REPORT | ON | WAR CRIMES | TRIALS | IN | SERBIA | DURING | 2014 AND 2015 |

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Humanitarian Law Center

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CONTENT

Abbreviations used in the text

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

Introduction and methodology

This is the fifth report of the Humanitarian Law Center (HLC) on war crimes trials in Serbia. For the first time, the report includes a two-year period. The main reason for this is the fact that trials in Serbia were not held in 2014 for several months owing to the lawyers' strike.[1]

The Legal Team of the HLC followed all war crimes trials conducted in the territory of Serbia - that is, a total of 27 trials before the Departments for War Crimes of the Higher Court and the Appellate Court in Belgrade, as well as before the courts of general jurisdiction. Moreover, during the reporting period, HLC lawyers represented victims in six cases before the Department of War Crimes of the Higher Court in Belgrade.[2]

The report gives a brief overview of proceedings for all 27 cases, as well as the basic findings of the HLC regarding the cases, which are important for the public. A great number of war crimes proceedings covered by this report have lasted for a considerable number of years and therefore, the previous annual reports of the HLC on trials are important for a complete insight into the course of the proceedings and findings. The report also covers trials for crimes not qualified as war crimes by the relevant prosecutor's offices of general jurisdiction, although all the circumstances of such cases indicate they are war crimes.

The report puts special emphasis on the work of the prosecutor's offices and courts in the public parts of court proceedings, above all on the analysis of indictments and judgments in certain cases. The work of other bodies included in war crimes prosecution (War Crimes Investigation Service of the Ministry of the Interior of Serbia, the Witness Protection Unit, etc.) cannot be analyzed on the basis of individual cases, since there are no publicly available data on the subject. The HLC had published an analysis of practice and key problems in the work of these bodies within the analysis of war crimes prosecution in Serbia in the period 2004 – 2013 (published in September 2014).

The War Crimes Department of the Higher Court in Belgrade issued first instance judgments in nine cases in the reporting period.[3] The War Crimes Department of the Appellate Court in Belgrade issued nine judgments acting upon appeals against judgments of the Higher Court in Belgrade.[4] One

1 On 13 September the Assembly of the Bar Association of Serbia unanimously adopted a decision to suspend the work of lawyers on the whole territory of Serbia as of 17 September 2014, which lasted until 26 January 2015. The reasons for the work stoppage were the amendments to the Law on Public Notaries and an accompanying set of laws (Law on Real Estate, Law on Amendments to the Law on Extrajudical Procedure and Law on Certification of signatures, manuscripts and transcripts). Another reason for the stoppage was an increase of lawyers' tax obligations.

2 Cases: *Lovas, Skočić, Tenja II, Sotin, Ternje/Trnje* and *Qyshk/Ćuška*.

3 Cases: *Qyshk/Ćuška, Bihać, Skočić, Sotin, Tenja II, Beli Manastir, Luka Camp, Sanski Most, Sremska Mitrovica* and *Bijeljina II.*

4 Cases: *Skočić, Čelebići, Ovčara V, Bihać, Luka Camp, Qyshk/Ćuška, Bijeljina II, Prizren and Tenja II*

judgment was issued before courts of general jurisdiction.[5] Seven indictments of the OWCP have been confirmed in the reporting period against a total of nine persons for war crimes against civilians.[6]

The analysis of the cases in the Report are preceded by an overview of general findings on war crimes trials in 2014 and 2015, as well as important social-political events significant for war crimes trials.

I General findings and social-political context

1. Inefficient work of the War Crimes Prosecutor's Office

i. A small number of indictments

In 2014 the OWCP raised **seven indictments against nine persons** in total for war crimes against civilians.[7] Out of these, the cases of *Bihać II* and *Bijeljina II* had been previously drawn up - that is, the indictments were raised against persons who were not available to the state authorities at the time of conducting the initial proceedings in these cases (*Bijeljina I* and *Bihać I*); the four remaining cases were transferred from the B&H judiciary.

It is clear that all the indictments in 2014 are less complex cases mostly with only one indictee; such cases required a minimum engagement from the OWCP. Most of the indictments include cases with five or fewer victims,[8] with the exception of the *Ljubenic* case which includes 57 victims, while half of the indictments are for cases with only one victim.

In 2015 the OWCP filed two indictments in two more complex cases – *Srebrenica* and *Štrpci*. These two indictments included a total of 13 indictees and the death of more than 1000 victims. Both cases are the result of the cooperation of the OWCP and State Prosecutor's Office of B&H. However, in 2015 neither of these two indictments was confirmed by the court. Both were returned to the OWCP to be amended; the indictment for the *Štrpci* case was returned three times.

Generally, the pace of work and raising of indictments by the OWCP were not satisfactory both in the previous period and the observed period, regarding the expectations of the victims and the need to

5 Case *Miloš Lukić*.

6 The following persons were indicted: Boban Pop Kostić (*Luka Camp*), Svetko Tadić (*Bihać II*), Goran Šinik (*Gradiška*), Mitar Čanković (*Sanski Most-Kijevo*), Miodrag Živković (*Bijeljina II*) and Milan Dragišić (*Bosanski Petrovac-Gaj*).

7 KTO 1/14, the defendant Boban Pop Kostić (indictment in case *Luka Camp*); KTO 2/14, the defendant Svetko Tadić, (indictment in case *Bihać II*); KTO 3/14, the defendant Goran Šinik (indictment in case *Gradiška*); KTO 4/14, the defendant Mitar Čanković (indictment in case *Sanski Most – Kijevo*); KTO 6/14, the defendant Miodrag Živković (indictment in case *Bijeljina II*); KTO 7/14, the defendant Milan Dragišić (indictment in case *Bosanski Petrovac – Gaj*).

8 The HLC methodology: the number of victims written in the statistical overview is the number of identified persons in the indictment who personally suffered a violation of rights in a way that can be qualified as a war crime.

establish the rule of law in relation to grave crimes committed in the nineties of the previous century. Bearing in mind the fact that, according to the OWCP data,[9] there are 876 cases in preliminary investigation proceedings, if the current tempo continues, less than 10% of war crimes cases will be solved in the following 10 years. Current results as well as the projection of the OWCP work indicate that the OWCP needs a significant strengthening of resources and a prosecution strategy in order to direct the OWCP resources more rationally and efficiently, primarily to solving high-priority cases which would be determined following certain criteria (a greater number of victims, perpetrators, and high rank perpetrators, and other factors).

ii. Insufficiently prepared indictments

A great number of indictments raised or represented in the reporting period lack reasoning and are unsupported by adequate evidence. The cases of *Gradiška*, *Luka Camp* and *Sanski Most Kijevo* clearly lack proper rationales in the indictments. Moreover, the Prosecutor's Office did not manage to prove charges from indictments in the cases of *Tenja II*, *Čelebići* and *Prizren,* inter alia, because of insufficient or compromised evidence. The impression is that the OWCP hastily started proceedings in these cases, that is, issued unfounded indictments.

The War Crimes Department of the Higher Court is also responsible for the quality of indictments because it has a legal obligation to evaluate the evidence provided before it confirms any indictment. Moreover, the Higher Court should return insufficiently grounded indictments to the OWCP for amendment.[10] Regarding this issue, we must point out that pre-trial chambers of the Higher Court refused to confirm two indictments of the OWCP in 2015. Moreover, the *Srebrenica* indictment was returned for amendment twice and the *Štrpce* indictment three times. Although the HLC did not have an insight into these indictments and therefore could not analyze their quality - that is, it could not analyze the decision of the Higher Court to amend the indictments, one can conclude that such practices of the Higher Court can positively affect the quality of indictments filed by the OWCP in the future.

iii. Lack of prosecution of high ranking perpetrators

All confirmed indictments from the reporting period have been filed against direct war crimes perpetrators – low ranking members of armed formations, who, as a rule, had no rank. Thus, the practice of non-prosecution of senior perpetrators in the former military, police and political hierarchies of Serbia, that is, of the Federal Republic of Yugoslavia, has continued. In its practice so far, the only high ranking suspects the OWCP initiated proceedings against were members of the armed

9 Amendment of information and clarifications (Answers to the OWCP Questionnaire, A No. 162/13, 21 July 2013).
10 Criminal Procedure Code "*Official Gazette of the Republic of Serbia"* No. 72/11, 101/11, 121/12, 32/13, 45/13, 55/14, Article 337 para. 3.

and civilian structures of B&H and Republic of Croatia.[11]

The lack of prosecution of high ranking perpetrators is criticized by Trial Chamber presidents from the Higher Court's War Crimes Department. Announcing their judgments, they publicly ask why the superiors have not been charged, since evidence which indicates their responsibility was presented during the proceedings.

In the *Lovas* case, the Presiding Judge stated the following: "The Second Brigade of the JNA has the biggest responsibility;"[12] in the *Beli Manastir* case, the Presiding Judge said: "The superiors to the defendants are also responsible for this crime;"[13] in the *Qyshk/Ćuška* case, the Presiding Judge emphasized: "The rules of the military hierarchy are such that one may conclude that someone else besides Toplica Miladinović [the first defendant] was there; however, we have dealt only with the charges presented."[14]

The investigation against General Dragan Živanović

On 5 August 2014 the Prosecutor's Office issued an order to conduct an investigation against General Dragan Živanović on charges for war crime against civilians, that is, against Albanian civilians in Kosovo in 1999.[15] The OWCP press release states that General Živanović, Commander of the 125th Motorized Brigade, is charged with having committed a war crime by not taking any measures to prevent the killing and injuring of civilians, destruction of property and expulsion of Albanians in the period from 1 April to 15 May 1999 in the villages of Qyshk/Ćuška, Pavljan/Pavlan, Lubeniq/Ljubenić and Zahaq/Zahać. Moreover, it is stated that General Živanović knew that the members of the 177th Unit of Military-Territorial Detachment (VTO) Pejë/Peć, acting upon the given orders and combat tasks of his command, would commit war crimes against Albanian civilians.

This is the first investigation of the OWCP known to public, against a member of the Yugoslav Army with the rank of general and commander of a brigade. Although it is a positive step, one may criticize the OWCP for initiating the investigation only in 2014, especially given the fact that Živanović himself stated in 2008, while testifying before the ICTY in the *Šainović et al.* case, that the 177th Unit of

11 Proceedings against Ejup Ganić – a member of the Wartime Presidency of B&H, Jovan Divjak – a general in B&H Army, Vesna Bosanac – a Director of the General Hospital in Vukovar, Vladimir Šeks – Vice-President of the Croatian Parliament, Naser Orić – Commander of the Bosnian Army in Srebrenica, etc.

12 Transcript from the announcement of judgment dated 26 June 2012, p.18, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf, accessed on 7 May 2015.

13 Transcript from the announcement of judgment dated 19 June 2012, p.15, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/39-19.06.2012-presuda1.pdf, accessed on 7 May 2015.

14 Transcript from the announcement of judgment dated 11 February 2014, p.33, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/04/93-11.02.2014_objava_presude.pdf accessed on 7 May 2015.

15 The OWCP announcement dated 5 August 2014, available in Serbian at http://tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2014/VS_2014_08_05_CIR.pdf, accessed on 7 May 2015.

Military-Territorial Detachment Pejë/Peć was already subordinate to him at that time.[16] The same was confirmed by the witness Duško Antić in his testimony given in the *Qyshk/Ćuška* case in 2011.[17] Apart from that, the HLC filed a criminal complaint against Dragan Živanović, among others, for the crimes committed in the villages of Pavlan/Pavljane and Zahaq/Zahać, at the time when there was already an investigation against certain immediate perpetrators of the crime in the village of Qyshk/Ćuška.[18] Moreover, the HLC analyzed in detail the crimes committed in the zone of responsibility of this brigade, where more than 1,800 Albanian civilians were killed.[19] This was analyzed by the HLC in its Dossier on the 125th Motorized Brigade of the Yugoslav Army published on 11 October 2013.

Preliminary investigation in the "Rudnica" case

The preliminary investigation initiated by the OWCP is a positive step regarding the clarification of responsibility and the role of high ranking individuals in the Serbian security services in Kosovo in relation to crimes and concealment of bodies of Kosovo Albanians. The OWCP initiated these proceedings after the criminal complaint of the HLC in the "Rudnica" case.[20]

In January 2015, the HLC published the "Rudnica" Dossier, which provided insight into evidence on four crimes of VJ and MoI members committed in April and May 1999 in Kosovo. Civilians – Kosovo Albanians, were killed in the crime; their bodies were exhumed from the mass grave in Rudnica in 2014. The dossier also provides insight into the process of "clearing up the battlefield", by which the victims' bodies were removed from the crime scene and hidden for 15 years. The evidence presented in the dossier indicates that the responsible party is the 37th Motorized Brigade of the VJ, whose commander was Ljubiša Diković. The responsibility lies here both for the committed crimes and the procedure of "clearing up the battlefield" during which the bodies were hidden. On 25 May 2015 the HLC filed a criminal complaint against Diković and one identified and several unidentified former members of the 37th Motorized Brigade, as well as against several unidentified MoI members regarding the crime in the village of Rezallë/Rezala, described in the dossier.

Such a step indicates a possible change in the OWCP's practice in relation to the prosecution of individuals regarding whom there is serious suspicion about their participation in war crimes, and who now hold certain state functions. Namely, after the publication of the "Ljubiša Diković" dossier

16 The testimony of Dragan Živanović, 17 January 2008, case of *Šainović et al.,* p.20497, available in English at http://www.icty.org/x/cases/milutinovic/trans/en/080117IT.htm, accessed on 7 May 2015.

17 Transcript from the main hearing in the *Qyshk/Ćuška* case, dated 23 Febrary 2011, p.65, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Cuska/8%20Cuska%20transkript%20sudjenje%20-23.02.2011.pdf, accessed on 7 May 2015.

18 See the HLC statement dated 25 August 2010, "Criminal complaint against members of the VJ and MoI of Serbia for war crimes against Albanian civilians" available in English at http://www.hlc-rdc.org/?p=13073&lang=de, accessed on 7 May 2015.

19 Dossier of the 125th Motorized Brigade of the VJ, available in English at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Dossier-125th-mtbr.pdf, accessed on 7 May 2015.

20 Letter of the OWCP, No. 77/15, 12 October 2015.

in January 2012 – in which the HLC stated allegations and evidence on the involvement of the 37th Motorized Brigade in crimes against more than 400 Kosovo Albanians in the zone of responsibility of the abovementioned brigade – the OWCP issued a statement within less than 48 hours which informed the public to the effect that the HLC's allegations had been checked, adding that "there is absolutely no basis for the criminal responsibility of the chief of General Staff of the Serbian Army, General Diković regarding the war crimes."[21]

2. Modest effects of regional cooperation

Given that the states in the region do not extradite their nationals who are suspected of war crimes, regional cooperation among Prosecutors' Offices dealing with the prosecution of perpetrators of war crimes is the only way, for a large number of cases, to avoid their impunity.[22] Thanks to the signed agreements on cooperation, the Prosecutors' Offices directly exchange information and evidence and assign cases to one another. The War Crimes Prosecutor's Office of the Republic of Serbia has signed agreements on cooperation with Croatia, B&H and Montenegro.[23]

On the basis of established regional cooperation with B&H, six cases for war crimes were transferred to the domestic judiciary in the reporting period – the case of *Luka Camp* was transferred to the OWCP from the Basic Court of Brčko District of B&H, the case of *Sanski Most – Kijevo* was transferred from the Cantonal Court in Bihać, the case of *Bosanski Petrovac – Gaj* from the Prosecutor's Office of B&H and the case of *Gradiška* from the District Court in Banja Luka. The cooperation with the authorities of the Republic of Croatia and Montengro in the reporting period did not result in the raising of indictments.

Based on regional cooperation, until 2015 the OWCP processed only the more simple cases with a small number of defendants – one, most frequently. Those defendants did not have any positions in the command structures – they were direct perpetrators.[24] This cooperation must be much more intensified, bearing in mind the fact that a large number of suspects reside in Serbia.

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21 OWCP, "General Diković is not responsible for war crimes", 25 January 2012, available in Serbian at http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2012/VS_2012_01_25_CIR.PDF accessed on 8 December 2015.

22 Apart from the agreement with Montenegro. See Article 7a of the Agreement between Montenegro and the Republic of Serbia on extradition, available in Serbian at http://sudovi.me/podaci/ascg/dokumenta/854.pdf, accessed on 10 December 2015.

23 Protocol of Prosecutor's Office of Bosnia and Herzegovina and Prosecutor's Office for War Crimes of the Republic of Serbia on cooperation in the prosecution of perpetrators of criminal acts of war crimes, crimes against humanity and genocide; Agreement on cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide, concluded between the Prosecutor's Office for War Crimes of the Republic of Serbia and the State Prosecutor's Office of the Republic of Croatia; Agreement on cooperation in the prosecution of perpetrators of crimes against humanity and other goods protected by international law concluded between the Prosecutor's Office for War Crimes of the Republic of Serbia and the Supreme State Prosecutor of the Republic of Montenegro.

24 Cases: *Bihać, Bihać II, Gradiška, Sanski Most, Bosanski Petrovac, Bosanski Petrovac – Gaj, Bijeljina II, Luka Camp.*

In 2015 in cooperation with the Prosecutor's Office of B&H the OWCP filed two indictments in two cases with a larger number of victims and perpetrators – Srebrenica and Štrpci. A mutual investigation team from Serbia and B&H worked in the case of Štrpci and the arrest of 15 suspects was performed mutually by these two Prosecutor's Offices and police from the two states.[25]

3. Those responsible for the murder of the Bytyqi brothers are still stronger than the institutions of Serbia

The brothers Iljir, Agron and Mehmet were killed in July 1999 in the training camp of the Special Police Units (PJP) in Petrovo Selo near Kladovo, after having been taken out of the jail in Prokuplje by members of the police, where they were detained because of a misdemeanour. Their bodies were buried in the mass grave in the camp, together with the bodies of Albanian civilians killed in crimes of Serbian forces in Kosovo. The proceedings which were conducted for the killing of the Bytyqi brothers finally ended in 2013 in acquittals.[26]

The United States of America (USA) – the country of which the Bytyqi brothers were citizens – have monitored the proceedings in this case and for many years they have demanded from the authorities of Serbia to resolve it. In May 2015, the US Congress submitted a resolution requesting Serbia to process this crime as a priority.[27] Serbian Prime Minister Aleksandar Vučić, during his visit to Washington in June 2015, promised that Serbia would solve the case of the killing of the Bytyqi brothers.[28] Shortly before the visit, the MoI issued a press release which stated that a certain progress in the investigation of the Bytyqi brothers murder had been made and there was some new evidence in this case.[29] Almost at the same time, the Serbian Prime Minister announced the formation of a special commission for the investigation of the killing of the Bytyqi brothers, not explaining why the whole case would be transferred to the jurisdiction of a journalist-based commission[30] at the time of the collection of new evidence and alleged progress. However, a month and a half after the announcement to establish the commission, and a day after the Prime Minister met the Assistant Secretary of State,

25 The OWCP statement: "Indictment filed against five persons for the torture and murder of 20 passengers from the train in Štrpci in 1993", 3 March 2015, available in Serbian at http://www.tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2015/VS_2015_03_03_CIR.pdf accessed on 14 January 2016.

26 For more details in the *Bytyqi brothers* case see the Humanitarian Law Center, (Belgrade, HLC, 2014) "Report on war crimes trials in Serbia in 2013", p.60, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf

27 The resolution of 19 May 2015, available in English at https://bytyqibrothers.files.wordpress.com/2015/05/zeldin_resolution_xml.pdf accessed on 8 December 2015.

28 "Vučić: We will solve the Bitići case", *BIRN,* 5 June 2015, available in Serbian at http://www.balkaninsight.com/rs/article/vu%C4%8Di%C4%87-re%C5%A1i%C4%87emo-slu%C4%8Daj-biti%C4%87i accessed on 8 December 2015.

29 P.D., "Stefanović: New evidence in Bitići case", *Danas,* 2 June 2015, available in Serbian at http://www.danas.rs/danasrs/politika/stefanovic_novi_dokazi_u_slucaju_bitici.56.html?news_id=302607 accessed on 8 December 2015.

30 "Vučić asked Veran Matić to be included in the investigation of the killing of the Bitići brothers", *Beta,* 29 May 2015, available in Serbian at http://www.blic.rs/Vesti/Politika/563283/Vucic-trazio-da-se-Veran-Matic-ukljuci-u-istragu-ubistva-brace-Bitici accessed on 8 December 2015.

the media published information which stated that the Prime Minister had decided not do establish the commission, thus leaving the case within the OWCP jurisdiction.

Public disclosure of information about the alleged discovery of new evidence at the time of PM Vučić's visit to the USA, as well as the idea to transfer the case to a journalist-based commission after 16 years of unsuccessful investigation, clearly shows the lack of strategy, capacity and above all political will of the state to find the persons responsible for this crime.

In November 2014 Fatos Bytyqi, Agron, Mehmet and Iljir's brother, spoke to the representatives of the current authorities and the Prosecutor for War Crimes, insisting on finding the persons responsible for the deaths of his brothers. Fatos indicated the former warden of the PJP training camp in Petrovo Selo and the PJP commander, later the Commander of the Gendarmerie, and today a member of the Main Board of the SNS (Serbian Progressive Party), Goran Radosavljević Guri, as the main suspect.[31]

4. Unreasoned sentencing decisions of the courts

During the reporting period, as a rule, the Departments for War Crimes of the Higher and Appellate Court have not offered reasonings in their sentencing decisions on the established mitigating and aggravating circumstances for those convicted. These circumstances are only listed in the judgments, without explaining how the given sentence achieves the purpose of punishment – "the suppression of socially dangerous activities that violate or jeopardize the social values protected by criminal legislation."[32]

On 11 December 2015, an expert meeting was held on "Determining the sentences and the criteria for war crimes cases as applied so far", which included the representatives of the Departments for War Crimes of the Higher and Appellate Court, lawyers from Serbia and the region, the ICTY representatives and the expert public. The participants in the expert meeting agreed that it was necessary to change the current practice in this regard and adequately reason the sentences imposed on persons convicted for war crimes.

The practice of the Departments for War Crimes is especially problematic when it comes to certain mitigating circumstances and legal concepts, which is the reason why they are particularly analyzed in the text that follows.

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31 On 16 September 2009 the Deputy War Crimes Prosecutor in his closing arguments in the Bytyqi brothers case said that "the process leading to victims and their execution could not have happened without the camp warden and commander of the Special Police Unit, later Commander of the Gendarmerie, Goran Radosavljević. There is still no indisputable evidence that Goran Radosavljević took part in a particular action. However, there are special proceedings against him in the OWCP. Transcript of the closing arguments in the *Bytyqi Brothers* case, of 16 September 2009, p.21, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/04/35-16.09.2009..pdf, accessed on 7 May 2015.

32 Article 5, para. 2 CC FRY.

i. Family circumstances and the lapse of time as mitigating circumstances

The courts in war crimes cases most frequently use "family circumstances" as mitigating circumstances, although the CC of the FRY does not stipulate such circumstances. The CC of the FRY stipulates that the court should consider "personal circumstances".[33] The courts regularly use family circumstances as mitigating circumstances within personal circumstances.

The practice of the Departments for War Crimes also suggests that almost any family circumstance can be considered as a mitigating circumstance. In this manner, the courts have considered the facts that the defendant has one child or more, or even the fact that the defendant does not have a family and relatives at all – all of these have been considered as mitigating circumstances by the courts (see case *Qyshk/Ćuška*).

In the *Beli Manastir* case, a mitigating circumstance for the defendant was the fact that he is "**a family man**." However, the court did not explain how this circumstance could be deemed mitigating considering that the defendants are convicted **of having killed all the male members of a family**.

Since the Departments for War Crimes consider family circumstances as mitigating ones for every defendant, this circumstance loses the specificity necessary for it to be taken into account by the courts at all. That is to say, if the court considers certain circumstances of the defendant as mitigating, it should specify them and explain why it deems them as such and how the final sentence contributes to the purpose of punishment. Although the ICTY has regularly taken into account the family circumstances of the defendant, it has pointed out that they should not be given great importance because they are "**personal factors typical of many defendants**."[34] Moreover, in other cases the ICTY has explicitly stated that "the fact that [the defendant] has a wife and child does not constitute any mitigating circumstance whatsoever."[35]

Besides, **the lapse of time since the criminal act** is regularly considered a mitigating circumstance. The HLC believes that the lapse of time since a criminal act is not a circumstance which the court should consider as mitigating when it comes to war crimes. Namely, disregarding lapse of time as a mitigating circumstance logically stems out from the universal provision of no statute of limitations for war crimes. This is also the position of the ICTY – **the period between the criminal conduct and the judgment cannot be taken into account as mitigating circumstances in cases of war crimes**.[36]

33 Article 41 of the CC FRY.

34 First instance judgment of the ICTY in case of *Prosecutor v. protiv Ante Furundžija* (IT-95-17/1), para. 284; First instance judgment of the ICTY in case of *Prosecutor v. Goran Jelisić (IT-95-10)*, para. 124.

35 First instance judgment of the ICTY on the sentence in case of *Prosecutor v. Dragan Zelenović* (First instance judgment of the ICTY in case of *Prosecutor v. Ante Furundžija* (IT-95-17/1), para. 55.

36 Judgment of the Trial Chamber of the ICTY in case of *Prosecutor v. protiv Dragan Nikolić* (IT –94-2), 18 December 2003, para. 273.

ii. Mitigating the sentence below the statutory minimum

The CC FRY stipulates that the court is entitled to mitigate a sentence below the statutory minimum of five years for a war crime in cases of "particularly mitigating circumstances" for the defendant.[37] The Departments for War Crimes apply this institute and the mitigating circumstances too, without any adequate explanation, and more often than one would expect, since the institute is specific and exceptional.

