
Humanitarian Law Center
REPORT
ON WAR CRIMES TRIALS
IN SERBIA IN 2013

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ABBREVIATIONS

BiH – Bosnia and Herzegovina

Court of Appeal Deparment – the War Crimes Department of the Court of Appeal in Belgrade

CPC – Criminal Procedure Law

CDG – Croatian Defence Guard

Higher Court Department – War Crimes Department of the Higher Court in Belgrade

HLC – Humanitarian Law Center

KLA – Kosovo Liberation Army

MUP – Ministry of Interior

OWCP – Office of the War Crimes Prosecutor

TO – Territorial Defense

YA – Yugoslav Army

YPA – Yugoslav People's Army

Introduction

In 2013, the War Crimes Department of the Higher Court in Belgrade (the Higher Court Department) heard twelve cases, and delivered first-instance judgments in seven, convicting thirteen of the accused and acquitting one. One judgment, involving a war crime against the civilian population, resulted from a plea agreement entered into between the Office of the War Crimes Prosecutor (OWCP) and the accused. The remaining five cases were still ongoing in 2013.[1]

In 2013, the War Crimes Department of the Court of Appeal in Belgrade (the Court of Appeal Department) delivered eight decisions on appeals against rulings of the Higher Court Department[2] as follows: in three cases the Court of Appeal Department quashed the Higher Court's judgments and returned the cases for retrial[3]; in one case judgment was reversed in part and the case was sent back to the Higher Court Department for retrial (with respect to three of the accused); conviction of one defendant was confirmed[4]; in two cases the Court of Appeal Department finally convicted seven accused persons[5]; and in two cases, acquitted nineteen accused persons.[6]

In 2013, the courts of general jurisdiction heard two cases involving war crimes against the civilian population - the *Orahovac/Rrahovec* case, which was tried in the Higher Court in Požarevac and resulted in a first-instance judgment, and the *Kušnin/Kushnin* case, in which the appeals process is currently underway before the Court of Appeal in Niš. The proceedings against Miloš Lukić, on trial for murder, which, given the circumstances of the case, amounts to a war crime against the civilian population, are still underway before the Higher Court in Prokuplje.

The OWCP indicted 14 persons during 2013.

The Constitutional Court of Serbia rendered a decision, finding that the right to a fair trial for a person convicted in a war crimes case had been violated.

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1 *Ćuška/Qyshk*, *Sanski Most*, *Tenja II*, *Bihać* and *Beli Manastir* cases.
2 *Beli Manastir*, *Bijeljina*, *Bosanski Petrovac*, *Bitići/Bytyqi*, *Gnjilane Group*, *Mark Kashnjeti*, *Lički Osik* and *Lovas* cases.
3 *Prizren*, *Bosanski Petrovac* and *Lovas* cases.
4 *Beli Manastir*
5 *Bijeljina* and *Lički Osik* cases.
6 *Bitići/Bytyqi* and *Gnjilane group* cases.

The Humanitarian Law Center (HLC) represented the victims in six cases, three of which were at the investigation stage[7], and the other three at the trial stage, before the Higher Court Department in Belgrade[8]. HLC observers monitored the trial proceedings in all other cases heard by this Court.

I General findings

1. Few indictments

As in previous years, in 2013, the OWCP failed to take sufficient action to prosecute war crimes perpetrators. During 2013, it brought eight criminal cases against fourteen individuals: one was indicted for a war crime against prisoners of war,[9] and thirteen for a war crime against the civilian population.[10]

The indictment in the *Ljubenić II* case resulted from the proceedings in the *Ćuška/Qyshk* case which were conducted before the Higher Court Department. The opening of the *Sanski Most*, *Bihać and Ključ* cases was the result of the cooperation between the OWCP and the judiciary of Bosnia and Herzegovina (BiH), and based on evidence provided by the Cantonal Court in Bihać (BiH).

The downward trend in the number of persons indicted, which began in late 2010 (33 persons were indicted in 2010, nine in 2011 and, seven in 2012), reflects the inactivity of the OWCP.

If we examine the activity of the OWPC by individual cases, during 2013, the War Crimes Prosecutor and his nine deputies each, on average, represented the prosecution in two cases before first instance and second-instance courts. With the exception of the *Ćuška/Qyshk, Gnjilane Group* and *Lovas* cases, most of the cases handled by the OWCP were not particularly complex, with between one and five defendants.

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7 *Sotin*, *Trnje/Terrnje* and *Ljubenić II/Lybeniq II* cases.

8 *Skočić*, *Tenja II* and *Ćuška/Qyshk* cases.

9 Marko Crevar (*Sremska Mitrovica* case).

10 The accused are as follows: Miroslav Gvozden (Sanski *Most* case), Đuro Tadić (Bihać case), Samir Hondo (*Čelebići* case), Pavle Gavrilović and Rajko Kozlina (Trnje case), Vladan Krstović, Lazar Pavlović and Milan Ivanović (*Ljubenić II* case), Dragan Mitrović, Dragan Lončar, Mirko and Miroslav Milinković (*Sotin* case) and Milan Škrbić (*Ključ* case).

2. Officers and generals still evade justice

Since its founding in 2003, through to the present day, the OWCP has only rarely shown willingness to indict mid-ranking Yugoslav People's Army (YPA), Yugoslav Army (YA) and Ministry of the Interior (MI) of the Republic of Serbia officers who ordered crimes or whose subordinates committed crimes that they, as their superior officers, knew of, but failed to prevent and/or to denounce the perpetrators. Thus far, not a single high-ranking officer (of the rank of major, colonel or general) has been indicted.

During 2013, the OWCP brought an indictment against one mid-level officer in the *Trnje/Termje* case.[11] However, this indictment alone is not sufficient to change the overall impression that high-ranking army officers and generals continue to be shielded from criminal prosecution in Serbia. Thus in the *Ćuška/Qyshk* case, for example, the OWCP focused investigation on direct perpetrators and a junior commissioned officer (a lieutenant), despite the existence of evidence clearly implicating the principal perpetrator's superior in the crime.[12]

One of the reasons why high-ranking officers have not been indicted so far is the fact that the OWCP continues to refrain from charging anyone with command responsibility. If the command responsibility doctrine, that is, the provisions of international law that lay down this mode of criminal responsibility for crimes committed during the armed conflicts in the former Yugoslavia (Additional Protocol I, customary international law), were applied, the persons who, on the basis of the leadership positions they occupied within the military, police and political hierarchy, were responsible for the deaths of thousands of civilians, could be brought to justice. The Court of Appeal Department sent a heartening signal in 2013 in this regard. Namely, deciding to quash a first-instance judgment delivered in the *Lovas* case, the Court of Appeal Department suggested that such criminal responsibility could be applicable to this case, if the court was provided with convincing and clear reasons.[13]

3. Sentencing policy

The average length of prison sentences imposed by the Higher Court Depart-

11 Pavle Gavrilović, commander of the YA 549th Motorised Brigade's Logistic Battalion, who held the rank of Senior Captain.

12 See *Cuska/Qyshk* case; see the closing argument of victims' representatives, the main hearing transcript of 22/01/2014, at: http://www.hlc-rdc.org/wp-content/uploads/2014/02/89-22.01.2014..pdf, accessed on 26 May 2014.

13 See the *Lovas* case.

ment and the Court of Appeal Department on war crimes perpetrators was ten and twelve years, respectively.

In considering sentences, the courts continue to give far too much weight to mitigating circumstances and not enough to aggravating circumstances. Furthermore, the courts frequently make use of the option of penalty reduction, although lawmakers' intentions were to make this option available only in exceptional circumstances. Additionally, courts very often regard the aggregate weight of mitigating circumstances found as the equivalent of one particularly mitigating circumstance, something which runs contrary to the law, which clearly stipulates that courts may reduce penalties only in exceptional circumstances.

A striking example, is the sentencing decision in the *Beli Manastir* case, where the accused, Velimir Bertić, was given a prison sentence of eighteen months for a war crime against the civilian population because the court considered his family circumstances and the absence of previous convictions to be mitigating factors, and found no aggravating factors. Taking into account all mitigating circumstances, particularly the fact that at the time of the commission of the offence, the accused, being 22, was in transition to young adulthood, the amount of time that subsequently passed during which the accused did not commit any further offences, and the severity of the harm inflicted upon victims and the resulting consequences, the court found these circumstances to be particularly mitigating. Affirming the first-instance judgment with respect to the accused Bertić, the Court of Appeal Department held the same view, considering the judgment proportionate to the seriousness of the offence and found that no aggravating factors existed, even though the accused, as stated in the disposition of the judgment, injured al least nine persons and committed several offences.

Modifying two judgments delivered by first-instance courts, with regard to the sentences, the Court of Appeal Department pointed out the first instance court had not treated each defendant's case sufficiently individually in the sentencing process and instructed the courts to pay more attention to this principle in the future.[14]

4. Procedural measures for witness protection

Over the course of the trials in 2013, no cases of serious attacks on witnesses or their integrity were reported. One witness in the *Ćuška/Qyshk* case was

14 See *Bijeljina*, *Lički Osik*, *Skočić*, *Ovčara V* and *Bosanski Petrovac* cases.

declared to be particularly vulnerable. This was the first time that a witness in a war crime case had been declared particularly vulnerable.

5. Promptness and efficiency of the Court of Appeal Department

In 2013, the Court of Appeal Department worked very efficiently and paid full respect of the right to trial within a reasonable time. This court delivered eight decisions on appeals in 2013, all of which refer to cases completed in 2012 or 2013.

6. Regional cooperation

After several years of talks between representatives of the Prosecutor's Offices of Serbia and BiH, Vladimir Vukčević, the Serbian War Crimes Prosecutor, and Jadranka Lokmić Misirača, the Deputy Chief Prosecutor of BiH, signed a Protocol on Mutual Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, on 31st January 2013. The protocol, signed under the auspices of the European Commission, provides for direct communication and exchange of evidence and information in war crimes cases between the two prosecutor's offices.

The provisions of the Protocol aimed at preventing so-called parallel investigations (where both signatory parties conduct investigation of the same matter) are of particular importance. Under Article 3 of the Protocol, the parties undertake to:

"...within three months of the signing date of this Protocol, inform each other, by exchange of initial data in all pending cases under Article 1 of this Protocol, particularly in cases where suspects, accused or indicted persons have dual citizenship.

"In the event of subsequent detection of the perpetrator /perpetrators, the Parties shall, within three months from the date of obtaining knowledge of the perpetrator/perpetrators, inform the Chief Prosecutor/the War Crimes Prosecutor."

Given that the Protocol entered into force in January 2013, consistent application of Article 3 would require both parties to have informed the other party by late April 2014 of the cases against persons holding citizenship of the other

party that were ongoing at the time of signing the Protocol.[15]

7. Proceedings before the courts of general jurisdiction are unfair both to victims/injured parties and the accused

During 2013, the courts of general jurisdiction heard three cases involving war crimes (*Kušnin/Kushnin*, *Orahovac/Rrahovec* and *Miloš Lukić*). According to HLC data, the courts of general jurisdiction have thus far heard at least another 14 other cases involving war crimes or offenses which, despite containing elements of the offence of a war crime, have been erroneously classified as other offences. With the exception of *Sjeverin* and *Podujevo* cases, which were tried in the Belgrade District Court, all these cases were marked by serious omissions on the part of the prosecution service in charge of the cases and a total lack of media coverage.

The proceedings conducted during 2013 before the courts of general jurisdiction were characterized by an unacceptably slow pace, which was caused by the courts' tolerance of abuse of procedural rights by defendants and their defense counsels, as well as by inactivity on the part of prosecution service, as a result of which, these cases have been dragging on for more than ten years. It was also obvious that judges and prosecutors were insufficiently trained in international humanitarian law.

The HLC therefore urges the Office of the Public Prosecutor of the Republic of Serbia (OPPRS) to use its legal powers to refer these cases to the OWCP. Pursuant to the Law on Public Prosecution, the OPPRS may, in accordance with the principle of substitution, authorize a lower ranked public prosecutor to proceed in a matter under the jurisdiction of another lower ranked public prosecutor.[16]

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15 In January 2014, however, the public was informed that the OWCP was conducting an investigation against some citizens of BiH, without having informed the Public Prosecutor's Office of BiH, which was in contravention of the provisions of the Protocol - see the OWCP press release "Investigation against Orić and others pursued", of 29th January 2014, at http://www.tuzilastvorz.org.rs/html_OWCP/vesti_saopstenja_2014_eng.htm, accessed on 26th May 2014.

16 Article 20 (1) of the Law on Public Prosecution ("Official Gazette of the Republic of Serbia" No 116/2008, 104/2009, 101/2010, 78/2011 - 101/2011, 38/2012 – Constitutional Court decision, 121/2012 and 101/2013).

8. Anonymization of judgments in war crimes cases found to be unlawful

During 2013, the Higher Court Department had a habit of anonymizing rulings delivered in war crimes cases, thereby denying victims and society the right to learn the facts about the war crimes that were committed. In 2013, the HLC submitted three requests for access to first-instance and second-instance rulings delivered in various war crimes cases, to the Higher Court Department, invoking the right to free access to information of public importance. However, large parts of the rulings that the court delivered to the HLC were redacted (blacked out). The explanation offered by the court was that the anonymization was done in accordance with the Law on Personal Data Protection. Not only were the names and surnames of defendants and witnesses anonymized, but also whole pages containing the rationale behind certain rulings. This rendered the rulings effectively unreadable and unsuitable for analysis or for understanding the events in question.[17]

Even the Constitutional Court of Serbia resorted to anonymization, in a decision on a constitutional complaint lodged by one of the accused persons in the *Ovčara I* case. This Court withheld from the public the name of the complainant and his legal representative, names of lower court judges who had tried the case, and even the place where the crime was allegedly committed.

II Cases

A First-instance proceedings

1. *Ćuška/Qyshk*

During 2013, the Higher Court Department[18] heard the case[19] against the following indictees: Toplica Miladinović, Srećko Popović, Slaviša Kastratović, Ranko

17 In March 2014, the Commissioner for Information of Public Importance and Personal Data Protection ruled that the practice of anonymization of judgments was unlawful, see the HLC press release: "Anonymization of Judgments in Cases of War Crimes is unlawful", of 25th March 2014, at: http://www.hlc-rdc.org/?p=26422, accessed on 26th May 2014.

18 Members of the War Crimes Department' Trial Chamber: Judge Snežana Nikolić Garotić (presiding), Judge Vinka Beraha Nikićević and Judge Rastko Popović, members.

19 Case number: K Po2 48/2012.

Momić, Milojko Nikolić, Siniša Mišić, Dejan Bulatović, Boban Bogićević, Radoslav Brnović, Veljko Korićanin and Abdulah Sokić, all of whom were charged with committing a war crime against the civilian population.[20]

Course of proceedings[21]

The OWCP first brought an indictment in this case on 10th September 2010.[22] The indictment was amended several times during the main hearing, because the prosecutor dropped the charges against some of the accused persons, brought charges against other individuals, and included new charges in the indictment.[23]

The OWCP indictment of 17th December 2012 alleges that Toplica Miladinović, Srećko Popović, Slaviša Kastratović, Ranko Momić, Milojko Nikolić, Siniša Mišić, Dejan Bulatović, Boban Bogićević, Radoslav Brnović, Veljko Korićanin and Abdulah Sokić, at the time members of the of the YA 177th Military Territorial Detachment (MTD) based in the Peć/Pejë municipality, engaged in the expulsion of local ethnic Albanian civilians from the villages of Ljubenić/Lubeniq, Ćuška/Qyshk, Pavljane/Pavlane and Zahać/Zahaq, by subjecting them to intimidation and terror, that included unlawful destruction of civilian property, torching of civilians' homes, ancillary facilities and motor vehicles, unlawful appropriation of civilian property – money, jewelry and other valuables and motor vehicles; furthermore, the accused are alleged to have committed individual and mass killings, and permanently removed ethnic Albanian civilians from their homes and villages, banishing them to the Republic of Albania.

The indictment further alleges that on 1st April 1999, the accused killed at least thirty-six civilians in the village of Ljubenić/Lubeniq, inflicted serious injuries on eleven other civilians, in the form of penetrating wounds and destroyed at least eleven family houses by setting fire to them. On 14th May 1999, at least forty-one civilians were killed In the village of Ćuška/Qyshk, more than forty family homes and more than forty ancillary facilities were destroyed by being set on fire and more than 250 civilians were expelled from their homes and

20 Article 142 (1) in conjunction with Article 22, Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY" No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of the FRY, No 35/92, 37/93 and 24/94.

21 HLC trial reports, main hearing transcripts, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/cuska.html, accessed on 30th May 2014.

22 OWCP indictment no 4/10 of 10th September 2010.

23 More details on changes to the indictment in Humanitarian Law Center, War Crimes Trials in Serbia, Report for 2012, (Belgrade: Humanitarian Law Center,2013), p. 15.

forced to go to the Republic of Albania. On the same day, at least ten civilians were killed and at least four family homes were torched and destroyed in the village of Pavljane/Pavlane. Later on the 14th May 1999, the accused entered the village Zahać/Zahaq, where they killed at least twenty one civilians, set at least four family homes ablaze and seized more than thirty motor vehicles.

During 2013, thirty-six trial days were held, over the course of which fifty-seven witnesses were examined, including twenty-nine injured parties and five expert witnesses. In January 2013, one of the defendants agreed to testify for the prosecution and was consequently declared a protected witness (protected witness A1). The OWCP dropped the charges against him.

In 2013, the OWCP presented its case, consisting mainly of statements by witnesses/injured parties, who provided accounts of what had happened in the villages of Ljubenić/Lubeniq and Pavljane/Pavlane, and Zahać/Zahaq on 1st April and 14th May 1999, and the examination of defense witnesses. The latter, for the most part, claimed in their testimonies to have seen some of the persons accused in the *Ćuška/Qyshk* case in other locations at the time of the crime, away from the village where the crime took place.

After dropping the charges against defendant Vidoje Korićanin, on 7th October 2013, the OWCP issued an amended indictment charging, for the first time, Nenad Lekić, Vladan Krstović, Lazar Pavlović and Milan Ivanović, who were subsequently put under investigation[24], and Predrag Vuković, who is still at large, as co-perpetrators in the commission of a war crime against the civilian population in the villages of Ljubenić/Lubeniq, Ćuška/Qyshk, Pavljane/Pavlane and Zahać/Zahaq. The amended indictment differed from that of 17th December 2012 in the number of civilians killed in the village of Ljubenić/Lubeniq, so the accused were now charged with killing of at least fifty civilians instead of at least thirty-six, as was alleged in the initial indictment.

At the main hearing, held on 27th November 2013, injured party G.N. took the stand. She spoke about being raped as a little girl in Pavljane/Pavlane. The Trial Chamber declared G.N. a particularly vulnerable witness.[25]

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24 Case number: KTI No 7/13.

25 "The authority conducting proceedings may *ex officio*, or at the request of parties or the witness himself, designate as an especially vulnerable witness a witness who is especially vulnerable in view of his age, experience, lifestyle, gender, state of health, nature, the manner or the consequences of the criminal offence committed, or other circumstances." Article 103 (1) of the Criminal Procedure Code, Official Gazette of the Republic of Serbia, No 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.

Following her testimony, on 9th December 2013, the OWCP once again amended the indictment, with respect to the accused, Milojko Nikolić. The amended indictment alleged that Nikolić, on 14th May 2013, in the village of Pavljane/Pavlane, made injured party G.N., who was 13 at the time, enter a house, where he punched her with his hands and struck her with his weapon on the head, and then raped her.

The evidence process closed on 20 December 2013.

HLC Findings

The judge presiding over the case conducted the trial professionally and efficiently.

This was the first war crime case in which a trail chamber declared a witness to be a particularly vulnerable witness. In doing so, the court protected the integrity of the witness, who had been subjected to sexual abuse. The witness was declared particularly vulnerable after the closure of the main hearing, in the course of which she spoke for the first time about being raped.

It appears, however, that G.N. should have been given this status earlier in the proceedings and that both the prosecutor and legal representatives of the victims failed to react in a timely manner and demand that G.N. be declared a particularly vulnerable witness or accorded some other form of protection (exclusion of the public[26], removal of the defendants from the courtroom[27]). As early as the investigation stage, when the witness gave her statement to the prosecutor, there were clear indications that the victim was a sexual abuse survivor. Furthermore, before questioning witness G.N. at the main hearing, the court head heard the testimony of a psychiatric expert who pointed out that the witness was psychologically frail and having suicidal thoughts, and that a potential emotional breakdown caused by her testifying in court could worsen her condition. All these findings suggested that she was extremely vulnerable and should have been treated in a sensitive manner to avoid any detrimental consequences that testifying in court might have on her wellbeing and integrity.

While G.N. was being examined, as a particularly vulnerable witness, the

26 Article 363 (1) (4), Criminal Procedure Code, Official Gazette of the Republic of Serbia, No 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.

27 Idem, Article 390(5).

chamber rightly reprimanded Milojko Nikolić's defense lawyer Dragan Palibrk for disobeying the rules on examination of a particularly vulnerable witness by posing questions to her directly instead of through the chamber.[28]

Abundant evidence presented during the evidence presentation process implicated some persons who held more senior position within the hierarchy of the YA.[29] Despite that, the prosecutor did not include them in the indictment nor were they subject to investigation in 2013. Evidence showing the systematic nature of the crimes committed, the fact that the defendants were subordinated to the YU 125th Motorized Brigade, and especially the testimonies given by some members of the MTD, indicate that responsibility for planning, organization and execution of the crimes committed in the villages of Ljubenić/Lubeniq, Ćuška/Qyshk, Pavljane/Pavlane and Zahać/Zahaq lies not just with the chief defendant Toplica Miladinović, as stated in the indictment, but also with persons who were his superiors in the military hierarchy. Furthermore, the role of the MI of the Republic of Serbia in organizing, perpetrating and concealing this crime has not been explained.

The indictment directed against soldiers holding lower ranks in the YA units which committed the crimes in the villages of Ljubenić/Lubeniq, Ćuška/Qyshk, Pavljane/Pavlane and Zahać/Zahaq, highlighted, once again, the issue of the OWCP's reluctance to apply the command responsibility doctrine in domestic war crimes cases.

2. *Tenja II*

The proceedings[30] before the Higher Court Department[31] against BožoVidaković

28 Idem, Article 104.

29 See, for instance, the testimony of Duško Antić, in transcripts from the main hearing of 23th February 2011, p. 65 at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Cuska/8%20Cuska%20transkript%20sudjenje%20-23.02.2011.pdf ; testimony of Toplica Miladinović, in transcript from main hearing of 20th December 2010, p. 79, at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Cuska/1%20Cuska%20Transkript%20sudjenja-20.12.2010..pdf ; Zoran Rašković, in the transcript from the main hearing of 26th January 2012, p. 39 at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/36-26.01.2012.pdf.

30 Case number: K. Po2 1/12.

31 Members of the Trial Chamber of the War Crimes Department: Judge Dragan Mirković (presiding), Judge Mirjana Ilić and Judge Bojan Mišić (members).

and Žarko Čubrilo, who were accused of a war crime against prisoners of war[32] and a war crime against the civilian population,[33] continued into 2013.

Course of proceedings[34]

The OWCP indictment of 22nd June 2012[35] charges Božo Vidaković, in his capacity as commander of the 4th company of the Tenja Territorial Defense (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 7th July and the end of August 1991, on the territory of the municipality of Tenja (Croatia).

Božo Vidaković is charged that on 7th August 1991 in Tenja, he murdered a prisoner of war, Đuro Kiš, who was a member of the Croatian MI, in the hallway of the movie theater in Tenja. The victim's hands were tied with barbed wire at the time of his murder. The indictment further alleges that between 7th July and the end of August 1991 in Tenja, Vidaković unlawfully confined seven Croatian civilians – Marija and Marko Knežević, Manda Banović, Franjo Fuček, Nedeljko, Elizabeta and Franjo Gotovac – in the house of a local resident and held them captive there until the end of August. After that, Vidaković put them in a white van and took them to an unknown destination, after which they disappeared without trace, until in February 1992, witness Đoko Bekić recognized the bodies of Nedeljko, Elizabeta and Franjo Gotovac among bodies that had been found in a field behind Branko Radičević Street in Tenja. The bodies of the other victims were found and exhumed from a grave at Betin Dvor on 26th February 1998.

