civilians Snežana Krizmanić and Marina and Katarina Balić. Between 14 and 18 October 1991, Devetak and Milan Devčić made a 'liquidation list', following which members of the *Dusan the Great* armed group, between 16 and 18 October 1991, killed 16 civilians[128]. On an unspecified date in November 1991, unidentified members of the *Dusan the Great* armed group, following an order from Ljuban Devetak, killed Zvonimir Martinović. The court found no evidence indicating when and on whose order Zoran Krizmanić had been killed, or whether Devetak ordered the murder of Stjepan Luketić.

It was established that the accused Devetak and Miodrag Dimitrijević, on the morning of 17 October 1991, made an agreement on and subsequently issued orders (Ljuban Devetak to certain members of the *Dusan the Great* armed group and Miodrag Dimitrijević to Perić, commander of the Sabateurs Squad of the Valjevo TO) to confine the villagers of Croatian ethnicity in the yard of the Agricultural Cooperative in order to find culprits for "nocturnal armed provocations".

The Court also established that the defendant Ljuban Devetak caused the defendant Petronije Stevanović and a number of members of the *Dusan the Great* group to physically abuse Croatian civilians confined in the yard of the Agricultural Cooperative by showing, on the night of 17-18 October 1991, video footage of the celebration of the Croatian Democratic Union (HDZ) anniversary, in the village of Lovas, and telling members of the *Dusan the Great* group present at the time: "Well, brothers, let's see now who our enemies are". Thereafter, members of the *Dusan*

[128] The following persons were killed: Darko Pavlić, Željko Pavlić, Marko Damjanović, Josip Jovanović, Petar Luketić, Đuka Luketić, Alojz Krizmanić, Stipe Dolački, Đuro Krizmanić, Franjo Panđo, Andrija Devčić, Marija Fišer, Ivan Vidić, Marin Balić, Katarina Balić and Anton Luketić.

the Great group went to the Agricultural Cooperative where the Croatian civilians were confined. In the presence of Devetak, they attacked the Croatian civilians they had seen in the video footage, punching and kicking them and hitting them with cables and metal bars, while the accused Stevanović stabbed six civilians[129] with a knife. The accused Nikolaidis joined the group of *Dusan the Great* members who were beating civilians, and hit the civilians with a rifle butt.

The defendants Devetak and Dimitrijević, in a meeting held on the evening of 17 October 1991, made a decision to send the Sabateurs Squad of the Valjevo TO, the *Dusan the Great* volunteer group, and two members of the Lovas TO to search the terrain around the vineyards[130], using the Croatian civilians who were confined in the Cooperative using them as "human shields" in case of an attack by Croatian armed forces, although they knew that the area had been mined on 13 October 1991 by the JNA. The defendant Dimitrijević ordered the defendant Perić, commander of the Sabateurs Squad of the Valjevo TO, which arrived in the village of Lovas on 17 October 1991, carry out that action together with members of the *Dusan the Great* volunteer group. On the following day, 18 October 1991, on the orders of commander Perić, Vlajković and Josipović arrived at the Cooperative with some 50 soldiers. Members of the *Dusan the Great* volunteer group, namely Jovan Dimitrijević, Stojanović, Bačić and Kosijer, joined them there, carrying orders from an un-named person, to use the civilians as a 'human shield' to demine the minefield. Upon reaching the minefield, members of the *Dusan the Great* armed group ordered the civilians to enter it, holding hands, pushing away the clover with their feet and stop upon noticing a mine. Josipović and Vlajković, despite having realized that the civilians would be used for mine clearance and despite not having been ordered to do so, continued taking part in that action together with their soldiers. After the mines began exploding as a result of the civilians stepping on them, members of the TO and the *Dusan the Great* group opened fire on the survivors, killing 17 of them[131], and leaving another 11 seriously or lightly wounded [132]. Following the killing and wounding of the civilians, Saša Stojanović ordered the clearance of the remaining unexploded mines, giving instructions to those civilians who had not been injured how to do it. About 15 mines were deactivated in this way. The Court could not establish whether civilian Petar Badnjak, listed among 18 victims in the amended indictment, died on the minefield since none of the witnesses-injured parties who survived the minefield incident could confirm with certainty that Badnjak was there.

Following orders issued by Devetak, Stevanović took part in the killing of at least five civilians, and Nikolaidis of at least one Croatian civilian between 16 and 18 October 1991. The court established that Petronije Stevanović took part in the killing of six persons – Petar Luketić, Đuka Luketić, Alojz Krizmanić, Stipe Dolački, and Marin and Katarina Balić. However, in order to

[129] Ivica Đaković, Boško Bođanac, Marin Madžarević, Zlatko Toma, Ivan Vidić and Anton Krizmanić.
[130] The vineyards are located on the outskirts of the village of Lovas, in the direction of the Šid - Vukovar highway.
[131] Marijan Marković, Tomislav Sabljak, Ivan Sabljak, Marko Sabljak, Zlatko Panjik, Antun Panjik, Darko Solaković, Ivan Palijan, Slavko Kuzmić, Zlatko Božić, Marko Vidić, Mato Hodak, Slavko Štrangarević, Mijo Šalaj, Ivan Kraljević and Josip Turkalj.
[132] Stanislav Franković, Ivan Mujić, Zlatko Toma, Ljubomir Solaković, Josip Gerstner, Mato Kraljević, Josip Sabljak, Emanuel Filić, Milko Keser, Milan Radmilović and Marko Filić.

maintain consistency with the indictment (which charged Stevanović with taking part in the killing of five civilians), the chamber found him guilty of taking part in the killing of at least five persons.

In determining the type and severity of the penalty to be imposed on him and bearing in mind his role in the crimes committed, the court gave Ljuban Devetak the maximum sentence of 20 years' imprisonment. The aggravating circumstances included the number of crimes committed, the high degree of responsibility of the accused, the fact he held the broadest authority and *de facto* possessed the greatest power in the village of Lovas and that he encouraged, in a most perfidious way, other defendants to commit crimes. His activities resulted in the death of 30 persons, in some cases these were two or three members of the family or parents of persons fighting for the opposite side in the armed conflict or who were members of the HDZ, "by which he showed a peculiar cowardice and a high degree of revengefulness and ruthlessness". Furthermore, the court took into account Devetak's conduct during the trial, and his offensive behaviour towards some of the injured parties and witnesses on a couple of occasions. The court also found some mitigating circumstances, including the defendant's family status and ill health.

In determining the sentences for the other defendants, the Court considered their family circumstances, their lack of previous convictions, age or their guilty plea as mitigating circumstances. The number of the civilians killed and/or their high degree of responsibility, given the positions they held at the time of the crime, were held to be aggravating circumstances.

In determining the sentences for all the accused, the Court also took into consideration the amount of time that had passed since the criminal acts, during which the majority of them had returned to normal family life. The Court gave significant weight to prevailing circumstances in the country at the time of crime, with pressures from the media and other sources as factors that contributed to this and similar crimes.

Speaking of the notable features of this trial, the presiding judge noted that it was marked by "shameful testimonies given by the JNA officers and their even more shameful conduct at the time of the events. Although they could have best explained in court what had happened in the village of Lovas and why so many civilians had been killed in such a short time, they all seemed to be suffering from amnesia while in the courtroom; moreover, at the time of the events in question they did not even bother to count the victims killed in the minefield or record their names; instead they allowed their bodies to be thrown into a trench dug out in the cemetery, as if they were animals". It was also noted that "the Office of the Military Prosecutor attempted to cover up this incident by archiving a criminal complaint submitted as early as 1991 by the Security Department concerning this event".

Analysis of proceedings

Although the proceedings before the first-instance court lasted for more than four years, it should be noted that this has been one of the most complex trials ever conducted before the Higher Court in Belgrade, because the indictment included several events that took place over a prolonged

period of time (almost a month), with a large number of injured parties, witnesses and accused. Furthermore, the trial chamber was faced with an indictment that did not offer much evidence, something also noted by the presiding judge in her explanation of the judgment. During the evidentiary hearing, the chamber would often *ex officio* summon witnesses that the TRZ should have put forward for examination. Over the Course of proceedings, a total of 198 witnesses were heard, of whom 76 testified via video link because they declined to appear before the Higher Court in Belgrade. The trial was prolonged owing to some abuses of procedural rights by indictees and their defense counsels, resulting in the need to repeat some elements.