While sentencing the two defendants for the *Qyshk/Ćuška* case, the court found there was space to mitigate their sentence below the statutory minimum since "it was not established that they had shown cruelty."[38] **The fact that the defendants did not show cruelty in committing the crime cannot be considered mitigating.** The usual way of committing the crime does not imply cruelty, and therefore, the lack of this circumstance cannot be deemed mitigating, especially not as "particularly" mitigating.

In the case of *Luka Camp,* the court considered several mitigating circumstances **cumulatively as "particularly mitigating"** (no criminal record, family circumstances and the lapse of time since the crime was committed). The mitigating circumstances considered by the court in the first first-instance judgment are "regular" and are used in almost all war crimes cases.[39] In that way, they are not "special" either in the linguistic or the legal interpretation of this term. Namely, the circumstances that someone has a family - or does not have one (see *Qyshk/Ćuška* case), does not have a criminal record and has remained long unpunished are not only not exceptional, but are the rule in war crimes cases in Serbia.

Other legal systems recognize the concept of particularly mitigating circumstances, but apply it in rare and exceptional circumstances, in accordance with its nature. For example, the Norwegian Law on the Punishment of War Criminals stipulates that in cases when a crime is committed following orders of a superior, or out of duress, one may apply the institute of mitigating a sentence below the statutory minimum – in other words, these circumstances are regarded as particularly mitigating.[40] Particularly mitigating circumstances in the Croatian Criminal Code are those in which the perpetrator has reconciled with the victim, compensated the damage caused by the criminal act or made a serious effort to indemnify the victim.[41]

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37 CC FRY, Article 42, para. 1. item 2.

38 Judgment of the War Crimes Department of the Higher Court in Belgrade, K Po2 No. 48/2012 dated 11 February 2014, p. 257, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/prvostepena_presuda_Cuska.pdf, accessed on 4 December 2015.

39 E.g. see: Judgment of the District Court in Belgrade in *Đakovica* case, K.v.br 4/05 dated 18 September 2006, p.38; Judgment of the War Crimes Department Higher Court in Belgrade in *Prijedor* case, Kpo2 4/2011 dated 28 November 2011, p.37; Judgment of the War Crimes Department Higher Court in Belgrade in *Stara Gradiška* case, Kpo2 br 32/2010 dated 25 June 2010, p.36; Judgment of the War Crimes Department Higher Court in Belgrade in *Tenja (Radivoj)* case, Kpo2 38/2010 dated 17 November 2010, p.48; Judgment of the District Court in Belgrade in *Ovčara II* case, K.V br 2/2005 dated 30 January 2006, p.50; Judgment of the War Crimes Department Higher Court in Belgrade in *Zvornik II* case, Kpo2 No. 28/2010 dated 22 November 2010, p.301-303; Judgment of the District Court in Belgrade in *Suva Reka* case, K.V. 2/2006 dated 23 April 2009, p.188-190; Judgment of the District Court in Belgrade in *Podujevo II* case, K.V 4/2008 dated 18 June 2009, p.60-61; Judgment of the War Crimes Department Higher Court in Belgrade in *Medak* case, Kpo2 No. 36/2010 dated 15 June 2010, p.46-47.

40 Geert-Jan Knoops, "Defenses in Contemporary International Criminal Law: Second Edition", p.14.

41 Article 48, para. 2 of the Criminal Code of Croatia (NN 125/11, 144/12, 56/15, 61/15).

It seems that the Departments for War Crimes choose to mitigate a sentence below the statutory minimum when they do not have enough evidence to determine the criminal responsibility of the defendant - that is, instead of applying the principle *in dubio pro reo* (e.g. see *Kashnjeti* case). Judge Hadžiomerović of the Department for War Crimes of the Appellate Court agrees with this view.[42] Another impression is that the Departments for War Crimes mitigate sentences below the statutory minimum in "easier" cases of war crimes which haven't resulted in the victim's death (e.g. see the cases of *Sremska Mitrovica* and *Luka Camp*). On the other hand, it seems that the courts of general jurisdiction apply this institute when they want to protect the defendant from criminal responsibility (e.g. see the cases of *Rahovec/Orahovac* and *Miloš Lukić*). **Being governed by such reasons is a blatant violation of the law.**

5. Inappropriately long proceedings for war crimes

Years-long court proceedings for war crimes in Serbia have become a distinctive mark of war crimes prosecution in Serbia. It is certain that it has negative consequences for the process of establishing the rule of law regarding the grave crimes committed in the 1990s.

The cases of *Tuzla Column, Lovas, Beli Manastir*, *Qyshk/Ćuška* and *Skočić* **have not been finally adjudicated although more than five years have passed**. Retrials of the first instance proceedings occurred in all of the cases. **Both the OWCP and the courts are responsible for the long duration.** Namely, due to the unsubstantiated indictments of the OWCP, the main hearings often turn into investigations, during which the court takes on the prosecution's role in effect. Because of this, there have been subsequent amendments to indictments, sometimes more than once, which have caused delay in trials so that the defendants could be given time to prepare their defense following the amended indictments (e.g. see the cases of *Lovas, Gradiška* and *Tuzla Column*).

Omissions in the work of courts have also influenced the long duration of proceedings. Namely, low-quality first instance judgments resulted in their quashing in the second instance proceedings and their being remanded for a retrial (e.g. see the cases of *Luka Camp* and *Bijeljina II*). On the other hand, the Appellate Court failed to perform its supervisory function adequately and clearly guide the work of first instance courts, especially in cases with complex legal issues such as the mode of participation in the commission of a criminal act (e.g. see the cases of *Skočić, Beli Manastir, Lovas* and *Bijeljina II*).

Cases before general jurisdiction courts, with all their other deficiencies, due to their long duration are authentic examples of mockery of the victims and of justice; and this originates from the institutions themselves. Taking into account the cases ended before 2014, these cases are **12 years long on average**.

42 Exposition by Judge Hadžiomerović in the expert meeting on "Determining the sentence and the so far applied criteria of war crimes cases", held on 11 December 2015.

Significant delays in trials are also a consequence of the change of president and trial chamber members, based on the decisions of the President of the Higher Court in Belgrade (this will be discussed in greater detail in the following finding). In one of the most complex domestic cases for war crimes – *Lovas*, three presidents of the trial chamber have been changed so far. Also, in a case of similar scope – *Qyshk/Ćuška*, the changing of the trial chamber president caused the change in the trial chamber president in the retrial, since several months had to pass before it could start. In the *Beli Manastir* case, two members of the trial chamber were changed in the retrial, and the main hearing was reopened only after the closing arguments, since the court considered that certain key facts had not been sufficiently discussed. The trial chamber president was also changed for the *Skočić* case in the retrial.

The consequences of many years of proceedings are far-reaching and serious and are causing harm to the reputation of the institutions of Serbia in the region and further afield. So far, in the reporting period, the proceedings have ceased against six indictees in total, because they died during the proceedings (see the cases of *Skočić, Qyshk/Ćuška* and *Lovas*). A significant number of victim-witnesses have refused to testify again before the courts because of fatigue and re-traumatization due to their repeated giving of testimony (see the cases of *Skočić* and *Bijeljina II*); and there is also a loss of faith in the procedures and institutions (case of *Qyshk/Ćuška*). And quite apart from this, the long duration of proceedings, that is, their repetition, sends a negative and discouraging message to future witnesses and victims as well – a message saying they will hardly receive justice before the institutions of Serbia.

The most notable example of unreasonably long proceedings is the *Ovčara* case, in which the judgment was quashed four years after it became final. The case was then remanded to the Appellate Court for retrial in the appellate proceedings.

6. The system of allocation of judges is harmful to war crimes proceedings

Five judges from the Department for War Crimes of the Higher Court in Belgrade were changed on various grounds between 2012 and the end of 2015.[43] Bearing in mind the fact that there are six judges in the Department for War Crimes, these frequent changes of judges have not only delayed the proceedings, since the new judges have had to get acquainted with the cases (as has already been discussed), but has also affected the quality of the trials.

The most frequent and problematic grounds for changing the judges of the Department for War Crimes in Belgrade have been the decisions of the Higher Court President in Belgrade on the annual allocation of judges for this court. Namely, the court's President establishes the annual allocation

43 Judges Olivera Anđelković, Tatjana Vuković, Rastko Popović, Snežana Nikolić Garotić and Bojan Mišić

of judges in a certain court via the Law on Organisation of Courts[44] and Court Rules[45]. The annual allocation of tasks for the following year is determined by the previously obtained opinion of the court; yet, the final decision is up to the President. In allocating the judges, the President should consider the circumstances that affect the efficiency and costs of proceedings, the necessary number of judges for a certain legal area and the number and type of cases which will be processed.

The decision of Aleksandar Stepanović, President of the Higher Court in Belgrade, reallocated Judge Snežana Nikolić Garotić from the Department for War Crimes of the Higher Court in Belgrade to a first instance Criminal Department of the Higher Court in 2014.[46] However, this was done before the expiry of her mandate determined by the Law on War Crimes. Namely, in accordance with this law, Judge Garotić was allocated to the Department for War Crimes in January 2010 for a period of six years, which means until 2016.[47] At the moment of the decision to reallocate her, Judge Nikolić Garotić was an acting judge in five war crimes cases.[48]

The President of the Appellate Court overruled the objection of Judge Nikolić Garotić as unfounded, explaining that the judge, by signing consent to be allocated to the Department for War Crimes for the period of six years, simultaneously gave her consent that the allocation could last less, that is, "up to six years."[49]

Judge Bojan Mišić was allocated to the Department for War Crimes in April 2013 and then reallocated to the first instance Criminal Department of the Higher Court in Belgrade. This was done through the annual allocation of judges for the year 2016[50] which was issued by the President of the Higher Court in Belgrade, Aleksandar Stepanović, in November 2015. At the time of the decision on reallocation, Judge Mišić was a member of trial chambers in five cases of war crimes.[51]

Although it is indisputable that the court president determines the annual allocation of judges' in accordance with the Law on Organisation of Courts[52] and Court Rules,[53] in doing so, **his decisions must not be contrary to the Law on War Crimes, which stipulates that the time of allocation of**

44 Law on Organization of Courts, "Official Gazette of the RS" No. 116/ 08, 104/09, 101/10, 31/11, 78/11, 101/11, 101/13, 40/15, Article 34.
45 Court Rules "Official Gazette of the RS" No. 110/09,70/11, 19/12 i 89/13. Article 46.
46 Annual distribution of tasks in the Higher Court in Belgrade for 2015. I Su No. 2/14-315 dated 27 November 2014, available in Serbian at http://www.bg.vi.sud.rs/images/Raspored_sudija_2015.pdf, accessed on 21 January 2016.
47 Law on war crimes, Article 10, para. 4.
48 *Gradiška, Lubeniq/Ljubenić, Bosanski Petrovac- Gaj, Sotin* and *Bijeljina II*.
49 Decision of the President of the Appellate Court in Belgrade Su No. I-2 217/14 dated 8 December 2014.
50 Annual distribution of tasks of the Higher Court in Belgrade for 2016, I Su No. 2/15 -242 dated 30 November 2015, available in Serbian at http://www.bg.vi.sud.rs/images/GODISNJI-RASPORED-POSLOVE-ZA%202016-god.pdf, accessed on 13 January 2016.
51 *Lovas, Bihać II, Sanski Most- Kijevo, Ternje/Trnje* and *Bosanski Petrovac.*
52 Law on Organisation of Courts, "Official Gazette of the RS" No. 116/ 08, 104/09, 101/10, 31/11, 78/11, 101/11, 101/13, 40/15, Article 34.
53 Court Rules "Official Gazette of the RS" No. 110/09,70/11, 19/12 and 89/13. Article 46.

judges in the Department for War Crimes is explicitly for six years. The interpretation of this legal provision, as stated by the President of the Appellate Court, is unfounded. Namely, if the legislator had really wanted the period of allocation to be less than six years, he would have made such a provision. Instead, there is a clear determination which says "six years" and not *up to six years.*

In the process of allocation of judges, even with a restrictive interpretation of the relevant laws and rules, it is indisputable that there is a broad range discretion granted to the President of the Higher Court and the Appellate Court - that is, the decision of the President is guided by imprecise rules like taking care of legality, neatness and uniformity of work.[54] Giving such discretion in a process which is non-transparent by its nature opens space for motives of a non-legal character. In this context one could understand the recommendations by the European Commission to Serbia in the coming period which say: "To establish and implement a fair and transparent system of selection and management of career development which is based on merit, in order to guarantee the independence of the judiciary to a greater extent."[55]

The issue of war crimes is specific and highly complex and requires expertise in the area of international humanitarian law. Because of this, the law stipulates that the advantage should be given to judges who have the necessary professional knowledge and experience in the area of international humanitarian law and human rights when it comes to allocation to the Department for War Crimes.[56] Contrary to this provision, **judges with no experience in war crimes matters whatsoever are allocated to the department and no system of mandatory training has been set up for them.** Therefore, the introduction to the vast theory and practice of international humanitarian law is left to their own initiative. Because of the abovementioned, the replacement of a few judges with many years of experience seems irrational from the perspective of court efficiency, which is something the court President is responsible for.[57]

The European Commission's progress report on Serbia in 2015 pointed out this problem, stating the following: "In order to maintain the quality of trials, there must be measures to preserve the great trial experience gained during the processing of these complex cases."[58]

54 Ibid, Article 48.

55 Annual report on the progress of Serbia for 2015, p.12, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf accessed on 14 January 2016.

56 Law on war crimes, Article 10, para. 6.

57 Law on Organisation of Courts "Official Gazette of the RS" No. 116/ 08, 104/09, 101/10, 31/11, 78/11, 101/11, 101/13, 40/15, Article 52.

58 Annual report on progress of Serbia for 2015, p.22, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf accessed on 8 December 2015.

7. The application of international humanitarian law – qualification of an armed conflict

IHL distinguishes between international and non-international armed conflicts. This difference is of essential importance in war crimes cases, since protected persons enjoy a different level of protection depending on what type of conflict we are dealing with, that is, certain acts can be a war crime in one conflict only, but not in the other.

Indictments and judgments in war crimes cases as a rule lack reasoning for the qualification of armed conflicts; they superficially state it is "a well-known fact" (e.g. see indictment in the case of *Sanski Most – Kijevo*). Also, the qualification of an armed conflict in certain cases deviates from the character of the conflict determined by the ICTY in relation to identical events (e.g. see indictment in the case of *Luka Camp*). Since the majority of cases for war crimes relate to cases of killing or causing injuries to civilians, the character of a specific conflict is not a decisive factor for the existence of a criminal act, since such acts are forbidden in all armed conflicts. On the other hand, in cases where the character of conflict is decisive for the existence of a criminal act, both the OWCP and the courts have failed to provide adequate rationales (e.g. see the cases of *Sremsksa Mitrovica* and *Tuzla Column*).

8. Pressure on Prosecutor's Office for War Crimes

i. Attacks on the person of the Prosecutor and Deputy

In 2014 and 2015, the Prosecutor for War Crimes Vladimir Vukčević and his Deputy Bruno Vekarić were harshly attacked by the representatives of public authorities and the media. Thus, in 2014 a member of parliament from the ruling SNS party and President of the Parliament Board for Kosovo and Metohija, Milovan Drecun, accused the Deputy Bruno Vekarić of having been illegally appointed Deputy for War Crimes, since he had not been chosen by the Parliament of Serbia, but appointed by the State Prosecutors Council instead.[59] The attack was then aimed at the OWCP in general, with Drecun questioning whether the OWCP was "Serbian or American", accusing the OWCP and the Prosecutor for War Crimes of cooperation with various USA officials, and mentioning financial assistance that the Prosecutor's Office had received on several occasions.[60]

ii. Political pressure on the work of the OWCP

During the reporting period, the representatives of the political authorities repeatedly commented on

59 "Drecun: Bruno Vekarić unlawfully elected Prosecutor Deputy", *Beta*, 20 November 2014, available in Serbian at http://www.blic.rs/Vesti/Politika/512763/Drecun-Bruno-Vekaric-protivzakonito-zamenik-tuzioca accessed on 8 December 2015.

60 "Drecun: Whose is the Prosecution – Serbian or American?", *Beta,* 25 November 2014, available in Serbian at http://www.vesti-online.com/Vesti/Srbija/451545/Drecun-Cije-je-Tuzilastvo--srpsko-ili-americko- accessed on 8 December 2015.

the work of the OWCP in an inappropriate manner, at times amounting to open threats.

The most extreme example was a statement by the Republic of Serbia President regarding the work of the Prosecutor for War Crimes in relation to the mass grave with the bodies of Kosovo Albanians in Rudnica, discovered in 2014. Namely, after publication of the "Rudnica" Dossier which gives serious indications on the role of the current Chief of Staff of the Serbian Armed Forces Ljubiša Diković in the crimes and concealment of bodies in the mass grave in Rudnica, President Tomislav Nikolić said that the Prosecutor for War Crimes "should be careful about what he is digging up in Serbia."[61]

Having announced the arrest for the crime in Štrpci, the OWCP received a public "recommendation" from Nikola Selaković, the Minister of Justice, that it should investigate crimes against Serbian victims as well.[62]

The attacks and political pressure on the OWCP were condemned by the Human Rights Commissioner of the Council of Europe,[63] the ICTY,[64] the European Commission,[65] and domestic expert public, as "an open public attempt to influence the Prosecutor of War Crimes."[66]

iii. The lack of political support for war crimes trials

Apart from the abovementioned open threats and pressure on the OWCP, other acts of the highest state representatives also show that the current political elite openly denies, at the symbolic level, the importance of establishing justice for crimes from the 90s of the last century.

A week after the publication of the "Rudnica" Dossier which indicates the evidence on serious crimes committed in the zone of responsibility of the 37th Motorized Brigade of the VJ, commanded by the current Chief of Staff of the Serbian Armed Forces Ljubiša Diković, President Tomislav Nikolić awarded Diković with the Order of the White Eagle First Class with swords for "special merits in the development of the defence system and command and control of military units."[67]

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61 Ognjen Zorić, "Nikolić: Prosecutor Vukčević should consider what he is digging in Serbia", *Radio Slobodna Evropa*, available in Serbian at http://www.slobodnaevropa.org/content/nikolic-tuzilac-vukcevic-da-razmisli-sta-kopa-po-srbiji/26849571.html accessed on 8 December 2015.

62 "Selaković: Now, how about the Serbian victims, as well", *Beta, Tanjug,* 5 December 2014, available in Serbian at http://www.b92.net/info/komentari.php?nav_id=932752 accessed on 8 December 2015.

63 Report of the Human Rights Commissioner of the Council of Europe Nils Muižnieks after his visit to Serbia from 16 to 20 March 2015, para.17 and 18, available in English https://wcd.coe.int/com.instranet.InstraServlet?command=com.instranet.CmdBlobGet&InstranetImage=2798638&SecMode=1&DocId=2302808&Usage=2 , accessed on 10 September 2015.

64 Annual Report of the ICTY for 2015, para. 56, available in English at http://www.icty.org/x/file/About/Reports%20and%20Publications/AnnualReports/annual_report_2015_en.pdf accessed on 8 December 2015.

65 Annual Report on progress of Serbia for 2015, p.22, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf accessed on 8 December 2015.

66 "Still no reaction of judiciary to Nikolic's interview", *N1,* 16 February 2015, available in Serbian at http://rs.n1info.com/a35789/Vesti/I-dalje-bez-reakcije-pravosudja-na-Nikolicev-intervju.html accessed on 8 December 2015.

67 "Nikolić awarded Diković, Chomsky, gendarmerie, actors, etc.", *N1,* 10 February 2015, available in Serbian at http://rs.n1info.com/a34289/Vesti/Nikolic-odlikovao-Dikovica-Comskog-i-Zandarmeriju.html accessed on 8 December 2015.

Moreover, the state authorities of the Republic of Serbia welcomed the former Commander of the Priština Corps of the VJ Vladimir Lazarević with highest honours when he returned to Serbia in December 2015, after having served a prison sentence for crimes against humanity committed during the war in Kosovo. He arrived to Serbia by a Serbian Government plane, accompanied by Defence Minister Bratislav Gašić and Minister of Justice Nikola Selaković. Among others at the celebration organised in Niš, he was welcomed by Aleksandar Vulin, Minister of Labour, Veteran and Social Affairs, and Ljubiša Diković, Chief of Staff of the Serbian Armed Forces. The Minister of Justice and Defence stated that Lazarević's return was a big day for Serbia, while Minister Selaković said: "Thanks to the General, the cities of Niš, Kraljevo, Valjevo and Kruševac and all our cities and villages are free today"[68], adding that Lazarević should be a role model for the youth.[69]

9. The election of the new Prosecutor for War Crimes

The mandate of the current War Crimes Prosecutor Vladimir Vukčević expired on 31 December 2015. However, **the new Prosecutor has not been elected yet, and neither has an acting Prosecutor been appointed at the time of the publication of this Report**.[70]

The agenda of the Assembly of the Republic of Serbia held on 21 December 2015 included the election of 55 public prosecutors, including the War Crimes Prosecutor as well. However, a new Prosecutor was not elected at the meeting because none of the six candidates had the majority of votes. Dejan Terzić had the most votes (109) and Snežana Stojković (75), while the other four candidates had less than 10 votes.

According to the Law on Public Prosecution, the State Prosecutors Council proposes candidates for the election of public prosecutors to the Government of the Republic of Serbia, and then the government, as the authorized proposer, proposes the final candidates for the election of public prosecutors to the National Assembly.[71] The State Prosecutors Council proposed six candidates for the War Crimes Prosecutor to the Government and ranked them in the following way: (1) Snežana Stanojković - Deputy of the War Crimes Prosecutor (70 points); (2) Dejan Terzić - Judge of the Appellate Court in Novi Sad (70 points); (3) Đorđe Ostojić - Deputy of the State Public Prosecutor (69.2 points); (4)

68 Gordana Bjeletić, "Lazarević: I survived the "Hague scaffold", *Beta,* 3 December 2015, available in Serbian at http://rs.n1info.com/a114838/Vesti/Vladimir-Lazarevic-u-Srbiji.html accessed on 8 December 2015.

69 N1, "The controversy over welcoming Lazarević from The Hague", 4 December 2015, available in Serbian at http://rs.n1info.com/a115279/Vesti/Docek-Vladimira-Lazarevica.html accessed on 14 January 2016.

70 According to the Law on Public Prosecution, if a Public Prosecutor's function ends, the Republic State Prosecutor appoints the acting Prosecutor until the new Prosecutor begins his duty, which can be for a year maximum. The Law on Public Prosecution ("Official Gazette of the RS" No. 116/2008, 104/2009, 101/2010, 78/2011 – other law, 101/2011, 38/2012 – decision of the Constitutional Court, 121/2012, 101/2013, 111/2014 – decision of the Constitutional Court, 117/2014 i 106/2015), Article 36.

71 The Law on Public Prosecution ("Official Gazette of RS", No. 116/2008, 104/2009, 101/2010, 78/2011 - other law, 101/2011, 38/2012 – decision of the Constitutional Court, 121/2012, 101/2013, 111/2014 - decision of the Constitutional Court, 117/2014 and 106/2015), Article 74.

Milan Petrovic - Deputy of the War Crimes Prosecutor (67.8 points); (5) Mioljub Vitorović - Deputy of the War Crimes Prosecutor (64.8 points) and (6) Sonja Milićević – Deputy of the Public Prosecutor at the Higher Prosecutor's Office in Zaječar (57.6 points).[72]

The way of evaluating the candidates for War Crimes Prosecutor was completely nontransparent. Namely, the State Prosecutors Council gave the maximum number of points to all candidates for their expertise and competence, although their career backgrounds were very different, since half the candidates did not have any experience in war crimes cases whatsoever. In addition, the Law on War Crimes provides that "when proposing candidates for War Crimes Prosecutor [...] an advantage is given to candidates who have the necessary expertise and experience in criminal law, international humanitarian law and human rights".[73] One of the two candidates who were given the maximum number of points by the State Prosecutors Council does not meet the qualifications. Namely, Dejan Terzić is a Judge of the Appellate Court in Novi Sad and does not have any prosecution experience in cases of international criminal law, humanitarian law and human rights.[74] The other candidate, Snežana Stanojković, has relevant experience in war crimes cases, but the cases she was acting in were more simple in scope; they were mainly cases transferred from other prosecutor's offices through regional cooperation.[75]

Since the State Prosecutors Council gave maximum points to all five candidates fortheir expertise, the mark in the programme for the organisation and improvement of the OWCP had the most decisive influence on the candidates' ranking. All candidates had to prepare and present this programme. The two highest ranked candidates – Snežana Stanojković and Dejan Terzić - were the only ones who got maximum points for the programme they presented.[76]

Having had an insight into the programmes of Terzić and Stanojković [see appendices 2 and 3], which the HLC obtained on the basis of the Law on Free Access to Public Information, the following issue is raised: the meaningfulness and expediency of the criteria that the State Prosecutors Council is governed by when evaluating these programmes. Namely, the programmes do not address some of the basic problems in the OWCP work - that is, they do not offer solutions to improve the work which would demonstrate knowledge on specific problematics in the work of War Crimes Prosecutor. Also, when compared, it is hard to understand how these two essentially different programmes, which focus on different problems and suggest a completely different methodology for the Prosecutor's

72 Website of the State Prosecutors Council, final ranking list for the election of public prosecutors in the Public Prosecutor's Office in the Republic of Serbia, available in Serbian at http://www.dvt.jt.rs/izbor-javnih-tuzilaca-konacna-rang-lista.html accessed on 14 January 2016.