Žarko Čubrilo is charged with the unlawful detention and murder of eleven Croatian civilians in mid-July 1991. According to the indictment, Čubrilo, aided by Jovo Ličina and Savo Jovanović, members of the Tenja TO, took Ivan Valentić, Marija Cerenko, Ana Horvat, Katica Kiš, Pera Mamić, Josip Medved, Stipe and Evica Penić, Josip Prodanović, Vladimir Valentić and Franjo Burč out of a makeshift prison in Tenja, after which he ordered Ličina and Jovanović to tie the civilians' hands. He then put them on a truck and drove them to a livestock

32 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144 (1), and Article 142 (1).

33 This case was transferred to the Serbian judiciary under the Agreement on Mutual Cooperation in Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide, signed by the Office of the War Crimes Prosecutor of the Republic of Serbia and the Office of the Attorney General of the Republic of Croatia.

34 HLC trial report, in the transcript from main hearing, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/tenja2.html, accessed on 30th May 2014.

35 Deputy War Crimes Prosecutor Snežana Stanojković.

burial site near the village of Bobota. On arriving there, Čubrilo ordered Ličina and Jovanović to pull back the tarpaulin covering the rear of the truck and ordered the civilians out of the truck, shooting them in the head, one by one as they got out of the truck.

The trial commenced on 29th September 2012, but was halted during the first half of 2013, because two members of the Trial Chamber had been appointed to serve on the Court of Appeal Department. Once a new chamber was set up, the trail began anew on 2nd July 2013. By the end of the year, six trial days had been held, over the course of which the defendants presented their defense again, and 27 witnesses, including 13 injured parties, were examined.

The accused stood by their defense presented earlier, in its entirety.[36]

Most of the witnesses examined were either injured parties or victims' family members. Although the witnesses had no direct knowledge of the sufferings experienced by their family members, because they were outside Tenja at the time of the crime, their indirect knowledge of the event incriminated the defendants, Božo Vidaković in particular.

Witness Josip Knežević, the son of victims Marija and Marko Knežević, stated that he was living in Tenja with his parents and brother Zoran, when Serbian forces took control of this village. He and his father were used for forced labor and had to do all sorts of work. At that time, the accused, Vidaković, would come to their house on a daily basis, threaten them and take away their possessions. Eventually, he took his father away. After his father had been taken way, the witness, fearing for his own safety, managed to flee Tenja, together with his brother. When he later returned to the village, he was told by some Serbian neighbors that Vidaković had beaten and killed his parents.

Witness Oliver Kiš, the son of victim Đuro Kiš, said that he was in Osijek at the time of his father's murder. On 8th July 1991, a day after the murder, he was informed by Serbian combatants in Tenja, over a two-way radio, that his father had been killed by the defendant Vidaković.

Witness Lazar Radišić stated that during July and August 1991 he saw both defendants in Tenja. He saw Đuro Kiš being taken first to the TO command post, and then saw defendant Vidaković take the victim to the movie theater, forbidding anyone to follow him. Later that day, the witness was ordered to remove the body of Đuro Kiš, who had a shotgun wound on the chest. Rumors went

36 See: transcripts from the main hearing of 2nd July 2013, at which the accused persons presented their defensedefense at: http://www.hlc-rdc.org/Transkripti/tenja2.html, accessed on 27th May 2014.

around the village that Vidaković had also killed a local married couple, Marija and Marko Knežević, and Andrija Gotovac.

Former members of the Tenja TO were also examined as witnesses. They, as a rule, had "poor recall" of the events in question and maintained that they did not know the injured parties, although they were all residents of a small community. They also claimed not to have heard about the sufferings of the victims because, as they said, they were not interested in what had happened to their Croatian neighbors because that was "none of their business". They did hear some stories about their suffering, but were not willing to talk about them because, according to them, it was just hearsay.

HLC Findings

During the main hearing, held in 2013, the Trial Chamber failed to adequately protect the witnesses/injured parties who took the stand in this case. Vidaković made unpleasant comments to some witnesses who were testifying in this case. For instance, referring to witness Valentić, he said that he was "out of his mind".[37] In this instance, as in other instances, the presiding judge failed to use any of the statutory measures (reprimand or fine) available to him to protect the witness.[38] Instead, he just gave a verbal, informal, warning to Vidaković not to address the witnesses in such a way.

Although this case was suspended during the first part of 2013, following the appointment of two of the judges to the Court of Appeal Department, good preparation of the case and efficient conduct of the trial by the presiding judge helped to make up for lost time.

3. *Bihać*

In 2013, the Higher Court in Belgrade[39] opened the proceedings[40] against

37 The main hearing was held on 10th October 2013. This comment by Vidaković was not recorded in the transcript.

38 Article 102 of the Criminal Procedure Code, Official Gazette of the Republic of Serbia, No 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013.

39 War Crimes Department Trial Chamber composed of: Judge Mirjana Ilić (presiding), Judge Bojan Mišić and Judge Dragan Mirković (members).

40 Case number: K.Po2 5/13. The OWCP took over this case from the Cantonal Court in Bihać, under the Law on International Mutual Assistance in Criminal Matters and the Agreement on Mutual Assistance in Criminal and Civil Matters, signed by the Republic of Serbia and the Republic of Bosnia and Herzegovina. The accused, Đuro Tadić demanded to be tried in Serbia.

Đuro Tadić, who was charged with the commission of a war crime against the civilian population[41].

Course of proceedings[42]

According to the OWCP indictment issued on 8th April 2013,[43] Đuro Tadić, in his capacity as a member of the Republika Srpska Army (RSA), together with Zoran Tadić, Jovica Tadić, Zoran Berg, Željko Babić[44], Svetko Tadić[45] and the now deceased Slobodan and Gojko Đurić, committed a war crime against the civilian population in the village of Duljci (in the municipality of Bihać, BiH) on 23rd September 1992. Đuro Tadić and the other seven men, wearing either military or police uniforms, armed with machine guns, and with their faces masked and wearing caps, arrived, in two passenger vehicles, at the village of Duljci, where a group of Bosniak civilians were picking plums, as part of their so-called 'labor duties'. The men then discharged several burst of automatic fire at the civilians and stabbed some of them with knives. Then, having seen that some of the civilians had taken shelter in a cowshed, they threw a hand grenade at the cowshed, killing eighteen people (Haso Hasufović, Bekir Šahinović, Safija Šahinović, Hasnija Šehić, Ismeta Džaferagić, Zejna Šarić, Sadeta Mujić, Muho Dupanović, Meho Dupanović, Ago Dupanović, Šera Rakić, Huso Šarić, Vahida Vojić, Fatima Vojić, Senija Vojić, Aldina Vojić, Sabira Kolaković and Safija Šehić) and severely wounded another woman, Tahira Hajrulahović, by firing several shots at her in an attempt to kill her. Tahira, although seriously injured, survived and later escaped After that, they tossed the bodies into a pile and set fire to them.

The main hearing commenced on 26th June 2013 and closed on 12th December 2013. During seven trial days that were held in this case, the accused presented his evidence and twenty-five witnesses, including ten injured parties, gave their testimonies.

41 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of THE SFRY No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of FRY, No 35/92, 37/93 and 24/94, Article 142 (1), in connection with Article 22.

42 HLC trial reports, transcripts from the main hearing, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/bihac.html, accessed on 30th May 2014.

43 Case number: KTO 3/13.

44 Zoran Tadić, Jovica Tadić, Zoran Berga and Željko Babić had already been finally convicted for the same matter by the Cantonal Court, following a plea agreement.

45 Still at large.

Presenting his defense, the accused, Đuro Tadić, denied having committed the crime he was charged with. He said that he was a member of the Rajinovac unit of the RSA and that in mid September 1992 he was sent home, to the village of Rajinovac, to recover from contusions he had sustained on the battlefield. In that period his brother, Tomislav Tadić, was killed and his body was mutilated. On 22nd September 1992, a day after his brother's funeral, Đuro Tadić was visited by the now diseased Gojko Đurić, who, threatened Đuro with his weapon, and made Đuro drive his car for Tadić's brothers Svetko and Jovica, and nephew Zoran, and Željko Babić and Zoran Berg and himself. Tadić got into his car, not knowing where to drive, and drove until Gojko told him to stop at Duljci, near the place where some people were picking plums. Then Gojko ran out of the car and started shooting at the people. When Đuro saw him shoot at the civilians, he stepped out of the car, asked Gojko why he had done it and told the plum pickers to run. Gojko then forced other men out of the car and ordered them to follow him. The accused, and his brother Svetko got in the car, drove several hundred meters away, performed a u-turn and returned home. The next day, Gojko told him that he had killed nine civilians at Duljci.

Đuro Tadić changed his statement several times during investigation and the trial. He initially said that Gojko Tadić made him drive the men, but later said that Gojko was not with them in the car while they were driving to Duljci, without being able to explain why he was driving or how he knew where to go. Furthermore, he initially claimed to have told the civilians who were picking plums to run, but later said that he said that to the people who were guarding the civilians. After being confronted with discrepancies between his statement given during investigation and that given at the trial, he maintained that it was because "the judge did not understand him well". He also said that his relatives, who had admitted their guilt before the court in Bihać, were incriminating him only to receive milder sentences for themselves and maintained that their claims about the existence of an agreement to take revenge for Tomislav's murder were untrue.

Twenty-five witnesses were examined, including four co-perpetrators (Jovica and Zoran Tadić, Zoran Berga and Željko Babić, who had previously pleaded guilty in this matter before the Cantonal Court in Bihać), ten injured parties, including eye-witnesses, and eleven witnesses who had direct or indirect knowledge of the events in question.

The witnesses and co-perpetrators – Jovica Tadić, the brother of the accused, and Zoran Tadić, the nephew of the accused – claimed their right not to testify

against a close relative. Witnesses Zoran Berga and Željko Babić confirmed the existence of an agreement between the co-perpetrators to avenge Tomislav Tadić's death, and said that they all went to Duljci with that intention and killed the Muslim civilians who were picking plums. Witness Željko Babić stated that after Tomislav's funeral, his brothers (the convicted Jovica and the accused, Đuro Tadić) and Zoran Tadić agreed to avenge his death and that the accused went with them to Duljci the next day. Witness Zoran Berga confirmed that he and the accused went to Duljci in the same car and that all the men were armed with automatic rifles.

The injured parties who witnessed the crime described it in identical terms: a group of Bosniak civilians were picking plums as part of their 'labor duty', when masked and uniformed soldiers came and opened fire on them from automatic rifles. Some witnesses recognized Zoran Berga, Zoran Tadić and Gojko Đurić as attackers. They gave a convincing description of the sequence of events that took place and thus corroborated the allegations set forth in the indictment referring to that part. Their testimonies were reinforced by witnesses Mile Pepić and Milan Ivančević, who at the time of the commission of the offence, were at Duljci, as employees of the 'Srpska privreda' public company.

Another seven witnesses, who were, at the time. active-duty or reserve police officers, and controlled Rajinovac and Duljci, testified at the main hearing. They said they had no direct knowledge of the event itself, but their testimonies nonetheless contributed to the understanding of the broader context of the event. Namely, a few days before the civilians were killed, several soldiers of the RSA Rajinovac unit were killed and their bodies were mutilated. Tomislav Tadić was among them. Local residents were outraged, and for this reason, and also for security reasons, on 21st September 1992 the TO staff made a decision to abolish 'labor duty' (plum picking) in the whole area and to secure the funerals of the killed soldiers. After the funerals, thirty-seven Bosniak civilians were killed in the area – in the villages of Orašac, Duljci, Ćukovi – and many others, in fear for their lives, ran away and scattered across the area. The police inspected the crime scenes, and the military security service also undertook investigations into the crime, because some of the suspects were thought to be members of the army.

HLC findings

This trial is the product of good cooperation in the prosecution of war crimes established between the Serbian and the BiH's prosecutor's offices. The case

was well-prepared, the Trial Chamber acted in a highly professional manner and, despite some practical difficulties, such as the overbooked courtrooms in the Higher Court in Belgrade, and the need to adjust to the Court of BiH schedule to be able to examine witnesses via video link, succeeded in completing the evidence procedure within six months, despite the large number of witnesses.

4. *Sanski Most*

During 2013, the Higher Court Department[46] conducted proceedings[47] against Miroslav Gvozden for a war crime against the civilian population.[48]

Course of proceedings[49]

The indictment issued by the OWCP on 2nd April 2013 alleges that on 5th December 1992, the accused, together with several other members of the RSA – Mile Gvozden[50], Ostoja Gvozden, Bojan Gvozden and underage Zoran Šimčić[51] – with whom he had reached an agreement to avenge the killing of his brother Radoslav Gvozden, killed six Croatian civilians (Petar Topalović, Mila Topalović, Mato Matoš, Marija Šalić, Dragica Šalić and Manda Matoš) and attempted to kill Piljo Šalić[52] in the villages of Tomašica and Sasine (Sanski Most municipality, BiH).

The main hearing opened on 12th June 2013. Over the course of five trial days held during 2013, the accused presented his defense and nine witnesses, including three injured parties, were examined.

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46 War Crimes Department Trial Chamber, composed of: Judge Bojan Mišić (presiding), Judge Mirjana Ilić and Judge Dragan Mirković (members).

47 Case number: K.Po2 br. 4/13.

48 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of FRY, No 35/92, 37/93 and 24/94, Article 142 (1), in connection with Article 22.

49 HLC trial reports, transcripts from the main hearing, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/bihac.html, accessed on 30 May 2014.

50 Still at large.

51 Ostoja Gvozden, Bojan Gvozden and Zoran Šimčić were granted the benefits of 'repentant witnesses' (who testify against their co-perpetrators in exchange for having the charges against them dropped) in the proceedings conducted before the Cantonal Court Bihać

52 This case was transferred to the OWCP by the Cantonal Court in Bihać after the signing of a protocol on mutual cooperation between prosecutor's offices of Serbia and BiH. For more information on the protocol, see the chapter Regional Cooperation, p 7.

The accused claimed not to have committed the crime of which he was accused. He stated that at the relevant time he was living in Belgrade and went to his native village of Usorci (in the municipality of Sanski Most, BiH) to attend the funeral of his brother Radoslav Gvozden, aka 'Crni', who had been killed while serving as an RSA soldier. The funeral was held on 3rd December 1992, and attended by Ostoja, Bojan and Mile Gvozden, Radoslav's comrades and distant relatives, and Zoran Šimčić. At the funeral, the accused heard Mile say, "Crni, we will avenge your death". The accused said he was in the company of the all above mentioned relatives on 5th December 1992, when Mile called them to go to the neighboring village of Sasine. Carrying arms (the accused carried an automatic rifle), they went to the village of Sasine, inhabited by Croats. On entering the village, they saw a large group of people standing near the closest house in the village. An elderly man and a woman in her fifties were killed right there. There was a horse cart there, loaded with firewood, and two men and a six or seven-year old boy were sitting on top of it. The men were killed, and the boy was told by the accused to run. The rest of the Miroslav's group then went to a nearby house, after which Miroslav heard shots in the house. He could not tell the court how many people were killed in the house or who killed them. The accused claimed that this whole event had left a very strong impression on him, but that he could not remember who shot and killed the people in Sasina. After the killings, all men went back home to Usorci. Later that evening, the military police came and arrested them all.

Witnesses Bojan Gvozden and Zoran Šimčić incriminated the accused. These witnesses said that they had fought for the RSA during the Bosnian war. They attended the funeral of their comrade and relative Radoslav Gvozden, together with the accused and Mile and Ostoja Gvozden. During the funeral, these witnesses stated, Mile Gvozden said that they should avenge Radoslav's death by intimidating some people. On 5th December, they went armed to the neighboring Croatian village of Sasine, allegedly to settle some problems Mile had with a young man from that village. On entering the village, they found a large group of people, consisting of both Croats and Serbs. Mile and the accused entered the yard of a house, and then there was some commotion. Mile asked a man about his name, and when the latter answered that his surname was Topalović, Mile killed him, and immediately afterwards killed two women. After that, they headed home, and on the way home came upon a horse cart with two men and a boy sitting on it. Mile killed one of the men, after which he and the accused shot the other man. A little later, Mile and the accused barged into a house, after which shots were heard from the house. Mile came out of the house saying that they had just "killed a newly-wed couple".

Witness Ostoja Gvozden confirmed the existence of a revenge agreement.[53]

Witness/injured party Marinko Topalović testified that he, his father and father's colleague, Piljo Šalić, were riding on a horse-drawn cart, when they were stopped by a few young armed men at Sasina. One of the men shot and killed his father and then shot and seriously wounded Piljo. The witness recognized the accused as the man who fired the shots.

HLC Findings

The proceedings were marked by the outrageous misconduct by defense counsel Branimir Gugl, who misled both his client and the court, action that will result in an unnecessary prolongation of the proceedings.

According to the Criminal Procedure Code, only attorneys may act as defense lawyers in criminal proceedings. The Code further states that a defendant must have a defense counsel – from the first interrogation until the final conclusion of the criminal proceedings – if the proceedings that are being conducted against him are in connection with a criminal offence punishable by a term of imprisonment of eight years or more, which includes war crimes.[54] As the defense counsel for the accused was a person who, after his name had been removed from the roll of attorneys, had not been readmitted to the roll,[55], the court deemed that the accused had not had a defense counsel at all and therefore held that all procedural actions performed so far will have to be repeated in order to secure the right to counsel for the accused.

Although incidents like this are rather rare, it is clear that the courts will have to perform some additional checks into persons who appear as defense lawyers, to make sure they fulfill all legal requirements for practicing law.

5. *Beli Manastir*

Zoran Vukšić, Slobodan Strigić and Branko Hrnjak are being retried[56] by the

53 See the summary of Ostoja Gvozden's testimony at: http://www.hlc-rdc.org/wp-content/uploads/2013/06/SanskiMost-14-06-2013.pdf, accessed on 27th May 2014.

54 Criminal Procedure Code, Official Gazette of the Republic of Serbia, No 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 74 (1). (2).

55 Branimir Gugl was suspended from practicing law for two years (from 29th May 2009 to 29 May 2011) following disciplinary action against him. Gugl never applied for reinstatement.

56 Case number: K.Po2 9/13.

Belgrade Higher Court Department[57] for a war crime against the civilian population[58].

Course of proceedings[59]

The OWCP indictment[60]of 23rd June 2010 alleges that Zoran Vukšić, Slobodan Strigić, Branko Hrnjak and Velimir Bertić, at the time members of the Special Purpose Units of the Beli Manastir (Croatia) police, unlawfully detained, physically abused, intimidated, terrorized, tortured and inhumanly treated Croatian civilians, between August and December 1991. In addition, Zoran Vukšić, Slobodan Strigić and Branko Hrnjak were also charged with murdering several civilians.[61]

The trial of this case commenced on 1st November 2010 at the Higher Court[62]. Fifty-five witnesses, including thirteen injured parties, were examined over the course of twenty-three trial days held in 2013.

On 19th June 2012, the Trial Chamber[63] delivered a guilty verdict, sentencing Zoran Vukšić to the maximum sentence of 20 years imprisonment, Slobodan Strigić to ten years, Branko Hrnjak to five years and Velimir Bertić to a year and a half in prison.

Main findings with respect to the first-instance judgment issued on 19th June 2012[64]:

57 War Crimes Department Trial Chamber composed of: Judge Dragan Mirković (presiding), Judge Mirjana Ilić and Judge Bojan Mišić (members).

58 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 142 (1) in conjunction with Article 22.

59 The HLC trial reports, transcripts from the main trial, indictments and judgments are available at: http://www.hlc-rdc.org/Transkripti/beli_manastir.html, accessed on 30th May 2014.

60 This case was transferred to the OWCP by the Office of the Attorney General of the Republic of Croatia under the Agreement on Mutual Cooperation in Prosecution of Perpetrators of War crimes, Crimes against Humanity and Genocide.

61 Full version of the indictment available at: www.tuzilastvorz.org.rs.

62 Case number: K.Po2 br. 45/2010.

63 Composed of: Judge Dragan Mirković (presiding) and Judge Olivera Anđelković and Judge Tatjana Vuković (members).

64 See Analysis of the judgement in: Humanitarian Law Center, Report on War Crimes Trials in Serbia in 2012, (Belgrade: Humanitarian Law Center, 2013), p. 73; redacted version of the judgment available at: http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Prvostepena-presuda.pdf, accessed on 27th May 2014.

i. In its judgment, the Trial Chamber established that: the accused Zoran Vukšić on 10th October 1991, having made an agreement with Zoran Madžarac to that effect[65], killed Adam Barić; Madžarac and an unidentified member of the Beli Manastir police, took the married couple Adam and Ana Barić out of their home, drove them to the Sudaraš neighborhood, where the accused Vukšić was waiting for them. Vukšić then killed Adam Barić by shooting him in the back of the neck and attempted to kill Ana Barić, by stabbing her three times in the neck, as a result of which she sustained life-threatening injuries.

ii. The accused, Zoran Vukšić, in the course of an attack against the village of Kozarac on 28th August, wantonly shot at houses and civilians, killing Ivo Malek, and inflicting serious injuries on Josip Vid by shooting him in the leg with a pistol.

iii. The accused Vukšić and Bertić physically abused numerous Croatian civilians who were unlawfully confined in the Beli Manastir police detention facilities, by kicking them, striking them with their batons, making them slap each other's faces, sticking guns in people's mouths, threatening to slit their throats and making them sing 'chetnik' songs. The accused, Bertić, made one civilian run barefoot across a stubble field, running after him and kicking him and then, after having seemingly let him escape, organized a 'rabbit hunt' for him, to catch him and beat him again. Bertić also hit one of the detained civilians with a baton, and threatened to cut his throat and made him sing 'chetnik' songs because the civilian's son was a member of the Croatian MI.

iv. On 17th October 1991, the accused, Vukšić, Strigić and Hrnjak, following an agreement between Vukšić and Madžarac, killed four Croatian civilians, all members of the Čičak family. Vukšić, Strigić and Hrnjak took the Čičaks in a police vehicle, driven by Strigić, to the abandoned 'Karaševo' farmhouse, and then first took Mato Čičak from the vehicle. Vukšić killed him by stabbing him in the neck. After that, they took Ivan, then Vinko, and lastly, Ante, out of the vehicle. Vukšić shot and killed Ivan and Vinko and then he and Strigić killed Ante with shots from their automatic rifles. After murdering the Čičaks, they returned to Beli Manastir and divided the possessions and money they had taken from the victims when they were in Zoran Madžarac's apartment.

65 The proceedings against Zoran Madžarac were suspended, as Madžarac is still at large.

The OWCP, defense counsels for the accused, and the accused Slobodan Strigić appealed the judgment.

On 29th March 2013, the Court of Appeal Department rendered a judgment[66] confirming the first instance judgment with respect to Velimir Bertić and quashing the first-instance judgment with respect to Zoran Vukšić, Slobodan Strigić and Branko Hrnjak and remanded the case to the first-instance court, ordering a retrial. The Court of Appeal Department held that the first-instance judgment contained serious procedural errors, because it failed to provide explanation concerning some crucial facts relating to the murder of the Čičak family. Namely, the first-instance court established the facts about the murder of the Čičak family on the basis of Hrnjak's defense, presented at the main hearing. However, the Court of Appeal Department held that the first-instance court failed to provide sufficient reasons as to why it accepted Hrnjak's defense as true. The court also pointed to the discrepancies between Hrnjak's testimony in his defense case and the material evidence presented, i.e. witnesses' testimonies and expert witness' findings regarding Mato Čičak's injuries. Namely, Hrnjak stated that Vukšić did not shoot Mato Čičak, but stabbed him in the neck, whereas expert witness Dunjić established that Mato had a gunshot wound to the head. Hrnjak's confession of guilt was also viewed as disputable, because Hrnjak did not admit to having perpetrated the offence but only to having been present at the time of the commission of the crime in question. Lastly, the Court of Appeal Department held that on the basis of the description of the criminal offence in question, as it was given in the judgment, it could not be inferred that Hrnjak's actions amounted to co-perpetration, i.e. participation in the commission of the criminal offence in question.

The retrial[67] commenced on 25th September 2013, before a chamber composed of members other than those who had adjudicated at the first trial.[68] Over the course of four trial days held in 2013, the defense presented its case and two expert witnesses, medical expert Dr Dušan Dunjić, and ballistics expert Milan Kunjadić, presented their findings.

The defendants stood by their defense presented at the trial, except that Vukšić, for the first time, stated that it was Hrnjak and Strigić who killed the Čičaks, saying he had not wanted to disclose this information earlier.

66 Case number: Kž1 Po2 No 7/12.
67 Case number: K. Po2 No 9/13.
68 Judge Dragan Mirković (presiding), and Judge Mirjana Ilić and Judge Bojan Mišić (members).