This trial was distinguished, on one side, by the high level of professionalism demonstrated by the trial chamber and by the serious deficiencies in the work of the TRZ, on the other. The chamber itself pointed out some of those deficiencies.

In its first indictment (filed on 28 November 2007), the TRZ included the killings of 69 civilians, but offered no evidence regarding the circumstances under which many of those events had happened, so throughout the proceedings the chamber took on the role of prosecution, particularly in searching for witnesses and obtaining the necessary documentation.

The enormous effort that the chamber invested in establishing the whole 'material truth' for the most part remained fruitless. When the proceedings were well into their fourth year, and evidence examination was drawing to its end, the TRZ amended the indictment reducing some of the actions for which defendants were charged, and in consequence reducing the number of killed civilians included in the indictment from 69 to 44, despite the fact that during the proceedings it had been established that 70 civilians had died in the village of Lovas over the period of time covered by the indictment, something that was never contested by any of the parties to the proceedings.[133]

Of the victims that the TRZ excluded from the amended indictment, the majority died during the attack by the 2nd Proletarian Guard Motorized Brigade of the JNA, launched on the village of Lovas on 10 October 1991. Over the Course of proceedings, convincing pieces of evidence emerged, demonstrating the personal responsibility of the commander of that brigade, a JNA colonel, Dušan Lončar, for the attack on Lovas that resulted in the death of 22 civilians. On 9 October 1991, Lončar ordered an attack on Lovas including the order to "carry out cleansing of the hostile population". A military expert witness in his findings and testimony at the main hearing, was of the opinion that Dušan Lončar, commander of the 2nd Proletarian Guard Motorized Brigade of the JNA, was the commander of all the units participating in the attack on the village of Lovas. According to him, the part of his attack order relating to "cleansing of the hostile population" was "in contravention with Article 13 of the Additional Protocol II".

Despite the existence of convincing evidence against Lončar, as well as the fact that, according to the amended indictment, the attack on Lovas was carried out by the JNA, the TRZ did indict

[133] In the initial indictment, the TRZ stated that Milan Latas had been killed during the artillery attack that the JNA launched on Lovas; however no one was charged with his murder.

Lončar or other members of the JNA in the chain of command. Instead, the TRZ opted to leave out of the amended indictment all the victims for whose death the JNA could be held responsible. Furthermore, the deputy prosecutor in charge of this case, Veselin Mrdak, in his closing argument, justified the conduct of the JNA and interpreted its role at the time of the events in the village of Lovas in a way that contradicted the evidence heard during the trial.

Pronouncing sentence, the presiding judge also noted the lack of readiness on the part of TRZ to prosecute all the responsible persons. She stated that the chamber had found that the 2nd Proletarian Guard Mechanized Brigade of the JNA was to be held primarily responsible for the attack on Lovas and everything that happened during the attack, adding that a valuable amount of evidence had been presented during the trial, which "leaves open the possibility for the prosecutor to seek justice for family members of the victims, who, after being included in the initial indictment, were left out from its amended version". "We have heard in this courtroom" the presiding judge added, "the full names of some other actors involved in the events in question, some of them even appeared before us as witnesses, so the prosecutor should fulfill the promise he gave in his closing argument and look into their criminal responsibility as well, if we are to ensure fairness both to the victims and the accused."

The amended indictment omitted to mention the forced expulsion of Croatian civilians from Lovas, even though this fact was established in court on the basis of numerous testimonies given by injured parties testifying for the prosecution and the defense alike. The presiding judge also pointed out this omission by the TRZ saying that "an important segment of the events in this area – expulsion of Croatian civilians from the area controlled by JNA – was left out of the indictment."

The TRZ did not completely succeed in proving even the charges set forth in the amended indictment, since the court held that the responsibility of the accused for the death of civilians was conclusively proved with respect to only 41 of the 44 persons named in the amended indictment. Nevertheless, the TRZ, after posting the judgment in this case on its website, issued a press release in which it falsely stated that the amended indictment, filed on 28 December 2011, had charged the indictees with "depriving 70 Croatian civilians of life". [134]

As regards the sentences imposed and the reasons the court was guided by in determining the sentences, the HLC holds that giving consideration to the amount of time that has passed since the crimes i.e. 20 years, during which the majority of the indictees had returned to normal life, could not be justified. The length of time between the commission of a crime and the subsequent judgment may, in principle, be taken into account for mitigation in cases of ordinary crimes, where the perpetrator, by refraining from re-offending over a prolonged period of time, shows his attitude towards a criminal act and resocialization. However, in the case of war crimes, where the existence of an armed conflict is the objective precondition for incrimination, the amount of time passed has no bearing, since once the conflict is over, the criminal act cannot be repeated. That the length of time passed should not be taken as a mitigating circumstance is indirectly borne out

[134] "128 years' imprisonment for war crimes against Croatian civilians in Lovas", 26 June 2012, www.trz.org.rs

by a universally accepted non-applicability of statutory limitations to war crimes. Such a position of the court is at odds with the established practice of the ICTY not to consider the length of time between the punishable conduct and the subsequent judgment as a mitigating circumstance.[135] The court also attached too much importance to the mitigating circumstances in determining penalties for Perić and Vlajković, sentencing them each to five years imprisonment (the statutory minimum), and particularly with regard Josipović, who was sentenced to four years in prison (below the statutory minimum). Given the seriousness of consequences of their acts – the death of 17 and wounding of 11 civilians in the minefield and the fact that all three of them were JNA officers at that time, they should have received tougher sentences.

At the beginning of this trial, family members of a large number of injured parties came to the Higher Court to attend the proceedings. Following the decision of the Court of Appeal to release Ljuban Devetak from detention, many of these people, revolted by this decision, stopped attending the trial.

2.6. *Gnjilane Group*[136]

The retrial of the *Gnjilane Group* case ended on 19 September 2012, in the conviction by the Higher Court in Belgrade[137] of Samet Hajdari, Ahmet Hasani, Nazif Hasani, Agush Memishi, Burim Fazliu, Selimon Sadiku, Faton Hajdari, Kamber Sahiti, Ferat Hajdari, Sadik Aliu and Shefqet Musliu. All were all found guilty of committing a war crime against the civilian population [138] and sentenced as follows: Samet Hajdari to 15 years in prison, Ahmet and Nazif Hasani to 13 years in prison each, Agush Memishi, Burim Fazli and Selimon Sadiku each to 12 years in prison, Faton Hajdari to 10 years in prison, Kamber Sahiti, Ferat Hajdari and Sadik Aliu each to eight years in prison, and Shefqet Musliu to five years in prison.

Defendants Samet Hajdari, Ahmet Hasani, Nazif Hasani, Agush Memishi, Burim Fazliu, Selimon Sadiku, Faton Hajdari, Kamber Sahiti, Ferat Hajdari, Sadik Aliu, Shefqet Musliu, Fazli Ajdari, Rexhep Aliu, Shaqir Shaqiri, Idriz Aliu, Shemsi Nuhiu and Ramadan Halimi, were found not guilty of the charges in another 20 counts of the TRZ indictment[139], because there was no evidence indicating that they committed the acts specified under these counts. They were acquitted of charges of expelling ethnic Albanians, Serbs and persons from other minority

[135] ICTY, Trial Chamber judgment in the *Dragan Nikolić* case (IT-94-2-S) – par. 272 and 273.
[136] K-Po2 18/11.
[137] Members of the trial chamber: judge Snežana Nikolić Garotić (presiding), judge Rastko Popović and judge Vinka Beraha Nikičević.
[138] Article 142 (1) of the CC of the FRY, as co-perpetrators, in conjunction with Article 22 of the CC of the FRY.
[139] Deputy War Crimes Prosecutor Miroljub Vitorović.

ethnicities, unlawful detention, inhuman treatment, rapes, torture, killing, inflicting bodily injury and suffering and looting of property.

Course of proceedings

An indictment issued by the TRZ[140] on August 11, 2009 charged Samet Hajdari, Ahmet Hasani, Nazif Hasani, Agush Memishi, Burim Fazliu, Selimon Sadiku, Faton Hajdari, Kamber Sahiti, Ferat Hajdari, Sadik Aliu, Shefqet Musliu, Fazli Ajdari, Rexhep Aliu, Shaqir Shaqiri, Idriz Aliu, Shemsi Nuhiu and Ramadan Halimi with war crimes against civilians as co-perpetrators.