73 Law on war crimes, Article 5.

74 The list of candidates for the election of Public Prosecutor including biographies, addressed to the National Assembly of the Republic of Serbia by the Serbian Prime Minister, 24 No.: 119-13625/2015, 17 December 2015.

75 *Tenja II, Gradiška, Bihać II, Sanski Most – Kijevo, Bosanski Petrovac* and *Bosanski Petrovac – Gaj.*

76 Website of the State Prosecutors Council, final rankings list for the election of public prosecutors in the Public Prosecutor's Office in the Republic of Serbia, available in Serbian at http://www.dvt.jt.rs/izbor-javnih-tuzilaca-konacna-rang-lista.html accessed on 14 January 2016.

Office's work, were given the identical (maximum) number of points by the State Prosecutors Council.

Thus, in his programme, Terzić suggests almost the same solutions which are already written in the Action Plan for Chapter 23. On the other hand, the programme of Snežana Stanojković does not pay attention to key activities from the Action Plan for Chapter 23 at all, nor to the key problems in the Report on screening for Chapter 23 regarding war crimes,[77] such as the protection of victims and witnesses and the prosecution of high rank perpetrators. Moreover, Stanojković proposes the prosecution of war crimes through trials in absentia as a desirable *modus operandi* for the OWCP, although it is an extremely exceptional processing activity which is not in accordance with international standards (for more on this, see the analysis of the case of *Cobras*), regarding the regional cooperation among the prosecutor's offices; and that would surely cause distrust and probably the cessation of cooperation. Stanojković's programme proposes activities which would focus the prosecutorial activity on cases where the victims belong to one specific nationality.

The election of public prosecutors was criticized both by the representatives of the expert public[78] and members of parliament[79] because of political pressure and non-transparency. The Minister of Justice Nikola Selaković reacted to these criticisms with an explicit confession, saying that the Government was indeed guided by unlawful political criteria in the election of prosecutors: "I would be a complete political masochist if I permitted those who are entirely politically unsuitable for the Government to be elected. However, the principle criterion is still professional qualification for the execution of the prosecutorial duties."[80] Human Rights organizations reacted to this statement demanding his resignation and a repetition of the process of the Prosecutor's election.[81]

10. Action Plan for Chapter 23

The Action Plan for the negotiations of Serbia with the EU regarding Chapter 23, which relates to the judiciary and fundamental rights, stipulates a number of obligations and activities of institutions in the field of war crimes prosecution which need to be implemented in the following years.[82] A

77 Screening report for Chapter 23, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2014/140729-screening-report-chapter-23-serbia.pdf accessed on 14 January 2016.

78 Press release of the Association of Prosecutors of Serbia, "It is not clear what criteria the Government was governed by when proposing candidates for public prosecutors", 18 December 2015, available in Serbian at http://www.uts.org.rs/index.php?option=com_content&view=article&id=1132:uts-nije-jasno-kojim-se-kriterijumima-vlada-rukovodila-prilikom-predlaganja-kandidata-za-javne-tuzioce&catid=64:saopstenja-za-javnost&Itemid=733 accessed on 14 January 2016.

79 Saša Dragojlo, "Serbian MPs debate about new prosecutors", *BIRN*, 22 December 2015, available in Serbian at http://www.balkaninsight.com/rs/article/sva%C4%91a-srpskih-poslanika-oko-novih-tu%C5%BEilaca-12-22-2015 accessed on 14 January 2016.

80 Ibid.

81 The HLC press release, "The selection of suitable political prosecutors undermines the rule of law", 23 December 2015, available in English at http://www.hlc-rdc.org/?p=30911&lang=de accessed on 14 January 2016.

82 The final version of the Action Plan for Chapter 23 was confirmed by the European Commission in September 2015. In the future, this document will be considered by the Council of the European Union.

gradual strengthening of the OWCP's capacities is planned through the employment of additional staff, including eight prosecutor's deputies and seven assistants in the period from 2015 to 2018, as well as the potential employment of military experts.[83] The adoption of a Prosecutor's Strategy for investigation and prosecution of war crimes in Serbia is also planned; the development of a draft text is planned by the end of 2015.[84] The Action Plan stipulates the adoption of a comprehensive national strategy for the investigation and prosecution of war crimes up to the end of 2015.[85]

The Action Plan also stipulates the revision of the legal and factual situation in the War Crimes Investigation Service in order to improve its work. Special attention will be given to the issue, "whether the recruitment of staff should be reformed bearing in mind the potential impact of previous participation of candidates in conflicts in the former Yugoslavia."[86] The same process is planned for the Witness Protection Unit.[87] Apart from this, the Action Plan stipulates enhanced cooperation of the OWCP and the ICTY,[88] training for all the relevant actors on international criminal law,[89] improving the capacity of the OWCP and Service for support and assistance to witnesses and victims,[90] specifying criteria for the anonymisation of judgments[91] and a series of measures to promote the rights and status of victims in the proceedings.[92]

The HLC has actively participated in the preparation of the Action Plan by sending recommendations to the draft plan. Out of 62 recommendations by the HLC, 52 were fully or partially adopted.[93]

11. National Strategy for War Crimes Prosecution

In November 2015, the Ministry of Justice of the Republic of Serbia in accordance with the Action Plan for Chapter 23 published the Draft National Strategy for War Crimes Prosecution for the period from 2016 to 2020 and opened a public debate which ended on 31 December 2015.[94] Although the Draft does recognize some key shortcomings in the work of the institutions so far regarding war

83 The final version of the Action Plan for the negotiation of Chapter 23, Activity 1.4.1.2, available in English at http://www.mpravde.gov.rs/files/Action%20plan%20Ch%2023%20Third%20draft%20-%20final1.pdf accessed on 8 December 2015.
84 Ibid, 1.4.1.3.and 1.4.3.2.
85 Ibid, 1.4.1.1. and 1.4.3.1.
86 Ibid, 1.4.1.7.
87 Ibid, 1.4.4.2.
88 Ibid, 1.4.3.4.
89 Ibid, 1.4.1.6.
90 Ibid, 1.4.4.3. and 1.4.4.4.
91 Ibid, 1.3.9.2.
92 Ibid, 3.7.1.21, 3.7.1.20, 3.7.1.18, 3.7.1.23, 3.7.1.17.
93 *Summary of comments of civil society organizations on the draft Action Plan for Chapter 23*, the Ministry of Justice of the Republic of Serbia, available in Serbian at http://www.mpravde.gov.rs/tekst/8851/treci-nacrt-akcionog-plana-za-poglavlje-23-nakon-okoncanog-konsultativnog-procesa.php, accessed on 21 January 2016.
94 Draft of the National Strategy for prosecution of war crimes for the period from 2016 to 2020, available in English at http://www.mpravde.gov.rs/files/National%20Strategy%20for%20the%20Prosecution%20of%20War%20Crimes.pdf accessed on 14 January 2016.

crimes prosecution and stipulates certain good solutions to overcome them, it yet fails to determine the key measures to reach the primary goal – the more efficient prosecution of war crimes – and thus significantly dilutes its potential.

Among the positive elements of the Draft, one can point out the dedication shown by the authors to strengthening the capacities of all actors involved in the prosecution of war crimes, as well as improving the legal framework and practice of protecting and supporting victims and witnesses. However, numerous parts of the draft are not precise and concrete enough, leaving space for reinterpretation of the obligations of the public authorities, and also of the expected results. Namely, for numerous activities the draft does not stipulate the responsible holder of activities, and the content of those activities is very imprecise. For example, in the part regarding the Office of the War Crimes Prosecutor (OWCP), the following is stated: that its independence will be ensured "by means of ensuring adequate capacities", without specifying the responsible entity and its specific obligations.

Although the whole Draft emphasizes the commitment of the Serbian Government to processing all war crimes committed in the 90s of the last century, it is stated that **the OWCP's capacities and those of other institutions shall be limited by government austerity measures**. There is reason to fear that the strengthening of the OWCP and other institutions and thus the effectiveness of prosecution of war crimes will remain under the direct influence of the executive, that is, the Ministry of Justice, because of the austerity measures.

Moreover, even though the shortcomings in the work and functioning of the Witness Protection Unit have been repeatedly criticized in the report of the European Commission on Serbia's progress in 2013, 2014 and 2015, and a number of specific problems have been identified – gaps in the protection of insider witnesses, ineffective supervision of the work of the unit,[95] lack of formal procedures for complaints of persons in the programme against the unit members, etc., the Draft does not stipulate concrete measures to correct these problems.

The HLC sent detailed comments on the Draft Strategy and recommendations for its improvement to the Ministry of Justice as part of the public debate.[96] In April 2015, the HLC presented a Model Strategy for the prosecution of war crimes committed during and in relation to the armed conflicts in the former Yugoslavia for the period 2015-2025.[97] The Working group for development of the Draft

95 Annual report on progress of Serbia for 2015, p.18, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf accessed on 14 January 2016.

96 The HLC comments on the Draft of National Strategy for processing war crimes for the period from 2016 to 2020, available in English at http://www.hlc-rdc.org/wp-content/uploads/2016/01/HLC_Comments-ff-January_2_2016-RR.pdf accessed on 14 January 2016.

97 HLC, Model Strategy for processing war crimes committed during and regarding the armed conflicts in the former Yugoslavia for the period 2015-2025, available in English at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Model-Strategy-for-the-Prosecution-of-War-Crimes-Committed-during-and-in-relation-to-the-Armed-Conflicts-in-the-Former-Yugoslavia_za-web.pdf accessed on 14 January 2016.

Strategy used the model in its work. Numerous recommendations from the Model were incorporated in the Draft Strategy by the Working group.

12. Related proceedings

i. Lawsuit of Ljubiša Diković against Nataša Kandić and the HLC for compensatory damages[98]

In February 2013, VS Chief of Staff of the Serbian Army Ljubiša Diković filed a claim for non-pecuniary damages against the founder and at the time Director of the HLC Nataša Kandić and the HLC, for libel and violation of honour, on account of the allegations in the Dossier "Ljubiša Diković", published in January 2012. The Dossier provides the public with, inter alia, the facts and evidence on the crimes committed by the Serbian forces in the zone of responsibility of the 37th Motorized Brigade in Kosovo, under the command of Ljubiša Diković.

At the first hearing in May 2015, Nataša Kandić was examined, with the presence of the public and the media.[99] However, at the hearing held on 15 September 2015, where Ljubiša Diković was to be questioned by Nataša Kandić, Judge Gordana Aranđelović decided to exclude the public on the grounds of the courtroom being too small and having no place for journalists, even though the public had attended the questioning of Nataša Kandić during the previous hearing in the very same courtroom. Nataša Kandić, the legal representative of the HLC - Sandra Orlović, and lawyer Vladimir Gajić left the courtroom, stating that the decision was not based on legal grounds, and adding it was a serious breach of the law and the principle of public hearings.

Towards the end of 2015, the legal representative of the HLC, Sandra Orlović, was heard before the court. Before the conclusion of the hearing, on 25 December, the Judge rejected all the evidentiary motions submitted by Nataša Kandić and the HLC. The representative of Nataša Kandić and the HLC requested the exclusion of the acting judge on grounds of bias.

Since the OWCP earlier refused to investigate the allegations of the Dossier "Ljubiša Diković", Diković's responsibility with respect to the allegations from the Dossier has never been investigated in criminal proceedings. Taking into consideration that the credibility of the Dossier and the veracity of its allegations, including the allegations of Diković's role in the crimes described in the Dossier, constitutes a legitimate defence of Nataša Kandić and the HLC as defendants in these proceedings,[100]

98 The transcripts from the proceedings can be found in Serbian on HLC's website on the following link http://www.hlc-rdc.org/?p=30931

99 Ognjen Zorić, "Kandić: I am not changing my allegations on Diković ", *Slobodna Evropa*, 19 May 2015, available in Serbian at http://www.slobodnaevropa.org/content/kandic-ostajem-pri-navodima-iz-dosijea-dikovic/27025301.html accessed on 14 January 2016.

100 ECtHR, case *De Haes and Gijsels v. Belgium* dated 24 February 1997, para. 42, 47.

the civil court has, in essence, assumed the role of a criminal court, which also implies examining the criminal responsibility of Ljubiša Diković, which by no means falls within the jurisdiction of a civil court.

ii. Misdemeanour charge against the Minister of Defence Bratislav Gašić

On 12 June 2015, the HLC filed a misdemeanour charge against the Minister of Defence, Bratislav Gašić, because of the unlawful labelling of the archive of the 37th Yugoslav Army Motorized Brigade (37th VJ MtBr) with the highest level of secrecy of data.

In mid-June 2014, during the research into the Dossier "Rudnica" and the criminal complaint for which the pre-investigation procedure is currently being conducted, the HLC demanded on the basis of the Law on the Free Access to Information of Public Importance that the Republic of Serbia Ministry of Defence (RS MoD) provide documents relating to the activities of the 37th VJ MtBr at the time of the crimes described in the Dossier "Rudnica". The ministry issued a decision dismissing the HLC's request for the provision of documents on the 37th VJ MtBr and informed the HLC that **the entire archive of the 37th VJ MtBr had been declared secret for a period of 30 years** on the basis of a decision rendered by the Minister of Defence.

On the basis of the Law on Free Access to Information of Public Importance, in mid-May the HLC came into possession of the controversial "Decision on the Protection of Archival Material Produced during the Work of the Dissolved Command of the 37th Yugoslav Army Motorized Brigade." The Decision failed to state the reasons for designating the archives with the top secret label, although the Minister, in line with the Data Secrecy Law, was obliged to provide a rationale as to how the interests of the state could have been "irreparably and severely damaged", which he failed to do.[101]

It is obvious that the decision of the Minister (dated 31 July 2014) was rendered immediately after the HLC filed an initial request with the RS MoD in June 2014 demanding access to the information relating to the 37th VJ MtBr, from which one could easily realize that the HLC had been investigating the circumstances of the killings and the transferring of bodies of Kosovo Albanians to the mass grave in Rudnica. The date on which the Minister rendered the secrecy decision, as well as the fact that he declared only the documents which relate to the 37th VJ MtBr secret, point to the fact that the intention of the Minister's decision was to prevent the investigation of war crimes — that is to say, he acted in violation of Article 3 of the Data Secrecy Law, which states that "data marked as classified with a view to concealing crime shall not be considered classified."

The HLC lodged the misdemeanour charge with the First Basic Public Prosecutor's Office and the Ministry of Justice, as the supervisory body, pursuant to the Data Secrecy Law. The Ministry of Justice has never replied, while the prosecution submitted a reply in July 2015, informing the HLC that there

101 Law on Data Secrecy, Article 11, para 4.

were "no grounds for initiating the misdemeanour proceedings". The HLC therefore submitted an objection to the Republic Public Prosecutor's Office. At the time of the publication of this report, however, the HLC has not received a reply.

Therefore, in September 2015 the HLC submitted a request for initiating the misdemeanour proceedings to the Misdemeanours Court. The Misdemeanours Court rejected this request in its judgment of 30 November 2015, on the grounds of expiry of the statute of limitations, against which the HLC filed an appeal. In effect, the Misdemeanours Law stipulates that misdemeanour proceedings cannot be initiated if a period of one year has passed from the day when the misdemeanour was committed,[102] and indeed, the HLC submitted the request for initiating the misdemeanour proceedings after such a deadline. The court, however, entirely neglected the fact that the HLC *reported* the misdemeanour to the responsible authority within the deadline, submitted the objections and urgency letters to the competent authorities, and submitted the request for initiating the misdemeanour proceedings only after ascertaining the lack of interest on the part of the competent authorities in conducting this proceedings, which occurred after the deadline. The court decision is unlawful, as it entirely failed to observe the provisions of the Misdemeanours Law, which explicitly allows for initiation of proceedings after the deadline, in the case of a passive attitude of competent authorities, as found here: "A misdemeanour complaint submitted by the injured party to the competent authority, under the conditions foreseen by this Law, shall be considered to constitute a request for initiating misdemeanour proceedings in such cases as the authorized body fails to initiate the proceedings."[103]

For the misdemeanour committed by the Minister of Defence the statute of limitations definitely expires in July.

iii. Criminal proceedings against a former protected witness

On 27 November 2015 before the Basic Court in Leskovac, the trial commenced in the case against the former protected witness Slobodan Stojanović, a retired member of the MoI, charged with endangering safety. The proceedings were initiated by the criminal complaint against Stojanović, submitted by the War Crimes Prosecutor Vladimir Vukčević and his Deputy Dragoljub Stanković. The motion for indictment alleges that Stojanović on two occasions sent threatening messages to the address of the OWCP via electronic mail.[104]

The first hearing in this case was scheduled for 27 November 2015, but was not held, as Vladimir Vukčević and Dragoljub Stanković had informed the court of their inability to attend.

Slobodan Stojanović, a former member of the Fourth Company of the 37th Detachment of the Serbian Special Police Unit, is a former OWCP protected witness who earlier offered to testify on the crimes

102 Law on Misdemeanours ("Official Gazette of the RS", No. 65/2013) Article 84, para. 1.
103 Ibid, Article 180, para. 5.
104 Motion for indictment of the Basic Public Prosecutor's Office in Leskovac Kt No. 1971/2012 dated 27 May 2014.

against Albanians committed during 1998 in Kosovo by the members of the Company above. His engagement in the protection programme was discontinued after four months, after he repeatedly attempted to draw the attention of the competent authorities to the bad living conditions he was kept in and unprofessional conduct of the Witness Protection Unit.[105] Stojanović and other protected witnesses in this case sent unavailing appeals to, inter alia, the President of the Republic, Minister of Justice and Minister of the Interior, pointing to the problems they were facing during their engagement in the Programme.[106]

After leaving the protection programme, Stojanović publicly accused the prosecutors of protecting the perpetrators of the crime and stated that the policemen who were appointed to be in charge of protected witnesses' safety were the ones who had committed the crimes.[107]

This event is a bizarre consequence of the problems existing over many years in the system for the protection of witnesses – especially insiders (former army and police members) - in war crimes cases in Serbia, and the lack of institutional readiness to provide the appropriate protection to these witnesses. For years, the competent institutions, in particular the MoI and Ministry of Justice, have been ignoring the grave criticism of the witness protection system in war crimes cases, on the part of relevant international and domestic actors.[108] In addition to this criticism, the public could also hear the testimonies of a number of protected witnesses - former army and police members, including Slobodan Stojanović, on maltreatment and intimidation by the Protection Unit members.[109] One of the protected witnesses was granted asylum in a third country, on the ground of threats he was exposed to by, among others, the Protection Unit's members.[110]

The lack of credibility of the witness protection programme is best demonstrated by the fact that in the last five years, not a single former army or police member has entered the protection programme, even though the participation of insider witnesses is crucial in war crimes cases. Such events further

105 Humanitarian Law Center, Report on irregularities in the prosecution of war crimes in the Republic of Serbia, Belgrade, September 2011, p.57.

106 Ibid, p.69.

107 Branka Mihajlović and Iva Martinović, "Former protected witness accuses", *Radio Slobodna Evropa,* 12 November 2013, available in Serbian at http://www.slobodnaevropa.org/content/bivsi-zasticeni-svedok-optuzuje/25166118.html accessed on 8 December 2015.

108 E.g. see Annual report on progress of Serbia for 2015, p.18, available in English at http://ec.europa.eu/enlargement/pdf/key_documents/2015/20151110_report_serbia.pdf accessed on 14 January 2016; HLC, Analysis of the prosecution of war crimes in Serbia in the period from 2004 to 2013, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf

109 E.g. see Branka Trivić, "Witnesses are deterred by the unit in charge of their protection", *Slobodna Evropa,* 27 December 2011, available in Serbian at http://www.slobodnaevropa.org/content/svedoke_zastrasuje_jedinica_za_njihovu_zastitu/24435346.html accessed on 14 January 2016; Humanitarian Law Center, The report on irregularities in the prosecution of war crimes in the Republic of Serbia, Belgrade, September 2011, p.57; Transcript from the trial in *Qyshk/Ćuška* case, 25 January 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf, accessed on 14 January 2016.

110 Transcript from the main hearing of 25 January 2012 in *Qyshk/Ćuška* case, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf, accessed on 13 January 2016.

stigmatize the few witnesses who have exhibited the courage to testify on the crimes committed by their colleagues, and dissuade potential new witnesses, owing to their mistrust of the system.

iv. Case before the European Court for the OWCP's ineffectiveness

On 24 December 2014, the HLC filed an application with the European Court of Human Rights against the Republic of Serbia, for violating Articles 2, 6 and 13 of the European Convention - that is, for failing on the part of the OWCP to conduct an effective investigation into cases of deprivation of life and torture, inhuman and degrading treatment.

In September 2011, the HLC submitted a criminal complaint to the OWCP relating to the crimes committed in the camps of Šljivovica and Mitrovo Polje in the period from late July 1995 until 10 April 1996. Along with the criminal complaint, the HLC also submitted to the OWCP around 70 statements by former camp detainees who had endured torture and inhuman treatment, and suggested to the OWCP that these be heard as witnesses in the case.

On 8 March 2013, the OWCP rendered a decision stating that "there is no case for criminal prosecution of the accused, as it emerges from the submission itself and all subsequent information and actions taken, that their acts contained none of the elements of the criminal offence of a war crime against prisoners of war, nor of any other crime under the jurisdiction of this Prosecutor's Office".[111]

The HLC subsequently ascertained that the OWCP had failed to contact any of the proposed witnesses, thus indicating that in this case the OWCP failed to conduct a comprehensive, independent and effective investigation, as it is bound to do under the European Convention, according to which the states parties are obliged to examine all events in which individuals have been under the exclusive control of the state authorities and to provide a reasonable explanation for any injuries suffered by people under the control of these authorities.

Initially, on 4 April 2013, the HLC filed a constitutional complaint to the Serbian Constitutional Court on behalf of 78 former camp detainees. On 27 June 2014, the Constitutional Court rendered a judgment rejecting the constitutional complaint, explaining that the OWCP decision did not constitute an individual act which decided on the rights and obligations of the applicant of the constitutional complaint, therefore, the requirements for conducting the proceedings before the Constitutional Court had not been fulfilled.[112]

111 Announcement of the Office of War Crimes Prosecutor of the Republic of Serbia KTR No. 134/11 dated 1 March 2013.

112 Judgment of Constitutional Court of the RS Už No. 2603/2013 dated 26 June 2014.

As there were no legal instruments left in the domestic judiciary, the HLC filed an application with the European Court of Human Rights.[113] The application filed by the HLC was preliminarily accepted by the European Court and communicated to the Republic of Serbia with the request for a reply. Serbia replied to the application in December 2015.

13. Unlawful practice of anonymization of judgments in war crimes cases

Previously, the Higher Court in Belgrade had refused to deliver non-final judgments to the HLC, saying that by doing so, those trial proceedings could be seriously disrupted.[114] The Commissioner for Information of Public Importance and Personal Data Protection, by a decision of October 2013, declared such conduct and reasoning of the court unlawful and ordered the court to submit the non-final judgments to the HLC.[115] Subsequently, the court began to deliver the judgments to the HLC, but they were anonymized - that is, certain data were redacted.

Certain judgments delivered to the HLC were redacted to such an extent that by reading them one could not determine what event it was, since the names of the defendants, victims and witnesses were anonymized. The court reasoned by stating that it was acting in accordance with the Law on Protection of Personal Data. The decision of the Commissioner for Information of Public Importance and Personal Data Protection of 17 March 2014 declared the practice of over-redaction of judgments exercised by the Higher Court in Belgrade to be unlawful.[116] The Commissioner found that such anonymization represented excessive and disproportionate data-processing. The decision of the Commissioner stated that the names of the accused were not protected personal data, but only their specific personal data, such as addresses, personal ID numbers and dates of birth.

Despite the binding decision of the Commissioner, the Higher Court has not acted accordingly. For example, the court anonymized the names of both witnesses and the victims in the delivered first instance judgment in the *Čelebići* case, which it delivered to the HLC.[117]

The problem of judgments anonymization could be solved if the Higher Court developed Rules on

113 The European Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 in Article 3 provides for the right to life, in Article 6 the right to a fair trial, and in Article 13 the right to an effective remedy.

114 More on the issue of anonymization in the Humanitarian Law Center (Belgrade, HLC, 2014) "Report on War Crimes Trials in Serbia in 2013" p.8, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 26 May 2015.

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

116 Decision of the Commissioner for Information of Public Importance and Personal Data Protection No. 07-00-00337/2014-03 dated 17 March 2014.

117 Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Čelebići* case, No. K.Po2 8/13 dated 22 November 2013, p.17-19, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/celebic_prvostepena_presuda.pdf, accessed on 23 April 2015.

Minimum Anonymization of Court Decisions. The Appellate Court in Belgrade has such Rules, which stipulate that the data on defendants in judgments for war crimes are not to be anonymized.[118]

14. Proceedings before courts of general jurisdiction below the standard of a fair trial

The proceedings in two cases (*Kushnin/Kušnin* and *Miloš Lukić*) were conducted before the courts of general jurisdiction in the reporting period. The report has also included the *Rahovec/Orahovac* case, which was finally adjudicated in 2013, because the final judgment of the court became available to the public only in 2014.

The basic feature of these cases is the unreasonably long duration of the proceedings. The trial in the *Rahovec/Orahovac* case lasted for more than 12 years,[119] the trial in the *Miloš Lukić* case over 15,[120] while the proceedings in the *Kushnin/Kušnin* case, which started on 16 September 2002, has not been finished yet.