Defendant Hrnjak, testifying in his own defense, repeated his earlier statement that he did not participate in the murder of the Čičak family members, but was only present during the murder. He explained that he joined the other defendants, because he had been told by a colleague, Đuro Opačić, at the Beli Manastir police station, that "some people" needed to be transported to Jagodnjak to surrender to the YPA. Vukšić instructed Stigić where to drive and where to pull over. When they pulled over and got out of the vehicle, Vukšić told Madžarac to take one man out of the vehicle, after which Vukšić stabbed him with a knife in the neck. Then Vukšić asked Madžarac to take another man from the vehicle, and killed him too, with his gun. After that Vukšić killed a third member of the Čičak family with his gun. Vukšić and Strigić killed the fourth victim with their automatic rifles. Hrnjak pointed out that defendant Vukšić threatened him after the crime and warned him not to tell anyone about the event. Hrnjak was afraid that Vukšić would kill him, as he was "the most dangerous man in Baranja".

Expert witness, Dušan Dunjić, stuck to his earlier opinion that the injuries inflicted on Mato, Ante, Ivan and Vinko Čičak were caused by firearms.[69] He pointed out that on the basis of the photographic documentation of the crime scene, showing the bodies of the victims lying next to each other, it can be concluded that the bodies had been moved before the crime scene investigation took place.

Expert witness, Milan Kunjadić, testified about the position of the victims' bodies at the moment that they sustained their injuries, and offered his opinion about the type of weapon used and the sequence of injuries.[70] With respect to the defense counsel's motion for a crime reconstruction in court, as part of the evidence procedure, Kunjadić stated that even after a crime reconstruction, he would not be able to provide a more detailed opinion on the matter.

The chamber denied the defense motion for re-examination of previously examined witnesses and of witnesses who did not have direct knowledge of the events which were the subject of these proceedings. The defense motion for a crime reconstruction was also denied, as unnecessary. The evidence process

69 See trial report of 27th November 2013 at: http://www.hlc-rdc.org/wp-content/uploads/2013/11/BeliManastir_ponovljeni_postupak_Izvestaj_sa_sudjenja_27.11.2013.pdf, accessed on 27th May 2014.

70 See trial report of 28th November 2013 at: http://www.hlc-rdc.org/wp-content/uploads/2013/11/Beli-Manastir_-ponovljeni-postupak_Izvestaj_sa_sudjenja_28.11.2013.pdf, accessed on 27th May 2014.

closed on 13th December 2013, and closing arguments were scheduled for February 2014.

HLC findings

The judgment of the Court of Appeal Department in the part concerning penalties is a continuation of the unacceptable practice of imposing lighter penalties than the relevant statutory minimum in war crimes cases. The Court of Appeal Department affirmed the first-instance judgment passed on the accused Bertić, in which he had been sentenced to eighteen months in prison, in line with provisions allowing the courts to reduce penalties below the relevant statutory minimum where particularly mitigating circumstances exist. Justifying this decision, the Court of Appeal Department stated, among other things, as follows: "...that this is an adequate punishment, and commensurate with the seriousness of the offence, is reinforced by the fact that no aggravating circumstances were found to be present".

Such a view, held by both the first instance court and the appellate court, is inconsistent with court-established facts. Namely, the judgments state that the accused inflicted bodily injuries on at least nine persons, some by sticking his gun in their mouths or by pressing his gun against their heads, threatening to kill them; making them sing 'chetnik' songs, and engaging in other forms of inhumane treatment. The number of such actions undertaken by the accused, shows his persistence, ruthlessness and cruelty, and this is something that the courts should not have ignored. At the same time, both courts gave far too much weight to the mitigating circumstances. The fact that the accused was 22 years old, a young adult, at the time he committed the offence, should not be given much weight in war crimes cases.

The Court of Appeal Department rightly quashed the first-instance judgment in connection with the murder of the Čičak family, and instructed the trial court to assess Hrnjak's defense more carefully. It drew particular attention to the fact that the judgment failed to fully explain why the courts accepted the part of Hrnjak's defense in which he claimed to have never been at the Čičaks' house before the murder, despite witness' statements pointing to the contrary, and why it accepted Hrnjak's testimony concerning the place of the murders and the manner in which they were committed, since they contradicted both the photographic documentation and the expert witness' findings concerning Mato Čičak's injuries. Namely, the court accepted as true, Hrnjak's statement that the accused, Vukšić, stabbed Mato Čičak with a knife in the neck, whereas the expert witness found that Mato Čičak's injuries, had been inflicted by a firearm.

At the retrial, the first-instance court followed the instructions of the Court of Appeal Department and managed to clarify some parts of Hrnjaks' defense that had remained unclear at the first trial. Medical expert Dušan Dunjić explained that in his testimony about the injuries sustained by Mato Čičak, he could only testify about those injuries that were found on the skeletal remains, since there had been no soft tissues left for the post-mortem examination. For that reason, he could not exclude the possibility that Mato Čičak might have died as a result of having been stabbed in the neck with a knife, that is to say, in the manner described by Hrnjak during his defense case. This expert also largely resolved the dilemma concerning the discrepancies between Hrnjak's testimony and the photographic documentation, explaining that the bodies of the Čičak family members had most likely been moved before the photographs were taken, and gave reasons for reaching this conclusion.

With regard to the Court of Appeal Department's observation that on the basis of the first-instance judgment's disposition it could not be inferred which actions by the accused amounted to co-perpetration, no analysis of the proceedings before the first-instance court could be undertaken before the retrial resulted in a judgment.

B Cases resulting in first-instance judgments during 2013

6. *Skočić*

On 22nd February 2013, the Higher Court Department,[71] delivered a judgment[72] finding the seven defedants guilty of a war crime against the civilian population[73] and sentenced them to imprisonment as follows: Zoran Đurđević and Zoran Stojanović to twenty years each, Tomislav Gavrić and Zoran Alić to ten years each, Dragana Đekić to five years and Damir Bogdanović to two

71 War Crimes Department Trial Chamber: Judge Rastko Popović (presiding), Judge Vinka Beraha Nikićević and Judge Snežana Nikolić Garotić (members).

72 Case number:K.Po2 No 42/10

73 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 142 (1), in connection with Article 22.

years. Đorđe Šević, who received a five-year prison sentence for this offence, will serve a concurrent sentence of 15 years[74].

Course of proceedings[75]

On 30th April 2010, the OWCP brought an indictment against Sima Bogdanović, Damir Bogdanović, Zoran Stojanović, Tomislav Gavrić and Đorđe Šević for crimes committed in the village of Skočić (municipality of Zvornik, BiH), according to which the accused, as members of a paramilitary unit under the command of Sima Bogdanović, are alleged to have committed a war crime against Roma civilians on 12th July 1992 in the village of Skočić, together with other, unidentified, soldiers. The crime resulted in the deaths of twenty-two civilians and the wounding of one, Zijo Ribić, who participated in the proceeedings as an injured party. Another three injured parties, 'Alpha', 'Beta' and 'Gamma' were held captive until January 1993, during which period they were subject to forced labor, beaten, raped and subject to other forms of sexual abuse.[76]

Following the identification of another three members of Sima Bogdanović's paramilitary unit, on 23rd February 2011, the OWCP issued another indictment for the same criminal offence, against Zoran Alić[77], and on 22nd December 2011, against Zoran Đurđević and Dragana Đekić[78], after which the proceedings against them were merged with the already ongoing proceedings against Sima Bogdanović and others.

The proceedings against Sima Bogdanović ended following his death in August 2012.

On 4th December 2012, the OWCP issued an amended, consolidated indictment against Damir Bogdanović, Zoran Stojanović, Tomislav Gavrić, Đorđe Šević, Zoran Alić, Zoran Đurđević and Dragana Đekić.[79]

74 Đorđe Šević was finally sentenced to fifteen years in prison by a Belgrade District Court judgment of 15th July 2005 (K.No 1419/04) for the criminal offence of a war crime against the civilian population, which he committed after the criminal offence which is the subject of the *Skočić* trial.

75 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/skocici.html, accessed on 31st May 2014.

76 OWCP indictment KTRZ no7/08, of 30th April 2010, available at:http://www.tuzilastvorz.org.rs/html_trz/optuznice_cir.htm, accessed on 27th May 2014.

77 Case number: KTRZ No 11/10.

78 *Ibidem*.

79 Case number: KTRZ No7/08, of 4th December 2012, available at:http://www.tuzilastvorz.org.rs/html_trz/optuznice_cir.htm, accessed on 27th May 2014.

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 twenty two, listed in the initial indictment, to a total of twenty seven, Additionally, the paramilitary unit under the command of the late Sime Bogdanović, in which the defendants served, was identified as a unit fighting on the Serbian side in the conflict, under the name of 'Sima's chetniks'.

The main hearing commenced on 14th September 2010 and ended with the passing of a judgment on 22th February 2013. Over the course of the main hearing, forty one witnesses, including six injured parties, were examined.

The court established that the accused, Stojanović, Šević, Alić, Đurđević and Đekić, togheter with other, as yet unidentified members of the 'Sima's Chetniks' unit, entered the village of Skočić on 12th July 1992 armed, and without any military necessity, destroyed the village mosque. Afterwards they went to a part of the village inhabited by thirty-five Roma, and ransacked their houses, looking for money and valuables. Then they drove thirty-two village residents out of Hamdija Ribić's house and searched them, during which the accused Dragana Đekić robbed the injured party 'Gamma' of her gold jewelry. While searching the houses and the injured parties, members of 'Sima's Chetniks' punched, kicked and hit the injured parties with rifle butts. The first victim they first beat up and then killed was Arif Nuhanović. The court further established that the accused, Stojanović, struck Esad Aganović, first with his rifle and then with a bicycle wheel. The now deceased Sima Bogdanović took the injured party 'Alpha' out of Hamdija's house, tied her hands with a belt and raped her with her hands tied, after which he pulled out her two gold teeth with a pair of pliers. In the meantime, other, unidentified members of the unit, took the injured parties 'Beta', thirteen years old at the time, and 'Gamma', fifteen years old at the time, to Hamdija Ribić's house and raped them there.

The late Sima Bogdanović ordered the injured parties onto a truck, in which members of the unit had tossed the body of Arif Nuhanović, and then transported them to the village of Malešić. Upon arrival in Malešić, they ordered the injured parties 'Alpha','Beta' and 'Gamma' to get out of the truck, and ordered Dragana Đekić and other, unidentified members of the unit to watch over them. The accused Stojanović and Đurđević, together with the late Sima Bogdanović and other members of the unit, transported the remaining injured parties to the village of Šetići, to a pit in a place known as 'Hamzići', where they killed twenty-seven civilians and tossed their bodies into the pit. The injured party Zijo Ribić, who was eight years old at the time, survived the killings with severe injuries. During the events at 'Hamzići', the accused Alić, failed to intervene to halt events, but stood nearby, keeping watch.

The court also estsblished that Stojanović, Šević, Đurđević, Alić and Đekić,

were in the village of Malešić between 12th July and early September 1992, together with other, unidentified members of their unit, and that the accused Damir Bogdanović and Tomislav Gavrić joined them in the second half of August. The injured parties 'Alpha', 'Beta', and 'Gamma were kept confined in various houses in the village, and ordered by members of the unit to do everything they were told to do, on pain of death. Thus they washed their captors' clothes, cooked for them and cleaned the houses in which they stayed. While in Malešić, the injured parties were repeteatedly beaten by the accused Stojanović, Đurđević, Alić and Dekić and also sexually abused throughout the period. The accused Đurđević and some other, unidentified members of the unit, made the inured parties 'Beta' and 'Gamma' walk naked on the tables and Đurđević threatened to make the injured party 'Alpha' her drink his semen from a glass. All three injured parties were raped on a number of ocassions by other, unidentified members of the unit, and some of the accused. The injured party 'Alpha' was raped by the accused, Stojanović, Đurđević, Alić and Gavrić on repeated ocassions. The injured party 'Beta' was raped by the accused, Stojanović, Alić and Gavrić, and the injured party 'Gamma' by the accused, Gavrić.

Assessing the state of mind of the accused at the time of committing the criminal act, the court established the existence of direct intent.

In determining sentences to be passed upon the accused, the court found the existence of a number of mitigating factors. Specifically, with respect to Damir Bogdanović, his family circumstances, the fact that, being only twenty years old, he was a young adult at the time of the commission of the offence, the absence of convitions prior to commiting the offence in question, as well as his pivotal role in helping the injured parties 'Alpha' and 'Beta' survive the war, were regarded as mitigating circumstances. These, taken together, as being interrelated, amounted to a particulary mitigating circumstance, as a result of which the court imposed a sentence on Bogdanović which was less than the statutory minimum. The seriousness of the offence committed and its consequences were taken into account as aggravating factors.

As for defendant Zoran Stojanović, the court consedered his being a father of two and his substantially impaired capacity at the time of the crime (he was drunk) to be mitigating circumstances.

With respect to Zoran Alić, the fact that he had lost a leg in the war, and that at the time of the commission of the crime he was only a minor, aged 17, were taken into account as mitigating circumstances.

Zoran Đurđević's family cirmustances were held to be mitigating factors.

Aggravating circumstances taken into account with respect to the accused,

Stojanović, Alić and Đurđević included the severity of the offence, the consequences of the offence, the circumstances under which the offence was committed, the accuseds' motives, and especially the number of criminal acts committed. The court found that the consequences of their offences were severe, as the group to which the three defendands belonged, killed twenty-eight civilians, including elderly people, children aged between two and sixteen, and heavily pregnant women. The court also held that in the commission of the crime, the accused displayed a high degree of cruelty, brutality, ruthlessness, determination and persistance.

The court took into acount as an agravating cirumstances for Stojanović and Đurđević their previous convictions for criminal offences against life and body and property. In the case of the accused, Alić, his previous conduct, that is, his convictions, were taken into account as aggravating factors. With regard to the accused, Đurđević, the court did not take into accound the fact that he had been convicted by the same court for the same type of offence, because this conviction was not at the time, final.[80]

As for the accused, Tomislav Gavrić, there were both mitigating and aggravating circumstances, the former being his family circumstances, and the latter, his multiple convictions for offences against property.

In the case of Dragana Đekić, the court regarded her age at the time of the crime (she was seventeen), her family circumstances and the absence of previous convictions as mitigating circumstances and the seriousness of the offence committed, its consequences, the circumstances under which the offence was committed and her lack of compassion for the suffering of the helpless victims as aggravating circumstances.

The age of the defendant, Đorđe Šević, at the time he committed the offense (he was a young adult, just twenty), his difficult family circumstances, his diminshed capacity at the the time of the commission of the the offense, and the absence of previous convictions were taken into account for mitigation, whereas the seriousness of the crime committed, the motives, and the circumstances under which the crime was committed were regarded as aggravating circumstances. Even though Đorđe Šević had already been convicted for another war crime against the civilian population, this fact was not regarded as an aggravating factor, on grounds that the defendant committed that offence after committing the offence which is the subject of the *Skocic* trial.

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80 In a Belgrade High Court judgement, No K.Po2 7/2011, of 4th June 2012 (*Bijeljina* case), Zoran Đurđević was sentenced to thriteen years imprionement for a war crime against the civilian population.

The court held that it had not been proven that the accused Zoran Stojanović, by ordering Mehmed and Esad Aganović (a grandfather and his grandson) to undress and perfom oral sex on one another, had engaged in inhumane treatment and violation of human dignity. The court also held that over the course of the proceedings it had not been proved that the defendant Đorđe Šević raped the injured parties 'Alpha' and 'Beta' or participated in the killing of the civilians at 'Hamzići'.

The accused, their defense counsels and the OWCP appealed the judgment. The case is currently before the Court of Appeal Department. Its ruling on the appeal is expected to be rendered during 2014.

HLC's findings

During the proceedings, the OWCP acted in a highly professional manner, and tried to identify and bring to justice as many perpetrators as was possible, in order that this crime be solved. When, during proceedings, after the first indictment including five perpetrators had been issued, another three permetrators were identified, the OWCP put them under investigation. The OWCP also amended the indictment to increase the number of victims killed at 'Hamzići' from twenty-two, as listed in the initial indictment, to twenty seven, in doing so, including all victims of Roma ethnicity from the village of Skočić.

The proceedings were marked by the harrowing testimonies of the protected witnesses, 'Alpha', 'Beta' and 'Gamma', and their strong emotional reactions to questions posed by the accused and their physical presence in the courtroom. None of the protected witnesses, however, received psychological support either before, during or after the trial, because the Victim and Witness Assistance and Support Service of The Higher Court Department did not have a psychologist. Psychological support for these witnesses would have certainly contributed to making their testimonies of higher quality and would have diminished the psychological trauma caused by testifying.[81]

The presiding judge displayed an appropriate level of sensitivity in examining these sexual abuse survivors. He warned the accused that they should address the witnesses in a polite manner, and not by first name, and dismissed all questions aimed at degrading the protected witnesses. In instances where the accused made comments on the witnesses' statements, the presiding judge responded by warning them, in an informal way, that they would be barred from speaking if they continued behaving that way.

81 For more details see: Humanitarian Law Center, *Report on war crimes trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013), p. 22.

Where the sentences passed upon the accused are concerned, all individual sentences were appropriate for the seriouseness of the offences of which the accused were found guilty, except in the case of Damir Bogdanović, where the court unjustly made use of the option of penalty mitigation to impose a mitigated prison term on him of just two years, a penalty which is under the statutory limits for such offences. The law allows for the mitigation of penalties only where exceptional circumstances exist. And the accused's family situation and his age can by no means can be viewed as being exceptional circumstances. Furthermore, the court failed to provide any explanation as to why Bogdanović's crucial role in helping the injured parties 'Alpha', 'Beta' and 'Gamma' survive was accepted as a mitigating cirmustance. The mere reference to this circumstance in the judgment cannot be deemed to amount to a partuclularly mitigating circumstance which would justify the court's decision to make use of the option of penalty mitigation in the case of Damir Bogdanović.

7. *Mark Kashnjeti*

On 21st June 2013, the Higher Court Department[82] delivered a judgment[83] in the *Mark Kashnjeti* retrial, finding Kashnjeti guilty of a war crime against the civilian population[84] and sentencing him to two years' imprisonment.

Course of proceedings[85]

The OWCP indictment of 11th May 2012 (which was later amended four times, to provide more precise information on the matter) alleged that in the course of the armed conflict in Kosovo, Kashnjeti, having joined the Kosovo Liberation Army (KLA), on 14 June 1999, in uniform and armed, in the company of a group of unidentified KLA soldiers, stopped a vehicle carrying the injured parties – Božidar Đurović and Ljubomir Zdravković – in Alsani Durmishi Street in Prizren (Kosovo), ordered them out of the vehicle, frisked them and stripped them of their identification documents, money and other valuables. The indictment further states that Kashnjeti tied Đurović's and Zdravković's hands with rope and he and other KLA members then took them, threatening them

82 War Crimes Department Trial Chamber composed of: Judge Vinka Beraha –Nikićević (presiding), and Judge Snežana Nikolić – Garotić and Judge Rastko Popović (members).

83 Case number: K. Po2 No 3/2013.

84 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144 (1), and Article 142 (1), in connection with Article 22.

85 HLC trial reports, main hearing transcripts, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/kasnjeti.html, accessed on 31 May 2014.

with guns, and beating Đurović ocassionally with a rifle butt to the head and body, to a nearby backyard, where they kept them confined for several hours. After that, the accused transported them and Miroslav Jovanović, whom the unidentifed KLA soldiers had confined earlier, to Prizren's Ortokol suburb and ordered them to go to Serbia.

The main hearing commenced on 13th September 2012. Over the course of the four trial days held, the accused presented his defense and eight witnesses, including two inured parties, were examined. On 19th November 2012, the court delivered a judgment[86] finding *Mark Kashnjeti* guilty and sentencing him to two years' imprisonment. Both the OWCP and the defense appealed the judgment.

On 8th March 2013, the Court of Appeals Department renderred a ruling[87] by which it granted the defense's grounds of appeal, quashed the first-instance judgment and remitted the case to the first-instance court for a retrial. The Court of Appeal Department found that the first-instance judgment contained serious procedural errors, as it failed to provide reasons as regards the facts which were the subject-matter of evidentiary actions, and the reasons provided were completely unclear. Specificaly, where the existence of an armed conflict at the time the offence was comitted is concerned, the Court of Appeal Department pointed out that by the time the offence in question was committed the Kumanovo Agreement on Cessation of Hostilities in Kosovo had already been signed. The court also challenged the status ascribed to the accused (a person fighting for one side in the conflict), because the judgment failed to provide reasons for treating the accused as such.

The Court of Appeal Department also found that the first-instance court erred in not seeking an anthropology expert's opinion during the evidence process, the opinion which would have determined whether or not Mark Kasjneti was the person in the photograph on the basis of which the OWCP identified the accussed and which was the OWCP's key piece of evidence. The court further held that the first-instance court erred in denying the motion by the defense to accept as evidence a video footage produced by 'Klan Kosova TV', in which a person claims that the person in the photograph is not Kashnjeti. Lastly, the Court of Appeal Department held that the first-instance court had not made sufficient effort to interview, through video conferencing, Mentor Çoçaj and Bajram Çoçaj, residents of Kosovo, who had been put forward by the defense as witnesses.

The retrial commenced on 19th April 2013. Over the course of three trial

86 Case number: K.Po2 No 3/12.
87 Case number: Kž1 Po2 No 1/13.

days, two witnesses were inteviewed by video link, two expert witnesses were heard and the video by 'Klan Kosova TV' was viewed.

Witness Mentor Çoçaj declined to testify, saying he did not know the accused. Witness Ramadan Bytyqi, a former KLA fighter, stated that he saw the photograph allegedly showing the accused in the 'Klan Kosova TV' video footage, after which he phoned the TV station to refute it. He said he did not know the accused and that the person on the photograph, who according to the OWCP was Kashnjeti, was a person he knew by the nickname 'Jimmy'. He said he knew that because he himself was among the KLA soldiers shown in the photograph. The man known as 'Jimmy' was twenty-one at the time.

Expert witnesses found that the accused possessed a great number of anthropological characteristics similar to those possessed by the person shown in the photograph that was published in the daily newspaper *Kurir*.[88] In effect, that the degree of similarity between the anthropological features of the person in the photograph and those of the accused was such that it was highly plausible that they were the same person. Expert witnesses stated that they had used the method known as 'comparison by observation'. Medical expert Dušan Dunjić conceded that the person in the photograph might have been forty-eight but could not answer the question posed by the defense counsel whether he conceded that the person in the photograph might have been under thirty-five. Anthropologist Marija Đurić stated that the age of the person in the photograph could not be determined with accuracy, and that it was a person aged between twenty-five and fifty years.

The court found the accused guilty and sentenced him to two years in prison. The court found that there existed an armed conflict at the time of the commission of the offense, on the basis of information from Ministry of Defense sources, according to which the army was withdrawing from Kosovo between the 10th and the 20th of June 1999 and that the last reported armed clash with the KLA took place on the 18th June 1999. The court therefore concluded that it was irrelevant whether at the time of the event in question, i.e. on 14th June 1999, there existed an armed conflict in the Prizren area, because international humanitarian law applied until the date peace was completely established on the entire territory controlled by one side in the conflict.

That Kashnjeti was the person in the photograph was established on the basis of the testimonies of the injured party Đurović and witness Milan Petrović, and also indirectly, on the basis of the statemen given by witness Miroslav Jovanović, and the expert witnesses' findings. The court also established that

88 The photo is available at: http://www.kurir-info.rs/prepoznali-zlocinca-kasnjetija-clanak-187978, accessed on: 30th May 2014.

at the time of the event the accused was a KLA member and the injured parties were civilians.

HLC findings

At the retrial, the Higher Court Department failed to rectify all of the errors found by the Court of Appeal Department in its ruling of 8th March 2013.

In its second judgment, the Higher Court Department again concluded that the accused had joined the KLA, without providing reasons for having come to such conclusion.

With regard to the status of the injured party, Đurović, the court provided a very confusing explanation. First it claimed to have established that the injured party was a civilian, but later stated that it was mindful of his statements that some weapons had been found in his vehicle during a search, and further stated "...in that regard the statement of witness Mentor Çoçaj that during a search of a vehicle carrying two occupants some weapons were found in it". This was an obvious oversight by the court, as witness, Mentor Çoçaj, never testified about any circumstance, and certainly not about Đurović possessing weapons. Not only that, the court also failed to explain why Đurović was treated as a civilian, if he himself confessed to having possessed an automatic rifle.