The indictment alleged that the accused, as KLA members, during the armed conflict in Kosovo, specifically in the period between early June and the end of December 1999, ordered and committed the following offences against civilians of Serb, Roma and Albanian ethnicity: unlawful detention, inhuman treatment, torture, rape, murder, inflicting bodily injury and great suffering and looting of property.

On 14 May 2010, the trial chamber ruled to sever the proceedings against those defendants who were being tried *in absentia*, namely: Shefqet Musliu, Sadik Aliu, Idriz Aliu, Shemsi Nuhiu, Ramadan Halimi, Fazli Ajdari, Rexhep Aliu and Shaqir Shaqiri.

On 21 January 2011, the trial chamber, presided over by Snežana Nikolić Garotić, passed a judgment of conviction and sentenced the defendants to imprisonment as follows: Agush Memishi, Selimon Sadiku and Samet Hajdari, each to 15 years; Faton Hajdari, Ahmet Hasani and Nazif Hasani each to 10 years; and Kamber Sahiti and Ferat Hajdari each to 8 years. They were found guilty on five charges of the indictment and cleared of the remaining 16 charges. They were found guilty of torturing and murdering Stojanče and Zorica Mladenović and two unidentified persons, and particularly guilty of the degrading and inhumane treatment of victims – protected witnesses C1 and C2 – whom they detained without due process, tortured and eventually raped. Also, they were found guilty of the torture and unlawful detention of protected witness B2 and looting of his property, as well as the unlawful detention of protected witness B1, his wife, and her friend, whom they tortured in the high school dormitory in Gnjilane/Gjilan. The court alsofound them guilty of unlawful detention of protected witness A5, his brother and father and the torture of protected witness A5 and his brother.

On 7 December 2011, the Court of Appeal in Belgrade accepted appeals by the TRZ, defense counsel and the accused, set aside the judgment of the trial court and ordered a retrial of this case, on the following grounds: the disposition of the judgment was ambiguous and at variance with the reasons set forth in its explanatory part; the judgment failed to state reasons as regards the

[140] The full text of the indictment is available on the TRZ website: www.tuzilastvorz.org.rs

decisive facts, and the reasons stated were for the most part unclear and contradictory to each other.[141]

The retrial opened on 20 March 2012, after the Higher Court in Belgrade had decided on 7 March 2012 to merge criminal proceedings against Fazli Ajdari, Rexhep Aliu, Shaqir Shaqiri, Shefket Musliu, Sadik Aliu, Idriz Aliu, Shemsi Nuhiu[142]and Ramadan Halimi and the proceedings against Agush Memishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliju into one case.

14 trial days were held in 2012, during which the court, as suggested by the Court of Appeal, examined the brother and sister-in-law of protected witness C1, who testified that C1 and C2 had arrived in their apartment in Niš in June 1999.

Witness Darinka Đorđević (sister-in-law of C1), said C1 and C2 told her that they had been queuing from bread in Gnjilane/Gjilan when taken out of the queue by two Albanians who then took them to a forest, where they raped and beat them.

Witness Dragiša Đorđević (C1's brother) testified saying that C1 had told him that two Albanians in uniforms had taken her and C2 from a bread queue in Gnjilane/Gjilan and brought them in the high school dormitory, where they raped and beat them for seven days.

At the retrial, the court accepted as evidence, for the first time, records of an autopsy performed by ICTY investigators at the Institute for forensic medicine in Orahovac/Rahovec in July 2000. The autopsy was performed on bodies that had been found in a container located in the Gnjilane/Gjilan hospital campus and which had served as an ancillary mortuary. Among the bodies found there were the bodies of Stojanče Mladenović and Zorica Mladenović, for whose killing the defendants were charged.

Expert witness Professor Slobodan Savić submitted his finding and opinion regarding the autopsy records. In his opinion, the record of the autopsies performed by ICTY investigators at the Forensic Medicine Institute in Orahovac/Rahovec, reinforced his findings and opinion presented during the first trial before the war crimes chamber. On the basis of the new documentation, the expert witness could not conclude whether the bodies had been cut and mutilated post-mortem or pre-mortem. He also indicated that there was no evidence indicating that the bodies had been incinerated, since their bones were not charred. The time of death or the environment in which the bodies were held before exhumation and autopsy cannot be determined. The expert witness reiterated that the bodies indeed were cut post-mortem, but only to provide samples for DNA testing, something corroborated by ICTY documentation.

[141] For more details on the Court of Appeal's ruling in this case, see the Report on War Crimes Trials in Serbia in 2011, HLC, p. 52.
[142] On 21 March 2012, defendant Shemsi Nuhiu was extradited to Serbia from Switzerland under an arrest warrant issued for him by the Serbian MUP.

The presiding judge, Snežana Nikolić Garotić, pronounced judgment on 19 September 2012, providing a summary of the reasons the chamber was guided by in making its judgment. She stated that the moving testimonies of protected witnesses C1 and C2 tallied in their essential parts – that both of them had been taken from a bread queue on 17 June 1999, that they were beaten, tortured, raped in the high school dormitory in Gnjilane/Gjilan until 23 June 1999. Their statements were corroborated by witnesses – the brother and sister-in-law of C1. C1 and C2 clarified why during their first interrogation by the investigative judge of the District Court in Niš in 2000 they omitted to say that they had been raped. They said that they had not mentioned the rape because they felt shame; they felt unprotected at the time, whereas during these proceedings they had all the protection they needed. Such an explanation was supported by expert witnesses, psychiatrists Dr Branko Đurić and Dr Ana Nejman, who indicated that the injured parties come from a patriarchal community, which often stigmatizes rape victims, holding them responsible for what had happened to them. In addition, judge Snežana Nikolić Garotić explained the discrepancies with respect to identification of the perpetrators, a process which had to be repeated twice, saying that different outcomes were caused by technical deficiencies during identification, as well as by the fact that during the trial the injured parties had had more time to observe the defendants and state precisely who had abused them and how.

The court accepted the young age of all the defendants at the time of the crime as a mitigating factor. The brutality of the crime and persistence demonstrated in its commission were considered as factors aggravating the guilt of all the defendants.

The defendants were not proven guilty on other charges in the TRZ indictment.

As regards the existence of an armed conflict, it was explained that it had lasted until 20 June 1999. From this date the armed conflict in Kosovo no longer existed because the Serb armed forces were not present in Kosovo after 20 June 1999 or in Gnjilane/Gjilan after 14 June 1999, something confirmed by witness testimonies and BIA and VBA reports.

The court did not give credence to any part of the testimony of cooperating witness 'Božur 50'[143], because he only stated facts that were common knowledge and he was not a member of the KLA, something confirmed by VBA, BIA and EULEX reports. The court was not even convinced whether this witness had ever been in the high school dormitory in Gnjilane/Gjilan. On the basis of the evidence presented, it was established that the bodies of the victims had not been post-mortem mutilated, incinerated or thrown into the Lake Livočko, as was claimed by this witness. According to an EULEX report on the search of Lake Livočko, no human remains were found in the lake. That the bodies of victims were not mutilated and incinerated after death was corroborated by expert witness testimony. Nothing could be inferred from the testimony of the

[143] According to the TRZ indictment, Božur 50 was a KLA member and a co-perpetrator in the crimes set forth in the indictment.

collaborating witness "Božur 50" as it was vague and non-specific, lacking precise dates and contradictory to the testimonies of numerous other witnesses.

The presiding judge, Snežana Nikolić Garotić noted that 206 witnesses had been heard during the trial, of whom 179 were injured parties, who had provided detailed accounts of what had happened to them, specifying the time, the place, the manner in which the offences were committed, and gave descriptions of the perpetrators. Their testimonies further discredited the testimony given by the cooperating witness 'Božur 50'.

The court also commented on the suffering of the injured parties and their ordeal, adding that the TRZ had paid little regard to their suffering by hampering the chances of uncovering the truth in this case.

Lastly, the presiding judge added that nobody in her courtroom had been threatened, referring to allegations in a TRZ press release that the accused, Agush Memishi, had threatened the Deputy War Crime Prosecutor.

Analysis of proceedings

During the retrial, the first-instance court considered the evidence according to instructions given by the Court of Appeal.