The long duration of the proceedings is the result of the lack of professionalism of the acting prosecutors and judges, the low level of expertise in the field of international humanitarian law and also the tolerance of the abuse of the procedural rights of the defense in order to delay the proceedings. Over the years, despite the data on unprofessionally conducted proceedings in these cases, the Republic Prosecutor's Office (RPO) has denied requests to transfer these proceedings to the OWCP's jurisdiction. Namely, the RPO, as the higher prosecution, was entitled to authorize the OWCP, as the lower prosecution, to act in war crimes cases in which Higher Public Prosecutor's Offices were acting.[121] Because of the RPO's passivity, irreparable damage was caused to numerous war crimes cases because the cases were completed even though they did not in any way meet the most elementary standards of a fair trial.

Apart from the long duration of the proceedings, the final cases of *Rahovec/Orahovac* and *Miloš Lukić* were characterized by the inappropriately low sentences imposed – three-year imprisonment and five-year imprisonment, respectively.

118 Rules on minimum anonymisation of court decisions, available in Serbian at http://www.bg.ap.sud.rs/images/pravilnik2010.pdf, accessed on 14 May 2015, Rulebook amending the minimum anonymisation of court decisions, available in Serbian at http://www.bg.ap.sud.rs/images/pravilnik_o_izmenama_pravilnika.pdf, accessed on 14 May 2015.

119 The main hearing started on 20 June 2000 and finally ended on 18 December 2013.

120 The main hearing started on 25 June 1999 and finally ended on 9 October 2014.

121 The Law on Public Prosecutor's Office, *Official Gazette of the Republic of Serbia* No. 116/2008, 104/2009, 101/2010, 78/2011, 38/2012, - decision of the Constitutional Court, 121/2012, and 101/2013, Article 20.

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

I. Case *Bosanski Petrovac – Gaj*[122]

CASE OVERVIEW	
Case current phase: first instance proceedings	
Date of indictment: 10 October 2014	
Trial commencement date: 15 June 2015	
Acting Prosecutor: Snežana Stanojković	
Defendant: Milan Dragišić	
Criminal act: war crime against a civilian population, CC SRY article 142	
Acting Chamber	Judge Vladimir Duruz (Presiding Judge) Judge Vera Vukotić Judge Beraha Nikićević
Number of defendants: 1 **Rank of the defendant:** low rank – no rank **Number of victims:** 5 **Number of questioned witnesses:** 7	**Number of trial days in the reporting period:** 5 **Number of questioned witnesses in the reporting period:** 7
Key events in the reporting period: Main hearing	

122 Case *Bosanski Petrovac – Gaj*, reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac_gaj.html

The course of proceedings

Proceedings overview, year 2014 – 2015

Factual description from the indictment

The defendant Milan Dragišić is charged with having killed three and wounded two Bosniak civilians on 20 September 1992 in Bosanski Petrovac, settlement of Gaj, while serving as a member of the VRS. In fact, after the body of his brother Dragan Dragišić, who died on the battlefield, had been brought back, he armed himself with an automatic rifle and went out into the street in his uniform, and started cursing "Turkish and Muslim mothers" in front of his Bosniak neighbours who were in the street, after which he shot them.[123]

Defense of the defendant

Stating his defense, the defendant said he did not feel guilty. He said that while the body of his brother was being brought in, he took an automatic rifle from the trunk of the car, with a round of bullets in the chamber of the rifle. Then he heard a burst of fire, but he cannot remember what happened. He was "out of his mind", and "everything was black" before his eyes, because he had discovered that the body of his deceased brother had been completely massacred. Therefore, he does not know if he killed his neighbours.[124]

Witnesses in proceedings

Muhamed Kavaz described how the defendant had killed his father Asim and wounded him on that day, when, being close neighbours, they went to see what had happened, after they heard crying and wailing from the house.[125] The witness Branko Srdić confirmed that the defendant killed Asim Kavaz – an event to which he was an eyewitness.[126]

Witnesses Mirko Velaga and Edin Bašić were not eyewitnesses to the event, but their indirect knowledge confirmed the allegations of the injured party Muhamed Kavaz about the murder of his father, and that the defendant, after killing Asim Kavaz, was moving around the settlement of Gaj shooting Bosniak civilians.[127]

123 The OWCP indictment dated 10 October 2014 KTO 7/14, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_Milan_Dragisic_10_10_2014.pdf, accessed on 16 October 2015.

124 Report from trial dated 15 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Izvestaj_sa_sudjenja_u_predmetu_Bosanski_Petrovac_Gaj_15_06_2015.pdf, accessed on 9 November 2015.

125 Report from trial dated 14 July 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_14.07.2015.pdf, accessed on 9 November 2015.

126 Report from trial dated 18 November 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_18.11.2015.pdf, accessed on 24 November 2015.

127 Report from trial dated 8 October 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Bosanski_Petrovac-Gaj_Izvestaj_sa_sudjenja_08.10.2015.pdf, accessed on 9 November 2015.

The presentation of evidence will be continued with an examination of the witnesses.

HLC findings

i. Regional cooperation

These proceedings are a good example of the cooperation between Serbia and Bosnia and Herzegovina in prosecuting war crimes, which intensified after the OWCP and the Prosecutor's Office of B&H signed in 2013 the Protocol on Cooperation in the Prosecution of Perpetrators of War Crimes, Crimes against Humanity and Genocide. Namely, this case was assigned to the OWCP by Prosecutor's Office of B&H, because the defendant, who is a citizen of the Republic of Serbia residing in Serbia, was not available for the B&H authorities (on the effects of regional cooperation see general finding 2).

ii. Armed conflict qualification

In this indictment, the OWCP qualified the armed conflict in B&H as a "non-international armed conflict", without an explanation for this qualification, stating only that at the time of the offense there was a decision in force by the Presidency of Bosnia and Herzegovina which proclaimed a state of war, and that the defendant violated the provisions of the Convention (IV) regarding the Protection of Civilian Persons in Time of War and the provisions of the Additional Protocol (II) to this Convention (see general finding 7).

II. Case *Sanski Most – Kijevo*[128]

CASE OVERVIEW
Case current phase: first instance proceedings
Date of indictment: 9 April 2014
Trial commencement date: 24 April 2015
Acting Prosecutor: Snežana Stanojković
Defendant: Mitar Čanković
Criminal act: war crime against a civilian population, CC SRY Article 142

Acting Chamber	Judge Mirjana Ilić (presiding Judge) Judge Bojan Mišić Judge Dragan Mirković

Number of defendants: 1	
Rank of the defendant: low rank – no rank	**Number of trial days in the reporting period:** 3
Number of victims: 1	**Number of witnesses questioned in the reporting period:** 5
Number of witnesses questioned : 5	

Key events in the reporting period:
Main hearing

128 Case *Sanski Most - Kijevo*, reports from trial and case documents available in Serbian at: http://www.hlc-rdc.org/Transkripti/Sanaski_Most_Kijevo.html

The course of proceedings

Proceedings overview, year 2014-2015

Factual description from the indictment

The defendant Mitar Čanković is charged with the following crime: As a member of the Military of the Republic of Srpska (VRS), he is charged with having sequestered Ismet Bešić from a group of arrested civilians, taken his wallet and personal ID, and then killed him by shooting at least three shots at him in the head and chest on 19 September 1995, during the arrest of civilians in the settlement of Kijevo (the Municipality of Sanski Most, B&H). [129]

Defense of the defendant

The defendant denied committing the criminal offence he is charged with, but did not deny the fact that at the time he was a member of the Military of the Republic of Srpska, nor the fact that he knew the person killed, since they were both from the same place.

Witnesses in proceedings

Witness Izet Bešić, the son of killed Ismet Bešić, was 12 years old at the time of this critical event. He witnessed that soldiers had come to the village, among them the defendant too, whom he already knew. He was wearing a masked uniform and had an automated rifle. The soldiers took a group of men; Izet's father was among them. Izet heard a shot, turned around, and then heard two more shots. He saw his father fall face to the ground and saw the defendant holding the rifle pointed at his father and standing in his immediate vicinity.[130]

A medical expert, who conducted the autopsy of the victim's body, stated that the victim had received head and chest injuries. There were at least three automated rifle bullets in the victim's body.[131]

Witnesses Predrag Marić and Željko Burić, VRS members, confirmed the defendant's testimony, stating that, at the critical period, he was not present at the place where the civillians had been killed. They said he was on Mt Grmeč with the unit he belonged to. The witnesses' testimony was confirmed by Dragan Žujić, also a VRS member.

Evidentiary proceeding will be continued with examination of the witnesses.

129 Indictment OWCP No. KTO 4/14 dated 9 April 2014, available in Serbian at: http://www.hlc-rdc.org/wp-content/uploads/2015/03/Mitar_Cankovic_optuznica.pdf accessed on 22 December 2015.

130 Report from the trial on 9 September 2015, available in Serbian at: http://www.hlc-rdc.org/wp-content/uploads/2015/10/Izvestaj_sa_sudjenja_Sanski_Most-Kijevo_09.09.2015.pdf, accessed on 10 November 2015.

131 Ibid.

HLC findings

i. Regional cooperation

This case is another example of good cooperation between the judicial authorities of the Republic of Serbia and those of Bosnia and Herzegovina in processing war crimes. The case was transferred to the Serbian national judiciary by the Cantonal Court in Bihać, after the indictment against Mitar Čanković had been confirmed, since he was not available to the state bodies of B&H owing to the fact that he has residence in Serbia.

ii. Office of the War Crimes Prosecutor (OWCP) faulty indictment

Although this is a transferred case, which requires minimum efforts from the OWCP regarding the analysis of the evidence submitted and drawing up an indictment, the OWCP indictment does not generally meet professional standards, since the largest number of factual statements do not contain an explanation. As to the existence and qualification of the armed conflict, it only mentions that, at the time of the offence, the B&H Presidency's declaration of a state of war was in effect. and that there was a non-international armed conflict between the Army of B&H and VRS, which was "a well-known fact". However, such an explanation is insufficient and imprecise, since the OWCP has taken the opposite position in some other war crimes cases - it has held the position that there had been an international conflict in B&H. On the one hand, one can say that there was an armed conflict in B&H and that it is common knowledge. However, this cannot be said for its character.

As to the indictment's rationale, it is extremely poor and does not contain basic explanations. The indictment only states the following: the defendant denies committing the offence; from the witnesses' testimonies - Izet and Fatima Bešić - "one can undoubtedly conclude that the defendant had committed the offence" he is charged with; certain "appropriate court-medical documents" have been collected; the conduct of the defendant was in violation of international law. Given the fact that the indictment does not state at all what the witnesses specifically said or what the court-medical documents implied, it remains unclear how the OWCP concluded that the defendant had committed the offence. In every indictment, especially those for war crimes that are the most severe criminal offences, the explanations would have to be far more thorough and convincing, as with certain indictments from the OWCP.[132]

132 OWCP indictment in *Sotin* case No. KTO 9/13 dated 31 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Optuznica_Sotin.pdf, accessed on 22 December 2015; OWCP indictment in *Zvornik II* case No. KTRZ 9/06 dated 3 August 2008, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Zvornik-II-optuznica-od-03.08.2008.pdf, accessed on 22 December 2015; OWCP indictment in *Banski Kovačevac* case No. KTRZ 13/07 dated 16 April 2008, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Banski-Kova%C4%8Devac-optu%C5%BEnica-16.04.2008..pdf, accessed on 22 December 2015.

III. Case *Bihać II*[133]

CASE OVERVIEW
Case current phase: first instance proceedings
Date of indictment: 9 October 2014
Trial commencement date: 26 March 2015
Acting Prosecutor: Snežana Stanojković
Defendant: Svetko Tadić
Criminal act: war crime against a civilian population, CC SRY article 142

Acting Chamber	Judge Mirjana Ilić (Presiding Judge) Judge Dragan Mirković Judge Bojan Mišić

Number of defendants: 1	
Rank of the defendant: low rank – no rank	**Number of trial days in the reporting period:** 5
Number of victims: 25	**Number of witnesses questioned in the reporting period:** 13
Number of witnesses questioned: 13	

Key events in the reporting period:
Main hearing

133 Case *Bihać II*, reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/Bihac_II.html The War Crimes Prosecution took over the prosecution in this case from the Cantonal Court in Bihac on the basis of the Law on Mutual Legal Assistance in Criminal Matters and the Agreement between the RS and Bosnia and Herzegovina on legal assistance in civil and criminal matters.

The course of proceedings

Proceedings overview, year 2014 – 2015

Factual description from the indictment

The defendant Svetko Tadić is charged with having killed Safija Mešić, Ibrahim Mešić, Hava Mešić and Mina Hrnjic in their house on 23 September 1992. in the village of Mešići (the Municipality of Bihać, B&H), as a member of the RS Army, together with other army members and members of the RS Police.[134] The defendant is also charged with having killed Rašid Šahinović in the VJrd of his house on the same day, when returning from the direction of Ibrahim Mešić's house.

The defendant is charged with having gone to the village of Duljci on the same day in the afternoon, together with other members of the VRS,[135] where some Bosniak civilians were picking plums. The defendants and the others masked themselves by putting caps and socks over their heads. They fired several bursts at the civilians and killed several of them. Having seen that some of the civilians fled to the nearby barn, they threw a grenade in the barn. A total of 18 civilians was killed in the plum orchard and the barn. Defendant Tadić and the other perpetrators then burned the bodies of the murdered civilians.[136]

Defense of the defendant

Stating his defense, the defendant denied committing the crime he is charged with, claiming he was not in Bihać at the time of the crime. He said he went to Knin immediately after the funeral. He also said that the case against him was "a show trial", since his alleged accomplices, who are charged at the Cantonal Court in B&Hac, have accused him falsely in order to minimize their guilt.

Witnesses in proceedings

A total of 13 witnesses were questioned, out of whom eight are the injured parties whose family members were killed in the critical events. Most of them did not have any direct knowledge about the events. The presentation of evidence in this case will be continued with the questioning of the witnesses.

134 Goran Mihajlović was convicted for this criminal act at the Cantonal Court in Bihać.

135 **Zoran Tadić, Jovica Tadić, Zoran Berga and Željko Babić,** on the basis of a Plea Agreement, are/were sentenced for the same criminal act at the Cantonal Court in Bihać. For this criminal act **Đuro Tadić** was sentenced to 13 years in prison by judgment of the Appellate Court in Belgrade in the *Bihać* case, No. Kž1 Po2 4/14 dated 12 December 2014. During the processing of Đuro Tadić, the defendant Svetko Tadić was not available to the state authorities of the Republic of Serbia. **Slobodan and Gojko Đurić**, father and son, were also part of the group. They were killed a few days after these events.

136 The OWCP indictment dated 9 October 2014 KTO 2/14, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Bihac_II_-optuznica_Svetko_Tadic.pdf, accessed on 23 October 2015.

HLC findings

i. Regional cooperation

These proceedings are a continuation of the trial for the war crimes committed in September 1992 in the Bihać area, since the defendant Đuro Tadić has already been convicted by the Appellate Court judgment of 12 December 2014 for the crime in Duljci, for which the defendant Svetko Tadić is also charged.[137] At the time of the initiation of the proceedings against Đuro Tadić, the defendant was not available to the state authorities of the Republic of Serbia.

The trial chamber sitting in this case was the same one which sat in the case against the defendant Đuro Tadić, so it is well familiarized with both the critical events in Duljci and the wider context of events, which would in general make it easier to determine the facts necessary for reaching a judgment in this case.

The OWCP did not have many difficulties in collecting evidence here, since the case was transferred from the Cantonal Court in Bihać, which had already identified the defendant and his brother Đuro Tadić as co-perpetrators. The trial against Đuro Tadić was conducted and completed before the domestic judiciary. During this trial, two persons previously convicted before the Court in Bihać identified the defendant as one of the co-perpetrators in this crime.

137 The War Crimes Department of the Appellate Court judgment in Belgrade in the *Bihać* case, No. Kž1 Po2 4/14 dated 12 December 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/02/B&Hac_Drugostepena_presuda_12_12_2014.pdf, accessed on 23 October 2015.

IV. Case *Ternje/Trnje*[138]

CASE OVERVIEW	
Case current phase: first instance proceedings	
Date of indictment: 4 November 2013	
Trial commencement date: 24 February 2015	
Acting Prosecutor: Mioljub Vitorovic	
Defendants: Pavle Gavrilovic and Rajko Kozlina	
Criminal act: war crime against a civilian population, CC FRY article142	
Acting Chamber	Judge Mirjana Ilic (Presiding judge) Judge Dragan Mirkovic Judge Bojan Misic
Number of defendants: 2	
Rank of the defendants: middle and low rank	**Number of trial days in the reporting period:** 5
Number of victims: 27	**Number of questioned witnesses in the reporting period:** 7
Number of questioned witnesses: 7	
Key events in the reporting period: Main hearing	

138 Case *Ternje/Trnje*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/Ternje/Trnje.html

The course of proceedings

Proceedings overview until 2014

Factual description from the indictment

The defendants are charged with having participated, as members of the 549th Motorized Brigade of the Yugoslav Army, in killing at least 27 Albanian civilians, 12 of whom were women and four of whom children, on 25 March in the village of Trnje (the municipality of Suva Reka, Kosovo).[139] Gavrilovic, as Commander of the Logistics Battalion of the 549thMtBr, immediately before the attack on the village assembled his subordinate officers, including the defendant Kozlina, and issued an order, pointing his hand in the direction of the village and saying,"No one should be left alive". Kozlina is charged, as a Sergeant and commander of a combat group, and acting upon Gavrilovic's orders, with killing Voci Maliqi by firing a burst from the automatic rifle into his back, and turning afterwards to the others saying,"This is how you should do it".Kozlina is charged with killing another 16 civilians.

Proceedings overview, year 2014 – 2015

Defence of the defendants

Both defendants denied committing the crime they are charged with. Gavrilovic stated that his battalion had participated in a task of a wider scale, which included 'the blockade of the territory in the area of the village of Ternje/Trnje, but had never actually entered the village, or issued such an order. An identical defence was also presented by Kozlina.[140]

Witnesses in proceedings

In the course of the evidentiary proceedings, seven witnesses/victims were questioned; and they described the attack on their village and the killings of their family members and village inhabitants.[141]All the witnesses described the entrance of the army into the village, yet they were unable to recognize the defendants as the persons who had been present on the critical day in the

139 OWCP indictment No. KTO 7/2013 dated, 4 November 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/Optuznica_Ternje/Trnje.pdf, accessed on 2 December 2015.

140 Trial report, dated 24 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/02/1_Ternje/Trnje_-Izvestaj_sa_sudjenja_24_02_2015.pdf, accessed on 2 December 2015.

141 Transcript from the main hearing, dated 27 October 2015, p.6, available in Serbian at thttp://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdfaccessed on 2 December 2015, Transcript from the main hearing dated 28 October 2015, p.20, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/14-28.10.2015.pdf, accessed on 2 December 2015.

village of Ternje/Trnje.[142] Several witnesses stated that police forces had also been present in the village on the day of the attack, and that some policemen had participated in killing the civilians. Although several witnesses identified the policeman who had participated in the crime, he was not included in the indictment for this case.[143]

Later in the proceedings, the victims will testify, as well as former VJ members – insiders, on the role of the defendants in the attack on Ternje/Trnje village.

HLC findings

i. Passive attitude of OWCP and inefficient trial

The indictment in this case was raised **11 years after the information on the participation of the two defendants in the Ternje/Trnje crime became available to the public**, while only three trial days were held during the main hearing, which lasted for two years.[144]The indictment in this case was filed only in late 2013; whilst the responsibility of the defendants had been testified to as early as in 2002 by the protected witness K-41[145]and protected witness K-32[146] before the ICTY in the case against Slobodan Milošević, and seven years ago, in 2008, the HLC filed a criminal complaint for the crime in Trnje.[147] Futhermore, to date six trial days were adjourned on account of the illness of the judge, or the failure of the victims to appear before the court because the court had sent them the subpoenas too late, or the alleged health problems of the accused.[148]

ii. Unprepared case by the OWCP

On the basis of the course of the proceedings so far, it is evident that the OWCP is unprepared for the trials and that the indictment displays some major shortcomings. Although the acting prosecutor was changed after the filing of the indictment, the newly appointed Prosecutor had sufficient time to prepare for managing the case. During the main hearing, however, the Prosecutor almost failed to ask a single question to the prosecution witness, but rather, left his role to the court.

142 Transcript from the main hearing, dated 27 October 2015, p.6, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdf accessed on 2 December 2015, Transcript from main hearing dated 28 October 2015, p.20, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/14-28.10.2015.pdf, accessed on 2 December 2015.

143 Transcript from the main hearing, dated 27 October 2015, p.6, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/13-27.10.2015.pdfaccessed on2 December 2015.

144 Trials held on 24 February and 27 and 28 October 2015.

145 Transcript of the testimony of protected witness K-41, available in English at http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020906ED.htm, accessed on 2 December 2015.

146 Transcript of the testimony of protected witness K-32, available in English at http://www.icty.org/x/cases/slobodan_milosevic/trans/en/020717ED.htm, accessed on 2 December 2015.

147 The HLC press release on filing the criminal complaint in May 2008, available in English at http://www.hlc-rdc.org/?p=12923&lang=de, accessed on 2 December 2015.

148 The HLC press release, 'Trial for the Crime in Ternje/Trnje – Justice Delayed is Justice Denied', 5 October 2015, available in English at http://www.hlc-rdc.org/?p=30330&lang=de

Futhermore, the indictment failed to include all the victims of the crime covered by the indictment, while, at the same time, listing a person who is still alive as the victim. Also, despite the fact that several witnesses testified that the police had also participated in the crime, the indictment failed to include these persons. The Presiding Judge rightly criticized the OWCP for these failures, as well as the pre-trial chamber for confirming the indictment, and required the OWCP to amend the indictment and submit the supporting evidence.[149]

iii. The defendants' status in the Serbian Army

At the time when the indictment was raised, both defendants were active duty soldiers in the Serbian Armed Forces (VS), and it is almost certain that they are still engaged in the military service of the VS, despite being involved in proceedings where they are charged with committing a war crime against civilians.

The HLC sent a request to the VS Chief of General Staff, Ljubiša Diković, demanding that these individuals be suspended from military service during the course of the proceedings in accordance with the Law on the Serbian Armed Forces. As a matter of fact, the Law foresees that a professional military person may be removed from duty if criminal charges have been brought against him/her and the crime "is of such a nature that it would be harmful to the interests of the service that such a person should remain on duty."[150] The HLC has not received any answer to this request to date.

The HLC therefore requested from the Ministry of Defence information of public importance on whether the defendants were still active members of VS. The Ministry rejected the request, stating that the information requested is protected as personal information and information "relevant for the defence of the state." Deciding on the appeal made by the HLC, the Commissioner for Information of Public Importance dismissed the arguments advanced by the Ministry and ordered it to provide the HLC with the information requested within five days. The deadline set for the enforcement of the Commissioner's decision expired nearly 18 months ago, and the Ministry still has not delivered the information requested. The Commissioner finally rendered a conclusion on approving enforcement on 22 September 2015, in which the Commissioner ordered the Ministry to deliver the information requested to the HLC within two days under threat of paying a fine.[151] The HLC has not yet received a response from the Ministry.

Keeping war crimes indictees in military service during the course of proceedings sends an exceptionally negative message to the institutions tasked with prosecuting war crimes and degrades the trials which

149 Trial report dated 28 October 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/Ternje/Trnje-glavni-pretres-28.10.2015.pdf

150 Law on the Serbian Armed Forces, *Official Gazette of the Republic of Serbia,* No. 116/2007, 88/2007, 101/2010, - oth. law, 10/2015 and 88/2015 – CC decision, Article 77.

151 Conclusion on approving enforcement by the Commissioner for Information of Public Importance and Personal Data Protection No. 07-00-02047/2014-03, dated 22 September 2015.

aim to, inter alia, restore trust in the institutions of the Republic of Serbia. Providing the war crimes indictees with a form of state shelter also breeds mistrust in the victims from other ethnic communities, and affects their willingness to take part in the trials before the Higher Court in Belgrade.

iv. Discrimination of Kosovo lawyers

In the course of the investigation of this case, the victims were represented by the Kosovo lawyers Teki Bokshi and Admir Salihu, and Nikola Čukanović, a Belgrade-based lawyer. During the preparatory proceedings, the Presiding Judge challenged the right of Kosovo lawyers to represent the victims in these proceedings, stating that they had not been listed in the Directory of the Bar Association of Serbia, and pursuant to the Legal Profession Act, **they do not have lawyer status in Serbia, and therefore may not represent the parties**. The judge filed a request with the Bar Association of Serbia asking for the opinion in this matter, and until the reception of the response, the lawyers were prohibited from representing the victims. The Bar Association failed to respond to this request until the end of 2015.

Such a decision of the Presiding Judge deprived the victims of the right to be represented in the proceedings by the lawyers they had selected themselves, whom they trust and with whom they are able to communicate in their mother tongue. Earlier, the representation of victims by Kosovo lawyers before the War Crimes Department was not disputed, and this **issue was addressed by a proper interpretation of positive legislation, complying with the principle of reciprocity and in the interest of the victims** [see Case *Qyshk/Ćuška*].