The court accepted the findings of anthropology expert witnesses' and based its judgment upon them. However, two serious objections can be made be to these findings. First, the examination consisted of a mere comparison of a rather unclear photo and the accused, without the application of any modern technique during the process. By simple observation it was established that the two persons had a large number of similar morphological characteristics. Second, the expert witnesses' opinion was extremely vague, as they estimated the age of the person in the photograph to be between twenty-five and fifty years, which renders their expertise questionable.

Furthermore, the court failed to look into the discrepancy between the testimony of the injured party, Đurović, who said during the retrial that the persons who stopped him were between twenty-five and thirty years old, and the fact that Kashnjeti was forty-six at the time.

The statements of the injured party Đurović, and witnesses Petrović and Jovanović, in which they claimed to have recognized the accused, should have been assessed with particular thoroughness, particularly bearing in mind that the photograph at issue was published in the media in the aftermath of Kashnjeti's arrest, with captions clearly alleging that the person photographed was the accused.

8. *Tuzla Convoy*

Following the retrial of the *Tuzla Convoy* case, on 2nd December 2013, the Higher Court Department[89] rendered a judgment[90], finding the accused, Ilija Jurišić, guilty of the criminal offence of use of impermissible means of combat [91] and sentenced him to twelve years in prison.

Course of proceedings[92]

The indictment brought by the OWCP[93] on 9th November 2007, which was amended on 18th September 2009, alleges that the accused, Ilija Jurišić, on 15th 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 Police Department in Tuzla, issued an order to attack a army (YPA) convoy at the moment when the convoy was peacefully making its way through Tuzla. The attack resulted in the deaths of at least fifty one and wounding of at least fifty YPA members and took place in breach of previous agreements on the peaceful withdrawal of YPA units, Tuzla and BiH.[94]

The first-instance trial of this case commenced on 22nd February 2008 before the District Court in Belgrade. On 28 September 2009, the trial chamber[95], delivered its judgment, sentencing Ilija Jurišić to 12 years imprisonment.[96]

The Court of Appeal Department, upon considering the appeal by the defense and the OWCP, opened the main appeals hearing on 22nd September 2010, over the course of which it examined twelve witnesses. The Court requested that the Ministry of Defense submit the agreement concluded in April 1992 by BiH and the FRY, and the order for the withdrawal of YPA units from the territory of BiH, issued by the YPA General Staff in April or May 1992. The Ministry

89 War Crimes Department Trial Chamber: Judge Dragan Mirković (presiding), and Judge Mirjana Ilić and Judge Bojan Mišić (members).

90 Case number: K Po2 No 53/10

91 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 148.

92 HLC trial reports, main hearing transcripts, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/tuzlanska_kolona.html, accessed on 31st May 2014.

93 Deputy War Crime Prosecutor, Milan Petrović.

94 This case was transferred to the OWCP in 2004 by the Office of the Military Prosecutor in Belgrade.

95 Composed of Judge Vinka Beraha-Nikićević (presiding) and Judge Snežana Garotić Nikolić and Judge Vesko Krstajić (members).

96 Case number: KV No 5/2007.

submitted the requested order and informed the Court of Appeal Department that it was not able to submit the agreement on peaceful withdrawal of the YPA from the territory of BiH, because that document had been destroyed during the NATO bombing in 1999.

On 11th October 2010, the Court of Appeal Department rendered a decision[97] granting the defense's appeal and sending the case back to the first-instance court for retrial. The Court of Appeal Department found that the first-instance court had failed to correctly and completely determine the following: the decisive facts as regards the existence of an agreement between BiH and the FRY on the peaceful withdrawal of the YPA from the territory of BiH, the status of the Tuzla-based 'Husinska buna' YPA military compound at the time, why and under what circumstances it was decided to evacuate the compound on 15th May 1992, whether the accused was aware of the existence of agreements on the peaceful withdrawal of the YPA signed between BiH and the FRY and between the YPA barracks command and Tuzla local authorities, whether the accused was aware of the existence of a 'perfidious plan' to attack the YPA convoy, the exact wording of the attack order and the time it was issued.

The retrial commenced on 6th July 2011, before a trial chamber composed of members other that those who heard the case at the initial trial.[98] Over the course of thirteen trial days, seventeen witnesses were examined and an expert witness submitted his opinion regarding the facts that the Court of Appeals' Department considered not to have been sufficiently established during the first trial.

On 2nd December 2013, the Higher Court Department rendered a judgment finding Ilija Jurišić guilty and sentencing him, for the second time, to twelve years' imprisonment. Stating the reasons for the judgment, the judge presiding over the trial said that although the court, during the retrial, did not obtain the agreement on the withdrawal of the YPA from the territory of BiH, concluded between BiH and the FRY, it nonetheless concluded that such an agreement had existed, and that the accused was aware of its existence, as it was a generally known fact. The presiding judge also said that the accused was aware of the agreement reached between the commander of the 'Husinska buna' YPA barracks and the civilian authorities in Tuzla concerning the withdrawal of the YPA, as on the relevant day he, in his capacity as a member of the Operational Staff, came to its headquarters, despite not being on duty that day.

The court established the existence of a 'perfidious plan' to attack the military

97 Case number: KŽ1 Po2 No 5/10.

98 Judge Dragan Mirković (presiding) and Judge Tatjana Vuković and Judge Olivera Anđelković (members).

convoy on the basis of the fact that schools and courts in Tuzla were closed that day, and that some apartments in buildings alongside the route used by the army for its retreat, were occupied by police. The court also established that the deployment of armed personnel at different points including terraces of buildings, which stood along the route used by the YPA convoy, amounted to setting an ambush against the YPA units who were retreating. The proof that the accused knew about the existence of the "perfidious plan" was found also in the fact that he did not try to stop the attack nor did he make any report or note on the event.

HLC findings

At the time of writing of this report, the HLC has been unable to perform an in-depth analysis of the judgment following the retrial, because the written judgment has not been made available to the HLC.

Nonetheless, on the basis of the evidence presented during the retrial it can be concluded that the trial chamber did not fully comply with the instructions of the Court of Appeal Department. Specifically, it still remains unclear how the court was able to determine that the accused was aware that an agreement on the withdrawal of the YPA on 15th May 1992 had been reached between Mile Dubajić, commander of the YPA barracks in Tuzla, and the civilian authorities of Tuzla, since direct participants in this event, who were examined as witnesses, give statements which were entirely at odds with each other in this respect. Witness Ugo Nonković, a YPA commissioned officer at the time, stated that on the day in question, Mile Dubajić and the local authorities of Tuzla concluded an agreement on withdrawal of the YPA, which did not specify the date of withdrawal. Other witnesses, however, said they had not been aware of the existence of such an agreement. Witness Mile Dubajić said that he himself had made the decision on 15th May 1992 that the YPA should start withdrawing. Witness Meša Bajrić said he had not informed the accused about his meetings with Mile Dubajić.

The role of the accused also remained unclear. According to Meša Bajrić, commander of the local police station at the time, the accused had no order-issuing authority but only passed on his order to "respond to fire with fire". As for the existence of the "perfidious plan", military expert Dr. Mileta Stojković said that such a plan had been devised beforehand, by one or more persons who had received excellent military training. However, he could not rule out the possibility that it all might have happened because the things had got out of control. In his opinion: "It made no sense to sacrifice such high-ranking officials from 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 initiative".

The retrial also failed to resolve the issue of the meaning of the order to "respond to fire with fire", as an attack order issued by the accused. The police who participated in the exchange of fire at Brčanska Malta claimed in court that they responded to fire coming from the army convoy with fire, without having received any order to do so, because it was impossible to pass any order on to them, as they did not have any means of communication.

As the defense counsel for the accused announced he would appeal the judgment, the final decision in this case will have to be made by the Court of Appeal in Belgrade.

9. *Ovčara V*

On 1st July 2013, The Higher Court Department[99] rendered a judgment finding Petar Ćirić guilty of committing a war crime against the prisoners of war[100] and sentenced him to fifteen years in prison. As the accused was already serving a ten-year prison sentence passed upon him by the District Court in Novi Sad, he received a concurrent sentence of twenty years.

Course of proceedings[101]

The OWCP[102] indictment against Petar Ćirić, brought on 18th June 2012, alleges that Ćirić, as a member of the Vukovar-based Territorial Defense Force, which operated as a part of the YPA, on 21st November 1991 killed and ill-treated prisoners of war from the Vukovar Hospital. Ćirić is also alleged to have participated, as a member of a firing squad, in the shooting of prisoners of war at a location known as Grabovo; after returning from Grabovo, Ćirić participated in the shooting of the last remaining group of approximately ten prisoners of war outside the storage building at the Ovčara farm.

The main hearing commenced on 15th November 2012. Over the course of five trial days, eight witnesses were examined.

The Higher Court Department judgment of 1st July 2013 found the accused

99 War Crimes Department' Trial Chamber: Judge Rastko Popović (presiding), and Judges Vinka Beraha Nikićević and Snežana Nikolić Garotić (members).

100 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144, in connection with Article 22.

101 HLC trial reports, main hearing transcripts, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/ovcara_5.html, accessed on 31st May 2014.

102 Deputy War Crimes Prosecutor, Dušan Knežević.

guilty on all charges of the indictment, except that of shooting the last group of prisoners of war outside the storage building at the Ovčara farm.

The court did not give credence to the accused's statement that at the time of the event in question he had not been at Ovčara, considering it unconvincing and aimed at evading criminal responsibility. His involvement in inflicting bodily injuries upon prisoners of war at Ovčara and the execution of prisoners of war at Grabovo, was determined on the basis of testimonies given by witnesses/collaborators with justice, Božo Latinović and Spasoje Petković, which were held by the court to be clear and compelling. Furthermore, when confronted with the accused, these witnesses came across as confident and consistent in their statements.

The court did not find that the accused participated in the execution of the last remaining group of approximately ten prisoners of war, and left this act out of the disposition of the judgment.

In determining sentence, the court considered several mitigating and aggravating factors. The accused's family circumstances and his young age (twenty-three) at the time of the commission of the offence were regarded as mitigating circumstances. Aggravating circumstances included the seriousness of the offence and its consequences, the accused's motives and the circumstances under which the offence was committed, ruthlessness and obvious determination displayed by the accused, as the incident lasted for hours, and caused the death of al least 200 people, including three minors and a seventy-two year-old man as the oldest among the victims. The court also took into account the following facts: that among the victims there were two women, one of whom was heavily pregnant and the other sixty years old; that the bodies of the victims were thrown into a mass grave and covered with earth, which showed contempt and disrespect for the victims as human beings. The fact that the accused had multiple convictions was also taken into account.

HLC findings

The proceedings were conducted efficiently and completed within a short period of time. This was partly due to the provisions of the Criminal Procedure Code, which allow the parties to come to an agreement about the uncontested facts before the trial.[103] Namely, many of the facts surrounding the

103 Article 349(4) of the Criminal Procedure Code, *Službeni glasnik*, Official Gazette of the Republic of Serbia, No 72/2011, 101/2011, 121/2012, 32/2013, 45/2013 and 55/2014.

events which were the subject-matter of the indictment against Petar Ćirić had already been established in previously conducted proceedings.[104] Hence in this case it was not necessary to prove the existence of some important facts, such as the existence of an armed conflict, the status and identity of victims, the accused's status at the time of the commission of the offence, the time and place of the offence and the manner in which it was committed. During the preliminary hearing, the parties agreed that these facts would be uncontested.

The fifteen years' prison sentence that was passed for the offence, seems too lenient, especially given the range of aggravating factors that were found to be present. However, as the accused had already been finally convicted and sentenced to ten years in prison for another offence, even had a tougher sentence had been passed for the offence which was the subject of this trial, it could not have resulted in a harsher concurrent sentence.

In determining sentence, the court took into account the accused's family circumstances and his young age for mitigation. Irrespective of the fact that the accused received a long term prison sentence, in effect the maximum sentence provided by law, taking these factors into account for mitigation seems quite inappropriate, given the seriousness of the offence committed and its consequences – huge number of victims, and the fact that more than sixty victims executed at Ovčara are still unaccounted for – and that during the trial Ćirić did not help to disclose the location where victims' bodies still lay hidden.

10. *Čelebići*

On 18th November 2013, the Higher Court Department[105] rendered a judgment[106] acquitting Samir Hondo of charges of committing a war crime against the civilian population.[107]

104 *Ovčara* (acc.Vujović and others), *Ovčara II* (acc.Bulić), *Ovčara III* (acc. Sireta) cases.

105 Trial Chamber composed of Judge Snežana Nikolić Garotić (presiding), and Judge Vinka Beraha Nikićević and Judge Rastko Popović (members)

106 Case number: K. Po2 No 8/13.

107 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144, in connection with Article 22.

Course of proceedings[108]

On 17th May 2013, the OWCP brought an indictment[109] against Samir Hondo. The indictment alleges that Hondo, as a member of the Army of BiH and a guard at the 'Čelebići' prison camp (in the municipality of Konjic, BiH), in which Bosnian Serb civilians were detained during June, July and August 1992, on several occasions beat-up the detainees, inflicting numerous bodily injuries on them, and participated in the torture of civilians by imprisoning them in a manhole with insufficient air for twenty four hours.

The main hearing opened on 11th September 2013 and ended after seven trial days, during which eleven witnesses were heard.

The accused denied having committed the offence he was charged with, claiming that the indictment against him was based on a false statement given by the injured party, Zoran Đorđić. Hondo explained that he was a member of the 43rd Brigade of the Army of BiH, and that he himself had submitted to the court a document attesting to that. He said he was assigned to be a guard at the 'Čelebići' prison camp during the period when the injured party, Đorđić, was detained in it, but he never beat or injured anyone. Referring to the conditions in the camp, he admitted they were bad, because detainees slept in hangars, on concrete floors, and received small amounts of low-quality food. He confirmed that detainees had been beaten and killed. He himself testified for the prosecution at a trial before the Court of BiH, against a former guard, Eso Mucić. The injured party, Zoran Đorđić, testified at the same trial as a defense witness. Hondo further said that he had met Đorđić on several occasions after the war, but Đorđić never mentioned to him any harm that he had suffered at his hands. In 2012, Đorđić arrived in Bijeljina, to the house of Hondo's sister and her husband, and demanded money in exchange for not reporting Hondo. Hondo declined to give him money and reported him to the police instead. That was why, Hondo believed, the injured party falsely accused him and even persuaded other witnesses to do the same. Hondo said that former prison camp detainees Željko Živak and Dragan Đorđić could confirm that he had never beaten or tortured Zoran Đorđić.

During the evidence process, in addition to hearing the accused, the court heard seven witnesses, former detainees of the 'Čelebići' camp, the statements

108 HLC trial reports, main hearing transcripts, indictments and judgments are available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/celebic.html, accessed on 31st May 2014.

109 Case number: KTO No 6/13.

of three former detainees were read out in court, the judgment passed upon Eso Mucić by the Court of BiH and a passage of the court transcript from Eso Macić's trial containing statements of ten witnesses who testified at that trial, were both examined. Those witnesses, while focused on Eso Macić's acts, also mentioned other guards at the camp, but none of them mentioned Samir Hondo. Following a motion by the defense, the court also examined the content of the statements that Hondo and other witnesses gave to the competent authorities of BiH in several court proceedings conducted against the injured party, Zoran Đorđić, on charges of extortion. This document was admitted as evidence despite opposition from the prosecution, because the court held that it supported the defense of the accused, who claimed that Zoran Đorđić had blackmailed him and threated to report him to the police unless he gave him money, and that he eventually reported him to the police for that reason alone.

The Higher Court's judgment of 18th November 2013 established that the accused, Samir Hondo, did not commit the offence he had been charged with by the indictment.

In the oral explanation of the judgment, the presiding judge pointed out that the following facts had not been under dispute during the proceedings: the existence of an armed conflict in BiH at the relevant time, that the accused was a member of one side in the conflict, the existence of the camp in Čelebići, where Serb civilians were detained, and that numerous crimes were committed in the camp. At issue was whether the accused committed the acts that the OWCP had accused him of.

The court did not give credence to the incriminating statement from the injured party, Zoran Đorđić, because his key allegations were not corroborated by other witnesses who had been present during the events in question. For the same reasons, the court did not give credence to witness Boro Mrkajić, considering it very unrealistic that, with regard to the imprisonment of detainees in a closed manhole, only Boro Mrkajić, out of seventeen detainees who had been subjected to this treatment incriminated the accused. The court noted that witness Rajko Đorđić, who had been imprisoned twice in the manhole, said he had never seen the accused nor heard anyone mentioning him in relation to the event.

Assessing the credibility of the injured party, Zoran Đorđić, the court concluded that the proceedings that were being conducted against him in BiH on charges of extortion discredited him as a witness, and they considered his

statement to be untruthful, unconvincing and driven by the desire to harm the accused.

When judgment was pronounced, the presiding judge also stated that the court felt compassion for the victims, but that this alone could not represent a reason for handing down a guilty judgment, something that the OWCP should have been mindful of when bringing the indictment.

HLC's findings

This was the most expeditious trial of all trials that resulted in first-instance judgments before the Higher Court Department. The accused was arrested on 20th March 2013 at the border crossing at Badovinci, on entering Serbia, and the OWCP raised an indictment against him as early as 17 May 2013. The trial took just two months to complete, owing to highly professional work of the trial chamber, and the well-prepared counsel for the accused.

The case against Samir Hondo is a striking example of poor and careless case preparation by the OWCP. Unconvincing evidence and the obvious lack of credibility of the key witness (the injured party) leads to the conclusion that the case was prepared in a hurry, and without due regard for the interests of justice. This case was an unnecessary waste of both OWCP and judicial resources, which could have been used for processing some of the large number of unresolved cases.

11. *Milan Škrbić*

On 13th September 2013, the Higher Court Department confirmed[110] the plea bargain entered into by the OWCP and Milan Škrbić, who was accused of committing a war crime against the civilian population[111], and sentenced Škrbić to seven years' imprisonment.

According to the OWCP indictment [112] against Milan Škrbić,[113] the accused, at the time a member of the Army of the Republic of Srpska, on 26th June 1992,

110 Case number: K.Po2 No 6/14 and SPK – Po2 No 2/2013.

111 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 142 (1).

112 Case number: Kto No 4/13 and Kto No 5/13.

113 The *Milan Škrbić* case was transferred to the OWCP by the Cantonal Prosecutor's Office in Bihać (BiH).

together with the now deceased Vlado Unčanin, killed two Muslim civilians – Šukrija Medić and Refik Mešanović – in the village of Sanica (municipality of Ključ, BiH).

The court confirmed the plea bargain in which the accused, Milan Škrbić, pleaded guilty to committing the offence he was charged with, at the time, place and in the manner specified in the indictment, and the OWCP recommended that he should be sentenced to seven years in prison in exchange for guilty plea.

This was the first plea bargain for a war crime against the civilian population.[114] Plea bargains that the OWCP entered into earlier, concerned harboring of ICTY indictees.

If this process were used more often in war crimes cases it would shorten the length of criminal proceedings considerably, and also lessen the burden of work of both the OWCP and the courts and allow them to spend more time on other, more complex cases.

C Cases that resulted in second-instance decisions during 2013

12. *Bijeljina*

On 25th February 2013, the Court of Appeal Department[115] delivered a decision[116] modifying the judgment of the Higher Court Department of 4th June 2012[117] with respect to sentences imposed on two accused – Dragan Jović and Alen Ristić. Namely, Dragan Jović had his sentence increased from fifteen to twenty years, and Alen Ristić had his sentence reduced from twelve to ten years. The court upheld the sentence of thirteen years for the third accused, Zoran Đurđević.[118]

114 Criminal Procedure Code, Official Gazette of the Republic of Serbia, *No* 72/2011, 101/2011, 121/2012, 32/2013 and 45/2013, Article 313.

115 Trial Chamber composed of: Judge Siniša Važić (presiding), and Judge Sonja Manojlović, MA Sretko Janković, Omer Hadžiomerović and Dr Miodrag Majić (members).

116 Case number: Kž1.Po2 No 6/12.

117 Case number: K.Po2 No 7/2011.

118 This case was transferred to the Republic of Serbia by BiH under the Agreement on Mutual Legal Assistance in Civil and Criminal Matter between the two countries.

Course of proceedings[119]

On 5th June 2011, the OWCP[120] issued an indictment against Dragan Jović, Zoran Đurđević and Alen Ristić for a war crime against the civilian population[121]. The indictment alleged that on the evening of 14th June 1992, the accused, as members of a volunteer unit, fighting on the Serbian side in the conflict, along with with Milorad Živković[122] and Danilo Spasojević[123], entered the house of the injured party Ramo Avdić in Bijeljina (BiH), seeking weapons. After Avdić had handed them weapons, they searched his house and robbed him of his money and jewelry. After that they forced Ramo's daughter Nizama and daughter-in-law Hajreta to undress, threatening them with guns, and raped and otherwise sexually abused them in the presence of Ramo's wife Fata and son Kurem. The indictment further alleges that Dragan Jović 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 pulled over, took the injured parties out of the car and raped and otherwise sexually abused them one further time, after which they left the scene, leaving the injured parties by the side of the road.

The main hearing opened on 4th July 2011[124] and ended on 4th July 2012 with a judgment. Over the course of eleven trial days, ten witnesses were heard.[125] The accused were found guilty as charged and sentenced to imprisonment as

119 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/bijeljina.html, accessed on 31st May 2014.

120 Deputy War Crimes Prosecutor Dušan Knežević.

121 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and "Official Gazette of the FRY", No 35/92, 37/93 and 24/94, Article 142 (1), in connection with Article 22.

122 Milorad Živković is at large and criminal proceedings against him were separated from this case.

123 The Supreme Court of the Republika Srpska finally sentenced Danilo Spasojević to five years in prison for this offence.

124 Trial Chamber composed of: Judge Vinka Beraha Nikićević (presiding), and Judge Snežana Garotić Nikolić and Judge Rastko Popović (members).

125 For more details on course of proceedings see: Fond Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013), and Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2011*, (Belgrade: Humanitarian Law Center, 2012).

follows: Dragan Jović to fifteen years, Zoran Đurđević to thirteen years and Alen Ristić to twelve years.

When considering sentences, the court felt that the following circumstances were aggravating factors with respect to all three of the accused: the seriousness of the offence and its consequences, the extreme cruelty displayed by the accused in the execution of the crime, as their intent was to humiliate the injured parties and inflict mental pain on them, disregarding the fact that the injured party Hajreta had given birth only four days previously. The court also established that these injured parties suffered psychological problems as a result of the crime and that they left their place of residence after the trauma they suffered.

As for mitigating circumstances, the court took into account the family circumstances and economic situation of the accused Dragan Jović and Zoran Đurđević and the fact that Alen Ristić was a young adult at the relevant time.

The OWCP, all the accused and their defense counsels appealed the judgment. The OWCP appealed the length of sentences passed on Dragan Jović and Zoran, and the accused and their defense counsels appealed on all grounds for appeal.

Reviewing the case,, on 25th February 2013, the Court of Appeal Department rendered a decision partially granting the appeals by the OWCP and Alen Ristić's defense attorney and modified the first-instance judgment only in the part relating to penalties imposed on Dragan Jović and Alen Ristić.

The Court of Appeal Department held that the first-instance court with respect to the accused Dragan Jović "... failed to give adequate weight to the number of acts committed by him, as an aggravating circumstance that was established beyond reasonable doubt during the trial, failed to give adequate weight to the conduct of the accused during the commission of crime (he was regarded by other accused as primarily responsible), failed to give adequate weight to the fact that the accused had killed the injured party Ramo Avdić only because he suspected that Avdić "was supplying weapons to the Muslim side", and also failed to give adequate weight to the cruelty and brutality displayed and the serious consequences of the crime in the form of mental health problems suffered by the victims".

In relation to the accused, Alen Ristić, the Court of Appeal Department found that the first-instance court had correctly assessed mitigating and aggravating circumstances in his case, but nonetheless failed to give adequate weight to his

young age (nineteen) at the time of the commission of offence and, "his role in the critical events", and especially, his health status.

HLC findings

The first-instance court's correctly and comprehensively established the underlying facts of the case and applied the provisions of both international criminal law and international humanitarian law properly. Additionally, the trial chamber showed concern for the wellbeing of the sexual abuse survivors and took adequate measures to protect them during examination.