This retrial was marked by unprofessional and unethical conduct from some of the defense lawyers, as well as by a TRZ press release containing a false allegation that the accused Agush Memishi threatened the Deputy War Crimes Prosecutor during his closing argument. The court, as the *dominus litis*[144] of proceedings, ought to have been harsher on defense lawyers and adequately punish their improper behaviour. Also, the court should have, within the scope of the powers conferred on it by law, responded in a more prompt and transparent manner to the TRZ press release containing the said allegations.

On 7 September 2012, the TRZ gave incorrect information to the general public that Agush Memishi had threatened Miroljub Vitorović, Deputy War Crimes Prosecutor. During the closing argument of the deputy prosecutor on 7 September 2012, Memishi noted that the TRZ had offered him the chance to become a "collaborator with justice" which would give him an opportunity to incriminate one of the co-accused and thus get revenge on him for some unresolved issues between the two of them and the harm the co-accused had caused to him and his family. Memishi declined the offer. On that occasion, Memishi said that although he had never committed any criminal act, he would take revenge on his co-accused, on his release from detention, and that if not him, someone else in the Memeshi family would do it, because many members of the Memishi family live in Preševo. None of the words that Memishi said were directed at the deputy war crimes prosecutor. This can be easily verified as all of the court

[144] Lat. master of proceedings.

proceedings were taped. Should the deputy prosecutor have felt threatened by the defendant, he could have, and still can, file a criminal complaint against Memishi for endangerment of safety or impeding the course of justice.[145]

As, by the time of writing this report, the court has not delivered its written judgment in this case, only a limited analysis of the oral judgment can be made.

On the basis of the operative part of the judgment and the summary of the reasons for the judgment, read out by the presiding judge during the pronouncement of the judgment, it can be said with a high degree of certainty that the trial court did comply with Court of Appeal's instructions.

The time of commission of a criminal act, an important distinguishing feature of the criminal act of war crime against the civilian population, was this time precisely determined, judging by the operative part of the judgment. Namely, the court established that all criminal acts against C1 and C2 were committed between 17 and 23 June 1999. The court also established that the armed conflict in Kosovo ended on 20 June 1999, when all Serb forces had withdrawn from the territory of Kosovo. This being so, it is then clear that the court rightly ruled that the criminal act committed against injured party B2 could not qualify as a war crime against the civilian population as it did not satisfy an essential requirement, that of having been committed during the course of an armed conflict.[146]

The existence or otherwise of an armed conflict, its temporal and geographic scope, were all clearly defined by the court in its ruling. It was emphasized that the armed conflict in Kosovo did not exist after 20 June1999, since there were no Serbian armed forces in Kosovo after that date and none in Gnjilane/Gjilan after 14 June 1999, as confirmed by witness statements and reports by the VBA and BIA. The trial court gave a clear answer with respect to this factual issue.[147] More specifically, an essential element that a criminal act must satisfy in order to qualify as a war crime against the civilian population, is the existence of an armed conflict or occupation. An armed conflict, either internal or international, exists only if there exist conflicting parties thereto, which was not the case after 20 June 1999, as the court rightly concluded. The indictment drawn up by the TRZ defines the time of commission of the acts as charged, in a rather non-specific manner. Only three out of the 21 counts of the charges precisely define the time period of the commission of the acts, whereas the remaining counts are rather vague i.e. the period between mid-June and the end of September 1999, which is unacceptable, given the legal description of

[145] Article 138 and Article 336b of the CC of the Republic of Serbia.
[146] According to the amended indictment of the TRZ KTRZ 16/08 of 16 November 2010, the acts against B2 were committed on 27 June 1999 (Count 19 of the said indictment).
[147] The explanation by the Higher Court in Belgrade of the concept of armed conflict and the nexus between a criminal act and an armed conflict is consistent with ICTY practice.. See ICTY decisions: Decision on the Defense Motion for Interlocutory Appeal on Jurisdiction, *Tadić* (1995, IT-94-1) and Trial Chamber judgment in the *Brđanin* case (2004, IT-99-36).

elements of this criminal act and the fact that the armed conflict ceased to exist as of 20 June 1999.

As for the assessment of the testimony of cooperating witness 'Božur 50' and the objection by the Court of Appeal that the original trial court had applied double standards in assessing his testimony, the re-trial clearly removed this irregularity. The testimony of cooperating witness 'Božur 50' was rejected in its entirety. This was the only possible decision, given the evidence presented and how flawed this witness's testimony was. The court also properly noted that the indictment by the TRZ was entirely based on the testimony of this witness, failing to offer any other evidence to substantiate the charges.

When analyzing the court's assessment of the above witness's statements, one fact deserves special attention: the same chamber, presided over by the same judge, in the initial trial gave a different assessment of this witness's credibility.

Despite the existence of ample evidence contrary to the factual allegations in the indictment, the TRZ did not substantially change the indictment before the end of proceedings. Instead, the TRZ ignored the fact that after 20 June 1990 there was no armed conflict in Kosovo and that the evidence given by the chief witness of the prosecution, 'Božur 50', contradicted the description of events set forth in the indictment.

2.7.*Beli Manastir*[148]

On 19 June 2012, the Higher Court in Belgrade[149] delivered a judgment convicting Zoran Vukšić, Slobodan Strigić, Branko Hrnjak and Velimir Bertić of a war crime against the civilian population.[150] Zoran Vukšić received the maximum prison sentence of 20 years, Slobodan Strigić was sentenced to 10 years' imprisonment, Branko Hrnjak to 5 years' imprisonment and Velimir Bertić to 18 months' imprisonment.

Course of proceedings

On 23 June 2010 the TRZ[151] filed an indictment[152] against Zoran Vukšić, Slobodan Strigić, Branko Hrnjak and Velimir Bertić for a war crime against the civilian population. According to

[148] The Higher Court in Belgrade - War Crimes Department -K-Po2 45/2010.
[149] Members of the trial chamber: judge Dragan Mirković (presiding), judge Tatjana Vuković and judge Olivera Anđelković.
[150] Article 142 of the CC of the FRY, as co-perpetrators, within the meaning of Article 22 of the CC of the FRY.
[151] Deputy War Crimes Prosecutor, Nebojša Marković.
[152] This case was transferred by the Office of the Attorney General of the Republic of Croatia in 2008, in keeping with the Agreement on Mutual Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide (2006).

the indictment, the defendants, at the time members of the Special Purpose Units of the SUP in the town of Beli Manastir, in the Republic of Croatia, unlawfully detained, physically abused, intimidated, terrorized, tortured and inhumanly treated Croat civilians, between August and December 1991. In addition, Zoran Vukšić, Slobodan Strigić and Branko Hrnjak were charged with murdering the civilians.[153]

As the evidence presentation process closed in 2011, during 2012 the parties presented their closing arguments, after which the court delivered its judgment on 19 June 2012. The trial chamber found the defendants guilty as charged. The court established that Zoran Vukšić and Velimir Bertić, in the course of an attack against the village of Kozarac on 28 August 1991, wantonly and without any military necessity shot at houses and in the direction of civilians who were in their houses or yards. Indiscriminately shooting, Zoran Vukšić killed an elderly man, Ivo Malek. Vukšić also shot Josip Vid, who was in his yard, in the leg, wounding him seriously. Velimir Bertić, also shooting indiscriminately and randomly from his automatic rifle, wounded Matilda Vranić.

The first-instance court also found that Vukšić and Bertić physically abused and intimidated a large number of unlawfully arrested civilians, who were confined in the detention facilities of the SUP in Beli Manastir. Vukšić and Bertić kicked Dragan Skeledžija and hit her with batons. They struck Marko Tomić and Josip Ćosić with batons and made them slap each other's faces. While beating Ivan Belaj, Bertić placed his gun into Belaj's mouth. The two men beat Stipe Abrišina threatening to slit his throat and made him sing 'chetnik' songs. Also, they repeatedly hit Marko Marić about the head and torso with rifle buts and stuck a gun into his mouth threatening to kill him. Jovan Narandža sustained blows to the torso and was further beaten with a cable by Vukšić.

Over the same period, Vukšić physically abused many civilians who were unlawfully confined in the Beli Manastir SUP detention facilities, by kicking them, striking them with his rubber baton, a phone cable and other objects, whilst Bertić over the same period intimidated some of the civilians. He made one civilian run across a stubble field[154], running after him and kicking him and then, after having seemingly let him escape, organized a 'rabbit hunt' for him, caught him and beat him again. Bertić also hit one of detained civilians with a baton, threatened to cut his throat because the civilian's son was a member of the Croatian MUP, and made him sing 'chetnik' songs.