V. Case *Gradiška*[152]

CASE OVERVIEW
Case current phase: first instance proceedings
Date of indictment: 8 April 2014
Trial commencement date: 6 March 2015
Acting Prosecutor: Snežana Stanojković
Defendant: Goran Šinik
Criminal act: war crime against a civilian population, CC SRY Article 142

Acting Chamber	JudgeVladimir Duruz (Presiding Judge) JudgeVera Vukotić JudgeVinka Beraha Nikićević

Number of defendants: 1	
Rank of the defendant: low rank – no rank	**Number of trial days in the reporting period:** 5
Number of victims: 1	**Number of witnesses questioned in the reporting period:** 3
Number of witnesses questioned: 2	

Key events in the reporting period:
Main hearing

152 Case *Gradiška,* reports from trial and case documents available in Serbian at: http://www.hlc-rdc.org/Transkripti/gradiska.html

The course of proceedings

Proceedings overview, year 2014 – 2015

Factual description from the indictment

The defendant Goran Šinik was accused of having killed a Croatian civilian, Marijan Vištica, on 2 September 1992 in the village called Bok Jankovac (the Municipality of Gradiška, B&H), near the city landfill, as a member of the VRS. The defendant took Marijan Vištica out of a bus heading to Croatia in the late afternoon in Gradiška, and forced him into a car parked nearby. Nebojša Prčić was the driver and Predrag Sladojević was sitting next to him. After that, they drove to Bok Jankovac and stopped near the city landfill on the Sava River bank. The defendant and the victim Vištica left the car, and Prčić and Sladojević drove back to Gradiška.[153]

Defense of the defendant

The defendant Goran Šinik denied committing the crime he is charged with, stating he was not in Gradiška that day. He said he had been in a different place together with the military unit he belonged to. The defendant said he did not know the victim.[154]

Witnesses in proceedings

The injured party, Anica Vištica, said that she wanted to leave Gradiška together with her husband and daughters and go to Croatia on that critical day. When reaching the bus they planned to take, she noticed the defendant with two other persons in uniforms standing very near the bus, "like predators."[155] She did recognize the defendant, since he used to come to their flat and threaten them. After they had entered the bus, somebody asked her husband to step outside again. Anica has not seen her husband since that moment. She did not see the defendant enter the bus on that occasion.

Prosecution wintess Nebojša Prčić confirmed having driven the defendant Goran Šinik and a person, whom he later found out to be the deceased Vištica, to a brickVJrd a kilometer and a half from Gradiška. He then immediately returned to Gradiška with Sladojević.[156] Prosecution witness Nikola Kolar confirmed that the defendant came to the bus, in which civilians were planning to leave Gradiška, and asked the deceased Vištica to step out from the bus. The two of them entered the car

153 Indictment of the OWCP No. KTO 3/13, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/Optuznica_08_04_2014.pdf , accessed on 30 March 2015.

154 Izveštaj sa suđenja od 18 juna 2015. godine, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Gradiska_Izvestaj_sa_sudjenja_18_06_2015.pdf, accessed on 7 October 2015.

155 Report from trial dated 13 July 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Gradiska-Izvestaj_sa_sudjenja_13.07.2015.pdf, accessed on 7 October 2015.

156 Report from trial dated 25 September 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Gradiska-Izvestaj_sa_sudjenja_25.09.2015.pdf, access in Serbian ed on 8 November 2015.

where Nebojša Prčić and Predrag Sladojević were sitting and "drove somewhere".

The trial will be continued with questioning of the witnesses.

HLC findings

i. Inadequate factual description

The OWCP did not provide an adequate factual description in the indictment, which is its key element.[157] Namely, the exact time of committing the act, the way it was executed, the causal link between the defendant's actions and the victim's death, cannot be concluded from the factual description of the act the defendant is charged with, nor from the indictment's explanation, since the OWCP did not provide convincing evidence. The only definite conclusions arising from the indictment's rationale are that the victim was last seen with the defendant on 2 September 1992 in Bok Jankovac near the city landfill and that the victim was declared dead in 1999.

Only the witness R.R. states he found the body of a man on the Sava River bank, together with witnesses M.N., R.S., R. Dj. and B.B., adding that he recognized the deceased Vištica. However, his statement does not have any other important details - e.g. the indictment does not say whether the witness saw any details indicating that the death had been a violent one or not. This witness says that M.N. took a canister before approaching the corpse, adding he saw smoke at one point, so he thought that M.N. and R.S. had set fire to the corpse. However, he did not see the actual act of setting fire.

On the other hand, witness M.N. says he does not know anything about the corpse, and witness B.B. says he remembers nothing; while witness R.Dj. confirms having seen a male corpse one day, adding the corpse was approximately 30 metres away from him, while he was together with R.R., M.N., R.S. and B.B.

The evidence presented in the indictment does not prove in a convincing manner that the defendant killed the victim Vištica. Also, apart from R.R.'s testimony of having recognized the victim's corpse, there is no other evidence on the victim's identity. Moreover, there is no evidence on the way he died, so the cause of death is unclear. Although it is not necessary to provide a detailed factual description of a criminal act in an indictment, the Criminal Procedure Code obliges the Prosecutor to present the factual description on which he bases a justified suspicion that a certain person committed a criminal act, which in this case has not been done.[158]

157 CPC, Article 332. para. 2.
158 CPC, Article 331, para. 1; Article 332, para 1. item 6.

ii. Armed conflict qualification

In this indictment, the OWCP qualified the armed conflict in B&H as a "non-international armed conflict", without any explanation being offered for such a qualification; it only stated it was "a well-known fact". On the other hand, the OWCP qualified this conflict as "international"[159] in another case (Tuzla Column case) which relates to the armed conflict in B&H during the same time period; while the ICTY has, in numerous cases, qualified the armed conflict in B&H as international[160] (see general finding 7).

159 Amended indictment of the OWCP dated 18 September 2009, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optu%C5%BEnica.pdf

160 E.g. see judgment of Trial Chamber of the ICTY in *Jelisic* case (IT -95-10) para. 43; judgment of the Appeals Chamber of the ICTY in the *Tadic* case (IT-94-1-A) para. 48 and 162; judgment of the Appeals Chamber in *Čelebići* case (IT-96-21-A) para. 33. and 34; judgment of Trial Chamber in *Blaškić* case (IT-95-14-T) para.123

VI. Case *Bosanski Petrovac*[161]

CASE OVERVIEW	
Case current phase: first instance proceedings (retrial)	
Date of indictment: 6 August 2012	
Trial commencement date: 13 November 2012	
Acting Prosecutor: Snežana Stanojković	
Okrivljeni : Nedeljko Sovilj and Rajko Vekić	
Criminal act: war crime against a civilian population CC SRY Article 142	
Acting Chamber	Judge Dragan Mirković (Presiding Judge) Judge Mirjana Ilić Judge Bojan Mišić
Number of defendants: 2 **Rank of the defendants:** low rank – no rank **Number of victims:** 1 **Number of witnesses questioned:** 12	**Number of trial days in the reporting period:** 6 **Number of witnesses questioned in the reporting period:** 6
Key events in the reporting period: Main hearing in the retrial	

161 *Bosanski Petrovac* case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/bosanski_petrovac.html. The case was delivered to the OWCP from the Cantonal Court in Bihac through International Legal Assistance.

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants are charged with having stopped the civilians Mile Vukelić and Mehmed Hrkić near the village of Jazbine (the Municipality of Bosanski Petrovac, B&H) on 21 December 1992, as members of the VRS. On that occasion, they ordered Mile Vukelić to leave and took Mehmed Hrkić to a nearby forest called "Osoje", where they killed him with at least three gun-shots.[162]

Defense of the defendant

The defendants denied committing the crime. They claimed to have seen Mile Vukelić and Mehmed Hrkić on the critical day, but they only greeted them and continued their way.

First instance judgment

On 11 March 2013 the Higher Court reached the judgment by which the **defendants were found guilty and sentenced to eight years in prison each**.[163] The judgment confirmed all points of the indictment.

Second instance judgment

The Appellate Court[164] passed its judgment on 20 December 2013 which accepted the appeal arguments of the defense, **overturned the judgment and returned the case to the first instance court for retrial**.[165] According to the Appellate Court, the first instance court did not provide clear conclusions on decisive facts. The first instance court determined the facts based on the testimonies of witnesses Jelka Plećaš and Mile Vukelić and an autopsy report. The Appellate Court ordered the witness Mile Vukelić to be questioned again in the retrial, preferably immediately at the main hearing, in order to determine the facts fairly and completely. He should also be obliged to confront the defendants directly, since he had been questioned by a video-conference link with the B&H court. His wife should be questioned as a witness, too. A ballistic examination is to be conducted so that

162 The OWCP indictment No. KTO 3/12 dated 6 August 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/11/Optuznica-Sovilj-i-Vekic.pdf, accessed on 16 October 2015.

163 Judgment of the War Crimes Department of the Higher Court in Belgrade, in case *Bosanski Petrovac* K.Po2 6/12 dated 11 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Nedjeljko-Sovilj-i-Rajko-Vekic-Presuda-11.03.2013..pdf, accessed on 7 April 2015.

164 Chamber: judge Siniša Važić, presiding judge; judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić.

165 Judgment of the War Crimes Department of the Appellate Court in Belgrade, case No. Kž1 Po2 5/13 dated 20 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/bosanski_petrovac_drugostepena_odluka.pdf, accessed on 7 April 2015.

an expert can explain whether it can be determined, on the basis of the autopsy report, whether the victim's injuries were caused by a burst of fire or single shots. This is to be done because the witness Jelka Plećaš said she had heard two shots in a time interval, but the autopsy report stated the victim had injuries caused by burst fire.

Proceedings overview, year 2014 – 2015

Retrial

The retrial should have started in 2014, but the main hearing due in May 2014 could not be held because of the absence of one member of the Trial Chamber for health reasons. The main hearing could not be held afterwards owing to the lawyers' strike.

In 2015, medical and ballistic experts were questioned before the court. Their task was to determine how and by what means the wounds of the victim Hrkić had been made, and also the cause of his death. Based on the available documents – a crime scene report and an autopsy report, which the experts assessed as very limited, superficial and unprofessional – neither the way the victim had been hurt nor the cause of his death could be determined. Also, neither of the following facts could be determined: whether the injuries were made by one missile or more, whether these were penetrating or perforating gunshot wounds or whether they were caused by individual or automatic fire.[166]

Jelka Plećaš and Mile Vukelić[167] were questioned again, and they did not change their testimonies. Witness Vukelić, in his previous testimony, had said that he was heading towards his house from the home of the Plećaš family together with Mehmed Hrkić on that critical day. While they were walking, they were met by the defendants, who were armed. The defendants ordered him to head towards his house, while they kept the now deceased Bukvić. Two hours later, the defendants came to his house and said that they had killed Mehmed. A neighbour, whose name he did not reveal, told him he knew who had killed Mehmed. Another neighbour, Jelka Plećaš, said that the defendants boasted about the killing in the village. At the retrial, the witness said that the neighbour who told him about the murder of Mehmed was Milorad Kolundžija.

Witness Jelka Plećaš in her previous testimony confirmed that Mile Vukelić had left her house together with Hrkić on that critical day, and added that she had called her father-in-law soon after Mile and Hrkić left. She then heard a shot and Mehmed calling for help, with the words: "No, let me go!" After that, she heard two more shots. At the retrial, she denied telling witness Vukelić a rumour that the defendants had killed Mehmed Hrkić.

166 Transcript of the trial of 27 January 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/27.01.2015.pdf, accessed on 30 November 2015.

167 Transcript of the trial of 3 April 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 30 November 2015.

Mahmut Hrkić,[168] the son of the deceased Mehmed Hrkic, was also questioned. He did not have any immediate findings on his father's death. Witness Milorad Kolundžija was also questioned. He challenged part of the testimony of the key prosecution witness Mile Vukelić - that is, he denied having any knowledge about the murder of Mehmed Hrkić.

HLC findings

i. Superficial first instance proceedings

The Appellate Court revoked the first instance judgment with reason, evaluating that the first instance court did not provide clear conclusions on decisive facts, such as the motives for committing the criminal act. Also, the court's reasons for reaching the judgment were unacceptable, since the factual state had not been fully clarified.

For example, the first instance court concluded that there were more people who shot Mehmed, and that those were the defendants. The court drew this conclusion on the basis of the testimony of witness Jelka Plećaš, who said her mother-in-law heard the deceased Mehmed cry out, "No, let me go!" [*interpreter's note: the words used in the native language imply the victim was addressing a number of people, not one*]. In addition, the first instance court considered the possible motive for this act could be revenge. The court determined this on the basis of witness Vukelić's testimony, in which he said that Zoran Škorić had been killed a few days before, adding that the deceased Škorić was the defendants' coeval, which "made them angry".[169] However, the court did not verify this claim, and during the appeals trial, the defense provided evidence that Zoran Škorić had been killed after the criminal act the defendants are charged with.

There is no doubt that the OWCP did not provide convicing evidence to the court. However, the court was authorized by law to present the evidence it deemed necessary itself, in order to thoroughly discuss the subject case.[170] The HLC gave a detailed analysis of the first instance judgment in its Report on War Crimes Trials in Serbia in 2013.[171]

ii. The OWCP's unconvincing evidence

At the retrial, the first instance court acted in accordance with the instructions of the Appellate Court.

168 Ibid.

169 Judgment of the War Crimes Department of the Higher Court in Belgrade in case *Bosanski Petrovac* K.Po2 6/12 date 11 March 2013, p. 10, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Nedjeljko-Sovilj-i-Rajko-Vekic-Presuda-11.03.2013..pdf, accessed on 21 December 2015.

170 CPC, Article 15 para. 3.

171 See: Humanitarian Law Center, *Report on War Crimes Trials in Serbia in 2013* (Belgrade: HLC 2014), p. 50-53, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf accessed on 9 September 2015.

The court questioned witnesses Mile Vukelić and Jelka Plećaš again and confronted them. Court-medical and ballistic expertise was conducted, and witness Milorad Kolundžija, whom witness Mile Vukelic had mentioned, was questioned as well. On the basis of the evidence presented so far, one can reasonably doubt that the OWCP has evidence which is credible enough for one to draw the conclusion that the defendants committed the criminal act they are charged with. The testimony of the key prosecution witness Mile Vukelić, on which the first instance judgment is largely based, is discredited by a detailed testimony of witnesses Jelka Plećaš and Milorad Kolundžija. Witness Jelka Plećaš categorically denied the allegations of witness Vukelić, who claimed that she and her husband told him there was a rumour in the village that the defendants had killed the victim Hrkić. Witness Kolundžija, who Vukelić claimed had told him he knew the defendants had killed the victim,[172] denied the allegation. However, Kolundžija did say that witness Vukelić himself told him he would suggest him as a witness, since Vukelić was allegedly charged with the murder of Hrkić.[173] Witness Vukelić's allegations of having heard that the defendants killed Hrkić to revenge the death of their fellow soldier – the deceased Zoran Škorić, who had been buried a day before, which was taken as the motive for the murder – were confuted by a death certificate that was delivered in the meantime. The death certificate confirmed that Zoran Škorić died on 28 January 1993, which was considerably after the critical event. The findings of a medical expert and ballistics expert did not directly confirm the allegations that three shots had been shot at the victim and therefore caused fatal injuries, since the expertise could not determine the way the injuries were caused to the defendant nor the cause of death.

172 Transcript of the main hearing dated 3 April 2015, p.16, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/30.04.2015.pdf, accessed on 30 November 2015.

173 Report from trial dated 25 November 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Bosanski_Petrovac-Ponovljeni_postupak-Izvestaj_sa_sudjenja_25.11.2015.pdf, accessed on 22 December 2015.

VII. Case *Qyshk/Ćuška*[174]

CASE OVERVIEW
Case current phase: first instance proceedings (retrial)
Date of indictment: 10 September 2010
Trial commencement date: 20 December 2010
Acting prosecutor: Dragoljub Stankovic
Defendants: Toplica Miladinovic, Milojko Nikolic, Dejan Bulatovic, Abdulah Sokic, Srecko Popovic, Sinisa Misic, Slavisa Kastratovic, Boban Bogicevic, Veljko Koricanin, Vladan Krstovic, Lazar Pavlovic and Milan Ivanovic
Criminal act: war crime against a civilian population, CC FRY article 142

Acting Chamber	Judge Vladimir Duruz (Presiding Judge) Judge Vinka Beraha Nikicevic Judge Vera Vukotic

Number of defendants: 12	
Rank of the defendant: low and middle rank	**Number of trial days in the reporting period:** 12
Number of victims: 141	**Number of questioned witnesses in the reporting period:** 1
Number of questioned witnesses: 116	

Key events in the reporting period:
Main hearings in the retrial

174 Case *Qyshk/Ćuška,* reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/cuska.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants, at the time members of the VJ 177th Military Territorial Detachment (177th MTDoVJ), are charged with expulsion of local ethnic Albanian civilians from the villages of Lubeniq/Ljubenić, Qyshk/Ćuška, Pavlan/Pavljane and Zahaq/Zahać (municipality of Pejë/Peć, Kosovo). During April and May 1999, the defendants killed at least 121 civilians in these villages, robbed and banished hundreds of civilians to Albania, and set several dozens of houses on fire.[175]

Proceedings overview, year 2014 – 2015

First instance judgment

On 11 February 2014, the Trial chamber of the Higher Court War Crimes Department in Belgrade[176]passed its judgment and found nine defendants guilty of committing war crime against a civilian population, sentencing them to terms of imprisonment ranging from between two and 20 years, while two defendants, Radoslav Brnović and Veljko Korićanin, were acquitted.[177]

In its judgment, the court convicted the defendant Toplica Miladinović, the Commander of 177th MTDoVJ, for ordering the late Nebojša Minić, Commander of the 1st platoon of the 177th MTDoVJ Pejë/Peć , to attack the ethnic Albanian civilian population and deport them, although he was aware of the fact that the members of the unit would destroy and plunder civilian property and kill the civilians, as they actually did. He was directly informed about the events, as he was located at the very entrance to the village of Lubeniq/Ljubenić during the attacks on this village, and during the attacks on the villages of Qyshk/Ćuška, Pavlan/Pavljane and Zahaq/Zahać he was in direct contact with his unit members through radio contact with the late Nebojša Minić, aka "The Dead Man", the commander of the 'Jackals' unit. In the village of Lubeniq/Ljubenić on 1 April 1999, under the command of the late

175 The OWCP indictment No. KTRZ No. 4/10, dated 10 September 2010, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Cuska/Optuznice/I%20Cuska%20%28Toplica%20Miladinovic%20i%20dr%29-optuznica, accessed on 4 December 2015. The initial indictment against the accused was filed for the criminal act of war crimes against a civilian population on 10 September 2010, and during the main hearing, the OWCP amended the indictment several times, by dropping charges against some of the indictees, adding new persons to the indictment and charging the indictees with the new crimes. Details on the amended indictment in: Humanitarian Law Center, Report on war crimes trials in Serbia in 2012, (Belgrade: HLC, 2013), p. 15, 16 and 17.

176 Trial chamber of the War Crimes Department: Snezana Nikolic Garotic (presiding), judges Vinka Beraha Nikicevic and Rastko Popović.

177 War Crimes Department of the Higher Court in Belgrade, judgment K Po2 No. 48/2012 dated 11 February 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/prvostepena_presuda_Cuska.pdf, accessed on 4 December 2015.

Nebojša Minić, the defendants killed at least 42 civilians and severely wounded 11 victims in the form of gunshot wounds; in the village of Qyshk/Ćuška on 14 May 1999, they killed at least 41 civilians; in the village of Pavlan/Pavljane on 14 May 1999, they killed 10 civilians, setting the houses and corpses on fire afterwards. A thirteen-year-old G.N. was raped in this attack. The trial chamber also identified that during the attacks on the village of Zahaq/Zahać on on 14 May 1999, 20 civilians were killed. During all these attacks in the villages, a substantial amount of property was destroyed and plundered.

The trial chamber dismissed the charges against Radoslav Brnović and Veljko Korićanin for all the crimes they were charged with by the indictment, owing to the lack of evidence.

Referring to the defendant Toplica Miladinović, the court took into consideration mitigating circumstances, including his age, his difficult economic situation, the fact that his mother-in-law had passed away during the proceedings, thereby making his family circumstances more complex, and the fact that he has four children. The court also took into consideration his position in the military hierarchy in Kosovo during the 1999 war, as he was a low-ranking officer (Lieutenant) compared to the officers who commanded the unit superordinate to the 177th MTDoVJ, and the fact that the military security structures of the time were at least acquainted with the events which are the subject matter of the proceedings, but failed to investigate them.

For almost all the defendants, the mitigating circumstances that were taken into consideration were difficult economic and family circumstances – having a lot of children, and/or no family and relatives. Regarding the aggravating circumstances, the court took into consideration the previous convictions, attitudes towards the victims during the proceedings[178] and familiarity with the laws of war. Referring to all the defendants, the court particularly took into consideration the number of murdered civilians, their age and fragility - the victims included old men over 89 years of age and disabled persons - and the fact that in some families all male members were killed. Also, when weighing the sentences, the court took into consideration the fact that during the commission of the act, the civilians were robbed.

Finally, the court particularly took into consideration the fact that the corpses were set on fire and that some victims are still missing.

When weighing the sentences for the defendants Slaviša Kastratović and Boban Bogićević, the court found that it was possible to mitigate the punishment below the statutory minimum.

178 As aggravating circumstances regarding Srecko Popovic, the court particularly took into consideration his attitude towards the victims and the resulting consequences, as during the proceedings, he repeatedly asked unpleasant questions and inappropriate comments directed towards the injured. After the injured Hadzi Cek told the court about his son's death, Popovic responded: '*Yes, I was there in Ljodj, it might have been me who 'knocked off' his son, and I don't regret it.*'

Second instance judgment

On 26 February 2015, the Appellate Court passed a judgment upholding the appeals filed by all the defence lawyers and returned the case to the first instance court for retrial. The Appellate Court found that the first instance judgment contained major violations of the criminal proceedings, as the "disposition part of the judgment proved incomprehensible and contradictory in itself", and failed to provide the reasons underlying the decisive facts, and the reasons which were actually provided proved vague and contradictory to a significant extent. The Appellate Court also found that the factual description also lacked full confirmation.[179]

Retrial

The retrial commenced on 8 June 2015. With respect to the defendant Ranko Momić, the criminal proceedings were separated as he was at large and not available to the state organs. The court also issued a judgment that these proceedings should merge with the one conducted against former members of the 177th MTDoVJ Vladan Krstović, Lazar Pavlović and Milan Ivanović in the *Lubeniq/Ljubenić* Case, who were charged by the OWCP indictment with having participated in the critical events in the village of Lubeniq/Ljubenić on 1 April 1999, along with other defendants.[180]

Protected witness Zoran Rašković testified that the defendants Krstović and Ivanović had been present in Lubeniq/Ljubenić village on the critical day, yet he was not sure about the defendant Pavlović. Rašković fully reconfirmed all the testimonies he had previously provided during the proceedings. He described the attack on Lubeniq/Ljubenić village, stating that on that occasion between 60 and 100 men were shot – ethnic Albanian civilians. He stated that the commander of the "Jackals" unit had issued an order to single out all the men over 12 years of age from the group of gathered inhabitants of Lubeniq/Ljubenić village; they were shot afterwards.[181]

HLC findings

i. Incomplete OWCP indictment

Lack of prosecution of high-ranking army members

Numerous items of evidence presented since the commencement of the trial in this case indicate the responsibility of certain persons who were not covered by the indictment, but were positioned higher

179 War Crimes Department of the Appellate Court in Belgrade judgment No. Kž1 Kpo2 6/14 dated 26 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 4 December 2015.

180 OWCP indictment No. KTO 8/13,dated 7 April 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Optuznica_za_Krstovic,Lazarevic_i_Ivanovic_7.4.2014.pdf

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

in the VJ hierarchy during the critical period.

Explaining the reasoning behind the judgment, the Presiding Judge underlined: "...Rules of military hierarchy compel us to conclude that there must have been someone else as well, apart from Toplica Miladinović; however, we have dealt only with the matters the defendants have been charged with." This was also confirmed by the prosecutor during the closing argument: "...the level responsible for organizing all of this has remained unidentified, and is not the subject matter of these proceedings..."

A step forward towards identifying the responsibility of other persons positioned in the military hierarchy related to the crimes covered by the indictment in the *Qyshk/Ćuška* Case is the OWCP decision from August 2014 to initiate the investigation against Dragan Živanović, the Commander of the 125th Motorized Brigade of the VJ, whose zone of responsibility included these villages [see general finding 1]. At the time of the writing of this report, the investigation was still underway.

Undisclosed role of MoI

The case cast no light on the role of MoI members in organizing, executing and concealing the crime for which the defendants were identified as being responsible. During the evidentiary proceedings, several witnesses, as well as some defendants during the presentation of the defence, testified on the role of police forces.[182] Likewise, during the evidentiary proceedings, an insight was gained into the war diary of the Military Department at Pejë/Peć, which contained entries relating to the 177th MTDoVJ. One of the entries stated that the 177th MTDoVJ had been supplemented by two MoI companies. Furthermore, several victims, and the defendants as well, testified that during the commission of the crime, apart from the military personnel, a significant number of police officers had also been present in the village. This was also highlighted by the Presiding Judge, during the explanation of the judgment. She stated: "The court remains certain and assured that the victims can distinguish between blue and green uniforms, and they say that someone else was there too..."

ii. Witness protection

The testimony of the protected witness Zoran Rašković remains one of the most striking testimonies presented before the War Crimes Department, out of all the proceedings conducted to date. Apart from the major contribution to identifying the facts, his testimony is particularly relevant for indicating one of the main problems found in all the war crime trials in Serbia - the inefficient protection of insider witnesses, i.e. former or active members of security forces. During the first trial in this case, Rašković publicly pointed several times to the shortcomings in the witness protection programme[183]

182 Witnesses Milicko Jankovic, Marko Vukotic, Zoran Raskovic and defendants Toplica Miladinovic, Srecko Popovic and Radoslav Brnovic.