In regard to sentences, the Court of Appeal Department justly decided to modify the sentence imposed on Dragan Jović by the first-instance court and to give him the maximum sentence of twenty years instead, considering it to be the only punishment adequate and necessary to achieve the purpose of punishment in this case. Such an opinion from the Court of Appeal Department is encouraging, especially given the long-lasting consequences suffered by the two victims. Moreover, harsh sentences for sex offenders will have a positive effect on other victims' decision to testify against offenders.

However, for exactly these reasons, the decision of the Court of Appeal Department to reduce Alen Ristić's sentence, on grounds that more weight should be ascribed to the mitigating factor that Ristić was a young adult at the time, cannot be deemed just. From the perspective of the victims, who were also young at the time, the reduction of Ristić's penalty on grounds of his youth is grossly inappropriate. It is also unclear what aspects of the accused's conduct during the critical events were held to be a mitigating circumstance, as the court did not specify any act of the accused that could be regarded as such.

Bijeljina is just another one of the many cases where the courts have taken factors such as the family circumstances of the accused into account for mitigation, something quite inappropriate where war crimes cases are concerned.

13. *Lički Osik*

On 13th March 2013, the Court of Appeal Department[126] rendered a judgment[127] modifying the Higher Court Department judgment of 16th March

126 Trial chamber composed of Judge Siniša Važić (presiding) and Judge Sonja Manojlović, Judge Sretko Janković, Dr Miodrag Majić and Omer Hadžiomerović (members).

127 Case number: Kž1.Po2 No 3/12.

2012[128] with respect to the sentences imposed on Čeda Budisavljević and Bogdan Gruičić, by increasing the sentence against Čeda Budisavljević from twelve to thirteen years' imprisonment, and reducing the sentence against Bogdan Gruičić from twelve to eight years[129]. The Court of Appeal Department upheld the twelve-year prison sentence imposed on Mirko Malinović and the ten-year prison sentence imposed on Milan Bogunović.

Course of proceedings[130]

On 25th June 2010, the OWCP[131] brought an indictment against Čeda Budisavljević, Mirko Malinović, Milan Bogunović and Bogdan Gruičić for a war crime against the civilian population[132]. The four men, members of the MI in the Serbian Autonomous District (SAD) of Krajina and the Territorial Defense Forces in Teslingrad at the time, were charged with the killing of five civilians in October 1991, on the territory of Lički Osik (Croatia). Čeda Budisavljević, as commander of a special unit of the MI of SAD Krajina and deputy commander of the police station in Teslingrad, received an oral order from his superior officer, Dušan Orlović, head of State Security Service of the SAD Krajina MI[133], 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 collaborating with Croatian forces, and their mother Lucija Rakić. The indictment further alleges that on the night of 20th October 1991, the accused, Budisavljević, Malinović and Bogunović, as they had previously agreed, went to the holiday house in which the injured party Lucija lived, and, 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, the accused Čeda Budisavljević, together with the accused Mirko Malinović, Milan Bogunović, Bogdan Gruičić and Novaković[134], went, as had been agreed, to the police station in Teslingrad where Mane, Dragan, Milovan and Radmila Rakić were confined, 'duck' taped

128 Case number: K.Po2 No 17/11.

129 The first-instance court had sentenced Čeda Budisavljević to twelve and Bogdan Gruičić to ten years in prison.

130 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/licki_osik.html, accessed on 31st May 2014.

131 Deputy War Crimes Prosecutor, Dušan Knežević.

132 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 142 (1) in connection with Article 22.

133 Dušan Orlović is being tried separately.

134 Goran Novaković is being tried separately.

their hands and mouths and then transported them to the Golubnjača cave, killed them with firearms and threw their bodies into the cave.[135]

The Higher Court Department[136] delivered a judgment on 14th March 2011[137], finding the accused guilty as charged and sentenced them each to twelve years in prison.[138]

Both the OWCP and the defense counsels of all of the accused filed an appeal against the judgment. Upon hearing the appeals, on 10th November 2011, the Court of Appeal Department rendered a decision[139] granting the appeals, quashing the first-instance judgment and sending the case back to the first-instance court for a new trial and reconsideration.

At a retrial, the Higher Court Department rectified the errors that had been identified by the Court of Appeal Department, and, on 16th March 2012, delivered its judgment, finding the accused guilty and sentencing them as follows: Čeda Budisavljević and Mirko Malinović each to twelve years in prison, and Milan Bogunović and Bogdan Gruičić each to ten years in prison.

Both the OWCP and the defense counsels of all the accused appealed against the judgment. The OWCP appealed against the sentencing element of the judgment, requesting that sentences for the accused be increased. The defense counsels of the accused appealed on all grounds for appeal.

The Court of Appeal Department granted the OWCP grounds for appeal in the part relating to the accused, Čeda Budisavljević, and increased sentence against him from twelve to thirteen years. The court also granted the grounds of appeal of Bogdan Gruičić's defense counsel with respect to length of sentence, and reduced Gruičić's prison sentence to eight years. Dismissing all other appeals as unfounded, the court upheld the first instance judgment in all remaining respects.

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135 This case was transferred to the OWCP by the Office of the Attorney General of the Republic of Croatia under the Agreement on Mutual Cooperation in Prosecution of Perpetrators of War crimes, Crimes against Humanity and Genocide, signed by Office of the Attorney General of the Republic of Croatia and the OWCP.

136 War Crimes Department's Trial Chamber: Judge Vinka Beraha Nikićević (presiding), and Judge Snežana Nikolić Garotić and Judge Rastko Popović (members).

137 Case number: K.Po2 No 46/10.

138 See in: Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013).

139 Case number: Kž1. Kpo2 No 7/11.

The Court of Appeal Department found that the first-instance court, when sentencing the accused Čeda Budisavljević, ascribed far too much weight to his admission of guilt as a mitigating circumstance, while giving inadequate weight to the aggravating factor present, that is, the fact that it was Budisavljević who shot all of the members of the Rakić family. With respect to Gruičić, the court found that the first-instance court in his case ascribed too much weight to the aggravating circumstance that five members of the Rakić family had been killed, even though the accused did not take part in the murder of Lucija Rakić.

HLC findings

The courts deserve serious criticism with regard to the length of sentences imposed in this case and the assessment of mitigating circumstances.

The Court of Appeal Department held that the first-instance court had correctly established the presence of mitigating circumstances in this case. The mitigating circumstances considered by the first-instance court with respect to all the accused included the amount of time that had passed since the commission of the offence (twenty years). 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 is completely irrelevant, since once the conflict is over, the criminal act can no longer be committed. That the length of time passed should not be taken as a mitigating circumstance in sentencing perpetrators of this type of criminal offences is indirectly borne out by the universally accepted non-applicability of statutory limitations to war crimes. The widely-known difficulties (both objective and subjective) and the sluggishness of war crimes processing in Serbia, have benefited defendants by allowing them to be free for a long time before being called to account, and giving them yet another benefit in the form of the above mitigating circumstance, is quite inappropriate.

The Court of Appeal Department rightly pointed out that the first-instance court, at the retrial, had failed to adequately personalize the sentences, by treating each of the accused individually. The initial fist-instance judgment failed to personalize the sentences, and sentenced all the accused, irrespective of their role and level of involvement in the commission of the criminal offence, and their personal circumstances, to the same prison term of twelve years. Only at the retrial did the first-instance court pay more, but still not enough attention, with respect to all the accused, to this matter.

The sentences imposed do not adequately reflect the gravity of the crimes committed, in particular with regard to the accused Čeda Budisavljević, whose

degree of criminal responsibility was the highest. While the Court of Appeal Department increased the sentence against Budisavljević, it also considered his admission of guilt to be a mitigating circumstance. However, in order for an admission of guilt to be considered a mitigating circumstance, it should be not only formal, but reflect the accused's mental attitude towards his acts, and be manifested by a sincere repentance and corresponding behavior throughout the proceedings. But this was not the case with Budisavljević. He showed arrogance, especially when questioning his co-accused and witnesses.[140] Given that Budisavljević took a direct part in the cold-blooded and premeditated murder of five members of a family, the cruelty 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 to prevent criminal offences and protect every citizen, he should have been given a much stiffer sentence.

14. *Bosanski Petrovac*

On 4th November 2013, the Court of Appeal Department [141], rendered a decision[142] quashing the judgment of the Higher Court Department [143], which found the accused, Neđeljko Sovilj and Rajko Vekić guilty of a war crime against the civilian population and sentenced them each to eight years' imprisonment.[144]

Course of proceedings[145]

According to the indictment filed by the OWCP[146] on 6th August 2012, the accused, on 21st December 1992, as members of the Army of Republika Srpska (ARS), stopped civilians Mile Vukelić and Mehmed Hrkić near the hamlet of Jazbine (in the Bosanski Petrovac municipality, BiH), ordered Vukelić to continue on and held Mehmed Hrkić back, later taking him into the forest and killing him, by firing at least three shots.

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140 See in: Humanitarian Law Center, *Report on War Crime Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013).

141 Trial Chamber composed of: Judge Dragan Mirković (presiding), and Judge Vinka Beraha Nikićević and Judge Snežana Nikolić Garotić (members).

142 Case number: Kž1 Po2 No 5/13.

143 Case number: K. Po2 No 6/13.

144 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Art. 142 (1), in connection with Article 22.

145 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/bosanski_petrovac.html, accessed on 31st May 2014.

146 This case was transferred to the OWCP by the Cantonal Court in Bihać through International Legal Assistance.

During the main hearing, which commenced on 13th November 2012, five trial days were held and eight witnesses were examined.

Presenting their defense, the accused denied having committed the offence, claiming that on the relevant day they had headed off from the house of the accused Rajko Vekić towards the battle line. On the way there, near the hamlet of Jazbine, they came across Mehmed Hrkić and Mile Vukelić. Vukelić and Hrkić were in civilian clothes and Vukelić carried a semi-automatic-rifle over a shoulder. The accused only exchanged hellos with them and continued on. A month later, when fresh soldiers came to their battle line, the accused heard that Hrkić had been killed. Sovilj and Vekić contended that Vukelić had accused them in order to avoid being held responsible himself because of been seen armed in the company of Hrkić immediately before Hrkić had been killed.

Witness Mile Vukelić (who testified via video conference) said that on the relevant date he was at the Plećaš's family home, where he saw Hrkić, with whom he had friendly relations. From there, he went home together with Hrkić. Vukelić also said he was not armed that day. On the way home, the two men came across the accused, who were armed with automatic rifles. The accused stopped them, ordered him to continue on and detained Hrkić, saying they wanted a word with him. Two hours later, the accused came to Vukelić's house and said to him that he they had killed Hrkić, warning him to keep that to himself.

Witness Jelka Plećaš, who testified via video conference from the Court of BiH, confirmed that on the relevant day Mile Vukelić was not armed and that he left her house together with Mehmed Hrkić. Soon after they left, Plećaš received a phone call from her mother-in-law, telling her that she had heard a shot and Hrkić crying for help and screaming, "No, let me go", after which the witness herself heard two shots.

Witnesses Boško Romić and Đurađ Salapura (the latter testifying via video conference), stated that just before the critical event some ARS soldiers from the Bosanski Petrovac area had been killed in clashes with the Army of BiH.

On 11th March 2013, the court delivered a judgment finding the accused guilty as charged.

The court did not give credence to the testimony given by the accused in their own defense that on the relevant day they came across Hrkić, who was in the company of armed Mile Vukelić, and that they just said hello to the two men in passing. The court assessed their defense as unconvincing and aimed at evading criminal responsibility, because it was contradictory to the statement of witness Mile Vukelić, which was corroborated, indirectly, by witness Jelka Plećaš.

The trail chamber also considered the statements by other witnesses who claimed that local people from the village were saying that it was the accused who had committed the offence, and also the testimony of witness Vukelić, who said that just a couple of days before the critical event, Zoran Škorić, a contemporary of the accused, had died in a battle, and that the accused had been outraged by this.

The court decided to sentence the accused each to eight years' imprisonment. The personal and family circumstances of the accused, that is, the fact that both men are refugees, providing for themselves and their aging parents, the absence of previous convictions, and the amount of time passed since the commission of the offence were all taken into account for mitigation. The circumstances under which the act was committed and its consequences were held to be aggravating circumstances.

The prosecutor and the defense counsels of both the accused filed an appeal against the judgment, the former against the length of sentence imposed, and the latter on all grounds for appeal.

Ruling on the appeals, on 20th December 2013, the Court of Appeal Department granted the defense's grounds for appeal and issued a ruling setting aside the first-instance judgment and sending the case back to the lower court for a retrial. Specifically, the Court of Appeal Department held that the first-instance court had failed to provide clear conclusions with regard to some decisive facts, such as the motives for the offence, and that the facts that the first-instance court was guided by in delivering its judgment, were unacceptable since the court had failed to determine all facts of the case.

HLC findings

The proceedings were completed within a short period of time, just four months. This was partly due to the provisions of the Criminal Procedure Code, which allow the parties to come to an agreement about uncontested facts before the trial. Thus the parties to the proceedings agreed that the existence of an armed conflict in BiH at the time of the commission of the offence, the affiliation of the accused with the ARS, the mental capacity of the accused and the status of the injured party were facts beyond dispute.

The first-instance court's findings of fact were based on the statements of witnesses Jelka Plećaš and Mile Vukelić, and on an autopsy report. The Court of Appeal Department however, found that the testimonies given by these witnesses were not properly and comprehensively assessed. Specifically, witness Vukelić said that a neighbor of his told him that he had seen the accused kill Mehmed Hrkić, without specifying who exactly that neighbor was, and despite this, the first-instance court made no attempt to determine his iden-

tity. In addition, the first-instance court failed to resolve some inconsistencies in this witness' testimony, specifically the part of his testimony in which he mentioned that in the aftermath of the crime, the accused had warned him to keep the information about the crime to himself, after which they boasted around the village about having killed Hrkić. Witness Jelka Plećaš stated that the accused never mentioned the event in question to her, but that she had heard different rumors in the village about who had killed Mehmed Hrkić. First she heard that it was her husband who had killed him, then it was Vukelić, and lastly, the accused. The Court of Appeal Department also held that on the basis of Jelka Plećaš's testimony in which she said that her mother-in-law told her about the injured party screaming, "No, let me go," it could not be inferred beyond reasonable doubt that the accused had committed the offence he was charged with. The court therefore ordered that witness Mile Vukelić, who at the initial trial had been interviewed via a video link with the Court of BiH, be re-examined at the retrial, preferably during the main hearing, and confronted with the accused, in order for the court to properly and correctly determine the facts of this case. The court also ordered that Vukelić's wife be called to give evidence about whether the accused had come to Vukelić's house, how they had behaved and what they had said at that occasion, and whether her husband had told her about meeting the accused in a forest. The court also ordered a ballistic examination.

The Court of Appeal Department rightly challenged the conclusion of the first-instance court with regard to the motive for the offence. Namely, the first-instance court determined a plausible motive for the offence on the basis of the statement of witness, Mile Vukelić, that a couple of days before the critical event, Zoran Škorić, a contemporary of the accused, had been killed in a battle, and that the accused were upset by this at his funeral. This conclusion contradicts material evidence, specifically Škorić's death certificate produced by the defense counsel of the accused, attesting that Škorić was killed nearly forty days after the murder of Mehmed Hrkić.

As in previous cases, the Higher Court Department, without good reason, took into account the amount of time that had passed since the commission of the offence, as mitigation. It should be mentioned again, that in the case of war crimes, where the existence of an armed conflict is the objective precondition for incrimination, the amount of time passed is completely irrelevant, since once the conflict is over, the criminal act can no longer be committed. That the length of time passed should not be taken as a mitigating circumstance in sentencing perpetrators of this type of criminal offences is indirectly borne out by a universally accepted non-applicability of a statute of limitations on war crimes.

15. *Gnjilane Group*

On 13th November 2013, the Court of Appeal Department[147] rendered a judgment[148] affirming the judgment of the Higher Court Department[149] with respect to acquittals, overturning the convictions of the accused Shefqet Musliu, Sadik Aliu, Agush Memishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu, who had been accused of committing a war crime against the civilian population as co-perpetrators.[150]

Course of proceedings[151]

An indictment issued by the OWCP on 11th August 2009, charged Fazli Ajdari, Rexep Aliu, Shaqir Shaqiri, Shefqet Musliu, Sadik Aliu, Idriz Aliu, Agush Memishi, Faton Hajdari, Shemsi Nuhiu, Ahmet Hasani, Nazif Hasani, Ramadan Halimi, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu with committing a war crime against the civilian population.[152]

The main hearing opened on 23rd September 2009. On 14th May 2010, the trial chamber ruled to separate the proceedings against those defendants who were being tried *in absentia*, namely: Shefqet Musliu, Sadik Aliu, Idriz Aliu, Shemsi Nuhiu, Ramadan Halimi, Fazli Ajdari, Rexep Aliu and Shaqir Shaqiri.[153] On 11th November 2010, the chamber decided to drop criminal proceedings against them.

On 16th November 2010, the OWCP amended the indictment to make it more precise. The amended indictment alleged that the accused – Agush Me-

147 War Crimes Department's Trial Chamber composed of Judge Sretko Janković (presiding), Judge Sonja Manojlović, Omer Hadžiomerović, Miodrag Majić and Vučko Mirčić (members).

148 Case number: Kž1. Po2 No 2/12.

149 Case number: K.Po2 No 18/11.

150 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144, in connection with Art. 22.

151 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/gnjilanska_grupa.html, accessed on 31st May 2014.

152 Case number: KTRZ 16/08, available at: http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2009_08_11_CIR.PDF, accessed on 28th May 2014.

153 The chamber made such a decision because a large amount of evidence needed to be presented with respect to those accused who were being tried *in absentia*, which would have considerably prolonged the proceedings against Agush Memishi and others.

mishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu – as KLA soldiers, between early June and the end of September 1999, committed the following offences against the civilian population in Gnjilane/Gjilan (Kosovo)and nearby villages: inhuman treatment, terror, intimidation, torture, unlawful detention, rape, murder, inflicting of bodily injuries and causing great suffering, and destruction and looting of property. These offences, which resulted in the deaths of at least eighty people, were aimed at achieving a common objective of the establishment of full civil and military control over Kosovo and driving Serbs and others who were not ethnic Albanians, out of Kosovo.[154]

On 21st January 2011, the Higher Court Department[155] rendered a judgment[156], finding the accused guilty on five counts of the indictment and not guilty on the remaining sixteen counts,[157] and sentenced them to imprisonment as follows: Agush Memishi, Selimon Sadiku and Samet Hajdari each to fifteen years; Faton Hajdari, Ahmet Hasani and Nazif Hasani each to ten years; and Kamber Sahiti and Ferat Hajdari each to eight years.

Considering the appeals filed by the OWCP, the defense counsels and the accused, on 7th December 2011, the Court of Appeal Department quashed the first-instance judgment and remitted the case to the first-instance court for a retrial.[158]

The retrial opened on 20th March 2012, after the Higher Court Department had decided on 7th March 2012, to join the cases involving all the persons who had been named in the original indictment.[159]

154 Case number KTRZ 16/08, available at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/Gnjilanska-grupa-precizirana-optu%C5%BEnica-16.11.2010..pdf, accessed on 28th May 2014.

155 Trial Chamber composed of: Judge Snežana Nikolić Garotić (presiding), Judge Vinka Beraha Nikićević and Judge Rastko Popović (members).

156 Case number: K. Po No 33/2010.

157 Of the 21-count indictment.

158 For more details about the Court of Appeal Department judgment, see: Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2011*, (Belgrade: Humanitarian Law Center, 2012), p. 52.

159 On 7th March 2012, the Belgrade Higher Court chamber ruled to merge the proceedings against Fazli Ajdari, Rexhep Aliu, Shaqir Shaqiri, Shefqet Musliu, Sadik Aliu, Idriz Aliu, Shemsi Nuhiu and Ramadan Halimi (case K.Po2 43/10) and the proceedings against Agush Memishi, Faton Hajdari, Ahmet Hasani, Nazif Hasani, Samet Hajdari, Ferat Hajdari, Kamber Sahiti, Selimon Sadiku and Burim Fazliu (case K.Po2 18/11) into one case (K Po2 18/11).

Following the retrial, on 19th September 2012, the Higher Court Department rendered a judgment finding Samet Hajdari, Ahmet Hasani, Nazif Hasani, Agush Memishi, Burim Fazliu, Selimon Sadiku, Faton Hajdari, Kamber Sahiti, Ferat Hajdari, Sadik Aliu and Shefqet Musliu guilty on just one count of the indictment, according to which the accused between 17th and 23rd June 1999 in the high school dormitory in Gnjilane/Gjilan and in a school in the village of Ugljare, together with other, unidentified KLA members, unlawfully detained and tortured the injured parties, and subjected them to inhumane treatment, including inflicting bodily injuries upon them, and raping the injured parties/protected witnesses C1 and C2. The court acquitted the accused of the other charges listed in the indictment.[160]

The OWCP, some of the accused and defense counsels of all those accused who were found guilty appealed the judgment.

In May 2013, the Court of Appeal Department upheld the acquittals and decided to convene a hearing before deciding on the convictions in the first-instance judgment. During the hearing, which took place on 16th and 17th September 2013, the accused, the witness collaborator with justice 'Božur 50' and the injured party/protected witness 'C2' were examined.

The Court of Appeal Department dismissed the OWCP's appeal as unfounded and upheld the acquittal of the accused, finding that the first-instance court had determined the facts of the case correctly and completely and applied substantive law properly.

The court granted the appeals against conviction in the first-instance judgment, filed by the accused, and reversing the convictions and clearing the accused of criminal responsibility. The court held that testimonies of the injured parties/protected witnesses C1 and C2 were discredited by numerous contradictions that existed between their statements given to an investigating judge in Niš, those given to the investigating judge handling the present case, those given during the identification of perpetrators, and those given before the first-instance and appeal court. Among other things, the Court of Appeal Department pointed to the facts that after an interrupted perpetrator identification process held on 2nd June 2009, the injured party C1 identified some unrelated persons as persons who had raped her. However, on the following

160 For more details about the first-instance judgment resulting from the retrial see: Humanitarian Law Center, *Report on War Crime Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013), p. 63.

day, during the next identification process, she recognized the accused as the persons who had raped her. The court also drew attention to the fact that the same witness, while testifying against the accused Selimon Sadiku, said that he might be the person who had beaten and ill-treated her, but failed to mention rape. However rape was later listed in the indictment as a criminal act that Sadiku was charged with. In addition to this, during their interrogation by the investigating judge of the District Court in Niš, neither of the injured parties mentioned having been raped multiple times, and later tried to explain it by claiming that the investigating judge had not reproduced their statements in their entirety for the record.

HLC findings

This case involves numerous crimes committed against Serbian civilians in the Gnjilane/Gjilan area towards the end or after the end of the armed conflict in Kosovo (June-December 1999). Seventeen persons stood accused in this case, which lasted four years, over the course of which 206 witnesses, including 179 injured parties gave evidence before the court. However, the outcome of this case did not provide an answer to the question about what happened to the dozens of people who, at the time, disappeared without trace and whose remains, with few exceptions have yet to be found. The way in which the OWCP prepared and conducted the case is the main reason why this was so, and the inappropriate evaluation of evidence of sexual violence is another.

Inappropriate selection of charges

Since most of the counts on the indictment (twenty-one out of the twenty-four) refer to events that took place after the end of the armed conflict in Kosovo, the OWCP should have ensured that there would be no possibility of the indictment being dismissed because of these counts, on grounds of non-applicability of provisions of international humanitarian law outside a situation of armed conflict. Specifically, the act with which the accused were charged – a war crime against the civilian population – can be committed only at the time of armed conflict. In some previous proceedings, conducted before Belgrade courts, and which resulted in final judgments, it has already been established that the conflict in Kosovo ended on 20th June 1999, since after that date, the armed forces of the FRY, as a party to the conflict, were no longer present on the territory of Kosovo. Thus the Court of Appeal Department in its judgment handed down in May 2013, acquitting seventeen accused persons, stated that a war crime against the civilian population could be committed only during war, armed conflict or occupation, and that all Serbian armed forces had withdrawn from Kosovo by 20th June 1999, following the signing of the Kumanovo Agreement. Since most of the events set forth in the indictment took place

after the withdrawal of the Serbian armed forces from Kosovo, after which the possibility of resuming the armed conflict which had then ended, ceased to exist, the OWCP's assertion regarding the existence of armed conflict cannot be accepted, as one party to the conflict was no longer present.