The trial chamber found that Vukšić, jointly with Zoran Madžarac, who had proceedings against him suspended[155], on 10 October 1991, killed Adam Barić by shooting him in the back of the neck at point blank range and attempted to kill Ana Barić, Adam Barić's wife, by stabbing her four times in the neck, as a result of which the victim sustained life-threatening injuries.

[153] Full text of the indictment is available on the TRZ website: www.tuzilastvorz.org.rs.
[154] A field covered with stubble after harvesting (Merriam-Webster online dictionary).
[155] Madžarac is out of reach of Serbian authorities.

The court also found that the defendants Vukšić, Strigić and Hrnjak, on 17 October 1991, pursuant to a previous agreement between Vukšić and Zoran Madžarac, killed four Croatian civilians, members of the Čičak family[156]. The defendants transported the Čičaks in a Black Maria to the 'Karaševo' farmhouse. First they took Mate Čičak from the van, after which Vukšić stabbed him in the neck and then killed him with a shot to the head from a Colt handgun. After that, Ivan, Vinko and Ante were taken out of the van and killed by Vukšić with shots to the head and torso. The accused Strigić fired at Ante's dead body with his automatic weapon.

Stating the reasons for the judgment, the presiding judge said, among other things, that the responsibility for this crime lay not only with the accused but also with their superior officers who were aware of the crime and knew who the perpetrators were but failed to prosecute any of them. The murder of the Čičaks would not have happened, said the court, had Vukšić been arrested for some earlier crimes against Croatian Civilians that his superior officers knew of.

Analysis of proceedings

The HLC cannot analyze the judgment pronounced on 19 June 2012, because of the Higher Court's practice of denying access to non-final judgments delivered by this court.[157] However, the proceedings which resulted in this judgment were free from substantial violations of CPC provisions that could have affected the legality and properness of the judgment rendered.

With regard to penalties, i.e. the length of prison sentences imposed, each deserves a separate comment. For example, 20 years' prison sentence imposed on Zoran Vukšić, as the maximum penalty prescribed for such an offence, is appropriate given the number of criminal acts he committed, his conduct and mental attitude towards the crime. On the other hand, the penalty imposed on Velimir Bertić does not correspond with the crimes he is charged with. Imposing prison sentences below the statutory minimum in war crimes trials is unacceptable, regardless of the age of a perpetrator at the time of the commission of a criminal offence. Given all the aggravating circumstances present, the position that there existed circumstances that justify such a lenient penalty is untenable. Despite his very young age (21) at the time of the crime, and the fact that he did not take part in the killing of civilians, Bertić showed determination and ruthlessness in the commission of his crime. Such a light penalty for this type of crime will not help establish a value system that could prevent similar crimes from re-occurring.

A remark given by the presiding judge during the pronunciation of judgment about the responsibility of the superior officers of the accused deserves special attention. The court established that the said superior officers were aware of the crimes and knew who the perpetrators were but failed to prosecute them. The court emphasized that the murder of Čičak family members would not have happened had Vukšić been arrested by his commanding officers before. Testimonies by Vukšić's superiors - Radoslav Zdjelarević, head of the SUP in Beli

[156] Vinko, Mate, Ivan and Ante Čičak.
[157] For more details regarding this TRZ practice, see page 13.

Manastir, and Milan Jarić, Zdjelarević's deputy and commander of the unit the accused served in – reinforce this conclusion. The witnesses were at the time, the commanding officers of the accused. They knew of the crimes he had committed previously but took no action against him. They therefore contributed significantly to the commission of a new crime – the murder of the Čičak family members. It is not clear why the TRZ has not prosecuted these officials to date, although the facts established during this trial suggest that all legal prerequisites have been met for such an action. The court is bound to act within the limits of the indictment of the TRZ, which *de facto* creates a criminal case and, in particular, defines its scope, by determining which persons are to stand trial. The way in which the TRZ acted in this case, shows that the TRZ has continued with the practice of prosecuting only direct perpetrators and not those who, as their superiors, were at least as responsible for the crimes as the direct perpetrators.

2.8. *Kušnin/Kushnin*[158]

On 3 August 2012, the Higher Court in Niš[159] made public its judgment in this case, finding Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregi guilty of a war crime against the civilian population. The accused were sentenced as follows: Mančić to 14 years in prison, Radojević to 9 years, Tešić to 7 years and Seregi to five years in prison.

Course of proceedings

The Office of the Military Prosecutor in Niš, in its initial indictment of 19 July 2002 , which was amended on 16 September 2002, accused Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregi of participation in the murder of two ethnic Albanian civilians on an unspecified date in early April 1999 in the village of Kušnin/Kushnin, in the municipality of Prizren. The indictment alleged that the defendant Mančić, the chief security officer at the APO 4445 in Prizren, ordered the defendant Radojević, a platoon commander at the time, to take one soldier with him and kill the two men who had just been arrested and brought to him. Radojević passed on the order to the soldier Tešić. Upon receiving the order, Tešić and another solider, Seregi, took brothers Miftar and Selman Temaj, both from Kušnin/Kushin, in the direction of Prizren. Close to the road, about four kilometres from the place where their unit was stationed, the two soldiers killed the Temaj brothers with an automatic weapon and then incinerated their bodies. The indictee Mančić was also charged with having taken an amount of money from an individual walking in a column of people fleeing their homes, which had been stopped by the army above a place known as Vran stena on the road between Orahovac/Rahovec and Mališevo/Malishevë.

[158] The Higher Court in Niš, K No 46/10.
[159] Members of the trial chamber: Judge Dijana Janković (presiding), judge Marina Đukić, lay judges Vladana Aleksić, Dragana Šarić and Ivan Mladenović.

At the first-instance trial, at the Military Court in Nis, Danilo Tešić and Mišel Seregi admitted having committed the offences they were charged with. The trial resulted in their conviction on 11 October 2002. The defendants were sentenced to imprisonment as follows: Zlatan Mančić to seven years, Rade Radojević to five years, Danilo Tešić to four years and Mišel Seregi to three years.

Upon hearing the appeals lodged by both parties, the Supreme Military Court in Belgrade, on 22 May 2003 handed down a ruling modifying the trial court judgment by increasing the prison terms for the accused.[160]

However, the VSS reversed this final judgment and remanded the case for a new trial[161].

The retrial opened on 6 June 2007 at the District Court in Niš. Following the replacement of the judges in the trial chamber including the presiding judge, the retrial began anew in 2010.

During six days of hearings held in 2012 the court heard seven witnesses. At the main hearing, held on 3 February 2012, seven witnesses,[162] who at the relevant time were members of the VJ, holding different ranks in the military hierarchy, gave their statements. None of them corroborated the allegations set forth in the indictment. The subsequent hearings were either postponed or dedicated to procedural issues, irrelevant for deciding on the merits of the case. Some of the defense lawyers stood out for their misbehaviour, something which was not adequately corrected by the presiding judge. On 3 August 2012, the court pronounced its judgment, convicting Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregi. The presiding judge failed to provide a summary of the reasons for the court's decision, saying, "it is unnecessary because the accused are not present, so there is no need to bore the audience with it".

Analysis of proceedings

Proceedings in this case took more than 10 years to complete, even though the indictees admitted having committed the crime. All participants in this trial are to blame for such excessively long proceedings: the court itself, in the first place, for showing no interest in speeding up the proceedings; defense lawyers, who, with their conduct and the evidence they put forward helped significantly to delay the proceedings; and the Deputy Senior Public Prosecutor of Niš, whose duty was to draw attention to the undue delay in the proceedings, but who was extremely passive in this matter, in addition to being late in amending the indictment.