183 "Threats from the Police, humiliation from the Prosecution", *E novine*, 4 February 2012: http://www.e-novine.com/mobile/srbija/srbijatema/58452-Pretnje-policije-ponienja-Tuilatva.html, accessed on 12 January 2016.

and the threats he was exposed to, including those by the police officers in charge of his security.[184] In the course of his testimony during the retrial, he stated that those problems still persisted, saying he was unable to obtain a personal ID, which prevented him from having a normal life.[185] A detailed analysis of this problem was presented by the HLC in the Trial Report for 2011[186] and the Analysis of the Prosecution of War Crimes in Serbia.[187]

These proceedings were also the first to implement the institutes of highly vulnerable witness and the agreement on defendant's testimony, introduced by the new CPC.[188] A detailed analysis of the implementation of these institutes in this case was presented by the HLC in the Trial Report for 2013 and the Analysis of the Prosecution of War Crimes in Serbia.[189]

iii. Kosovo lawyers

During the proceedings, the defence lawyers challenged the status of the lawyer Mustafa Radoniqi, the victims' representative, who had been listed in the Bar Association of Kosovo, stating that according to the Statute of the Bar Association of Serbia (AKS), he was not entitled to represent the parties in these proceedings. While deciding on the issue, the court ruled that according to the AKS Statute, the lawyers who were not listed in the AKS directory were entitled to represent the parties before the Serbian courts only if they registered in the foreign lawyers directory. Taking into consideration the current status of Kosovo and the fact that Serbian state authorities do not perceive Kosovo as a foreign country, the court concluded that the AKS also cannot perceive Kosovo lawyers as foreigners. Taking into account the current specificities, and the fact that the Bar Association of Kosovo was no longer within the AKS, the court concluded that the factual situation should be taken into consideration, along with providing the best possible protection for the represented party, thus allowing the lawyer to represent the party.

Such a court ruling is lawful and just, and rendered in the interest of the victims. However, the practice of trial chambers in the War Crimes Department is not uniform in this matter (see Case *Ternje/Trnje*).

iv. Particularly mitigating circumstances

When weighing the punishment for the defendants Slaviša Kastratović and Boban Bogićević, the

184 Transcript of trial in *Qyshk/Ćuška* Case, 25 January 2012, available in Serbian at: http://www.hlc-rdc.org/wp-content/uploads/2012/02/35-25.01.2012.pdf, accessed on 12 January 2016.

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

186 For more details, see: Humanitarian Law Center, Report on war crimes trials in Serbia in 2011, (Belgrade: HLC, 2012), p. 99,100 and 101.

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

188 CPC, Art. 103 and 104

189 HLC, Report on war crimes trials in Serbia in 2013, p. 11-12; Analysis of the Prosecution of War Crimes in Serbia from 2004-2013, p. 63-64.

court found that it was possible to mitigate the punishment below the statutory minimum of five years. The HLC believes that the circumstances identified with the two defendants do not have the weight of particularly mitigating ones, which is a necessary prerequisite for imposing the punishment below the statutory minimum. The court established that during the proceedings, the two defendants "were not identified with having demonstrated cruelty."[190] **The fact that the defendants had failed to demonstrate cruelty during the commission of the crime may not be considered as the mitigating one.** The typical way of committing the criminal act does not imply cruelty in a way that its absence may be considered as the mitigating circumstance. Therefore, the demonstration of cruelty during the commission of the criminal act may only be relevant as to aggravating circumstances, whereas its absence may under no circumstances be considered as mitigating. Likewise, it remains unclear why the fact that the defendant Boban Bogićević was described as "calm and unobtrusive"[191] during the commission of the crime was taken as mitigating. Particularly inappropriate was the standpoint of the court which identified the dedication and selflessness as "moral traits"[192], thus considering them as mitigating circumstances, of the defendant Slaviša Kastratović, who was convicted for committing such a grave criminal act.

v. Biased interpretation of the evidence presented on the part of Appellate Court challenges the role of army in the crime

The Appellate Court in its judgment upheld the appeal filed by the defendant Toplica Miladinović's lawyer, challenging the factual state, on the basis of which it was determined that Miladinović had issued the order for attacking the civilians. The findings of the Appellate Court show that the conclusion supporting the fact that Miladinović had issued the order in question was on the basis of the testimonies of the witnesses who had only been indirectly informed about the event, and the war diary of the 177th MTDoVJ whose authenticity was assessed as disputable by the Appellate Court.

However, the Appellate Court failed to dispute that the alleged order from Miladinovic had been passed on by the late Nebojša Minić in the following manner: "Guys, get ready, we're leaving in 10 minutes, it's to do with the village of Qyshk/Ćuška, we need to push out some Germans, set some houses on fire, tear up the documents, and everything else that's necessary." Also, the Appellate Court failed to present an alternative conclusion that, for example, Minić, as he was leaving the meeting with Miladinović, might himself have made up the order and passed it on. Nevertheless, the Appellate Court challenged the content of the alleged order, which had been passed on in such a manner, by stating: "It remains unclear as to how the first instance court determined with sufficient assurance that these orders had referred to the execution of the attacks on the ethnic Albanian civilian population

190 War Crimes Department of the Higher Court in Belgrade judgment,K Po2 No. 48/2012 of 11 February 2014, p. 257, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/prvostepena_presuda_Cuska.pdf, accessed on 4 December 2015.

191 Ibid, p. 257.

192 Ibid, p. 254.

and its displacement in the said villages, having excluded thereby the possibility that the orders might have referred to a legitimate military operation directed towards the enemy members in the armed conflict, or towards potential uncovering of KLA members and their disarmament."[193]

The Appellate Court, however, failed to take into consideration the finding of the first instance court, stating that the KLA had not been present in the said villages, thus making such an interpretation of the potential meaning of the said order entirely ungrounded. Finally, the suggestion on the part of the court that setting houses on fire or tearing up documents might be interpreted as a call for legitimate military operations are nothing but the biased interpretation of the facts established, particularly taking into account that there have been a number of judgments stating that this particular method was the *modus operandi* of the Serbian forces during the Kosovo war.

The Appellate Court also challenged the finding of the first-instance court that Toplica Miladinović had been directly informed of the crime, as he had been stationed at the very entrance to the village of Lubeniq/Ljubenić, during the attacks on this village. The Appellate Court based such a conclusion on two findings. Firstly, the statement of the witness who was testifying on Miladinović's presence was not supported by other evidence. Secondly, "the presence of the defendant Miladinović at the village entrance was not confirmed by any of the women, children and old men heard in this case, and they had been forced to leave the village and therefore pass by the village entrance; nor had they noticed any one with a rank higher than that of the late Minić as having taken part in the attacks on the village[…]"[194] The HLC believes that leaving facts of decisive relevance to depend on the victims' ability to recognise details, such as an unknown person at the village entrance or his rank, at moments when they are struggling for their lives, is nothing but an intentional shifting of the burden of evidence to the victims and an additional trauma for them, and also further evidence of the reaching of biased conclusions by the Appellate Court.

The Appellate Court also indicated that the first instance court failed to "determine the formation structure of the 177th MTDoVJ Pejë/Peć with indisputable certainty"[195], so that it remained unclear whether the 1st platoon of the 177th MTDoVJ had actually existed, whether Miladinović had been in command of it, and whether he had actually been authorized to issue orders for military actions.[196] The "vagueness" referred to by the Appellate Court proves problematic for several reasons. For determining Miladinović's criminal responsibility, it is irrelevant whether the order was issued to the 1st platoon of the 177th MTDoVJ or to an armed group under a different name. However, by suggesting that the mere existence of the 1st platoon was not established, the conclusion arises that the crimes

193 War Crimes Department of the Appellate Court in Belgrade judgment No. Kž1 Kpo2 6/14 dated 26 February 2015, p. 9, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Resenje_Apelacionog_suda_26_02_2015.pdf, accessed on 4 December 2015.
194 Ibid.
195 Ibid, p. 11.
196 Ibid, p. 11-12.

in Lubeniq/Ljubenić, Qyshk/Ćuška, Pavlan/Pavljan and Zahaq/Zahać were committed by informal armed units, i.e. were not committed by the official forces, although their belonging to the VJ was undeniably determined in the first instance proceedings. Challenging Milanović's command position and authority to issue orders also proves irrelevant for determining his criminal responsibility, because ordering, as a mode of criminal responsibility, does not require any official capacity whatsoever.

VIII. Case *Lovas*[197]

CASE OVERVIEW
Case current phase: first instance proceedings (retrial)
Date of indictment: 28 November 2008
Trial commencement date: 17 April 2008
Acting Prosecutor: Dušan Knežević
Defendant: Milan Devčić, Željko Krnjajić, Miodrag Dimitrijević, Darko Perić, Radovan Vlajković, Radisav Josipović, Jovan Dimitrijević, Saša Stojanović, Petronije Stevanović and Zoran Kosijer
Criminal act: war crime against a civilian population CC SRY Article 142

Acting Chamber	Judge Bojan Mišić (Presiding Judge) Judge Mirjana Ilić Judge Dragan Mirković

Number of defendants: 10	
Rank of the defendant: low and middle rank	**Number of trial days in the reporting period:** 14
Number of victims: 54	**Number of witnesses questioned in the reporting period:** 4
Number of witnesses questioned: 193	

Key events in the reporting period:
Main hearing in the retrial

197 Case *Lovas*, reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/lovas.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The amended indictment[198] charges the defendants with having attacked civilians in the village of Lovas (Republic of Croatia) in October and November 1991. They are also charged with having treated civilians in an inhumane way, and tortured, hurt and killed them, which resulted in the death of 42 civilians; 12 civilians suffered heavy and minor bodily injuries. The indictment includes the event of 18 October 1991, when some of the accused forced 50 Croatian civilians, using them as a human shield, to walk across a minefield, thus killing 19 and wounding 12 civilians.

The defendants were: members of a self-established local civilian-military government (Devetak, Devčić and Radojčić), members of the Territorial Defence (TO) Valjevo, whose units then became a part of the Second Proletarian Guard of the Mechanized Division (2nd PGMD) of the JNA [Yugoslav People's Army] (M. Dimitrijević, Perić, Vlajković and Josipović), members of a volunteer group "Dušan the Great" (Stevanović, Nikolajidis, Bačić, Kosijer, J. Dimitrijević and Stojanović), and the Tovarnik Police Station commander (SM) Željko Krnjajić.

The original indictment of 28 November 2008[199] charged 14 persons[200] and included 69 fatally injured.

In the amended indictment of 28 December 2011, the number of fatally injured civilians was reduced from 69 to 44.[201] During the trial, three defendants died.[202] In the case of one defendant, the proceedings were separated for medical reasons.[203]

First instance judgemnt

The Higher Court[204] passed its judgment on 26 June 2012 and found all the defendants guilty of a criminal act of a war crime against civilians, committed in co-perpetration. The defendants were

198 Indictment of the OWCP No. KTRZ 7/07 dated 1 December 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Izmenjena_optuznica_01.12.2015.pdf

199 Indictment of the OWCP No. KTRZ 7/07 dated 28 November 2007, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Lovas-Optuznica-Ljuban-Devetak-i-dr..pdf, accessed on 9 April 2015. Amended indictment KTRZ 7/07 dated 2 September 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/09/Lovas_Precizirana_optuznica_02.09.2014..pdf, accessed on 9 April 2015.

200 The following persons are accused: Ljuban Devetak, Milan Devčić, Milan Radojčić, Željko Krnjajić, Miodrag Dimitrijević, Darko Perić, Radovan Vlajković, Radisav Josipović, Aleksandar Nikolajidis, Petronije Stevanović, Dragan Bačić, Jovan Dimitrijević, Saša Stojanović and Zoran Kosijer.

201 Amended indictment KTRZ 7/07 dated 28 December 2011, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optuznica-Lovas.pdf, accessed on 9 April 2015.

202 Ljuban Devetak, Aleksandar Nikolajidis and Dragan Bačić.

203 Milan Radojčić.

204 Chamber: Judge Olivera Anđelković,presiding, Judges Tajana Vuković and Dragan Mirković.

sentenced to imprisonment, with sentences ranging from four to 20 years.[205] The HLC gave a more detailed analysis of the first instance judgment in its Report on War Crimes Trials in Serbia in 2012.[206]

Second instance judgment

The Appellate Court[207] passed its judgment on 9 December 2013 overturning the previous guilty judgment of the Higher Court in Belgrade, thus returning the case to the first instance court for retrial.[208]

According to the Appellate Court, the first instance court did not explain the application of co-perpetration clearly - that is, it did not explain the exact actions undertaken by each defendant. A peculiar finding of the Appellate Court is the following: by the first instance judgment, the defendants were basically charged with command responsibility as a form of criminal responsibility. However, instead of giving clear arguments for such a type of responsibility, the first instance court has treated this as a broad framework of co-perpetration – a notion which is usually used in domestic criminal legislation. At the same time, the first instance judgment does not explain the link between the higher-ranking defendants on one side, and the actions of the immediate perpetrators and their consequences, on the other.

The HLC gave a more detailed analysis of the judgment of the Appellate Court in its Report on War Crimes Trials in Serbia in 2013, where it presented objections regarding the insufficient and unclear explanation of the reason for quashing the first instance judgemnts, as well as the factual state as determined and defendants' responsibility.[209] The HLC's criticism was especially directed towards the Appellate Court findings, "being unclear what precisely is the meaning of the term cleansing the villages of members of the Croatian National Guard (ZNG) and the Ministry of the Interior of the Republic of Croatia, as well as of citizens who were hostile…", despite the opinion of a military expert that this was an order which every soldier had to disobey, since it was in opposition to the Geneva Conventions.

205 War Crimes Department of the Higher Court in Belgrade judgment, K.Po2 22/2010 dated 26 June 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/01/P-R-E-S-U-D-A.pdf, accessed on 9 April 2015.

206 A detailed analysis of the first instance judgment can be seen in the Humanitarian Law Center, (Belgrade,HLC,2013) "*Report on War Crimes Trials in Serbia in 2012*" available in English at http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, p. 53-63, accessed on 12 April 2015.

207 Chamber: Judge Sonja Manojlović – presiding, Judges: MSc Sretko Janković, Dr Miodrag Majić, Omer Hadžiomerović and Vučko Mirčić.

208 Judgment of the War Crimes Department of the Appellate Court in Belgrade, No. Kž1 Po2 3/13 dated 9 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/Lovas_Resenje_Apelacionog_suda_09.12.2013..pdf, accessed on 9 April 2015.

209 See a detailed analysis in the Humanitarian Law Center (Belgrade, HLC, 2014) *"Report on War Crimes Trials in Serbia in 2013" p.* 66-75, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 12 April 2015.

Proceedings overview, year 2014 – 2015

Retrial

The retrial began with a preparatory hearing on 4 March 2014 before a new presiding judge, Vinka Beraha Nikićević, since the previous presiding judge Olivera Andjelković was moved to the Appellate Court in the meantime.[210]

Criminal proceedings against the defendant Ljuban Devetak were firstly separated for medical reasons. In the separate proceedings, medical expertise determined that the defendant was permanently disabled from taking part in the proceedings, and therefore the court dismissed the indictment against him in May 2014.[211] Since the defendant Devetak has died in the meantime, criminal proceedings against him have ceased.

On 28 May 2014, Presiding Judge Vinka Beraha Nikićević filed a request for her exemption, since she had participated in issuing a decision on defendants' objections to the original indictment of the OWCP in this case in 2008, as at that time being a member of the pre-trial chamber. The President of the Higher Court accepted the request on 30 May 2014 and awarded the case to Judge Bojan Mišić.[212]

The main hearing in the retrial started before a new chamber[213] on 2 September 2014, when the OWCP filed an amended indictment.[214] Taking into account the position presented in the judgment of the Appellate Court, regarding the need to determine the individual actions of the defendants who are charged with having acted as co-perpetrators, the OWCP specified those actions to a certain extent, but it did not change the indictment essentially.

Initially, the main hearing was postponed due to the preparation of the defense of the accused in relation to the amended indictment, and then the lawyers' strike caused the disruption of the further trial till the end of 2014.

The main hearing continued on 29 January 2015. The proceedings were separated for the defendant Milan Radojčić, because he could not appear before the court for health reasons. The proceedings were ceased against the defendants Aleksandar Nikolaidis and Dragan Bačić, who had died in the meantime.

The court questioned the military expert once again. He did not change his previous testimony, but

210 War Crimes Department of the Higher Court in Belgrade, *Lovas* case, retrial, case No. K. Po2 1/14.
211 War Crimes Department of the Higher Court in Belgrade, *Lovas* case, separate proceedings for the defendant Ljuban Devetak, Case No. K.Po2 8/14.
212 War Crimes Department of the Higher Court in Belgrade judgment, No. VII Su No. 39/14-183 dated 30 May 2014.
213 Trial Chamber: Judge Bojan Mišić, presiding, Judges Mirjana Ilić and Dragan Mirković.
214 Amended indictment KTRZ 7/07 dated 2 September 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/09/Lovas_Precizirana_optuznica_02.09.2014..pdf, accessed on 9 April 2015.

added he was able to conclude that there had been total chaos in command not only in Lovas, but in the whole zone of responsibility of the 2nd Division. The commander of that Division, Dušan Lončar, commanded all units, and was obliged to control the execution of all of his orders. However, he did not do this in practice. The expert did not find information that Dušan Lončar had ever been in Lovas. After the incident in the minefield, he should have made a report, which he did not do either.[215]

The defendant Miodrag Dimitrijević had hired a military expert adviser, who denied that the defendant Dimitrijević had commanding authority, thus challenging the previous findings of the military expert in his testimony.[216]

Closing arguments are scheduled for January 2016.

HLC findings

i. Delays in proceedings due to the failure of the OWCP and Court

These proceedings are amongst the most complex and comprehensive that have been processed before the Department for War Crimes, since they include a large number of defendants who belong to different military formations, several different events and a large number of witnesses. Despite the complexity of the case, which is the cause of its duration, it has been additionally prolonged due to the failures in the work of the OWCP and court.

The original indictment of the OWCP included 69 victims, but the OWCP did not provide enough evidence on how they had been killed. Because of that, the court *ex officio* asked and questioned a large number of witnesses, with the aim to determine the circumstances under which some of the victims had been killed. The OWCP was supposed to clarify the facts regarding the circumstances and responsibilities of the defendants already during the investigation phase, and in that respect, to provide evidence.

It was only after three years of trial that the OWCP amended the indictment in December 2011 and reduced the number of victims to 45. However, the amended indictment did not fully specify the way the civilians had been killed or the defendants' responsibility for killing certain victims. Therefore, the court ascertained the responsibility of the defendants for killing only 41 victims, in the judgment dated 26 June 2012.

Unnecessary delay in the proceedings was also caused by the Presiding Judge Vinka Beraha Nikičević.

215 Transcript from the main hearing, dated 25 September 2015, p. 6 available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/21-25.09.2015.pdf accessed on 19 December 2015.

216 Transcript from the main hearing, dated 2 July 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/18-02.07.2015.pdf accessed on 19 December 2015.

She filed a request for her exemption five months after taking on the case, although the grounds for her exemption were already known as soon as she was given the case.

The decision on her exemption caused another delay, since the case was allocated to another presiding judge, who spent several months studying it, because it was comprehensive (more than 20,000 pages of transcript and other documents). Trials were not held in the last quarter of 2014 due to the lawyers' strike.

Due to the excessive duration of the proceedings – the responsibility of both the OWCP and the court – this trial failed to fulfil its primary purpose, which was to prosecute at least the key defendants and provide justice for the victims. Namely, the indictment had to be dismissed because of the first-defendant's (Ljuban Devetak) illness. The proceedings relating to him ceased after he died. This defendant was said to be the person most responsible for the crimes stated in the indictment, by a large number of witnesses and some of the defendants, too.

Also, the victims whose killing Devetak was charged with had to be left out from the indictment by the OWCP, because of the suspension of the proceedings against him. The proceedings also ceased against the defendants Aleksandar Nikolaidis and Zoran Bačić, who had died in the meantime. At the same time, the victims and their families, including a great number of witnesses from Lovas, **have lost faith in the domestic judiciary owing to the proceedings' excessive duration and the dismissal of the indictment against Ljuban Devetak; and they no longer want to testify.**

ii. Selective indictment

Although it was evident that far more persons had taken part in committing the crimes than were the subject of the indictment, the OWCP did not make any effort whatsoever to collect evidence on their responsibility during the proceedings. The consequence of the OWCP's inactivity is that the final version of the indictment did not include all the victims who had been killed in the events described in the indictment. And the indisputable fact agreed upon between the parties to the proceedings was that a total of 70 civilians had been killed in Lovas in the relevant period.[217]

A characteristic of these proceedings is that, as far as the responsibility of high-level members of the Yugoslav People's Army (JNA) is concerned regarding the events in Lovas, the opinions of the OWCP and Trial Chamber that passed the judgment are completely different. In his closing argument, the OWCP deputy stated that there was no evidence that could give grounds that "the incriminating events in Lovas had been inspired, organised and conducted by certain persons at responsible political, police or military levels; the mentioned conclusion applies both to command and other

217 For example, a civilian, Milan Latas, who has never been a part of the indictment, was killed by artillery fire which was opened at Lovas on 10 October 1991 by the JNA, and this was indicated in the original indictment, p. 15, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Lovas-Optuznica-Ljuban-Devetak-i-dr..pdf, accessed on 12 April 2015.

structures, including the 1st Proletarian Guard Motorized Division, 2nd Proletarian Guard Motorized Division and members of the territorial defense of the Zone Headquarters of the Valjevo Territorial Defense."[218] On the other hand, when the judgment was pronounced, the Presiding Judge stated the following: "As far as the attack on Lovas is concerned, for the way it was conducted and all the things that happened during the attack, according to this Chamber, the command of the 2nd Divison bears the greatest responsibility."[219]

The court's opinion is completely reasonable if one takes into account the evidence presented during the proceedings. Namely, during the proceedings, evidence was presented which indicated the overall responsibility of the commander of the 2nd Division, Colonel Dušan Lončar, who gave the orders to attack Lovas, stating among other things that the village "must be cleansed of the hostile population". 22 civilians were killed in this attack.

In his findings and during the testimony at the main hearing, a military expert stated that this part of the order is contrary to Article 13 of the Second Additional Protocol to the Geneva Conventions.[220] His responsibility was discussed by an expert adviser, Miodrag Dimitrijevic. However, in spite of the evidence presented and the court's conclusions, the OWCP did not process the issue of this order nor any member of the JNA in the chain of command.

During the proceedings, on the basis of the evidence presented, the OWCP had enough time to process other persons responsible for the crime in Lovas, and especially the members of the headquarters of the 2nd Proletarian Guard of the Mechanized Division of the JNA, in order to include all events that could be considered criminal acts of war crimes against civilians, as well as the victims. However, this has not been done yet. If the OWCP's strategy is to start processing the persons responsible only after concluding the current proceedings, it may face the problem of not having defendants competent to stand trial.

iii. No charges for sexual violence and expulsion of civilians

The indictment in this case does not include the cases of rape in Lovas. Despite the fact that witnesses

218 Transcript from the main hearing dated 24 April 2012, p. 21-22, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/06/188-24.04.2012.pdf, accessed on 12 April 2015.

219 Transcript from the announcement of the judgment dated 26 June 2012, p. 18, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf

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

Vikica Filić,[221] Snežana Krizmanić[222] and Josip Sabljak,[223] stated there had been cases of rape in the relevant period, the OWCP did not ammend the indictment in order to include these acts. The court also did not react during these testimonies and it stuck to the indictment. Each time a witness mentioned the word rape, the court would immediately divert the conversation by asking whether the witness had been beaten. When the witness misunderstood the court's request for further explanation and said she would rather not talk about it, thinking the court referred to the rape, the court explicitly stated the following: "I do not want you to talk about rape. I am interested in beating and whether you have been beaten or tortured."[224]

In the *Croatia v. Serbia* case before the International Court of Justice regarding the implementation of the Convention on the Prevention and Punishment of the Crime of Genocide, Croatia presented evidence on cases of rape in Lovas, among other things. However, the court did not have enough evidence to pass a judgment on this issue.[225]

The expulsion of Croatian civilians from Lovas was not included in the indictment either, although numerous inhabitants of Lovas testified to it, among them the following persons: Đuro Filić,[226] Lovro Gerstner,[227] Vikica Filić,[228] Josip Sabljak,[229] and Josipa Balić.[230] The commander of the Second Division of the Pančevo Territorial Defense testified about the expulsion of civilians, and said he saw a certain form on arriving at Lovas. The form was distributed to the Croatian inhabitants of Lovas who were being expelled from Lovas; they were asked to sign the document, which would then transfer all their

221 Transcript from the main hearing dated 27 March 2009, p. 4. and 16, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/51-27.03.2009.pdf, accessed on 26 November 2015.

222 Transcript from the main hearing dated 30 June 2009, p. 19, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/61-30.06.2009..pdf, accessed on 26 November 2015.

223 Transcript from the main hearing dated 27 November 2009, p. 73-74, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas/75-27_11_2009.pdf, accessed on 26 November 2015.

224 Ibid, p. 16.

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

226 Transcript from the main hearing dated 16 December 2008, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/35-16.12.2008..pdf, accessed on 26 November 2015.

227 Transcript from the main hearing dated 23 February 2009, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/44-23.02.2009.pdf, accessed on 26 November 2015.