The Court of Appeal Department further stated in its judgment that the actions of the KLA, in the form of an attack against the civilian population, occurred after the end of the armed conflict, and could not qualify as a war crime, but as some other criminal offence. In this respect, it appears that the OWCP could have and should have categorized the acts described in the indictment that were committed after 20th June 1999 as a crime against humanity, which was criminalized at the time, both under customary international law and the ICTY Statute.[161] Such an act does not have to meet the requirement of having been committed during an armed conflict, but has to meet other conditions, which the acts in question certainly met (widespread or systematic attacks directed at civilians). The main objection that could be raised about this latter qualification is that at the time of the commission of the acts in question, crime against humanity was not criminalized under domestic criminal legislation, and such a categorization would therefore have violated the prohibition of the retroactive application of criminal law. It is important to note, however, that a number of decisions of the European Court of Human Rights and courts in successor states of the former Yugoslavia have accepted the argument that a crime against humanity could be tried in the domestic legal system. The OWCP itself is inclined to rely on customary international law in qualifying criminal acts. For example, in the case against Petar Enger, the OWCP filed a request for investigation into genocide committed during WWII, even though the crime of genocide had been defined only in 1948, in the Convention on the Prevention and Punishment of Genocide, and was formally incorporated in the domestic legislation only after the Convention entered into force, in 1951.[162]

161 ICTY Statute, Article 5. See also: judgment of the European Court of Human Rights in the case of *Boban Šimšić v. Bosnia and Herzegovina* (51552/10), of 10th April 2012, para. 8-13; judgment of the European Court of Human Rights in the case of *August Kolk and Petr Kislyiy v. Estonia*, of 17th January 2006; Judgment of the Court of Appeal of Montenegro in the case of *Đuković et al.* (Ksž 1/2012) of 22nd March 2012.

162 Adopted and opened for signature and ratification by the United Nations General Assembly Resolution 260 a (III) on 9th December 1948. It entered into force on 12th January 1951, pursuant to Article XIII, Official Gazette of the Presidium of the National Assembly of the Federative People's Republic of Yugoslavia, No 2/1950. See: Case number KTRZ. No 8/08, of 29th August 2008.

It remains unclear why the Court of Appeal Department did not rely on the legal conclusion of the Supreme Court regarding the duration and the end of the armed conflict in Kosovo. The OWCP approached the Supreme Court seeking its opinion on this legal matter,[163] and the Supreme Court issued its legal opinion in May 2013, in which it stated that the armed conflict in Kosovo lasted from February 1998 until the end of December 1999, when KLA members were disarmed.[164] The events involved in the *Gnjilane Group* case occurred in June 1999, and the legal conclusion of the Supreme Court directly refers to the *Gnjilane Group* case. Had the Court of Appeal Department taken the Supreme Court's ruling into account, it would have had a decisive influence on the final outcome of the case. Although in the opinion of the HLC, the Supreme Court's ruling is questionable, it is difficult to understand why the Court of Appeal Department did not take into consideration the legal conclusion of the Supreme Court, if the very intention of the Supreme Court was to achieve greater uniformity in court practice, thus preventing lower courts from taking different stances on a same matter.[165]

Protected witness 'Božur 50'

The alleged crimes against civilians, as they are described in the indictment, are full of harrowing details about torture and brutal executions. The only evidence the OWCP offered to support most of the charges set forth in the indictment (twenty-two out of the twenty-four) was the testimony of the witness/collaborator with justice 'Božur 50'. Testimonies given by witnesses/collaborators with justice are certainly expected to be precise, clear and convincing. However, the testimony of 'Božur 50''#' did not meet any of these criteria.

Protected witness 'Božur 50' spoke confusingly and vaguely throughout the proceedings, made changes to his statements, described events in non-specific terms, and failed to describe concrete actions allegedly undertaken by some of the accused persons. In addition, this witness was not able to precisely determine the time when the criminal acts were committed. Thus, when describing how an unidentified man was taken to the premises of the YA Center in Gnjilane and 'mutilated', he first said that he had heard about the event from some of the accused, but later altered his statement, both with regard to the

163 Dorotea Čarnić "Murder of 47 Serbs in Gnjilane: war crime or ordinary crime", *Politika*, 14th September 2013, available at: http://www.politika.rs/rubrike/Hronika/Ubistvo-47-Srba-u-Gnjilanu-ratni-ili-obican-zlocin.lt.html, accessed on 27th May 2014.

164 Legal conclusion of the criminal law department of the Supreme Court of 24th May 2013.

165 Law on Organisation of Courts, Official Gazette of the Republic of Serbia, *No* 116/2008, 104/2009, 101/2010, 31/2011, 78/2011, 101/2011and 101/2013, Article 31.

place this man was taken to, and the manner in which he was killed. Describing the event in which a man and a woman were thrown off a tall building, the witness first said that "other people" had told him everything about it, and later claimed to have seen "blood on the concrete floor". Later in the proceedings, he again altered his statement, claiming that he had actually seen the bodies and come to the conclusion that one of the accused, who had shown him the bodies, had done it.

Similarly, describing the alleged killing of a victim by hammering of a cigarette lighter into their skull, the witness first did not mention one of the accused persons in connection with this event, but later, when describing this particular event again, he incriminated that accused person. It was not possible to verify the accuracy of this witness' allegations, not even by questioning witnesses who lost family members, because their deaths could not been associated with any of the events described by the witness/collaborator with justice.

The descriptions this witness gave of certain events were contradicted by other evidence. The witness said that two victims, a married couple, were killed in the premises of the high school dormitory in Gnjilane, and that he did not see the murders. What he did see, according to his testimony, was the cutting of the victims' bodies into pieces and the accused putting those pieces into black sacks and throwing them into a dumpster in the yard of the dormitory building. But the daughter of the injured parties testified to the contrary. She said that she had lived with her parents in their house near Gnjilane, that she had been in the house at the time of their murder, hiding in a room adjacent to the room in which her parents were killed with a firearm. Expert findings and testimonies, autopsy reports, and repeated autopsy reports, all confirm that there were no signs of cutting or incineration on the remains of seven victims, which included this married couple. According to a report from the EULEX Kosovo Office for Missing Persons and Forensics, no human remains were found in Lake Livočko, where, according to the OWCP indictment, a number of the victims' bodies were disposed.

Assessment of the testimonies of sexual violence survivors

The Court of Appeal Department did not display an appropriate level of sensitivity when assessing evidence relating to sexual violence, most particularly with regard to the testimonies of the witnesses/injured parties 'C1' and 'C2'. The court held that their credibility had been impaired to such a degree that no judgment of conviction could be based on their testimonies, because the statements that they gave at different stages of the proceedings, from their

first interrogation by the investigating judge in Niš, later investigations and finally the main hearing, were inconsistent with each other concerning some of the underlying facts. There were inconsistencies about the time when the offence against them had been committed, the duration of the event, and the place where the offence had been committed.

The Court of Appeal Department should have displayed better understanding of the mental state of the two witnesses, who had undoubtedly endured brutal violence. In its judgment delivered on 19th September 2012, the Higher Court Department offered a logical and legally acceptable explanation of the inconsistencies in the testimonies of the injured parties C1 and C2, emphasizing that their testimonies tallied in their essential parts.[166] It should be noted here that the ICTY, in cases which involve elements of sexual violence, treats testimonies of sexual violence survivors in a manner which takes into account the specific trauma suffered by victims of sexual violence. Among other things, when assessing their testimonies the tribunal focuses on the events rather than on particularities, such as dates and places.[167]

16. *Bytyqi*

On 18th January 2013, the Court of Appeal Department[168] rendered a judgment[169] denying the appeal filed by the OWCP and upholding the Higher Court Department judgment of 9th May 2012 which acquitted Sreten Popović and Miloš Stojanović of charges of aiding and abetting the commission of a war crime against prisoners of war.[170]

Course of proceedings[171]

On 23rd August 2006, the OWCP indicted Sreten Popović and Miloš Stojanović

166 Judgment of the Higher Court Department, case number: K. Po2 18/11, of 19th September 2012, p. 58-62, available at http://www.hlc-rdc.org/Transkripti/Prvostepena_presuda_u_ponovljenom_postupku_Gnjilanska_grupa_19_09_2012..pdf, accessed on 28th May 2014.

167 See: ICTY Trial Chamber Judgment, *Furundžija*, of 10th December 1998, para 110-116 and ICTY Trial Chamber Judgment, *Kunarac et al.* 22nd February 2001, para 679.

168 Trial Chamber composed of: Judge Radmila Dičić Dragičević (presiding), Judge Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić (members).

169 Case number: Kž1 Po2 No 5/12.

170 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Art. 144, in connection with Article 24.

171 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/bitici.html, accessed on 31st May 2014.

for a war crime against prisoners of war[172] and on 3rd September 2009 amended the indictment. According to the amended indictment, Sreten Popović, in his capacity as platoon commander of the Operational Pursuit Group (OPG), forming part of the 124th intervention brigade of the Serbian MI's Special Police Unit (PJP), and Miloš Stojanović, in his capacity as commander of a squad in the same platoon, in early July 1999, in the context of the armed conflict in Kosovo deprived the injured parties – the brothers Agron, Ylli and Mehmet Bytyqi, members of the 'Atlantic Brigade' volunteer unit, a part of the KLA – of their right to a fair trial and subjected them to inhuman treatment and mental torture.

The District Court in Belgrade[173] rendered a judgment on 22nd September 2009, acquitting the accused of charges for lack of evidence.

The OWCP appealed the judgment. The Court of Appeal Department[174] granted the OWCP's appeal on 1st November 2010[175], quashed the judgment and sent the case back to the first-instance court for reconsideration.

During the new proceedings, which commenced on 23rd September 2011, the accused were heard again and 10 witnesses were examined. The OWCP further amended the indictment twice during the retrial, first on 2nd April 2012, and shortly thereafter, on 5th April 2012. The last amendment to the indictment alleges as follows: that the accused, in the first half of July 1999, in the context of, and in close connection with the armed conflict in Kosovo, which began on 24th March 1999 with the declaration of a state of war, and which lasted until 26th June 1999, when the decision of the Assembly of the FRY to revoke the declaration of the state of war took effect, aided and abetted the commission of a crime, by, acting in contravention of the norms of international humanitarian law relating to the treatment of prisoners of war,– the Bytyqi brothers, KLA members who had been arrested by the Serbian police on 26th June 1999 on the administrative border between Serbia and Kosovo – and taking them from the District Jail in Prokuplje and transporting them, on 8th July 1999, to the special police training grounds in Petrovo Selo, where they were held in a room lacking basic sanitation. The indictment further alleges that the accused, Sreten Popović, on the night of 9th July 1999 handed over the injured parties,

172 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article 144.

173 Trial Chamber composed of: Judge Vesko Krstajić (presiding), Judge Vinka Beraha Nikićević and Judge Snežana Nikolić Garotić (members).

174 Trial Chamber composed of: Judge Siniša Važić (presiding), Judge Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Nadežda Mijatović (members).

175 Case number: Kž1Po2 No 7/2010.

the Bytyqi brothers to unidentified members of the Serbian MI, who tied their hands with wire and took them to the place of a mass grave and killed them by shooting them in the back of the head. The accused were aware that by their unlawful act of taking the injured parties from the prison in Prokuplje, placing them in an inadequate facility - and for the accused Sreten Popović who took them out in the middle of the night and handed them over, with their hands tied with wire, to unidentified members of the police (their executioners) - they aided and abetted a crime enabling the unidentified members of the police to deprive the injured parties of their lives.

On 9th May 2012, the Higher Court Department[176] delivered a judgment acquitting the defendants,[177] holding that the OWCP had failed to prove the existence of an armed conflict at the time of the commission of the offence, a precondition for incrimination. The court decided that the armed conflict ended on 20th June 1999 with the withdrawal of the YA and Serbian police forces from Kosovo, and that therefore the injured parties, having been arrested on 26th June 1999, could not have had POW status. The court also held that it had not been proven that the accused had committed the offence for which they were indicted.

The OWCP appealed against the acquittal on the grounds of serious procedural errors and erroneous and incomplete findings of fact.

The Court of Appeal Department upheld the first-instance judgment on 18th January 2013.

HLC findings

The Mehmet, Ylli and Agron Bytyqi murder case lasted seven years. The indictment focused on marginal actors in this crime, and the proceedings did not result in bringing those who ordered and executed the murder of the Bytyqi brothers to justice, even though many facts established during the trial pointed to persons who, at the very least, had known about the murder.[178]

Omissions by the OWCP

The proceedings were marked by a series of omissions from the OWCP. The indictment was amended four times and whilst this is not, in itself, necessarily bad, those indictments were imprecise, contradictory and showed that the

176 Trial Chamber composed of: Judge Rastko Popović (presiding), and Judge Vinka Beraha Nikićević and Judge Snežana Nikolić Garotić (members).

177 Case number: K.Po2 No 51/2010.

178 See in: Humanitarian Law Center, *Report on War Crime Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013), p.52-53.

OWCP was uncertain about how to proceed in this case.

Thus the initial indictment charged the accused with depriving the injured parties of the right to a proper and fair trial, and subjecting them to inhumane and degrading treatment and physical torture, because of which, and also because of the manner in which they were brought to the training camp in Petrovo Selo, and in which they were detained, and handed over to unidentified members of the Serbian MI the victims felt an unbearable fear for their lives and bodily integrity. Such conduct by the accused was assessed by the OWCP as a war crime against prisoners of war. In the final amendment to the indictment this conduct was qualified as intentional aiding and abetting of the commission of a criminal offence, even though not one single act of the accused which amounted to aiding and abetting was listed in the disposition of the indictment.

Hence, the amended indictment charged the accused with a lesser offence of aiding and abetting the commission of a war crime against prisoners of war, as opposed to the previous indictments, which charged them as direct perpetrators.

Furthermore, the disposition of the indictment states, among other things, that the accused Sreten Popović, " ...late that night handed the injured parties over to unidentified members of the MI of the Republic of Serbia, who tied the injured parties hands with wire, and pushed them, into a police vehicle ..." ; and the very next paragraph of the indictment states as follows:" ... Popović Sreten, taking the injured parties out of the room in which they had been detained, in the middle of the night, and handing them over, with their hands tied with wire, to unidentified persons – members of the police – their executioners".[179] It remains completely unclear who and at which point, tied the hands of the injured parties with wire. Was it the accused Popović, or a third person, who had tied their hands before they were handed over to members of the police, or did the unidentified policemen do it, after the injured parties had been handed over to them? Interestingly enough, the initial indictment states that unidentified members of the police and the SAJ (special anti-terrorist unit) transported the injured parties to a mass grave, where some unidentified persons killed them. This differs from the final amended indictment, which states that they were handed over to policemen, who were their executioners. It is important to note that the OWCP failed to offer any proof, at any point in the proceedings, that the injured parties were killed by the very policemen they were handed over to, by the accused Popović.

The allegations set out in the amended indictment create additional confusion,

179 The OWCP indictment, No KTRZ 5/06 of 5th April 2012, available at: http://www.tuzilastvorz.org.rs/html_trz/OPTUZNICE/O_2012_04_05_CIR.pdf, accessed on 30th May 2014.

because the OWCP omitted to say, as it did in the initial indictment, that the accused Sreten Popović was acting on orders received from General Vlastimir Đorđević, which suggests that the accused decided on his own to bring the injured parties to Petrovo Selo, even though in the course of proceedings, and a long time before the indictment was amended, it had been established beyond reasonable doubt that such an order had existed.

The second amendment to the OWCP indictment of 5th April 2012, charged the accused – Sreten Popović and Miloš Stojanović – with the criminal offence of a war crime against prisoners of war, committed in violation of the rules of the Third Geneva Convention relating to the Treatment of Prisoners of War.[180] However, the rules contained in the Third Geneva Convention apply solely to situations of international armed conflicts, and such a conflict did not exist in Kosovo at the time. The international armed conflict in Kosovo ended on 9th June 1999 with the signing of the Kumanovo Agreement, between the Government of the FRY and KFOR, as has been previously established by the ICTY.[181] In light of the foregoing, the Court of Appeal Department rightly concluded that the Bytyqi brothers were not prisoners of war and that the OWCP had erred in qualifying the alleged acts of the accused as a war crime against prisoners of war.

The OWCP, however, could have and should have qualified their acts as a crime against humanity.[182] The murder of the Bytyqi brothers, in all its elements (the perpetrators' status, the manner of the killing, the concealment of the bodies in a mass grave which held the bodies of other Kosovo Albanians who had been killed during the conflict) was part of a systematic campaign of terror that was carried out by Serbian forces against Kosovo Albanians during the course of 1998 and 1999, as was confirmed by two final judgments rendered by the ICTY.[183]

The Court of Appeal's interpretation of international humanitarian law norms

In its judgment of 18th January 2013, the Court of Appeal Department upheld the finding of the first-instance court that the Bytyqi brothers did not have the status of prisoners of war. While this conclusion is indeed correct, the

180 Second amended OWCP indictment of 5th April 2012.

181 ICTY Trial Chamber judgment in the case of *Prosecutor v. Vlastimir Đorđević*, 23rd February 2011, para 1580.

182 On legal possibilities for charging an act as a crime against humanity in war crimes trials in Serbia see the findings on *Gnjilane Group* case on page 58.

183 ICTY Appeals Chamber judgment in the case of *Prosecutor v. N. Šainović et al.,* IT-05-87-A, 23rd January 2014, Appeals Chamber judgment in the case of *Prosecutor v. Vlastimir Đorđević*, IT-05-87/1-A, 27th January 2014.

reasoning on the basis of which the court came to it, is logically and legally unfounded. Instead of closing its analysis with the conclusion that a victim can be considered a prisoner of war only in time of war or non-international conflict, it disclosed in its judgment a variety of other arguments, which show that the court had misinterpreted international humanitarian law. In stating its reasoning regarding this matter, the court offered two arguments to support the conclusion that the Bytyqi brothers did not have the status of prisoners of war:

a. The Bytyqi brothers were not combatants

The court stated in its judgment that the Bytyqi brothers "at the time of their arrest were not members of any military or police unit, nor were they performing any military or police task, nor were they carrying arms or wearing a police or military uniform."[184] Leaving aside the question of the existence or otherwise of an armed conflict, the court made an error in assuming that combatant status necessarily involves "performing assigned tasks", carrying weapons and wearing a uniform. These elements are required for treating an injured party as a prisoner of war only in cases where irregular units exist, i.e. units not operating as part of the forces which constitute a party to an armed conflict. Volunteer units are considered under the Third Geneva Convention as part of the armed forces of a party to the conflict,[185] and the Bytyqi brothers were members of one such unit – the volunteer "Atlantic Brigade" of the KLA.

b. Competence for determining POW status

The second argument the court set forth to support its conclusion that the Bytyqi brothers were not prisoners of war is even more questionable. Namely, the court asserted that "the Bytyqi brothers were not at any point treated by the state authorities [FRY] as prisoners of war. *Therefore*, international conventions applicable to prisoners of war did not apply to them". The court in its judgment further states that none of the police officers, at any point (when transporting the injured parties to Petrovo Selo, or when handing them over), "…referred to the Bytyqi brothers as persons having the status of prisoners of war". The court concluded that since they were not referred to as such, they consequently did not have the status of prisoners of war nor did they enjoy the rights such a status entails. Apart form being logically unsound, this

184 Judgment of the Court of Appeals Department in the *Bytyqi* case (Kž1 Po2 No 5/12.) of 18th January 2013, p. 3.

185 Geneva Convention relative to the Treatment of Prisoners of War of 12 August 1949, Official Gazette of the Federal People's Republic of Yugoslavia (FPRY), No 24/50, Article 4 (a) (1).

reasoning cannot be justified by the Geneva Conventions and it represents a dangerous interpretation of the rights of prisoners of war. If the rights of protected persons indeed depended on the *opinion* of the persons fighting for the opposing side in a conflict, as the court asserted, the laws of war would not confer any rights or protection whatsoever. However, if we again leave the question of the existence of an armed conflict aside, the Geneva Conventions are very explicit about the protected categories of persons, including prisoners of war. Namely, in cases where prisoners do not have clearly distinctive signs showing that they are combatants, (which was the case with the Bytyqi brothers), their status is to be determined not by combatants of the party to the conflict which holds them captive, but by a competent court.[186]

Witnesses were threatened

Some active-duty police officers who took the stand at the main hearing were threatened. The judge who presided over the chamber reacted by reporting the threats to the competent MI authorities. However, the public was never informed whether and/or how the MI had acted upon the report and whether the persons who made threats were brought to justice.[187]

17. *Lovas*

On 9th December 2013, the Court of Appeal Department[188] quashed[189] the judgment of the Higher Court Department[190], which found the defendants guilty of committing a war crime against the civilian population[191], and sent the case back to the first-instance court for retrial and reconsideration.

Course of proceedings[192]

On 28th November 2007, the OWCP[193] indicted fourteen persons – Ljuban

186 Geneva Convention relative to the Treatment of Prisoners of War of 12th August 1949, Official Gazette of the FPRY, No 24/50, Article 5, p. 2.

187 See the transcript from the main hearing (in Serbian) of 8th and 9th February 2007, available at: http://www.hlc-rdc.org/Transkripti/bitici.html, accessed on 22nd June 2014.

188 Trial Chamber composed of: Judge Sonja Manojlović (presiding), and Sretko Janković, Dr Miodrag Majić, Omer Hadžiomerović and Vučko Mirčić (members).

189 Case number: Kž1 Po2 No 3/13.

190 Case number: K. Po2 No 22/2010.

191 Criminal Code of the Federal Republic of Yugoslavia, SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, and Official Gazette of the FRY, No 35/92, 37/93 and 24/94, Article. 142, in connection with Article. 22.

192 HLC trial reports, main hearing transcripts, indictments and judgments available (in Serbian) at: http://www.hlc-rdc.org/Transkripti/lovas.html, accessed on 31st May 2014.

193 Deputy War Crimes Prosecutor, Veselin Mrdak.

Devetak, Milan Radojčić, Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević, Darko Perić, Radovan Vlajković, Radisav Josipović, Jovan Dimitrijević, Saša Stojanović, Dragan Bačić, Zoran Kosijer, Petronije Stevanović and Aleksandar Nikolaidis – for crimes committed against Croatian civilians in Lovas (Croatia)[194] during October and November 1991, and then amended the indictment substantially on 28th December 2011.

The initial OWCP indictment of 28th November 2007 charged the accused with committing several criminal acts which together amounted to a war crime against the civilian population, during October and November 1991 in the Lovas area and in the village of Lovas.

The amended indictment reduced the number of civilians killed from an initial sixty-nine to forty-four, and charged just Željko Krnjajić for the 10th October 1991 attack against the civilian population in Lovas, which he was alleged to have perpetrated in his capacity as commander of the Tovarnik police station, which formed part of the 2nd Proletarian Guard Motorized Brigade of the YPA (2nd Pgmbr.), and on the orders of the commander of the brigade, and which resulted in seven houses being torched and seven civilians being killed.

Over the course of the main hearing, which opened on 17th April 2008, 194 witnesses were examined, the statements of thirty-six witnesses, who at the time of the trial were either deceased or ill, were read out, military experts provided their findings and testified in court and several thousand pages of written evidence were read out.

On 26th June 2012, the Higher Court Department[195] rendered its judgment finding all the accused guilty of committing a war crime against the civilian population as co-perpetrators.[196] The court found that the accused participated, in various ways, in an attack against Croatian civilians that took place in October and November 1991 in Lovas (Croatia), during which they engaged in the inhumane treatment of civilians, causing of severe suffering and violation of bodily integrity, torture and killings, resulting in the death of forty-one Croatian civilians and eleven other Croatian civilians being injured to various

194 Lovas is a municipality in the Vukovar-Srem County in eastern Slavonia, near Vukovar.

195 War Crimes Department' Trial Chamber: Judge Olivera Anđelković (presiding), and Judge Tajana Vuković and Judge Dragan Mirković (members).

196 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY, No 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/, Article 142, in connection with Article 22.

degrees. The accused were sentenced to imprisonment as follows: Ljuban Devetak to twenty years, Milan Devčić, Željko Krnjajić and Miodrag Dimitrijević each to ten years, Milan Radojčić to thirteen years, Darko Perić and Radovan Vlajković each to five years, Radisav Josipović to four years, Jovan Dimitrijević and Saša Stojanović each to eight years, Zoran Kosijar to nine years, Dragan Bačić and Aleksandar Nikolaidis each to six yeas, and Petronije Stevanović to fourteen years.