Excessively lengthy proceedings in cases that involve the gravest breaches of international humanitarian law, undermine both the victim's and public's confidence in the judiciary. Also,

[160] Mančić was sentenced to 14 years and Radojević to nine years imprisonment.
[161] As the HLC does not have the VSS's ruling on reversal, it does not know the reasons behind it.
[162] Witnesses Ivan Midović, Branislav Kovačevič, Dražen Dobrić, Pavle Rudić, Božidar Delić, Janko Grandić and Vlatko Vuković.

such a practice runs contrary to the standards enshrined in the ECHR, which have been incorporated in the CPC, namely the right to a trial within reasonable time.[163]

The HLC is not able to provide a thorough analysis of the judgment, because it does not have the written version of the judgment. The length of sentences clearly reflects the role of each indictee in the commission of the crime. However, the sentence imposed on Seregi, which barely exceeds the statutory minimum for such offences, and the sentence for Tešić, which is closer to the statutory minimum, do not fulfill the purpose of punishment nor do they secure justice for the victims.

3. Cases that resulted in second-instance decisions during 2012

3.1. *Rastovac*[164]

On 5 March 2012, the Court of Appeal in Belgrade confirmed[165] the judgment of the Higher Court in Belgrade from 23 September 2011, sentencing Veljko Marić to 12 years in prison for a war crime against the civilian population.[166]

Course of proceedings

On 12 August 2011, the TRZ[167] indicted Veljko Marić[168] for a war crime against the civilian population. The indictment alleges that the accused, as a member of the Croatian armed forces, specifically, the 77th Independent Battalion of Grubišno Polje, during the "cleansing" of the village of Rastovac (Grubišno Polje municipality, Republic of Croatia), uniformed and armed, entered the home of the Serb Slijepčević family, and killed Petar Slijepčević, in the presence of his wife, Ana Slijepčević, with several shots from his automatic weapon.

[163] ECHR Art. 6 (1): "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."
[164] K Po2 47/2010.
[165] Trial chamber members: judge Radmila Dragičević-Dičić (presiding), judge Siniša Važić, judge Sretko Janković, judge Omer Hadžiomerović and judge Miodrag Majić. Case No: Kž1 Po2 10/11.
[166] On that occasion, the HLC issued a press release (on 29 September 2011) entitled "Croatian citizen Veljko Marić should have been tried in Croatia", www.hlc-rdc.org
[167] Deputy War Crimes Prosecutor, Dušan Knežević.
[168] Indictee Veljko Marić is a citizen of the Republic of Croatia.

The trial of this case commenced on 7 October 2010 at the Higher Court in Belgrade[169]. After six hearing days and with 10 witnesses questioned, the court delivered a judgment on 23 September 2011 finding the accused guilty as charged and sentencing him to 12 years in prison.[170]

Marić's defense counsel appealed against the judgment on grounds of serious procedural errors i.e. the court failed to offer reasons concerning its decisions on decisive facts and consequently it was not possible to assess the lawfulness and correctness of the decision. The appeal also cited erroneous and incomplete establishment of the facts, violation of CC provisions and violation of Article 6 of the ECHR (right to a fair trial).

On 5 March 2012, the Court of Appeal in Belgrade handed down a judgment dismissing the appeal as unfounded and confirming the first-instance judgment.[171]

Analysis of proceedings

As stipulated by the Law on Organisation and Jurisdiction of Government Bodies in War Crimes Proceedings, The Higher Court in Belgrade has jurisdiction to try criminal offences committed on the territory of the former SFR of Yugoslavia, regardless of the nationality of the perpetrators and victims, including, among others, crimes against humanity and international law referred to in Chapter XVI of the CC of the SFRY and grave braches of international humanitarian law committed on the territory of the former SFRJ since 1 January 1991, as set forth in the ICTY Statute. It is therefore not clear why the Republic of Serbia did not transfer the *Rastovac* case to the Republic of Croatia as the incident in question occurred in Croatia, the late Petar Slijepčević was a citizen of the Republic of Croatia, and was resident in the Republic of Croatia, just like the indictee, Veljko Marić, and relevant witnesses. The Republic of Serbia should have, for reasons of efficiency and fairness and in order to strengthen confidence in judicial cooperation between the two states, extradited Veljko Marić to Croatia and transferred his case to the Office of the Attorney General of the Republic of Croatia, along with all the evidence available to it, in keeping with the Agreement on Cooperation that these two states have signed[172].

The 12-year prison sentence imposed on the indictee is a penalty commensurate with the severity of the offence and the degree of indictee's responsibility.

[169] Members of the trial chamber: judge Rastko Popović (presiding), judge Vinka Beraha Nikićević and judge Snežana Nikolić Garotić.
[170] For an analysis of this judgment, see the Report on War Crimes Trials in Serbia in 2011, HLC, p. 56.
[171] Decisions by the Court of Appeal and Higher Court in Belgrade are available at www.hlc-rdc.org.
[172] Agreement on Mutual Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, signed by the Office of the War Crimes Prosecutor of the RS and the Office of the Attorney General of the RH on 13 October 2006.

3.2.*Prijedor*

On 30 November 2012, the Court of Appeals acquitted Duško Kesar of charges of a war crime against the civilian population.[173]

Course of proceedings

On 11 December 2009, the TRZ[174] indicted Duško Kesar for a war crime against the civilian population. According to the indictment, the accused, as a member of the reserve component of the MUP of Republika Srpska, participated, together with Drago Radaković and Draško Krndija[175], members of the same armed formation, in intimidation and killing of three Bosnian civilians. The indictment further alleges that the three men, acting upon a previous agreement to "go kill the Muslims", arrived on the night of 30-31 March 1994 at the house of Faruk Rizvić in Prijedor (in Republika Srpska, BiH), carrying arms and explosives. Duško Kesar and Draško Krndija each threw a hand grenade at the house, at a wall underneath a window. Not being satisfied with the effect of the hand grenade explosions, Draško Krndija planted plastic explosive on the sill of the same window and set it off. Police officers Radoslav Knežević and Dragan Gvozden, who arrived at the scene shortly afterwards, found the Rizvić family members scared but still in the house. On leaving the house they saw Duško Kesar, Draško Krndija and Drago Radaković. Radoslav Knežević told them not to harm the Rizvić's as long as he and the other police officer were there. After the policemen had left, Kesar, Drago Radaković and Draško Krndija entered the house and killed Faruk Rizvić, his wife Refika Rizvić and Faruk's sister Fadila Mahmulji, by striking them with hard, blunt objects to the head and chest.

The trial of this case commenced on 5 March 2010. The accused, Duško Kesar, denied having committed the crime, saying that he had not taken part in the murder of the Rizvićs and Fadila Mahmulji because he had been out of Prijedor at that time.

The Higher Court in Belgrade[176] found Duško Kesar guilty and sentenced him to 15 years in prison.

[173] Article 142 (1) of the CC of the FRY in conjunction with Article 22 of the CC of the FRY.
[174] Deputy War Crimes Prosecutor, Veselin Mrdak.
[175] The judgment of the Supreme Court of Republika Srpska No 118-0-KŽ-06-000-018 of 18 April 2006, affirmed the judgment of the District Court in Banja Luka K. No 50/01 of 17 November 2005, convicting Drago Radaković and Draško Krndija for the same offence.

[176] Members of the trial chamber: judge Vinka Beraha Nikićević (presiding), judge Snežana Nikolić Garotić and judge Rastko Popović.

The Court of Appeal in Belgrade, upon hearing appeals from the defense and Kesar's wife, on 28 February 2011 accepted the appeals, set aside the judgment of the Higher Court and remitted the case for retrial.[177]

At the retrial, which opened on 8 June 2011, the trial court, acting upon instructions of the Court of Appeal, examined witnesses Gvozden and Knežević and allowed them to confront the accused face-to-face.

On 1 December 2011, Duško Kesar was convicted again and sentenced to 15 years imprisonment. Stating the reasons for the conviction, the presiding judge said that the court gave credence to the testimony of witness Gvozden, who convincingly testified about finding indictee Kesar, in the company of Krndija and Radaković, outside the house of the Rizvić family on the relevant evening. His testimony was corroborated by Krndija, who said that he and Kesar each had thrown a hand grenade at the Rizvić's house. The joint action, throwing of hand grenades, planting of explosives, by indictees Radaković and Krndija, based on a previous agreement, and the murder of the victims constitute a clear and mutually coherent sequence of events, which demonstrate that the accused had a direct intent to kill. In determining sentence on the accused, the Court accepted lack of previous convictions, family circumstances, unemployment and health status of the accused as mitigating circumstances. An aggravating circumstance was the murder of three civilians.

Upon hearing appeals filed by defense counsel and the wife and mother of the accused against the judgment delivered in the retrial, the Court of Appeal on 30 November 2012 acquitted the accused.