228 Transcript from the main hearing dated 27 March 2009, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Predmet%20LOVAS/transkripti/51-27.03.2009.pdf, accessed on 26 November 2015.

229 Transcript from the main hearing dated 27 November 2009, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas/75-27_11_2009.pdf, accessed on 26 November 2015.

230 Transcript from the main hearing dated 26 May 2011, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas%20za%20sajt/transkripti/151-26.05.2011..pdf, accessed on 26 November 2015.

property to the Municipality of Lovas.[231] Petr Kypr testified about the intention to expel the Croatian citizens from Lovas in the *"Vukovar troika"* case before the Hague Tribunal. At the time, he was a member of European Community Monitoring Mission and visited Lovas on 16 October 1991.[232] The court also emphasized the need of the OWCP to deal with the expulsion of the Croatian civilians when passing the first judgment.[233]

iv. Expert adviser

The *Lovas* case is the first case in which a legal adviser has been used in the proceedings for war crimes, which is regulated by the new CPC.[234] An expert adviser is someone who has professional knowledge in the area of a certain expertise. His role is to enable the party which hired him to have an effective hearing on his findings and opinion, and thus help in evaluation during the proceedings.

The defendant Miodrag Dimitrijević hired an expert adviser in this case. The expert is a retired JNA colonel, master in military sciences and someone with rich practical experience. Despite the fact that he is an expert in the relevant field, his testimony could be considered biassed, and is yet to be assessed by the Trial Chamber. Namely, the expert adviser Milisav Sekulić presented an unacceptably subjective opinion. For example, he assessed the testimony of a witness as "deliberate manipulation".[235] Moreover, he blamed the defendant Perić for the events on the minefield for which Dimitrijević is charged by the OWCP. What is more, the defendant Perić has never been charged with this, and no witnesses have claimed it either.[236] The expert adviser thus acted as another defense attorney of the defendant Miodrag Dimitrijević, which is not his role.

231 Transcript from the main hearing dated 24 June 2010, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Lovas%20za%20sajt/transkripti/103-24.06.2010.pdf, accessed on 26 November 2015.

232 Transcript from the open session in the ICTY case, *"Vukovar troika"* (IT-95-13) dated 24 March 2006, available in English at http://www.icty.org/x/cases/mrksic/trans/en/060324IT.htm

233 Transcript from the announcement of the judgment, dated 26 June 2012, p. 69, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/197-26.06.2012-objava.pdf

234 CPC, Article 125.

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

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

First instance proceedings before courts of general jurisdiction

I. Case *Cobras*[237]

CASE OVERVIEW
Case current phase: first instance proceedings
Date of indictment: 22 June 2012
Trial commencement date: 24 September 2015
Acting Prosecutor: Ivan Stanojević
Defendants: Šićer Maljoku/Shyqeri Maloku, Džafer Gaši/Xhafer Gashi, Demuš Gacaferi/Demush Gacaferi, Dem Maljoku/Demë Maloku, Argon Isufi/Agron Isufi, Anton Čuni/Anton Quni, Alija Rabit/Alija Rabit i Rustem Beriša/Rustem Berisha
Criminal act: terrorism CC SFRY Article 125

Acting Chamber	Judge Nebojša Žikić (Presiding Judge) Judge Grozdana Jovanović Three lay judges

Number of defendants: 8	
Rank of the defendants: low rank – no rank	**Number of trial days in the reporting period:** 2
Number of victims: 12	**Number of questioned witnesses in the reporting period:** 6
Number of questioned witnesses: 6	

Key events in the reporting period:
Main hearing

237 *Cobras* case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/grupa_kobre.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The first indictment in this case was issued by the Military Prosecutor's Office in 1999 and then, after military cases had been transferred to prosecutor's offices and courts of general jurisdiction, the Higher Public Prosecutor's Office in Niš amended the indictment on 1 October 2015. The indictment charged the defendants with having set landmines at the Yugoslav-Albanian border in September 1998 as members of the "Cobras" unit, which was a part of the KLA. It also charged them with having attacked members of the VJ, killing six and wounding six VJ members.[238]

Proceedings overview, year 2014 – 2015

The questioned witnesses, mostly VJ members, described the relevant events, saying that soldiers were killed in an ambush. However, they could not provide any data on the perpetrators.

The court ordered a forensic medical expertise on the circumstances of the injuries caused and the causes of death, which is to be conducted by an expert commission.

HLC findings

i. Backlog "military cases"

This case is one of the several hundred cases of military prosecutor's offices which were transferred to the jurisdiction of civilian prosecutor's offices after the abolition of the military judiciary in Serbia in 2004. Although a comprehensive analysis of the backlog military cases has not been conducted so far, taking into account the current case against the KLA members, the transferred war crimes cases which led to a serious impairment of Serbian-Croation relations,[239] and the evaluation given by the OWCP representatives,[240] the HLC has concluded that a significant number of the so-called military cases do not fulfil the minimum legal standards and that these cases have often been raised for political purposes.

The Law on Competences of Military Courts, Military Prosecutor's Offices and Military Attorney from 2004 transferred the military cases to the jurisdiction of civilian prosecutor's offices. This law also

238 Amended indictment of the Higher Public Prosecutor's Office in Niš No. KT 257/13, dated 1 October 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Optuznica_Sicer_Maljoku_i_dr.pdf, accessed on 8 December 2015.

239 Analysis of the prosecution of war crimes in Serbia in the period from 2004 to 2013, p.25.

240 Ibid, p.21.

transferred more than 100 military cases to the OWCP jurisdiction – those which were qualified as war crimes. However, a large number of those cases were closed, since they were obviously motivated by political and not legal reasons, as the OWCP stated.[241]

ii. Wrong qualification of a criminal act

Even if this case against the former KLA members fulfilled the material and procedural standards required for them to be further conducted by the civilian prosecutor's offices, the acts described in the indictment could possibly be war crimes only. In that case, this case would have had to be taken on by the OWCP, which should have assessed whether the described acts were punishable by international humanitarian law or not; and consequently, the OWCP should have continued with the prosecution or withdrawn from it. Namely, the defendants were one of the conflicting parties in the armed conflict at the time of the events stated in the indictment - that is to say, in September 1998 there was an armed conflict in Kosovo between the armed forces of FRY and the KLA, and therefore, a criminal act in such circumstances would be a war crime, and not a criminal act of terrorism. Both the ICTY and the OWCP determined that there was an armed conflict in Kosovo in September 1998.

iii. Trial in absentia

The defendants are not available to the authorities of the Republic of Serbia and are therefore being tried in absentia in accordance with Article 381 of the CPC, which allows such proceedings when the defendants are on the run or unavailable to the state authorities, but "only when the reasons are especially justified." Regarding this case, the HLC thinks there are no such reasons in this case.

The prohibition of trials in absentia for war crimes and other crimes under international law is a standard today, which has been established in order, among other reasons, to prevent political trials. Numerous national systems, international courts and international organizations stipulate the prohibition of trials in absentia: the United Nations Interim Mission in Kosovo (UNMIK), by the regulation of 2001, prohibited trials in absentia for violations of international humanitarian law;[242] the CPC B&H completely prohibits trials in absentia;[243] so does the Rome Statute of the International Criminal Court,[244] etc.

According to the resolution of the Committee of Ministers of the Council of Europe on criteria for proceedings conducted in the absence of the defendant, the defendant must not be tried in absentia

241 Ibid.

242 UNMIK regulation, No. 2001/1 dated 12 January 2001, available in English at http://www.unmikonline.org/regulations/2001/reg01-01.html, accessed on 8 December 2015.

243 Criminal Procedure Code of Bosnia and Herzegovina, Official Gazette of Bosnia and Herzegovina No. 3/03, 32/03, 36/03, 26/04, 63/04, 13/05, 48/05, 46/06, 76/06, 29/07, 32/07, 53/07, 76/07, 15/08, 58/08, 12/09, 16/09, 93/09, 72/13, Article 247.

244 The Rome Statute of the International Criminal Court, Article 63.

if it is possible and desirable to conduct a trial in another state or under another jurisdiction.[245] Bearing in mind the Protocol on cooperation between UNMIK and the FRY[246] which provides for the exchange of information in criminal matters and the possibility of transferring criminal files, as well as the fact that a special court for crimes committed during the war in Kosovo should be established next year,[247] the HLC believes that this trial of eight KLA members should have been given to the judicial institutions in Kosovo, that is, to the future special court, with which Serbia has already announced its cooperation.[248]

245 Resolution of the Committee of Ministers of the Council of Europe No. (75) 11.

246 The protocol on police cooperation between the Interim UN Mission in Kosovo (UNMIK) and the Federal Government of the Federal Republic of Yugoslavia and the Republic of Serbia.

247 International Justice Resource Center, "Kosovo to Create Special War Crimes Court but Faces Challenges", 25 August 2015, available in English at http://www.ijrcenter.org/2015/08/25/kosovo-to-create-special-war-crimes-court-but-faces-challenges/ accessed on 10 December 2015.

248 "Task Force for solving the crimes in Kosovo formed", *Tanjug*, 19 October 2015, available in Serbian at http://www.novosti.rs/vesti/naslovna/dosije/aktuelno.292.html:572651-Formirana-Radna-grupa-za-rasvetljavanje-zlocina-na-KiM accessed on 10 December 2015.

II. Case *Kushnin/Kušnin*[249]

CASE OVERVIEW	
Case current phase: first instance proceedings (retrial)	
Date of indictment: 19 July 2002	
Trial commencement date: 16 September 2002	
Acting Prosecutor: Ivan Stanojević	
Defendants: Rade Radojević, Danilo Tešić and Mišel Seregi	
Criminal act: war crimes against the civilian population CC FRY Article 142	
Acting Chamber: Judge Pavlović Jelena (Presiding Judge)	
Number of defendants: 3	
Rank of the defendants: low rank and middle rank	**Number of trial days in the reporting period:** 2
Number of victims: 2	**Number of questioned witnesses in the reporting period:** 0
Number of questioned witnesses: unknown	

Key events in the reporting period:
Main hearing in the retrial

249 *Kushnin/Kušnin* case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/kusnin.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Military Prosecutor's Office in Niš raised the first indictment in this case on 19 July 1999.[250] During the proceedings, it was finally amended by the Higher Public Prosecutor's Office in Niš on 26 June 2012.[251]

The defendants Zlatan Mančić, Rade Radivojević, Danilo Tešić and Mišel Seregi are charged with having killed two Albanian civilians in the village of Kushnin/Kušnin in April 1999, and robbed several.[252]

The first trial

Having conducted the proceedings during which the defendants Mišel Seregi and Danilo Tešić confessed committing the criminal act, the Military Court in Niš issued a judgment in October 2002 and **found all the defendants guilty** of the criminal act of a war crime against a civilian population and sentenced them to prison terms ranging from three-year imprisonment to seven-year imprisonment.[253] The Supreme Military Court in Belgrade, which was the competent court on the appeals of the parties at the time,[254] issued a judgment in May 2003 and imposed more severe

250 Indictment of the Military Prosecutor's Office in Niš No. VTK No. 2696/2000 dated 19 July 2000, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-19.07.2002.-optuznica.pdf, and amended indictment of the Military Prosecutor's Office in Niš VTK No. 2696/2000 dated 16 September 2002, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-16.09.2002.-precizirana_optuznica.pdf, accessed on 17 April 2015.

251 Amended indictment of the Higher Public Prosecutor's Office in Niš No. KT 98/10 dated 26 June 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/07/Kusnin-izmenjena-optuznica-26-06-2012.pdf, accessed on 25 December 2015.

252 Amended indictment of the Military Prosecutor's Office in Niš VTK No. 2696/2000 dated 16 September 2002, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-16.09.2002.-precizirana_optuznica.pdf, accessed on 17 April 2015.

253 Judgment of the Military Court in Niš in *Kushnin/Kušnin* case No. IK No. 258/2002 dated 11 October 2002, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-11.10.2002.-presuda_Vojnog_suda_u_Nisu.pdf, accessed on 17 April 2015.

254 Military courts as regular courts were competent for crimes committed by military personnel and for certain criminal acts committed by other persons, relating to the national defense and security, as well as disputes related to service in the Yugoslav Army, the Law on Military Courts "Official Gazette of the FRY", No. 11/95, 1/96, 74/99, 3/02, 37/02, Article 1. This law ceased to be effective as of 1 January 2005, when the jurisdiction of military courts was transferred to courts of general jurisdiction, by the Law on taking over the jurisdiction of military courts, prosecutors' offices and the Military Attorney, "Official Gazette" No. 137/04, Article 2.

prison sentences for the defendants, ranging from five to 14 years.[255] The Supreme Court of Serbia[256] overturned this judgment in November 2005, deciding that the requests of defense attorneys who questioned the legality of the final judgments were founded. Therefore, the case was remanded to the first instance court for retrial.[257]

Retrial

The retrial started in June 2007 before the District Court in Niš.[258] Since the presiding judge and the acting trial chamber were changed, the **trial began in 2010**.

In August 2012, the Higher Court in Niš[259] issued a judgment which found the defendants guilty and sentenced them to terms of imprisonment ranging from five to 14 years.[260]

The judgment determined that the defendants had killed the Albanian civilians Miftar and Selman Temaj from the village of Kushnin/Kušnin at the beginning of April 1999, being at the time members of the Yugoslav Army – Zlatan Mančić was the Head of the Security Corps,[261] the defendant Rade Radojević, the Commander of the First Firing Squad,[262] and Danilo Tešić and Mišel Seregi, soldiers of the First Firing Squad within the 549th Motorized Brigade of the VJ. Miftar and Selman Temaj were arrested and taken to Mančić, who conversed with them and then ordered the defendant Tešić to kill them. Moreover, he also ordered Radojević to choose another soldier who would kill the civilians together with Tešić. Following orders, the defendant Radojević ordered the defendant Seregi to kill the civilians together with Tešić. Tešić killed one civilian by shooting him in the back of the head using an automatic rifle and Seregi shot the other one in the back. Tešić then approached the civilian who was still alive and shot him once again in the head. Having done this, Tešić and Seregi burned the bodies with the aim of hiding the traces of murder.

255 Judgment of the Supreme Military Court in *Kushnin/Kušnin* case No. II K 45/03 dated 22 May 2003, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Temaj/Kusnin-Zlatan_Mancic_i_dr.-22.05.2003.-presuda_Vrhovnog_vojnog_suda.pdf, accessed on 17 April 2015.

256 As of 1 January 2005, the jurisdiction of the military courts was transferred to courts of general jurisdiction. The Law on taking over the jurisdiction of military courts, prosecutors' offices and the Military Attorney, "Official Gazette RS" No. 137/04, Article 2.

257 Judgment of the Supreme Court of Serbia in *Kushnin/Kušnin* case, No. Kzp. VP 3/05, 4/05 and 5/05, dated 24 November 2005, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Presuda-Vrhovnog-suda-Srbije-24.11.2005.pdf, accessed on 17 April 2015.

258 In 2004 military courts were abolished by the Law on transfer of jurisdiction of military courts, military prosecutor's offices and the Military Attorney, and were transferred to the authorities of the Member States; Serbia's responsibility was transferred to district courts in Novi Sad, Niš and Belgrade and the Supreme Court of Serbia.

259 During the reform of the judiciary, with the Law on Courts, which began to be implemented from 1 January 2010, the Higher Court of First Instance began conducting trials for war crimes, as well.

260 Judgment of the Higher Court in Niš in *Kushnin/Kušnin* case, No. 2K. No. 46/10 dated 3 August 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/10/Prvostepena-presuda-Kusnin.pdf, accessed on 17 April 2015.

261 At the time of the criminal act, an active military officer with the rank of major.

262 At the time of the criminal act, an active military officer with the rank of lieutenant.

The defense attorneys lodged an appeal against this judgment. Deciding on the appeals, the Appellate Court in Niš issued a judgment in December 2013 which **overturned the first instance judgment and remanded the case to the first instance court for retrial**. The proceedings against the defendant Zlatan Mančić were suspended because he had died in the meantime.[263]

The Appellate Court determined that the first instance judgment had been issued in a manner which substantially violated the criminal proceedings provisions, since there were no reasons on the decisive facts and the factual state had not been completely and validly determined. The first instance court was criticized because the victims' identity and the manner of their death were determined on the basis of circumstantial evidence. The Appellate Court held it necessary to get the record on the exhumation and autopsy of the mortal remains of Temaj Miftari, especially since the first instance court had accepted the defense of the defendants Tešić and Seregi, given at the military court on which occasion they admitted having committed the criminal act and added that both victims had been killed by shots to their heads. Since there was no autopsy report, the defendants' defense could not be verified, that is, one could not reliably determine whether the victims had been killed by shots to their heads.

Proceedings overview, year 2014 – 2015

In August 2014, the Higher Public Prosecutor's Office in Niš filed a proposal with the Republic Public Prosecutor's Office to submit a request against the Appellate Court's judgment for the protection of legality in favour of the defendants because of essential violations of criminal proceedings, by proposing the following – to revoke the judgment and remand the case to the Appellate Court in Niš for trial.[264] Namely, the Prosecution holds that the Appellate Court was obliged to pass the final decision on this case, given that the CPC provisions explicitly forbid the second instance court to revoke the first instance judgment again if the first instance judgment in the same case regarding the same criminal-legal event has already been revoked. The Republic Public Prosecutor's Office evaluated the proposal of the Higher Public Prosecutor's Office in Niš as grounded, and therefore filed a request for the protection of legality.

In October 2014, the Supreme Court of Cassation issued a judgment which dismissed the request for the protection of legality as unfounded.[265] The court established that the Appellate Court in Niš could have revoked the first instance judgment and remanded the case for retrial.

263 Judgment of the Appellate Court in Niš in *Kushnin/Kušnin* case No. 7Kž.1.4373/12 dated 13 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Resenje_Apelacionog_suda.pdf, accessed on 17 April 2015.

264 Proposal of the Higher Public Prosecutor's Office for the request for protection of legality in *Kushnin/Kušnin* case, No. KTR I 67/14 dated 20 August 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Zahtev_Viseg_javnog_tuzilastva_u_Nisu%20za_zastitu%20zakonitosti.pdf, accessed on 17 April 2015.

265 Judgment of the Supreme Court of Cassation Ktz 987/2014 dated 14 October 2014, available in Serbian at w.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Vrhovnog_Kasacionog_suda_14.10.2014._o_ZZZ.pdf accessed on 28 November 2015.

The retrial began in 2015, during which one trial day was held.

HLC findings

i. The incompetence of the general jurisdiction authority

The trial proceedings in this case have lasted for 13 years, yet the date of its completion remains uncertain. Both the prosecution and the court have contributed to the delay, which clearly shows that the prosecutions and general jurisdiction courts do not have the capacity to conduct proceedings for this type of criminal acts. Therefore, placing these cases under their jurisdiction was a bad decision made by the legislator.

ii. Decision of the Supreme Court of Cassation

The Supreme Court of Cassation made the right decision when it determined that the Appellate Court had not violated a specific provision of the CPC regarding the following issue – that the second instance court is obliged to bring a decision itself if the first instance judgment has already been revoked in the same case.[266] Namely, the judgment of the Higher Court in Niš, which had been revoked by the Appellate Court, was the first first instance judgment and therefore it could not have been previously revoked.

266 CPC, Article 455, para. 2.

III. Case *Spider Group*

CASE OVERVIEW	
Case current phase: first instance proceedings (retrial)	
Date of indictment: 4 May 2000	
Acting Prosecutor: unknown	
Trial commencement date: 4 July 2000	
Acting Trial Chamber: Judge Milan Londrović (Presiding Judge)	
Defendants: Jugoslav Petrušić, Milorad Pelemiš, Slobodan Orašanin, Branko Vlačo and Rade Petrović	
Criminal act: espionage, extortion, murder and illegal possession of firearms and ammunition	
Number of defendants: 5	
Rank of the defendants: low rank – no rank	**Number of trial days in the reporting period:** 1
Number of victims: 2	**Number of questioned witnesses in the reporting period:** 0
Number of questioned witnesses: unknown	
Key events in the reporting period: Main hearing	

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants Pelemiš and Petrović are charged with having killed two unidentified Albanians in mid-May 1999 near Dečani (Kosovo), on the orders of Petrušić.[267] The defendants Petrušić, Pelemiš, Vlačo and Petrović are charged with having forced two unidentified Albanians at the beginning of May to give DM 20,000 to them and threatening to kill them if they refuse to do so.

The indictment of the District Public Prosecutor in Belgrade charges the defendants with becoming members of the French Intelligence Agency during the war in 1999 and later volunteers in the VJ. The defendants Pelemiš, Orašanin and Vlačo are charged with illegal possession of various weapons and ammunition.

Defence of the defendants

The defendants denied committing the crime they were charged with, except for illegal possession.

The first first instance trial

The main hearing began on 4 July 2000 and the court decided to exclude the public during the main hearing. During the proceedings, the Prosecution specified the indictment regarding the identity of the injured parties for the extortion, indicating them to be Mirsat and Sadik Nimonaj. The Prosecution also specified the indictment regarding the identity of the killed civilians, indicating them to be Rahman Idrizi and Hamid Neziri.

On 13 November 2000 the District Court issued the judgment acquitting the defendants of the killing of Idrizi and Neziri. They were also acquitted of the charges of espionage. The court found the defendants Petrušić, Pelemiš, Vlačo and Petković guilty of extortion, the defendant Pelemiš of illegal possession of firearms and ammunition, and the defendant Orašanin of illegal possession of firearms and ammunition. They were sentenced in the following way: Petrušić, Vlačo, Petrović and Orašanin to one year's imprisonment, and the defendant Pelemiš to a year and a half in prison.[268]

Second instance judgment

267 Indictment of the District Public Prosecutor's Office in Belgrade No. KT 640/99 dated 4 May 2000, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Grupa_Pauk-Jugoslav_Petrusic_i_dr.-Optuznica_04.05.2000.pdf accessed on 21 December 2015.

268 Judgment of the District Court in Belgrade in Case *Spider Grupa*, K-broj 192/2000 dated 13 November 2000, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Prvostepena_presuda_13.11.2000.pdf, accessed on 15 December 2015.

Deciding on the appeals of the defence attorney and the Prosecutor, the Serbian Supreme Court overturned the judgment in 2002 and returned the case to the first instance court for retrial.

Conflict of jurisdiction

Upon returning the case, the District Court in Belgrade declared itself noncompetent for this case, stating that the Military Court was competent for the criminal act of espionage, and therefore transferring the case to the Military Court.[269] However, the Military Court also determined that it was noncompetent for this case, and considered the District Court to be the competent body. Because of this, the Military Court submitted a proposal for conflict of jurisdiction.[270] Since the Law on the Competences of Military Courts, Military Prosecution and Judge Advocate General came into force on 1 January 2005, the case was returned to the Military Department of the District Court in Belgrade.

However, the Military Department of the District Court again rejected the case, explaining it was not competent to proceed in these alleged criminal acts of espionage, since they were not directed against military facilities and military personnel. In 2005, the case files were then sent to the War Crimes Chamber of the District Court in Belgrade, which informed the District Court in 2006 that the OWCP did not accept to represent the indictment raised by the District Prosecutor's Office in 2000, since it considered itself noncompetent. After this, the case was finally returned to the District Court in Belgrade for retrial.

In 2009, immediately after the beginning of the retrial, the Higher Court in Belgrade made the decision to cease the proceedings due to the lack of evidence. The case was returned to the investigating judge of the Higher Court in Belgrade in order to conduct further investigations.

HLC findings

i. Exclusion of the public and removal of the HLC representative from the courtroom

During the first main hearing, the court decided to exclude the public during the whole hearing. One can assume this was because certain members of State Security and Military Security were questioned as witnesses.

Although the public was not excluded in the retrial, the Presiding Judge removed a representative of the HLC from the main hearing in 2013. Namely, the defence attorney for the defendant Rade Petrović asked the court to remove the HLC representative, since he could suggest questioning him as a witness later on. The reason for this was allegedly because the HLC had filed criminal charges

269 District Court in Belgrade, judgment No. KV. 1272/02 dated 8 July 2002.
270 Proposal of the Military Court in Belgrade Kv.br. 26/03 dated 13 March 2003.

for extortion, which was being debated in these proceedings. The Presiding Judge, Milan Londrović, accepted this proposal without asking for some evidence for the defence attorney's statements. This action was an abuse of procedural powers by the defence attorney, because of personal animosity towards the HLC, and the court confirmed this abuse with its decision.

ii. Wrong qualification of the criminal act

Bearing in mind that there was an armed conflict in the territory of Kosovo at the time of the events which are the subject of the indictment, that the defendants were members of a conflicting party – the 125th Motorized Brigade of the VJ, and that the victims were Albanian civilians, all the major elements of a criminal act – i.e. a war crime against civilians – were present in the behaviour of the defendants, and their behaviour should have been qualified in that way. Yet it is quite unclear why the OWCP declared itself noncompetent for this case. The decision of the OWCP was not available to the HLC.