The court found that the attack on Lovas had been carried out on the order of the command of the YPA's 1st Proletarian Guard Motorized Division which was given on 9th October 1991 to the command of the YPA'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 on that same day by Dušan Lončar, the commander of the 2nd Proletarian Guard Mechanized Brigade of the YPA, required that "supporting forces" – the TO and militia based in Tovarnik, which included the *Dušan Silni* (*Dušan the Great*) armed group – also participate in the attack, with the purpose of 'cleansing the village of the Croatian National Guard (CNG) and Croatian MI members', as well as its 'hostile residents'. The howitzer battery of the 2nd Proletarian Guard Mechanized Brigade of the YPA also took part in the attack on Lovas on 10th October 1991, firing some ten shells into the village. As a result of the artillery fire, one civilian was killed and another wounded. During the 'cleansing' of the village, carried out by the 'supporting forces', twenty 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 CNG or the Croatian MI were present in the village of Lovas at the time, and that, except for sporadic resistance, there was no organized defence in the village.

The court also found that the accused, Željko Krnjajić, took part in the attack on the village of Lovas on 10th October 1991, in his capacity 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 who controlled several streets in Lovas. In the course of the attack, 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 set on fire. 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 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.[197]

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 director of the Agricultural Cooperative with very broad powers in military and civil matters. He was 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 *Dusan the Great*, armed group who either took part in the attack on the village, or arrived later. The village was secured by reserve forces of the JNA from Serbia, composed of one company of the Ljig TO and the Lajkovac TO, and a tank company of the 1st Armoured Battalion of the YPA's 2nd Proletarian Guard Mechanized Brigade.

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

It was established by the court that during October 1991, Devetak, Devčić and Radojčić, 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 civilians. On an unspecified date in October 1991, Ljuban Devetak personally ordered members of the Dusan the Great group to kill three civilians. Between 14th and 18th October 1991, Devetak and Milan Devčić made a 'liquidation list', following which members of the Dusan the Great armed group killed sixteen civilians between 16th and 18th October 1991. The court found no evidence indicating when and on whose order Zoran Krizmanić had

197 Petra Preradovića Street, Marka Oreškovića (now Vukovarska) Street, Ive Lole Ribara (now Ante Starčevića) Street, Franje Račkog Street and Kralja Tomislava Street.

been killed, or whether Devetak had ordered the murder of Stjepan Luketić.

The Court also established that the accused, Ljuban Devetak, incited the defendant Petronije Stevanović and a number of members of the *Dušan 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 celebrations of the Croatian Democratic Union (HDZ) anniversary, in the village of Lovas, and telling members of the *Dušan the Great* group present at the time: "Well, brothers, let's see now who our enemies are". Thereafter, members of the *Dušan 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 with a knife. The accused Nikolaidis joined the group of *Dušan the Great* members who were beating civilians, and hit the civilians with a rifle butt.

The accused Devetak and Dimitrijević, in a meeting held on 17th October 1991, made a decision to send the Saboteurs Squad of the Valjevo TO, the *Dušan the Great* volunteer group, and two members of the Lovas TO to search the vineyards on the outskirts of Lovas, towards the main road linking Šid and Vukovar[198], and to use the Croatian civilians who were confined in the Cooperative as 'human shields' in case of an attack by the Croatian armed forces, despite knowing that the area had been mined on 13th October 1991 by the YPA.

The accused, Dimitrijević, ordered the accused, Perić, commander of the Saboteurs Squad of the Valjevo TO, to carry out the action, together with members of the *Dušan the Great* volunteer group. On the following day, 18th October 1991, on the orders of commander Perić, the accused Vlajković and Josipović arrived at the Cooperative with some fifty soldiers. Members of the *Dušan the Great* volunteer group, namely Jovan Dimitrijević, Saša Stojanović, Dragan Bačić and Zoran 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 *Dušan 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. After the mines began exploding as a result of

198 The vineyards are located on the outskirts of the village of Lovas, in the direction of the Šid-Vukovar highway.

the civilians stepping on them, members of the TO and the *Dušan the Great group* opened fire on the survivors, killing 17 of them and leaving another eleven injured to vaious degrees. The accused Saša Stojanović subsequently 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.

Following orders issued by Devetak, the accused, Petronije Stevanović, took part in the killing of at least five civilians, and Nikolaidis of at least one Croatian civilian between 16th and 18th October 1991. The court established that Stevanović had taken part in the killing of six persons. However, in order not to exceed the scope of 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.

The judgment was appealed by the defence counsels of all the accused, the accused Ljuban Devetak and his wife, and the following accused: Milan Radojčić, Željko Krnjajić, Miodrag Dimitrijević, Radovan Vlajković, Radisav Josipović, Dragan Bačić, Zoran Kosijer and Aleksandar Nikolaidis.

The Court of Appeal Department granted the appeals and reversed the judgment, sending the case back to the first-instance court for a retrial.

The Court of Appeal Department found the disposition of the first-instance judgment to be unclear, as the court had failed to clearly specify in it, in which way each of the accused was liable or establish which of the acts each of them had committed, whilst confusingly stating that they had committed specific acts which they could not have done

Furthermore, the appellate court pointed out that the first-instance court, in stating the reasons for its judgment, had failed to provide reasons for its conclusions regarding the underlying facts, which resulted in incorrect and incomplete finding of the facts. Despite the fact that a war crime against the civilian population can only be committed in two ways (either by direct perpetration or by ordering another person to commit it), the first-instance court, in the view of the Court of Appeal Department had accepted the view of the prosecutor that the said offence might also be committed in other ways as well, but failed to provide clear and convincing reasons for accepting such a view. The appellate court drew particular attention to the fact that the first-instance court, despite being bound to do so, failed to clearly explain why some of the accused were found by the court to have acted as co-perpetrators.

The Court of Appeal Department pointed out that the judgment was in fact based on the doctrine known in international law as 'command responsibility', and that the accused had been charged in this way, though not formally so. Command responsibility is not formally defined in domestic criminal legislation, however certain elements of criminal responsibility could clearly be described additionally as command responsibility, by their nature.

HLC findings

The HLC provided an analysis of the first-instance proceedings in this case in its Report on War Crimes Trials in Serbia in 2012.[199]

Unclear elements of the judgment of the Court of Appeal Department

The judgment of the Court of Appeal Department is unusually brief and basic in terms of explanations, something that this court itself criticized the first-instance court for. The Court of Appeal Department gave no reasons for its decisions regarding some of the underlying facts. The court granted the appeals of all the appellants, listed their names in the judgment, but failed to state the basis for its decision to grant the appeals of the accused Aleksandar Nikolaidis and Petronije Stevanović. As these reasons are missing, and as no other reference was made to these two accused persons in the judgment of acquittal, except when listing them as appellants and their grounds for appeal, the question then arises as to why their convictions were reversed, as it cannot be seen in the Court of Appeal's decision.

Some reasons given for the reversal of the first-instance judgment are completely unclear. The following segment of the statement of the reasons may illustrate this point:

...from the disposition of the contested judgment it follows that the attack against civilian objects and certain civilians had been carried out pursuant to orders issued by the commander of the JNA's 2nd Pgmbr (to 'cleanse' the village of members of the CNG and MI of the Republic of Croatia and of its hostile residents). However, the judgment went on to state immediately afterwards that the attack had been carried out without military necessity, which renders this part of the disposition of the first-instance judgment completely incomprehensible and contradictory in itself.

199 Humanitarian Law Center, *Report on War Crime Trials in Serbia in 2012*, (Belgrade: Humanitarian Law Center, 2013), p. 53.

It remains unclear where the Court of Appeal Department saw the contradiction. Which part the did the court find incomprehensible - that a commander of a YPA's brigade may issue such an order without any military necessity, or that such an order to 'cleanse', may be directed at 'hostile residents,' or was it something else?

Furthermore, the court made a mistake when citing provisions of the Criminal Procedure Code. Thus the court stated that the appeals justly point to the fact that the contested judgment *' ...constitutes a substantial violation of the provisions of the Criminal Procedure Code, specifically its Articles 438* (1) (1) and (2) (2)*, since, in the opinion of the War Crimes Department of the Court of Appeals in Belgrade, the disposition of the judgment is not understandable and contradictory.'* However, the substantial procedural violation referred to in Article 438 (1) (1), cited by the court, reads as follows: *' if the statute of limitations on criminal prosecution has expired, or prosecution is excluded due to an amnesty or pardon, or the matter has already been finally adjudicated, or there are other circumstances which permanently exclude criminal prosecution'*.

Errors with respect to the finding of facts and the responsibility of the accused

With regard to the analysis of the YPA's order and the court's insistence on additional explanations, the approach of the Court of Appeal Department in evaluating this evidence and, especially the term 'cleansing', which the court took in isolation, without reference to the widely understood context and meaning of the word. The Court of Appeal Department stated: "It is unclear what exactly the term *cleansing* the village from members of the CNG and Croatian MI, and its hostile residents exactly meant in this particular case ..." The term 'cleansing' should have been interpreted in the context of all the events that took place in the village of Lovas and its broader area at the critical time, and especially in the context of the crimes the Croatian civilian population in the area were exposed to during that period. Moreover, the content of this order was examined by a military expert, whose opinion was that the order was contrary to the Geneva Conventions, and that every soldier should have disobeyed it.[200]

With respect to the accused, Krnjajić, the Court of Appeal Department found that the first-instance judgment did not answer the question of at which point during the attack on Lovas, Krnjajić, who was acting upon the said YOA order,

200 Transcript from the main hearing of 16th November 2011, p. 1-2, available at: http://www.hlc-rdc.org/wp-content/uploads/2012/01/174-16.11.2011.pdf, accessed on 27th May 2014.

realized, or must have realized, that Lovas was an undefended target. However, this finding is totally at odds with both the statement of the reasons for the first-instance judgment and Krnjajić's own defence, as Krnjajić himself said, presenting his defence, that he had found no armed forces present in the village.[201]

In relation to Ljuban Devetak, the Court of Appeal Department found that the first-instance judgment was not clear about the capacity in which Devetak had acted during the critical events. Citing the first-instance court's formulation that Devetak was "*de facto* commander of the village and director of the Agricultural Cooperative, with very broad powers in military and civil matters", the Court of Appeal Department pointed out that from this statement it was not clear which armed formations he commanded, who appointed him and who he reported to.[202]

In an attempt to explain Devetak's role, the Court of Appeal Department asked the wrong questions. 'Who appointed him' or to whom he reported, is not relevant to the determination of Devetak's responsibility. What is relevant, is whether he had the power to control the actions of his subordinates. In other words, whether he had the authority to issue orders to persons who were his subordinates, that is, whether he was the *de facto* commander of the village. Devetak was charged with ordering the commission of a war crime against the civilian population. Formal appointment is not a necessary prerequisite for a person to be held responsible, rather it is 'given the particular circumstances of a case, his de facto position to issue orders to his subordinates (military commanders, government officials, political leaders, de facto commanders of military or other armed formations etc.)'.[203]

That Devetak was *de facto* commander of the village can be inferred on the basis of the testimonies of many witnesses and also those of some of the accused. Thus witness Aleksandar Vasiljević (chief of Security Service of the Federal Secretariat for National Defence at the time) said that Lovas had

201 Transcript from the main hearing of 19th May 2008, available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/11%20-%2019.05.2008.pdf; Judgment of the Higher Court Department, No K.Po2 22/2010, p. 32, available at: http://www.hlc-rdc.org/wp-content/uploads/2013/01/P-R-E-S-U-D-A.pdf, accessed on 27th May 2014.

202 Court of Appeal Department, Decision on quashing the judgment of the Higher Court Department in the *Lovas* case (Kž1 Po2 No 3/13.) of 9th December 2013, p. 11-12.

203 Bačić, Dr. Franjo et al., *Komentar krivičnog zakona Savezne Republike Jugoslavije,* Savremena administracija Belgrade, 1995, p. 501.

been under the command of the "self-proclaimed commander Devetak",[204] and witness Ratko Đokić (the then commander of the TO Valjevo Regional Headquarters) stated that when he first met Devetak in Lovas, Devetak introduced himself as the commander of the village, something which was later also confirmed by Colonel Lončar.[205] The accused, Miodrag Dimitrijević, claimed that Devetak was the head of the local government,[206] and the accused, Nikolaidis, said he was "the commander of the village" and the de facto commander of the volunteers.[207] Volunteers, Stojan Ilić and Nikola Vuković, and witness Borislav Mihajlović also stated that the volunteers who joined the TO followed Devetak's orders.[208] In addition to the witness statements, the fact, established in the first-instance judgment, that Devetak's orders had been carried out, indicate that Devetak did possess effective power. This fact was not contested even in the judgment of the Court of Appeal Department.

The conclusion of the Court of Appeal Department about the manner in which a crime against the civilian population can be committed is noteworthy. Namely, the court concluded that the first-instance court had accepted the view of the prosecution that this type of offence could also be committed in ways other than those including direct perpetration or issuing of an order, but failed to provide clear and convincing reasons for accepting that this was the case. Further, the Court of Appeal Department instructs the first-instance court "… if it finds command responsibility ...", as the basis for liability, " ...it is acceptable for the domestic legal system, to support it with clear and convincing reasons, citing relevant international and domestic provisions". This conclusion of the Court of Appeal Department should be understood to mean that this court accepts the possibility of applying the doctrine of command

204 Transcript from the main hearing of 21st June 2010, available at:,http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas%20za%20sajt/transkripti/100-21.06.2010.pdf accessed on 29th May 2014.

205 Transcript from the main hearing of 24th September 2009, p. 8, available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/63-24.09.2009.pdf accesed on 29th May 2014.

206 Transcript from the main hearing of 20th May 2008, available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/12%20-%2020.05.2008.pdf accessed on 29th May 2014.

207 Transcript from the main hearing of 17th April 2008, available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/01-17.04.2008..pdf, accessed on 29th May 2014.

208 Transcript from the main hearing of 30th March 2009, available at: http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/52-30.03.2009.pdf, accessed on 29th May 2014.

responsibility in domestic law, by direct application of international norms.

It should be noted in this respect that according to ICTY jurisprudence, command responsibility can be not just formal but also *de facto* superior authority.[209] In its judgment in the case of *Delalić et al.* the ICTY stated that "the term 'superior' [within the meaning of command responsibility, stipulated in Article 7(3) of the ICTY Statute] is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control."[210] In the same judgment, the Trial Chamber states that "the mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[211] Lastly, the chamber concluded that "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the actions of subordinates."[212]

In this regard, it should be noted that, in accordance with the practice of the ICTY, command responsibility does not apply only in cases of formal, but also those of factual superior authority.[213] In its judgment in *Delalić et al.* the ICTY states that "it is clear that the term 'superior' [in the sense of command responsibility under Article 7(3) of the Statute of the ICTY] is sufficiently broad to encompass a position of authority based on the existence of *de facto* powers of control."[214] In the same case, the trial chamber stresses that "the mere absence of formal legal authority to control the actions of subordinates should therefore not be understood to preclude the imposition of such responsibility."[215] Finally, the chamber concludes that "the factor that determines liability for this type of criminal responsibility is the actual possession, or non-possession, of powers of control over the action of subordinates."[216]

The decision of the appellate court makes is possible for the OWCP to correct the omissions made when bringing charges and during the course of the first-instance proceedings. During the retrial, the OWCP will therefore have opportunity to expand the indictment to include persons who were key par-

209 See: ICTY Trial Chamber judgment in the case of *Kordić and Čerkez*, 26th February 2001, para 405; ICTY Trial Chamber judgment in the case of *Aleksovski*, 25th June 1999, para 76.
210 ICTY Trial Chamber judgment in the case of *Delalić et al.* 16th November 1998, para. 371.
211 *Ibid.*, para. 354.
212 *Ibid.*, para. 370.
213 See: ICTY Trial Chamber judgement in *Kordić and Čerkez*, 26th February 2001, paragraph 405; ICTY Trial Chamber judgement in *Aleksovski*, 25th June 1999, paragraph 76.
214 ICTY Trial Chamber judgement in *Delalić et al*. 16th November 1988, paragraph 371.
215 *Ibid,* paragraph 354.
216 *Ibid,* paragraph 370.

ticipants in the crucial events – above all those from the former YPA – who have so far have not been called to account, as well as to include certain acts of commission, such as forced transfer of the civilian population. These omissions on the part of the OWCP were pointed out by, among others, the president of the panel at first instance herself.

D Cases pending before courts of general jurisdiction

18. *Kušnin/Kushnin*

On 3rd August 2012, a judicial panel of the Higher Court in Niš[217] rendered a judgment[218] convicting Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregij of a war crime against the civilian population[219] and sentenced Mančić to 14 years, Radojević to 9 years, Tešić to 7 years and Seregij to 5 years in prison.

Course of the proceedings

On 19th July 2002,[220] the Military Prosecutor's Office in Niš charged Zlatan Mančić and Rade Radojević with the criminal offence of incitement to murder[221] and Danilo Tešić and Mišel Seregi with the criminal offence of complicity in murder,[222] at the same time, Mančić was also charged with abuse of his official position over an extended period of time.[223] The accused were charged

217 Panel of Judges: judge Dijana Janković (President), judge Marina Đukić, lay judges Vladana Aleksić, Dragana Šarić and Ivan Mladenović.

218 Case No. K.br. 46/10.

219 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of the FRY, Nos. 35/92, 37/93 and 24/94, Article 142.

220 Case No. VTKbr. 2696/2000.

221 Article 47, paragraph 2, point 6 1 of the Criminal Code of the Republic of Serbia, Official Gazette of the Socialist Republic of Serbia, Nos. 26/77, 28/77 - corrected, 43/77 - corrected, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90 and Official Gazette of the Republic of Serbia, Nos. 16/90, 26/91 - USJ Decision Nos. 197/87, 75/91 RS.

222 Article 47, paragraph 2, point 6 of the Criminal Code of the Republic of Serbia, Official Gazette of Republic of Socialist Republic of Serbia, Nos. 26/77, 28/77 - corrected, 43/77 - corrected, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90 and Official Gazette of Republic of Serbia, Nos. 16/90, 26/91 - USJ Decision Nos. 197/87, 75/91 RS.

223 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of the FRY, Nos. 35/92, 37/93 and 24/94, Article 174, paragraph 1.

with depriving two unidentified persons of their lives and robbing civilians in the village of Kušnin/Kushnin (Prizren, Kosovo) in early April 1999.

On 16 September 2002, the Military Prosecutor's Office amended the indictment by changing the factual description and the legal qualification: the unidentified persons were designated as Kosovo Albanians and their murder as a war crime against the civilian population.

During the first-instance proceedings before the Military Court, Danilo Tešić and Mišel Seregi admitted committing the criminal offence as charged. On 11th October 2002, the Military Court in Niš concluded the first-instance proceedings, found all the accused guilty and sentenced them to terms of imprisonment of between 3 and 7 years.[224]

After hearing appeals from parties to the proceedings, on 22nd May 2003, the Military Supreme Court in Belgrade rendered a judgment[225] which modified the first-instance judgment and imposed more severe penalties on the accused, sentencing Mančić to 14, Radojević to 9, and Tešić to 7 and Seregi to 5 years imprisonment.

However, on 24th November 2005, the Supreme Court of Serbia, after considering the defence lawyers' motions to review the legality of the final judgment, rendered a judgment[226] which quashed the judgments of the military courts and referred the case back to the court of first instance for retrial.

The retrial stared on 6th June 2007 before the District Court in Niš.[227] In 2010, because of changes to the president and members of the chamber in charge of the case, it was decided to start the trial anew. In the course of the proceedings, the Higher Prosecutor's Office in Niš amended the indictment of the Military Prosecutor's Office on two occasions, i.e. on 7th May 2012 and 26th June 2012.

On 3rd August 2012, the Higher Court in Niš pronounced its judgment, finding

224 Case No.: IK br. 258/2002.

225 Case No.: II K 45/03.

226 Case No.: Kzp.VP 3/05, 4/05 and 5/05.

227 The military courts were abolished under the Law on the Transfer of Jurisdiction from Military Courts, Military Prosecutor's Offices and the Military Attorney's Office to the Authorities of the Member States. In the Republic of Serbia, jurisdiction was transferred to the district courts in Novi Sad, Niš and Belgrade and to the Supreme Court of Serbia, in 2004.

Zlatan Mančić, Rade Radojević, Danilo Tešić and Mišel Seregi guilty of a war crime against the civilian population.

The judgment states that during the armed conflict in the territory of Kosovo in early April 1999, the accused, who were members of the YA – Zlatan Mančić[228] in his capacity as the commanding security officer, Rade Radojević[229] as the commander of the First Rifle Platoon, and Danilo Tešić and Mišel Seregi as members of the platoon belonging to the 3rd Task Force of the 549th Motorized Brigade – shot dead two Kosovo Albanians from the village of Kušnin/Kushnin, Miftar Temaj and Selman Temaj.

The victims were first brought before Mančić for interrogation. After questioning, Mančić ordered Tešić to kill them with the help of another soldier and then he gave orders to Radojević to choose the other soldier. Radojević then ordered Seregi and Tešić to carry out the order. Acting in accordance with their orders, Tešić and Seregi marched the victims along the road to Prizren. On reaching a location some 4 kilometers from where their unit was stationed, they told the victims to continue on to Prizren. After the victims had walked 10 meters or so, Tešić shot one of them with an automatic rifle in the back of the head and Seregij fired a shot at the other and hit him in the back. Because the second victim was still showing signs of life, Tešić went up to him and fired another bullet at his head. After that, in order to cover up traces of the murder, Tešić and Seregij set the bodies on fire.

The court also established that at the end of March 1999 Mančić robbed a Kosovo Albanian near a place called Vran stena on the Orahovac-Mališevo road. The unidentified person who was driving a tractor, had been stopped by soldiers and Mančić demanded money from him with a raised voice. He took a quantity of German marks from him and slapped him about the face.

The court established that all the accused had acted with premeditated intent during the commission of the crime. A panel of expert witnesses determined that at the time of the commission of the crime Tešić and Seregi were such a state of fear and distress that it amounted to a state of substantially impaired mental capacity.

228 At the time of the commission of the act he was a serving member of the armed forces holding the rank of major.

229 At the time of the commission of the act he was a serving member of the armed forces holding the rank of second lieutenant.

In deciding on the type and severity of the punishment, the court took into account Zlatan Mančić's past life, i.e. the fact that he had no previous criminal record, as a mitigating circumstance. However, the court regarded the high degree of criminal responsibility involved, the number of actions performed and the circumstances in which the act was committed as aggravating circumstances. The court also took account of the fact that the victims were elderly persons (Miftar Temaj was 66 years old and Selman Temaj 70 years old at the time of their murder), and that the accused, in his capacity as security officer, had a specific duty to prevent crime among members of the VJ and to ensure respect for the rules of the international law of war, something which additionally raised the degree of his criminal responsibility.

In respect of Rade Radojević, the court regarded the absence of prior convictions and his personal circumstances –married with two children and living in poverty – as mitigating circumstances. The court took as aggravating circumstances, the degree of his criminal responsibility, the circumstances in which the act was committed and its grave consequences, and that as a commanding officer and professional soldier he had a duty to respect international law and to ensure that the soldiers under his command did likewise.

With regard to Danilo Tešić, the court considered as mitigating circumstances the fact that at the time of the commission of the act, Tešić was a young adult, a married man and the father of two children and was also living in poverty. It also regarded as an mitigating circumstance the fact that the accused had reported the incident, about which the military authorities were unaware, of his own accord and that at the time of commission of the act he was in a state of substantially impaired mental capacity, caused by fear and distress. As aggravating circumstances the court took into account the circumstances in which the act was committed, the fact that the victims were elderly persons who offered no resistance whatever, and the manner in which the offence was committed, i.e. that he shot the victims in the back after telling them that they were free to go.

In sentencing Mišel Seregi, the court regarded as mitigating circumstances the facts that at the time of committing the act he was a young adult and that he was in a state of substantially impaired mental capacity, caused by fear and distress. As aggravating circumstances, the court noted the circumstances in which the act was committed, i.e. the fact that the victims were elderly persons who offered no resistance, and the manner of the commission of the act, i.e. the victims were shot in the back after being told they were free to go.

The accused's lawyers appealed the judgment and the case has been pending before the Court of Appeal in Niš since 27th December 2012.