The Court of Appeal held that there was no solid and compelling evidence demonstrating that Duško Kesar was involved in the commission of the crime in question. His mere presence outside the Rizvićs' house, in the company of Draško Krndija and Drago Radaković, at the time when hand grenades were thrown at the window of the house and even during the killing of the victims inside the house, did not indicate that the accused took any actions amounting to the offence he was charged with, or that he had an intention to do so. Hence, the mere presence of the accused during the commission of the crime is insufficient in itself to suggest his willingness to take part in the killing of Faruk Rizvić, Refika Rizvić and Fadila Mahmulji.

[177] For an analysis of the Court of Appeal's judgment of 28 February 2011, see the Report on War Crimes Trials in Serbia in 2011, HLC, p. 27.

3.3. *Zvornik III/IV*[178]

On 4 October 2012, the Court of Appeal in Belgrade[179] handed down a ruling[180] on an appeal lodged by the TRZ. The Court granted the appeal and modified the sentencing part of the first-instance judgment of the Higher Court in Belgrade of 16 December 2011[181], with respect to two convicts – Goran Savić and Darko Janković, a.k.a. 'Pufta'. Goran Savić had his sentence increased from 18 months to three years and Darko Janković from 15 to 20 years. Other than that, the first-instance judgment was affirmed.

Course of proceedings

On 16 December 2011, a trial chamber of the Higher Court in Belgrade delivered a judgment finding the defendants Darko Janković, a.k.a. 'Pufta' and Goran Savić guilty and the defendant Saša Ćilerdžić not guilty of criminal offences they were charged with. The court found that Goran Savić and Darko Janković ill-treated Muslim civilians on the premises of the 'Ekonomija' farm in Zvornik (BiH) between 5 and 12 May 1992. In addition, Goran Savić was found guilty of heavily beating one of the civilians on the same premises, together with Dragan Slavković, who had already been finally convicted.[182] Darko Janković was also found guilty of a crime at the 'Ciglana' brick factory in Zvornik. Specifically, Janković was taking Muslim civilians, who had been brought to the brick factory to be used as forced labour, out of the 'Ciglana' building and made them loot Muslim and Serbian houses in the Zvornik area for him and the others and hand over the booty to them. Additionally, Darko Janković was found guilty of ill-treating two Muslim civilians at the 'Ciglana' works and crimes that occurred in the premises of the Cultural Centre in Čelopek (in the municipality of Zvornik). Janković on several occasions visited the Cultural Centre, where a group of 162 Muslim civilians was held captive, physically abused the captives and together with the late Dušan Vučković killed at least nine of them (he himself killed four). The Court of Appeal in Belgrade, in its decision on appeals lodged by both parties, modified the sentencing element of the first-instance judgment, sentencing Goran Savić to three and Darko Janković to 20 years in prison.

The Court of Appeal held that "the trial court failed to give adequate weight to the aggravating circumstances present in this case. The aggravating factors included: the severity of the offence, the number of the acts committed and the consequences thereof, the extreme brutality, violence

[178] Kž Po2 2/12.
[179] Members of the trial chamber: judge Radmila Dragičević Dičić (presiding), judge Siniša Važić, judge Sonja Manojlović, judge Sretko Janković and judge Omer Hadžiomerović.
[180] Kž1 Po2 2/12.
[181] K-Po2 23/10.
[182] Judgment VSS KŽ I RZ 3/08 of 8 April 2009 available at HLC website: www.hlc-rdc.org.

and ruthlessness shown to the victims, the determination and perseverance manifested during the commission of the crime against civilians who were helpless and held in inhumane living conditions, creating a climate of terror together with other co-defendants, despite the fact that the victims did nothing to deserve such a treatment. The Court took account of the gravity of the consequences of the acts on the survivors, who still suffer from mental trauma and physical pain as a result of the physical and mental torture they endured. Some of them have even fled their places of residence. For these reasons Goran Savić's sentence was modified."[183]

Analysis of proceedings

If one looks at the final judgment in this case, it is clear that the trial court conducted the first-instance proceedings without any substantial violation of the CPC, that it correctly and fully established the factual background, and that the acts of the accused were properly defined. Yet, the trial court erred in determining the sentences for the accused. Although the HLC did not see the written reasoned judgment, the Court of Appeal can be said to have obviously made a right decision when it modified the sentencing part of the trial court's judgment. The Court of Appeal offered valid arguments suggesting that aggravating circumstances had not been given sufficient weight in determining the sentence level. Such a reasoning of a second-instance court is encouraging, given the well-established practice of Serbia's courts to attach far more weight to mitigating circumstances with respect to the aggravating factors, which has often resulted in unduly lenient sentences on individuals convicted of war crimes.

As regards the decision acquitting Saša Ćilerdžić of criminal responsibility, the HLC is unable to analyse it because it does not have the first-instance or second-instance judgments in this case.

4. Cases that resulted in third-instance judgments during 2012

4.1. *Medak*

On 11 January 2012,[184] the Court of Appeal in Belgrade,[185] as a second-instance court in this case, reversed, in part, the judgment of the Higher Court in Belgrade acquitting the defendant

[183] Website of the Court of Appeal in Belgrade: www.bg.ap.sud.rs.
[184] Kž1 Po2 9/11.
[185] Members of the chamber: judge Radmila Dragičević Dičić (presiding), judge Siniša Važić, judge Sonja Manojlović, judge Sretko Janković and judge Omer Hadžiomerović.

Perica Đaković of charges of a war crime against prisoners of war, adjudging the defendant guilty of the said offence and sentencing him to one year in prison.

On 26 October 2012, the Court of Appeal in Belgrade – War Crimes Chamber[186] delivered a third-instance judgment[187] accepting the appeal of Perica Đaković, and reversing in part the second-instance judgment of the war crimes chamber of the Court of Appeal in Belgrade (of 11 January 2012), acquitting Đaković of charges against him.

Course of proceedings

On 6 October 2009, the TRZ indicted[188] Milorad Lazić, Nikola Konjević, Mirko Marunić, Nikola Vujnović and Perica Đaković for a war crime against prisoners of war.[189] The indictment alleges that the indictees, in the course of the armed conflict in the Republic of Croatia, and more specifically between 3 and 8 September 1991, beat the injured party Medunić, who had previously been apprehended and taken to the police station in Medak.[190] The indictees, together with some unidentified individuals, beat Medunić day and night, during and following interrogation at the police station, punched kicked and beat him with batons and wooden sticks, cut him and stabbed him with a knife, causing him severe pain as a result of which the injured party passed out repeatedly. The indictee Milorad Lazić struck Medunić repeatedly kicking and punching him in the head and body. He used a large kitchen knife to cut Medunić's uniform off, leaving him completely naked. Then he cut his face, shoulders and back and stabbed him in the left thigh. The indictee Mirko Marunić beat him with a rubber baton to the back and the defendant Konjević beat him with a stick to the torso and legs, and then with a beer bottle to the head. The indictee Nikola Vujnović on one occasion sat on the injured party's legs while the indictee Đaković struck the soles of his feet.

On 7 June 2010, the TRZ[191] amended the indictment, dropping criminal charges against the indictee Nikola Vujnović.

The trial in this case opened on 24 November 2009. On 23 June 2010, the Higher Court delivered its judgment,[192] sentencing Milorad Lazić and Nikola Konjević each to three years in prison and

[186] Members of the chamber: judge Zoran Savić (presiding), judge Vučko Mirčić, judge Mirjana Popović, judge Duško Milenković and judge Milena Rašić.
[187] Kž3 Po2 1/12.
[188] The Office of the Attorney General of the Republic of Croatia transferred this case to the TRZ, under the Agreement on Mutual Cooperation in the Prosecution of War Crimes Perpetrators.
[189] Article 144 of the KZ of the FRY.
[190] Medak is located in the Lika area in the Republic of Croatia. Before the war, it was part of the Gospić municipality, and now it has a status of municipality.
[191] Deputy War Crimes Prosecutor, Nebojša Marković.

Mirko Marunić to two years in prison. Perica Đaković was acquitted. In the reasoning of the judgment, specifically in the part relating to the acquittal of Perica Đaković, the court stated that it had not been proved that Đaković's acts had inflicted severe suffering or bodily harm on the injured party, therefore an important characteristic of the offence Đaković was accused of, was not found to be present.

Upon hearing appeals by both parties, the Court of Appeal in Belgrade on 19 January 2011 confirmed[193] the first instance judgment with respect to Milorad Lazić, Mirko Marunić and Nikola Konjević, and quashed the part of the judgment relating to Perica Đaković and ordered that he be retried before the first-instance court.[194]

Following the retrial at the Higher Court in Belgrade, Perica Đaković was on 1 July 2011 acquitted[195] of the charges set forth in the TRZ indictment against him.

The case reached the Court of Appeal in Belgrade, which on 11 January 2012 accepted[196] an appeal lodged by the TRZ and reversed the first-instance judgment, adjudging Perica Đaković guilty and sentencing him to one year in prison. In its reasoning, the Court of Appeal[197] states, inter alia, that while blows with a baton that the injured party received to his bare soles did not inflict severe mental suffering or physical pain on him, the indictee's acts did amount to inhuman treatment, as they constituted a serious attack on human dignity in a situation where the injured party, who the accused knew was a prisoner of war, was confined for several days at the police station and subjected to daily beatings and ill-treatment by other individuals. In these circumstances, the said act of the accused, by its character and intensity, did constitute an act constituting a war crime against prisoners of war. Inhuman treatment, while being a milder form of ill-treatment, because it inflicts less severe physical and mental pain on an injured party, does violate the human dignity of an injured party.

Perica Đaković's defense counsel appealed against the second-instance judgment. At the Court of Appeal's session held on 26 October 2012, Đaković' defense counsel, explaining the grounds for appeal said, inter alia, that the injured party, Mirko Medunić, had testified before the District Court in Rijeka (Republic of Croatia) in 1993 that Đaković had hit him on the soles of the feet in the 'Jadran' inn, while Nikola Vujnović had sat on him, and that this incident had not lasted

[192] K Po2 36/10.
[193] Kž1 Po2 9/10.
[194] For an analysis of the Court of Appeal's judgment of 19 January 2011, see the Report on War Crimes Trials in Serbia in *2011*, HLC, p. 36.
[195] K-Po2 3/11.
[196] Kž1 Po2 9/11.
[197] http://www.bg.ap.sud.rs/lt/articles/sluzba-za-odnose-sa-javnoscu/aktuelni-predmeti/ratni-zlocini/rz-donete-odluke/.

long. Testifying before the Higher Court in Belgrade in 2010, Medunić said he did not remember who exactly had hit him on the soles and who had sat on him, adding that he had not suffered as a result of it. The defense further argued that even if the court accepted that the accused had done this, the act would not amount to the offence he was charged with, adding that the ICTY held the same opinion on this matter.

The Court of Appeals' chamber trying this case in the third-instance, accepted the appeal on 26 October 2012[198] and modified the second-instance judgment of the Court of Appeal in Belgrade acquitting Perica Đaković of criminal liability. The Court of Appeal in its third-instance proceedings found that "blows to the injured parties' soles did not cause severe humiliation and degradation on him nor did they in any other way severely violate his human dignity, particularly given the fact that not every behavior that contravenes the international conventions and customs can be characterized as amounting to a war crime, because for an act to qualify as a war crime its seriousness and consequences must be found to be such as to justify such a severe legal characterization, which was not the case in this criminal matter." [199]

Analysis of proceedings

Analysing the judgments of the Court of Appeal delivered in this case during 2012, the FHP holds that the judgment convicting Perica Đaković is appropriate in terms of law and justice alike. Although at the time of writing the HLC did not have access to the judgments in writing, summary explanations of both judgments, posted on the Court of Appeal's website, suffice to draw some substantive conclusions.

What was a stumbling block in determining the guilt of the defendant Perica Đaković, had to do with the characterization of the acts of the defendant and their consequences. The legal norm defining the criminal offence Đaković was charged with reads that "anyone who in violation of international law orders or commits killing, torture, inhuman treatment of, biological, medical or other research experiments on, harvesting of tissues or body organs for transplantation or inflicting grave suffering or violation of bodily integrity or health against prisoners of war, or compels prisoners of war to service in armed forces of a hostile power or deprives them of the right to have a proper and fair trial shall be punished."[200]

Analysing the cited norm, it is clear that this offence can be committed by anyone, that is to say, a perpetrator of this offence does not have to act in any particular capacity. Each of the acts stand

[198] Kž3 Po2 1/12.
[199] http://www.bg.ap.sud.rs/lt/articles/sluzba-za-odnose-sa-javnoscu/aktuelni-predmeti/ratni-zlocini/rz-donete-odluke/.
[200] Article 144 of the CC of the FRY.

alone – there is no requirement for any cumulative effect, for them to constitute the offence of war crime against prisoners of war.

From the above catalogue of acts, the one that best defines the conduct of the defendant Đaković is exactly that chosen by the Court of Appeal in its judgment to convict, namely inhuman treatment, which in itself constitutes a "serious attack on human dignity". While accepting as an indisputable fact that being struck on the bare soles of the feet with a baton did not cause severe mental suffering and physical pain to the injured party, the court in its judgment showed understanding of the overall situation, where the injured party, whom the defendant knew to be a prisoner of war, was confined for several days at the police station and subjected to beating and ill-treatment on a daily basis by other individuals in turns, and held that the acts of the defendant, in these circumstances, and by their nature and intensity, were such that they constituted one of the individually listed acts amounting to a war crime against prisoners of war. This correct reasoning, and alignment with the facts found to exist lead to a conclusion that "inhuman treatment […] while being a milder form of ill-treatment, because it inflicts less severe mental and physical pain on an injured party, does nevertheless violate his human dignity".[201] This view also coincides with ICTY practice. The ICTY trial chamber in the *Čelebići* case found that "inhuman treatment is an intentional act or omission, that is, an act which, judged objectively, is deliberate and not accidental, which causes serious mental or physical suffering or injury or constitutes a serious attack on human dignity."[202] The ICTY trial chamber in the *Kordić and Čerkez* case[203] maintained the same definition of inhuman treatment.

Contrary to the above, the Court of Appeal chamber that delivered the judgment of acquittal found that the acts of the defendant had not produced a harmful consequence, which is a distinctive feature of the offence he was charged with, and stated that "the strikes to the soles did not inflict severe humiliation and degradation on the injured party". This chamber even went one step further, emphasizing that "not every behavior that contravenes international conventions and customs can be characterized as amounting to a war crime, because for an act to qualify as a war crime its seriousness and consequences must be found to be such as to justify such a severe legal characterization, which is not the case in this criminal matter". In contrast to this, the chamber that convicted Đaković had a clearly nuanced approach in assessing Đaković's conduct with respect to the conduct of other individuals convicted in this case, by taking into account the context in which the defendant Đaković committed the acts he was charged for. Such an approach is reflected both in the characterization of Đaković's acts by the chamber and the

[201] Website of the Court of Appeal in Belgrade, decisions made – war crimes, December 2012, http://www.bg.ap.sud.rs/lt/articles/sluzba-za-odnose-sa-javnoscu/aktuelni-predmeti/ratni-zlocini/rz-donete-odluke/.
[202] ICTY, Trial Chamber Judgment in the *Čelebići* case (1998, IT-96-21-T) - par. 543.
[203] ICTY, Trial Chamber Judgment in the *Kordić and Čerkez* case (2001, IT-95-14/2-T) - par. 256.

sentence imposed on him. The chamber that delivered the judgment of acquittal failed sufficiently to take into account the whole context of the events that preceded the acts committed by the defendant Đaković; instead it artificially placed them in a vacuum, completely isolating them both from the events that preceded them and in terms of the time and place of their commission.

The conduct of the TRZ in this case also contributed to the acquittal. On 7 June 2010, the TRZ amended the indictment by withdrawing the charges against the defendant Nikola Vujnović. The initial indictment charged Vujnović with sitting on the injured party's legs while the defendant Đaković hit the soles of his feet, which would make Vujnović a co-perpetrator in this offence, as his actions possess all the elements of the offence Đaković was charged with. By dropping the charges against Vujnović, the TRZ did not allow the court to decide on the guilt of all persons involved in the commission of this offence. In view of this, had Đaković been finally convicted, it would have created a paradoxical situation where one person would have been convicted and another person, a co-perpetrator, would have been acquitted. It should be noted that there were no legal obstacles to prosecuting Vujnović.