HLC Findings

This judicial proceeding have been ongoing for over 10 years. They were initiated before a military court on charges of murder, despite the obvious fact that the crime involved a war crime against the civilian population. This error was later corrected by the military prosecutor in the final amendment to the indictment which correctly qualified the acts as a war crime against the civilian population. Blame for the long duration of the proceedings can be laid at the door of all the parties to the proceedings. To begin with, the court itself has shown a lack of interest in expediting the proceedings. The defence lawyers have contributed to the delay by their attitude and evidentiary motions, while the relevant prosecutor (a Deputy Higher Public Prosecutor in Niš) has played an extremely passive role and was late in amending the indictment. An examination of the indictments in this case shows that the prosecutor's office of general jurisdiction is inadequately trained to deal with war crimes cases, particularly with regard to the application of the norms of international humanitarian law.

The proceedings continue to be unjustifiably prolonged: for instance, although the appeals were referred to the Appeal Court for a decision on 27th December 2012, the court had not set a date for a session by the time of the writing of this report (March 2014). A delay of this length in reaching a decision in proceedings of this kind, in a case which was started as far back as in 2002, is unacceptable. This practice is at variance with the standards laid down by the European Convention on Human Rights which states that everyone has the right to a hearing within a reasonable time[230] and which are incorporated in the Criminal Procedure Code. In order to avoid problems of this kind, there is every reason why such proceedings should be entrusted only to institutions specializing in this kind of work, i.e. the OWCP and the Higher Court and the Appeal Court in Belgrade.

230 '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.' European Convention on Human Rights, Article 6, paragraph 1.

19. *Orahovac/Rahovec*

On 21st February 2013, the Higher Court in Požarevac,[231] at the end of a second retrial, delivered its judgment[232] convicting Boban Petković of a war crime against the civilian population[233] and sentenced him to 5 years' imprisonment. The court acquitted Đorđe Simić of all charges.

The course of the proceedings

On 12th November 1999, the District Public Prosecutor's Office in Požarevac filed an indictment[234] charging that Boban Petković stopped Ismail Durguti on 9th May 1999 at a location called 'Rija', situated at the exit from Orahovac/Rahovec on the road leading to the village of Velika Hoča/Hoçë e Madhe and shot him in the head and killed him, with a service pistol handed to him by Đorđe Simić. After that Simić went to a nearby house and shot dead Sezair Miftari and his wife Shefkije, who were standing in the doorway, with an automatic weapon. The actions of Petković were classified as murder and those of Simić as aiding and abetting a murder.

On 19th July 2000, the District Court in Požarevac delivered a judgment convicting the accused and sentencing them to prison terms.[235]

On 18 December 2001, the Supreme Court of Serbia[236] quashed the judgment because of substantive violations of the provisions of the criminal procedure code and returned the case to the court of first instance for a retrial. On 19th February 2003, the District Public Prosecutor's Office in Požarevac amended the indictment by changing the legal qualification of the criminal offence to a war crime against the civilian population and designating Boban Petković as a member of the Serbian MI. The retrial commenced on 28th February 2003 and on 21st August 2003, the District Court in Požarevac delivered its judgment,[237] convicting Boban Petković and acquitting Đorđe Simić.

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231 Panel of judges: judge Dragan Stanojlović (President), judge Milica Arizanović and lay judges Miladin Milutinović, Radica Stević and Radmila Ćirković.

232 Case No. 2K 25/10.

233 Criminal Code of the Federal Republic of Yugoslavia, Official Gazette of the SFRY Nos. 44/76, 36/77, 56/77, 34/84, 37/84, 74/87, 57/89, 3/90, 38/90, 45/90, 54/90 and Official Gazette of FRY, Nos. 35/92, 37/93 and 24/94, Article 174, paragraph 1.

234 Case No. Kt. 118/99-108.

235 Case No.: K 96/99.

236 Case No.: Kž I 1955/00.

237 Case No.: K 17/02.

On 25th May 2006, the Supreme Court of Serbia[238] quashed this judgment, also because of substantive violations of the criminal procedure code and returned the case to the court of first instance for a retrial.

The second retrial commenced on 22nd January 2008, before the District Court in Požarevac. However, due to a change in the judicial panel, the trial started anew on 20th September 2011 before the Higher Court in Požarevac. On 21st February 2013, the Higher Court in Požarevac delivered a judgment convicting Boban Petković of the charges against him and acquitting Đorđe Simić of the charges.

HLC findings

This proceeding are a glaring example of serious violations of one of the fundamental rules of procedure – i.e. completion of procedure within a reasonable time – and demonstrate insufficient competence on the part of the prosecutor and the court of general jurisdiction.

The proceedings were started in 1999 and it is still uncertain when they will be finally completed. There were two trial days in 2008 and none in 2009 and 2010. In 2011 there was only one trial day and none in 2012. Responsibility for this state of affairs is borne primarily by the courts, which are duty bound to take account of the length of the criminal proceedings they are conducting.

The incompetence of the prosecutor in this case is reflected in the 2003 indictment which qualifies the actions of the accused as a war crime against the civilian population. The following was alleged against the accused, right up to the completion of the first-instance proceedings in 2013:

...on the day of 9th May 1999 at the location known as 'Rija' at the exit from Orahovac, acting in violation of the rules of international law – the Geneva Convention relative to the Protection of Civilian Persons in Time of War and the Additional Protocol to the Geneva Convention on the Protection of Victims of International Armed Conflicts, in his capacity as a member of the MI of the RS [Republic of Serbia], *while discharging his duty, guarding roads during an armed conflict, having spotted a civilian who was running away from an area where armed operations by members of the OVK* [Kosovo Liberation Army – KLA] *were in progress...*

The above description leads to the conclusion that the prosecutor in this case

238 Case No.: Kž 1399/05.

is not acquainted with the fundamental norms of international humanitarian law, i.e. which criteria must be fulfilled for there to be a criminal offence of a war crime against the civilian population. The description leaves it totally unclear as to the nature of the armed conflict in question, the sides in the conflict, the capacity in which the accused was acting, and the rules of international law he was violating by his actions.

The judgment also contains parts which reveal an astounding ignorance of the subject matter on the part of the court. Thus, in the part concerned with the established facts of the case, the court states the following in relation to Boban Petković:

...was a member of an armed formation, a police [armed formation], *in a location where armed confrontations were taking place at the time in question, and shots were being fired by members of the army and the police force of the RS on the one side, and members of the Shqiptar* [Kosovo Albanian] *armed formations, the OVK and the UCK [both acromyms for the Kosovo Liberation Army] on the other.* Followed by: *...that none of the deceased was a member of any Shqiptar armed formation*.

Thus, the court is ignorant of the well known fact that the armed formations referred to as the OVK and UCK are one and the same formation, its name and acronym in Serbian being Oslobodilačka vojska Kosova (OVK) and its Albanian name and acronym Ushtria Çlirimtaree Kosovës (UÇK).

Additionally, the judgment demonstrates the court's appalling ignorance of basic criminal law concepts. In a confusing and contradictory statement, the court does not differentiate between the accused's mental capacity and his guilt. In its judgment the court states:

...his premeditation was indeed diminished to a substantial level, though not substantially, on which matter the expert witnesses expressed their opinions, however, his will was preserved, as were consequently his perception and reasoning on the critical occasion, on the basis of which the court has come to the conclusion that this criminal offence was committed with premeditated intent.

Mental capacity refers to the mental condition of the perpetrator at the time of the commission of the offence, i.e. to his capacity to understand the significance of his act and to remain in control of his actions. This capacity of the perpetrator can either be diminished or substantially diminished, something which is for the expert witnesses to determine. On the other hand, premeditated intent refers to the perpetrator's mental attitude to the act. Premedita-

tion can never be diminished or substantially diminished; it can only be direct or indirect, something which is not for expert witnesses but for the court to decide.

20. *Miloš Lukić*

The Higher Court in Prokuplje,[239] which is trying Miloš Lukić for the criminal offence of murder,[240] did not hold a single session in 2013.

Course of proceedings

On 14th June 1999, the District Public Prosecutor's Office in Prokuplje submitted an indictment against Miloš Lukić,[241] a former member of the Serbian MI, in connection with the criminal offence of murder.[242]The accused was charged with killing a Kosovo Albanian named Hamdija Maloku on Rahman Morina street in Podujevo/Podujevë on 24th April 1999. According to the indictment, on encountering Hamdi Maloku, Lukić ordered him to stop; rather than comply, Maloku started to walk backwards. Maloku came to a halt behind a tree and put a hand in his pocket, leading the accused to believe that he was in possession of a weapon. The accused fired three shots from his service pistol from a short distance in Maloku's direction, one of which went through Maloku's head, killing him instantly.

During the proceedings, the accused admitted to having committed the criminal offence. On 25th June 1999, the District Court in Prokuplje[243] convicted Lukić [244] giving him a suspended sentence of 2 years in prison with a probation period of 3 years.

239 Case No.: K br. 1/2010.

240 Article 47, paragraph 1 of the Criminal Code of the Republic of Serbia, Official Gazette of Socialist Republic of Serbia, Nos. 26/77, 28/77 - corrected, 43/77 - corrected, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90 and Official Gazette of Republic of SerbiaS, Nos. 16/90, 26/91 - USJ Decision Nos. 197/87, 75/91 RS.

241 At the time of the commission of the act Miloš Lukić was a member of the MI, a fact not mentioned in the indictment.

242 Article 47, paragraph 1 of the Criminal Code of the Republic of Serbia, Official Gazette of Socialist Republic of Serbia, Nos. 26/77, 28/77 - corrected, 43/77 - corrected, 20/79, 24/84, 39/86, 51/87, 6/89, 42/89 and 21/90 and Official Gazette of Republic of Serbia, Nos. 16/90, 26/91 - USJ Decision Nos. 197/87, 75/91 RS.

243 Panel of judges: judge Branislav Niketić (President), judge Aleksandar Stojanović, lay judges Marko Koprivica, Dragomir Nikolić and Jovan Severović.

244 Judgement of the District Court in Prokuplje, No. 58/99, http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf, accessed on 30th May 2014.

On 23rd March 2000, the Supreme Court of Serbia issued a ruling which quashed the judgment of first instance court and referred the case back for retrial.[245] The Supreme Court stated that in view of the circumstances of the case, the court should not have imposed a suspended sentence because there were no legal grounds for such a decision.

On 10th August 2000, the District Public Prosecutor's Office in Prokuplje amended the indictment, changing the factual description of the incident. According to this indictment, the accused asked Maloku to produce his documents and when Maloku took his identity card and health card from his pocket and strode towards the accused to hand them over to him, the accused took out his service pistol from its holster and fired at Maloku killing him instantly.

Following the retrial, on 7th June 2001 the District Court in Prizren handed down a judgment[246] convicting Miloš Lukić and sentencing him to imprisonment of 1 year and 6 months.

On 2nd April 2002, the Supreme Court of Serbia issued a ruling[247] which again quashed the judgment of the first instance court on the grounds that it lacked merit on the decisive facts and that the key element of the judgment was vague.

HLC findings

The proceedings against Miloš Lukić have been ongoing for more than 14 years. Although the HLC has no information about the course of the proceedings between 2002 and 2012, this is clearly a case of an unreasonable delay in proceedings, which is incompatible with the principle of a fair trial. The decisions of the court in these proceedings should be subject to very serious criticism. They are analyzed in detail in the HLC's Report on War Crimes Trials in Serbia in 2012.[248]

There was only one trial day in 2012 and none in 2013. In reaction to the extreme delay on the part of the president of the judicial panel in charge of the

245 Case No.: Kž Ibr. 1153/99.
246 Case No. Kbr. 21/00.
247 Case No. Kž I br. 1122/01.
248 Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2012*, (Belgrade, Humanitarian Law Center, 2013), p. 34.

case,[249] on 14th November 2013, the lawyers for the injured parties[250] filed a request calling for their trial to be expedited and on 4th December 2013, the Higher Public Prosecutor's Office in Prokuplje filed another request for the trial to be expedited.[251] At the time of the writing of this report, the injured parties' lawyers had received no reply to their request for the hearing to be expedited and no main hearing had been scheduled.

The actions of Miloš Lukić contain all the elements of a war crime against the civilian population, and hence their prosecution lies within the jurisdiction of the Office of the War Crimes Prosecutor.[252] The case could be transferred to the Office of the War Crimes Prosecutor, following a decision by the Republic Public Prosecutor's Office. The transfer of general-jurisdiction cases to the Office for War Crimes Prosecution is possible under the Law on the Public Prosecutor's Office, which permits a higher prosecuting authority to authorize a lower public prosecutor to deal with matters falling within the jurisdiction of another lower public prosecutor, in cases where the competent public prosecutor is prevented from handling a particular case for legal or factual reasons.[253] This case can also be transferred to the OWCP if the current qualification of the offence is modified by the prosecutor on the case or if the court in charge of the case declares itself as having no jurisdiction, something which can be done before the completion of the case.

E The Decision of Constitutional Court of Serbia in the *Ovčara* case

On 12th December 2013 the Constitutional Court of Serbia (Constitutional Court)[254] issued a decision adopting the constitutional appeal by Saša Radak,

249 Judge Ivan Rakić.

250 Lawyers from Prokuplje Ivan Maksimović and Dragiša Radovanović.

251 The course of these proceedings are available at: http://www.portal.sud.rs.

252 Law on the Organization of Jurisdiction of State Organs in Proceedings Against Perpetrators of War Crimes, Official Gazette of Republic of Serbia, Nos. 67/2003, 135/2004, 61/2005, 101/2007 and 104/2009, Article 2 and Article 4.

253 Law on Public Prosecutor's Office, Official Gazette of Republic of Serbia, Nos. 116/2008, 104/2009, 101/2010, 78/2011 - law, 101/2011, 38/2012 - Constitutional Court decision, 121/2012 and 101/2013, Article 20, paragraph 1.

254 The judgment of the Court of Appeal Department in the *Ovčara* case (KZ 1 Po2 no. 1/10) of 23rd June, 2010. The judgment was rendered by the Department for War Crimes, and its panel composed of judges, Siniša Važić, as the presiding judge, and judges Sonja Manojlović, Miodrag Majić, Sretko Janković and Omer Hadžiomerović, as panel members. See also: Constitution of the Republic of Serbia, Article 32, paragraph 1.

who was convicted of war crimes against prisoners of war in the *Ovčara* case, and reversed the decision previously issued by the Court of Appeal Department.[255] The Constitutional Court found that the judgment of the Court of Appeal in Belgrade injured the complainant's right to an impartial tribunal, an integral part of the right to a fair trial, guaranteed by the Constitution of the Republic of Serbia.[256]

The judgment of the Constitutional Court was that Radak's case should be sent back to the Court of Appeal in Belgrade, for the court to re-examine his appeal against the first-instance judgment of the District Court in Belgrade in the *Ovčara* case.[257] The decision of the court was that its ruling to send the case back to the Court of Appeal should apply to the cases of all other persons convicted in this case and in the same legal situation as Radak.

The constitutional appeal

On 15th October, 2010, Saša Radak submitted a constitutional appeal against the judgment of the Court of Appeal Department and the verdict of the Belgrade District Court War Crimes Chamber, which had sentenced him to 20 years in prison. The appeal was filed on the grounds that the courts' decision had violated his right to life, his right to bodily and psychological integrity, his right to liberty and security, his right to a fair trial, the defendant's special rights under Article 33 of the Constitution, his right to legal certainty under the criminal law, all of which are guaranteed by the Constitution of the Republic of Serbia, as well as his right to a fair hearing as envisaged by the European Convention for the Protection of Human Rights and Fundamental Freedoms.[258]

The applicant's key argument regarding the alleged violation of his right to a

255 The decision of the Constitutional Court, Už-4451/2010, *Official Gazette of the Republic of Serbia* no. 54/2014. The decision was made by Constitutional Court Judges Dragiša B. Slijepčević – President, and judges Olivera Vučić, Marija Draškić, Bratislav Đokić, Goran Ilić, Agnes Kartag Odri, Katarina Manojlović Andrić, Milan Marković, Bosa Nenadić, Dragan Stojanović, Savahudin Tahirović, Tomislav Stojković and Predrag Ćetković.

256 The Constitution of the Republic of Serbia, Article 32 reads: "Everyone has the right to an independent and impartial tribunal established by law, that will fairly and within a reasonable time, in a public hearing, determine his or her rights and obligations, the existence of suspicion that was the cause of the proceedings, as well as the charges against of him or her."

257 The judgment of the District Court in Belgrade, *Ovčara* Case no. 4/06 of 12th March, 2009.

258 The Constitution of the Republic of Serbia, Official Gazette of the Republic of Serbia no. 98/2006, Article 24, Article 25, Article 27, paragraphs 1 and 2, Article 32, paragraph 1, Article 33, paragraph 1, and article 34, paragraph 3, and 5; The European Convention for the Protection of Human Rights and Fundamental Freedoms, the Official Gazette of Serbia and Montenegro – International Treaties, no. 9/2003, Article 6, item 1.

fair trial was that judge Siniša Važić, the presiding judge of the panel that issued the second-degree judgment, ought to have been excluded from the court panel because he had participated in the decisions of the trial court that had directly affected the first-instance judgment.

The findings of the Constitutional Court

Examining the allegations put forward in the constitutional appeal about alleged bias of judge Siniša Važić, the Constitutional Court adjudicated on two exclusion requests that had been filed against judge Važić at various stages of the proceedings in the *Ovčara* case.

The first request for exclusion was submitted by Saša Radak's defense counsel against Siniša Važić, in his capacity as President of the District Court in Belgrade (and against the judges in the trial chamber).[259] The reason given for the exclusion request was that judge Važić had participated in the pre - trial chamber of the District Court in Belgrade in the *Ovčara* case, as President of that chamber, and that when acting in this capacity he had ruled on a motion for the exclusion of the investigating judge, as well as two requests for the exclusion of the President and members of the trial chamber. The Supreme Court rejected this request for the exclusion of judge Važić, saying that in the opinion of the court, the circumstances specified in the request from the defense counsel were not of a nature that could bring into question the impartiality of President's decision-making.[260]

Another request for exemption of judge Siniša Važić in his capacity at the Court of Appeals in Belgrade was filed by the defense counsel on suspicion of his impartiality. The stated reason for the request for his exemption was that judge Važić, as the President of the Belgrade District Court War Crimes Chamber, had decided that defendant S.P. also a defendant in the *Ovčara* case, be given the status of a cooperating witness, and that, whilst serving on the Belgrade District Court War Crimes Chamber, he issued a decision which extended the custody of all of the accused, including Saša Radak.[261] This request was rejected on 2nd June, 2010 as unfounded by the Deputy President of the

259 Criminal Procedure Code, Official Gazette of the FRY, no. 70/01 and 68/02 and Official Gazette of the Republic of Serbia, no. 58/04, 85/05, 115/05, 49/07, 122/08 and 20/09, Article 40, paragraph 1, item 6.

260 The decision of the Supreme Court of Serbia to refuse the application for exemption, VII Su. 218/07, October 18, 2007.

261 Saša Radak's detention was ordered by the investigating judge of the War Crimes Court in Belgrade on 30th July, 2004.

Court of Appeals in Belgrade.[262] The explanation of this decision stated that the request was not justified because the participation of the President and members of the Chamber in their capacity as the chairman and members of the pre-trial chamber, which extended the detention of the accused and decided to grant the status of cooperating witness to individual defendants, could not be a reason for their exemption, and that the judge "in accordance with his function and according to the law, should at all times maintain confidence in his own independence and impartiality."

The decision of the Constitutional Court

The Constitutional Court found that the complainant's right to a fair trial or the right to have the charges against him be decided on by an impartial court had been violated because the judge, Siniša Važić, had been involved in the judgment of the Court of Appeals in Belgrade, which confirmed the conviction against the applicant. In the opinion of the Constitutional Court, the judge's engagement in several roles in the first instance trial and the decisions he made on those occasions raised doubts as to his impartiality when serving as the President of the Appeals Chamber.

When considering the decisions of the Supreme Court of Serbia, and that of the Court of Appeal separately, the Constitutional Court found nothing wrong with the decisions to reject requests for the exemption of judge Važić. However, in considering the decisions cumulatively, the Constitutional Court found that the right to a fair trial had been violated.

In the opinion of the Constitutional Court, the participation of judge Važić in the decision to confer the status of cooperating witness and the extension of detention for the accused took on a new relevance when one considered that he, as a judge of the Court of Appeals in Belgrade, was the President of the Appeals Chamber that issued the second-instance verdict. The Constitutional Court pointed out that the participation of a judge in any decision of the lower court in the same case did not necessarily have to result in his exclusion from proceedings before the Appeal Court. However, the court added that the multiple roles that judge Važić had played in the first instance procedure could not be justified in the manner that the Court of Appeal in Belgrade had done, when it had rejected the request for the exclusion of judge Siniša Važić. The Constitutional Court's rationale for this decision, stated that "in accordance with his function and according to the law, the judge shall at all times maintain confidence in his own independence and impartiality," eliminating 'objective'

262 Criminal Procedure Code, Official Gazette of the FRY, no. 70/01 and 68/02 and Official Gazette of the Republic of Serbia, no. 58/04, 85/05, 115/05, 49/07, 122/08 and 20/09, Article 40, paragraph 1, item 5.

doubt in the impartiality of the judge in this particular case was not enough. The Constitutional Court finally concluded that the multiple involvement of judge Važić during the first-instance trial and in the decisions made on that occasion were circumstances that raised doubt as to his impartiality as the President of the Appeals Chamber in the same case.

Since it found a violation of the right to a fair trial and accordingly ordered the Court of Appeal to once again hear the appeal that had been filed against the first-instance judgment, the Constitutional Court did not recognise any of the other complaints filed by the applicant.

HLC Findings

In this case, the Constitutional Court was dealing with the interpretation of the Criminal Procedure Code rules on the exclusion of judges and the evaluation of the circumstances that cast doubt on the impartiality of the judge. In formulating its decision, the Constitutional Court has not formally departed from the practice of the European Court for Human Rights, which in assessing the existence of circumstances that cast doubt on the impartiality of the judge, orders the examination of all the facts in each individual case.

However, the Constitutional Court did not offer any reasons for its interpretation of the rules of the CPC, explaining the basis for its doubts about the impartiality of the judge Važić, but arbitrarily concluded that the reasoning of the Court of Appeal was not sufficient "to eliminate the existence of an objectively justifiable concern about the impartiality of judge SV." Although the reasoning in the Court of Appeal's decision on the application for the exclusion is certainly not sufficient, and is certainly unacceptable for a decision on a delicate issue such as the exclusion of a judge of the Appeal Court, in such a complex case it remains unclear why the Constitutional Court failed to provide its reasoning for its decision and why it failed to take a clear, factual and articulate approach to the matter.

Furthermore, the Constitutional Court has failed to provide any explanation as to how a number of facts, which alone are not grounds for exemption, cumulatively lead to such a decision. The Constitutional Court concludes in its decision that the participation of judge Važić in a number of decisions during the first-instance trial, and later as President of the Appeals Chamber, and in the decision of the second-instance court, does not constitute grounds for mandatory exclusion (under Article 40, Paragraph 5 of the CPC), but casts doubt on his impartiality. Allowing his optional exclusion under Article 40, Paragraph 6 of the CPC.

Unlike mandatory exemption, optional exemptions are not determined by the mere existence of certain facts. In addition to facts, it is necessary that

the court also produce a legal doubt regarding the judge's impartiality. Therefore, whether optional exemption would be appropriate in a particular case depends not only on the existence of facts, but also the assessment of those facts. In this regard, the subjective assessment of the facts is decisive in determining the existence of doubt as to the impartiality of a judge, and it is precisely this assessment that is missing in the decision of the Constitutional Court. As a result of this decision, it remains completely unclear in what way judge Važić's multiple procedural engagement raises doubts about his impartiality.

Such an unjustified decision of the Constitutional Court, which after a judicial process lasting more than three years, revoked the final judgment in one of the most important and most complex war crimes cases, is certainly not conducive to the establishment of legal certainty, nor can it serve as the basis for the confidence of victims in the justice system of the Republic of Serbia. On the contrary, it seems to carry the risk of bringing legal uncertainty to a number of completed war crimes cases.

It is also concerning that the Constitutional Court has restricted access to information to which should be available to the public. Apart from its having 'anonymized' the names of the complainant and his attorneys, the court anonymized the names of lower court judges, including the name of the judge whose conduct led to the reversal of the judgment in the *Ovčara* case, and thus denied the public the opportunity to inspect the work of state officials. Moreover, contrary to the rules for protecting personal data, the Constitutional Court in this decision also crudely anonymized the place of the war crime – "S.R. was sentenced to a term of imprisonment of 20 years for war a crime against prisoners of war [...] carried out on 21st and 22nd November 1991, on the farm '*O.*' in *V.* …"

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