Regardless of the fact that the criminal act had been qualified wrongly, the indictment of the District Public Prosecutor's Office in Belgrade remains vague and unsubstantiated by evidence. As to the charges of espionage, the Prosecution does not state what constituted the actions of the defendants. Regarding the part of the indictment that deals with the criminal acts of extortion and killing, the identity of the four injured parties was not determined in the indictment, so this issue was resolved during the proceedings. Moreover, at the moment of raising the indictment, the Prosecution had proper evidence only for the criminal act of illegal possession of firearms and ammunition.

iii. Unexplained, vague and offensive first instance judgment

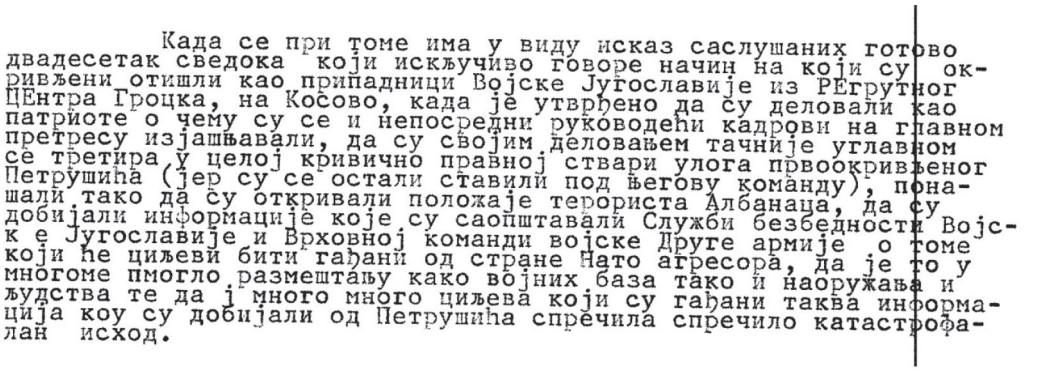
During the first instance proceedings, the witnesses – high-ranking members of the VJ – testified in favour of the defendants, and the court completely accepted their testimonies. The witness Aleksandar Savović, who was the Head of Security of the 125th Motorized Brigade at the time and a superior to the defendants, said he had concluded that the defendant Petrušić "was a great patriot and nationalist,"[271] who took part in "various actions at Košare". Savović also added there are still data with the security services that the defendant delivered about the targets NATO was planning to bomb, adding that this data was "valuable".[272] Moreover, the witness Momir Stojanović, a VJ colonel, Head of Security of the Priština Corps at the time, Stevan Đurović, a VJ colonel, who worked for the security services, and Miodrag Pantović, also a VJ colonel, who worked at the Directorate of Military Police, testified that all the defendants were actively engaged in fighting on the front lines.[273] Having accepted the testimonies that spoke of the services rendered the VJ by the defendants, the court concluded there

271 Judgment of the District Court in Belgrade in Case *Spider Grupa*, K-broj 192/2000 dated 13 November 2000, p. 27, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/12/Prvostepena_presuda_13.11.2000.pdf. accessed on 15 December 2015.

272 Ibid.

273 Ibid. p. 28.

was no evidence that the defendants had committed the criminal act of espionage and acquitted them. Moreover, the court praised the patriotic participation of the defendants in the Kosovo war.[274]



Када се при томе има у виду исказ саслушаних готово двадесетак сведока који искључиво говоре начин на који су окривљени отишли као припадници Војске Југославије из РЕгрутног ЦЕнтра Гроцка, на Косово, када је утврђено да су деловали као патриоте о чему су се и непосредни руководећи кадрови на главном претресу изјашњавали, да су својим деловањем тачније углавном се третира у целој кривично правној ствари улога првоокривљеног Петрушића (јер су се остали ставили под његову команду), понашали тако да су откривали положаје терориста Албанаца, да су добијали информације које су саопштавали Служби безбедности Војске Југославије и Врховној команди војске Друге армије о томе који ће циљеви бити гађани од стране Нато агресора, да је то у многоме помогло размештању како војних база тако и наоружања и људства те да ј много много циљева који су гађани таква информација коу су добијали од Петрушића спречила спречило катастрофалан исход.

[SIC: When bearing in mind the testimonies of nearly twenty witnesses who talk solely about the way the defendants left as members of the Yugoslav Army from the Grocka recruit center to Kosovo, when it has been determined that they acted as patriots, about which superior persons talked about during the main hearing, that they acted, more precisely the whole case deals with the role of Petrusic (as the other were under his command), so that they revealed the positions of terrorist Albanians, that they received information which they gave the Security Service of the Yugoslav Army and the Supreme Command of the Second Army about which targets will be hit by the NATO aggressor, that that helped the relocation of military bases, weaponry and personnel, that there have been many many attacks on targets, the information they got from Petrusic prevented a catastrophic outcome.]

None of the witnesses who were high-ranking members of the VJ knew anything about the killing of two Albanian civilians which the defendants are charged with. Witnesses Savanović and Tešić accused the defendants of this murder. The court took the view that the indictment was based on the testimonies of witnesses Stanko Savanović[275] and Dragan Tešić, who were on bad terms with the defendants, that witness Tešić had no direct knowledge on the events and that their testimonies were only indications that the defendants had killed two Albanian civilians, which could not be enough for a conviction.

However, the court did conclude that the defendants were responsible for extortion, since the defendant Vlačo himself said during the investigation that the two Albanian civilians were targeted by headhunters and the "prize" for their killing was DM 20,000. Vlačo was sent to the Kelebija border

274 Judgment of the District Court in Belgrade in Case *Spider Group*, K-broj 192/2000, dated 13 November 2000, p. 42.

275 The witness was a former member of 10th Sabotage Detachment of the VRS. He was convicted before the Court of B&H for the crime against humanity committed in Srebrenica - for the execution of Bosniak civilians at Branjevo farm.

crossing to take the money, and Pelemiš travelled with him. The witness Jović confirmed these allegations, saying he was a mediator in the money delivery. The statements of the defendants Mirsad and Sadik Nimonaj, who said they were blackmailed, were also accepted. The court did not question them directly, but used the statements given by the victims to the HLC, which the HLC officially submitted to the court.

In the judgment, the court refers to the victims and their nation as "shqiptar" (with small case 's') and to their language as "the shqiptar language". Since these terms are used in a pejorative sense in Serbia and are an offensive and discriminating term for members of the Albanian nation, an unbiased court should not have been using them.

Nowhere does the judgment explain the sentences delivered or whether the court considered some mitigating or aggravating circumstances in sentencing. The judgment only states that these sentences "will be able to achieve the purpose of punishment both as regards the defendants themselves and as regards general prevention, and will help ensure that such and similar criminal acts are no longer committed by the defendants."[276]

In the acquittal part of the decision regarding espionage, the court insists that it was not established whether the defendants collected and revealed "confidential military, economic or official information". However, the defendants are charged with Article 128, paragraph 3, of the Criminal Code of the FRY, which stipulates: "**Whoever joins a foreign intelligence service,** collects information for it **or** otherwise assists its work, shall be punished with imprisonment from one to ten years." *Joining* a secret service is an incriminating act according to this article; joining itself does not necessarily mean collecting and revealing data to the service, and the defendant Petrušić admitted working for the French Intelligence Service, which was accepted by the court.[277] This being the case, there were no clear reasons for acquittal.

iv. Unreasonable duration of the proceedings

The fact that the proceedings in this case lasted for more than 15 years and that procedural issues led to several years of trial delays clearly demonstrates the lack of will of the relevant institutions to finalize this case.

276 Judgment of the District Court in Belgrade in Case *Spider Group,* K-broj 192/2000 dated 13 November 2000, p. 41.
277 Ibid, p. 41-42.

First instance judgments passed by the War Crimes Department of the Higher Court in Belgrade

I. Case *Luka Camp*[278]

CASE OVERVIEW	
Case current phase: first instance proceedings (retrial)	
Date of indictment: 31 March 2014	
Trial commencement date: 2 June 2014	
Acting Prosecutor: Milan Petrović	
Defendant : Boban Pop ("The Priest") Kostić	
Criminal act: war crime against a civilian population, CC SRY Article 142	

Acting Chamber	Judge Vera Vukotić (Presiding Judge) Judge Vinka Beraha Nikićević Judge Vladimir Duruz

Number of defendants: 1	
Rank of the defendant: low rank – no rank	**Number of trial days in the reporting period:** 8
Number of victims: 1	**Number of witnesses questioned in the reporting period:** 4
Number of witnesses questioned: 4	

Key events in the reporting period:
Main hearing; first instance judgment; second instance judgment; repeated main hearing; first instance judgment in the retrial

278 Case *Luka Camp*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/brcko.html

The course of proceedings

Proceedings overview, year 2014-2015

Factual description from the indictment

The defendant Boban "The Priest" Kostić is charged with having beaten and tortured Muhamed Bukvić in the "Luka" Camp on 10 May 1992 in Brčko (B&H), as a VRS member. The defendant came to the camp where Muhamed was imprisoned and took him to one of the offices. He ordered him to write down his name and the date he would like to be executed on a piece of paper. Then he kept hitting him in the face and head with his right fist, on which he wore a brass knuckle, and holding a knife in his left hand at the same time.[279]

Defense of the defendant

The defendant admitted being a VRS member and visiting the above mentioned camp, but he denied having committed the criminal offence. He stated that he came to the camp because he was looking for his family from Brčko. However, he did not hurt anyone or have the authority to do so.

Witnesses in proceedings

Prosecution witness Džafer Deronjić, a former camp detainee, confirmed that he met the injured party Muhamed Bukvić in the camp and although knowing him well, he could not recognise him since his face was swollen and completely deformed because of the blows received. It was only in 1999 that Muhamed told him he had been beaten in the camp by a man called "The Priest".

Witness for the prosecution Konstantin Simonović, a former guard in camp Luka, stated he has no knowledge about the hurting of the injured party Mehmed Bukvić, adding that he did not know him.[280]

The injured Muhamed Bukvić has not been directly questioned in the hearing since he is an elderly man, seriously ill and living in Australia. Also, his testimony via a video-conference link could not be provided, because he was afraid for his own safety and the safety of his family in Brčko. Therefore, the Court read the statement he gave before the Cantonal Court in Tuzla in 1997, in the proceedings against the accused Konstantin Simonović, and the statement he gave to Australian Federal Police in 2010, in which he accused the defendant Boban "The Priest" Kostić, of having, together with Konstantin Simonović, interrogated and abused him in the camp.

279 The OWCP indictment No. KTO 1/14 dated 31 March 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/optuznica_Boban_Pop_Kostic-Brcko.pdf, accessed on 22 April 2015.

280 Witness Konstantin Simonović was sentenced to 6 years in prison before the Basic Court of Brčko District, judgment No. KP-218/05 dated 18 October 20105, for the criminal act of war crimes against civilians committed in the Luka Camp, including among other things, bodily injuries inflicted on the injured Muhamed Bukvić.

The testimony of Hasan Kamberović, given to the Prosecutor's Office of Brčko District, was also read, since this witness had passed away in the meantime. The witness saw the injured party in the camp, but could not recognise him, since he was so disfigured because of the beating. He only recognised him after Muhamed had addressed him. He did not say who had beaten him.

Expertise for the injured party

The Trial Chamber adopted the proposal of the defence attorney to obtain medical documents about the injured party, since he was diagnosed with schizophrenia, in order to determine whether he was competent for trial, that is, whether he can testify. The Commission of the Clinic for Psychiatry of the Clinical Centre of Serbia determined that the injured party had no psychopathological processes, although he was suffering from mental illness, and that at the time of the statement, he was competent.

First instance judgment

The Higher court pronounced its judgment[281] on 20 March 2015 which **found the defendant guilty** of a war crime against civilians, and **sentenced him to two years in prison**. During the sentencing, the court took into account the defendant's family situation as mitigating circumstances, with the fact that he was a family man who supports a minor child. The court took into account the lack of previous convictions of the defendant, and the time since the offence, and did not find any aggravating circumstances. All the above mentioned circumstances were taken by the court as highly extenuating circumstances, and therefore the court reached a judgment which is below the legal minimum.

Second instance judgment

The Appellate Court[282] delivered a judgment which **revoked the previous judgement and remitted the case to the first instance court for retrial**[283] on 10 June 2015. According to the Appellate Court, the first instance judgment was made in substantial violation of criminal proceedings, since it was based on evidence upon which it could not be based, that is, it was based on evidence presented in other proceedings, before the Cantonal Court in Tuzla. Furhermore, the principle of immediacy was also violated, that is, the right to defense, since the defendant was denied the right to examine the prosecution witness. The Court found that by doing so, the provision of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms was also violated; this Article gives the defendant a minimum right to examine the prosecution witness.

281 Judgment of the War Crimes Department of the Higher Court in Belgrade K.Po2 No. 5/14 dated 20 March 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf, accessed on 13 October 2015.

282 Chamber: Siniša Važić, presiding judge, judges Sretko Janković, Omer Hadžiomerović, Miodrag Majić and Nada Hadži Perić.

283 War Crimes Department of the Appellate Court in Belgrade judgement Kž1.Po2 1/15 dated 10 June 2015, available in Serbian at: http://www.hlc-rdc.org/wp-content/uploads/2015/10/Resenje_Apelacionog_suda_u_Beogradu.pdf, accessed on 13 October 2015.

Retrial

The injured party Muhamed Bukvić was questioned in the retrial via a video-conference link to Australia, along with protection measures of face distortion and exclusion of the public. He said that during his detention in the camp, he was first beaten by "Kole" (Konstantin Simonović) on 9 May 1992 and the next day by both the defendant "The Priest" Kostić and "Kole". The defendant was wearing a masked uniform at that time and had a brass knuckle on his hand. He beat him on the head, broke his nose and teeth, while "Kole" was hitting him with a bat, breaking his ribs. During the torture which lasted for an hour, he remained conscious. The accused Kostic "The Priest" and "Kole" asked him to write down when he would like to be killed. The next day he was beaten by Goran Jelisić.[284]

Bukvić's testimony was monitored by a court expert neuropsychiatrist. In evaluating the testimony of the victim, the expert said that a person who receives severe injuries such as blows to the head, and breaking of the nose, teeth and ribs, suffers great physical pain and fear, and his capacity for observation and memory are very limited. Therefore, the victim would not have been able to notice and remember the details he mentioned.

First instance judgment in retrial

On 5 November 2015 the Trial Chamber **acquitted the defendant**. The Court concluded that there was insufficient evidence that the defendant had committed the crime as charged, since he denied guilt and none of the witnesses questioned had direct knowledge of harming the victim, and the expert neuropsychiatrist assessed the victim's statement as unreliable. At the time of writing the report, the judgment has still not been made available to the public.

HLC findings

i. Violation of the right to defense

The Appellate Court was right to revoke the first instance conviction judgment, since it was only based on the read statement of the injured, given before the Cantonal Court in Tuzla in a case against another defendant. Thus, the right to defense of the defendant was violated, which is part of the right to a fair trial; the defendant could not question the injured party during the whole proceedings. Article 14(3)(e) of the International Covenant on Civil and Political Rights and Article 6(3)(d) of ECHR regarding criminal proceedings both guarantee the defense the right to "question the witness".[285] Not allowing the defense to cross-examine the prosecution witnesses, especially in a situation where the conviction

284 Goran Jelisić was sentenced to 40 years by an ITCY judgement for murder and injuries in Luka Camp, case number (IT-95-10).

285 For example, see case ECtHR, *Bricmont v. Belgium* (petition No. 10857/84), para. 81.

largely relies on the testimony of that witness, is clearly a violation of the right to a fair trial.[286]

Had the defense had the possibility to question witnesses in the investigation phase, the inability to question witnesses during trial would not necessarily have violated the ECHR.[287] However, in this case, not only did the defence not have the opportunity to question witnesses in the investigation phase, but testimonies given in other cases were used in this trial.

Although one cannot always ensure the presence of a witness in a hearing, which is most desirable, "the court is obliged to take all necessary measures to enable cross-examination of a witness".[288] Therefore, the first instance court had to provide the possibility of cross-examination for the defense, above all of the injured party. Given that the injured party is sick and lives in Australia, the court should have provided his testimony in the first instance proceeding via a video-conference link.

ii. Mitigation of sentence below the statutory minimum

The court reduced the defendant's sentence below the statutory minimum of five years for war crimes and sentenced him to two years of imprisonment. In this specific case, the court **cumulatively considered several mitigating circumstances**, applicable to almost all war crimes indictees (no criminal record, family circumstances and passage of time since the criminal act was committed) **as particularly mitigating circumstances**. The HLC thinks such a decision was contrary to the law [see general finding 4].

iii. Unclear and offensive language of the judgment

The largest part of the rationale of the first, first instance convicting judgment is a reproduction of transcripts of the questioning of the parties in the case and the content of the presented evidence. However, the factual and legal analysis was paid significantly less attention to. Moreover, the HLC assumes, spoken language from the transcript was literally inserted into certain parts of the judgment:[289]

286 For example, see *Dugin v Russia*, Communication to the Committee on Human Rights No. 815/1998, UN Doc CCPR/C/81/D/815/1998 (2004), para. 6.3; and *Kulov v. Kirgistan*, Communication to the Committee on Human Rights No. 1369/2005, UN Doc CCPR/C/99/D/1369/2005 (2010), para. 8.7.

287 For example, see case ECtHR, *Unterpertinger v. Austria* (petition No. 9120/80), para. 28,33; case Balsyte-Lideikiene v. Lithuania (petition No. 72596/01), para. 62.

288 For example, see ECtHR case *Hulki Gunes v. Turkey* (petition No. 28490/95), para. 95.

289 War Crimes Department of the Higher Court in Belgrade judgment K.Po2 No. 5/14 dated 20 March 2015, p. 20, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf., accessed on 13 October 2015.

Вештак је даље навео да свако ко се бави професионално истрагом саслушавањем људи у судском поступку једноставно лудило, као и кашаљ није лако сакрити, једноставно би вероватно то и лаик кад имате човека који је у растуру због душевне болсети од које болује и лаик то може да уочи.

[*SIC: The expert then said that for anybody who deals professionally with investigation, the interrogation of people in court proceedings, simple madness, as well as a cough, cannot be easily hidden… probably a lay person, when there is a man in a deteriorated condition due to the mental illness he suffers from…- even a lay person can notice that.]*

Apart from the fact that the meaning of the above written sentence is totally unclear, it refers to the mental illness the injured party suffers from as madness, which is at the very least, language inappropriate for a court.

iv. Armed conflict qualification

In this indictment, the OWCP qualified the armed conflict in B&H as a "non-international armed conflict", without the explanation for such a qualification, only stating this was "common knowledge". On the other hand, the ICTY sentenced Goran Jelisić for crimes in Luka Camp, among other things, for inflicting bodily harm on Mehmed Bukvić, qualifying the armed conflict as "international".[290] The first instance court accepted the qualification of the armed conflict as given by the OWCP,[291] stating that the parties at the preliminary hearing did not challenge the fact this was a "non-international armed conflict".[292]

290 ICTY judgement in Jelisić case (IT -95-10) para. 43.

291 War Crimes Department of the Higher Court in Belgrade judgement K.Po2 No. 5/14 dated 20 March 2015, p. 26-27, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_20.03.2015.-ANONIMIZOVANA.pdf., accessed on 13 October 2015.

292 Ibid, p.3

II. Case *Sotin*[293]

CASE OVERVIEW	
Case current phase: appellate proceedings	
Date of indictment: 31 December 2013	
Trial commencement date: 4 February 2015	
Acting Prosecutor: Dušan Knežević	
Defendant: Žarko Milošević, Dragan Mitrović, Mirko Opačić, Dragan Lončar and Miroslav Milinković	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Vera Vukotić (Presiding Judge) Judge Vinka Beraha Nikićević Judge Vladimir Duruz
Number of defendants: 5 **Rank of the defendants:** low rank and middle rank **Number of victims:** 16 **Number of questioned witnesses:** 16	**Number of trial days in the reporting period:** 11 **Number of questioned witnesses in the reporting period:** 16
Key events in the reporting period: First instance judgment	

293 *Sotin* Case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/sotin.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants are charged with having killed 16 civilians of Croatian nationality, of whom 13 were executed on the basis of a previously drawn up execution list. They are charged with having committed this criminal act in the period from October to December 1991 in the village of Sotin and nearby areas (the Municipality of Vukovar, Croatia), as members of the Sotin Territorial Defence (TD), police and JNA.

Proceedings overview, year 2014 – 2015

Defence of the defendants

The defendants Dragan Mitrović, Mirko Opačić, Dragan Lončar and Miroslav Milinković denied committing the crime they are charged with. In his defence, Mitrovic stated that he had not been in Sotin at all at the time of the events described in the indictment.[294] Lončar said that he had been in the place where 13 civilians were killed. However, he added that he had not taken part in the killing or seen who had been shooting, but assumed that Mirjana Raguž had been killed by the defendant Mirović.[295] In his defence, Opačić said he had been the president of Sotin local community, but denied drawing up any execution list as described by the indictment. He heard about the killing of 13 civilians a few days after it had happened, but "did not ask how it had happened."[296] Milinković stated he had been the Commander of the Logistics Battalion of the 80th Motorized Brigade of the JNA placed in Sotin and the commander of the area at the same time, as ordered by his superiors. He claimed he had not been in the village at the time of the killing. He thought the cooperating defendant had accused him because of the "campaign against members of the army."[297]

During his testimony, the cooperating defendant Žarko Milošević[298] described the above mentioned events in detail, including his involvement, as well as those of other defendants, in the way as stated by

294 Transcript from the main hearing dated 4 February 2015, p. 8-38, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/02-04.02.2015.pdf, accessed on 5 October 2015.

295 Ibid, p. 38-64.

296 Transcript from the main hearing dated 5 February 2015, p. 2-29, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/03-05.02.2105.pdf, accessed on 5 October 2015.

297 Ibid, p. 30-48.

298 Judgment of the War Crimes Department of the Higher Court in Belgrade, Str.Pov.Po2-4/2013 dated 17 July 2013, awarded the status of a cooperating defendant to Žarko Milošević, who was previously a defendant. The court did so by accepting the Agreement on the testimony of the defendant, which was concluded between him and the OWCP. The defendant agreed with the OWCP to be given a 9-year sentence.

the indictment. When the Presiding Judge asked him about the motives for killing Croatian civilians, the defendant replied that at the time "everybody in the village was full of hatred."[299]

First instance judgment

On 26 June 2015, the Higher Court passed a judgment[300] which found the **defendant Dragan Mitrović and the cooperating defendant Žarko Milošević guilty.** Mitrović was sentenced to 15 years in prison and Milošević to 9. The defendants **Mirko Opačićo, Miroslav Milinković and Dragan Lončar were acquitted.**

The judgment determined that Milošević and Mitrović killed civilians Stjepan Šter and Snežana Blažević in October 1991 at the location called Vodice, on the banks of the Danube River, near Sotin, while they were "searching the area", as part of a group consisting of members of the TD and police station members. It was also determined that Milošević killed the civilian Marin Kušić in a vineyard by the Danube River near Sotin, in November 1991. Finally, the court determined that Milošević and Mitrović killed 13 civilians on 27 December 1991, who were all Sotin inhabitants of Croatian nationality. According to the court, the killing was preceded by a decision made by Milošević and some other inhabitants to expel a certain number of Croatian civilians from Sotin so that refugees of Serbian nationality, coming from Western Slavonija, could move into their houses. On the premises of the local community, Milošević chose 13 persons of Croatian nationality from the list of civilians. Those persons were to be transferred to the police station on the same day and then the following day, they were to be taken to a location outside Sotin and killed.

He then took the list and went to the police station, where he told the persons present that they were to immediately arrest the mentioned civilians and detain them in the station; the people in the police station did what they were told. Also, he asked for a military truck and a driver from the defendant Milinković, who was the Commander of the Logistics Battalion of 80th Motorized Brigade and the commander of Sotin at the time. Milinković provided him with the truck, not knowing the purpose for which it was going to be used. Milošević informed the defendant Mitrović, a member of the police called "Cvole" (now deceased), two other members of the police (the investigation against these two persons has now ceased) and unidentified members of the police and TD of his decision. All of them voluntarily accepted his decision.

The detained civilians were put into the cargo area of the military truck. Milošević sat next to the driver, an unidentified member of the JNA, and told him to drive in the direction of Tovarnik. The defendants Mitrović, Lončar and unidentified members of the JNA and TD followed them in several

299 Transcript from the main hearing dated 6 February 2015, p. 10, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/04-06.02.2015.pdf, accessed on 5 October 2015.

300 Judgment of the War Crimes Department of the Higher Court in Belgrade, K-Po2 No. 2/14 dated 26 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 9 October 2015.

vehicles. Having passed the checkpoint without being identified or stopped, they turned into a field next to "Vupik" vineVJrd in the village of Sotin and stopped a few hundreds meters further, near the drainage channel. The civilians were then taken out and lined up. After a brief quarrel between Mirjana Raguž and Mitrović, the latter opened with a burst of fire into her. All the others, apart from Lončar and the truck driver, shot the civilians. All 13 civilians were killed.

During the sentencing, the court considered the **defendant Mitrović's family situation as mitigating circumstances** - that is, the court took into consideration the fact that he is the father of two, one of whom is a minor, and the fact that the defendant supports them by doing part-time jobs. Another mitigating circumstance was **the lapse of time since the criminal act**. However, as to the aggravating circumstances, the court considered the seriousness of the crime, the consequences it had and the number of victims.

The court sentenced the cooperating defendant Žarko Milošević to nine years in prison. On 28 June 2013 the cooperating defendant had made an agreement with the OWCP regarding his testimony. On the basis of this agreement, the court sentenced him to the abovementioned time period due to the crimes against civilians. Because of the CPC, the court was bound by this agreement regarding the sentence the defendant had previously agreed with the OWCP.[301]

The court acquitted Opačić, Lončar and Milinković. In the court's opinion, there was no evidence which proved that Opačić, being the local community president at the time, had made a decision together with Milošević to kill 13 Croatian civilians from the list of people who were to be evicted from Sotin. Also, the court did not find evidence that the defendant Milinković agreed with that decision or helped towards its realization by providing the military truck and the driver, by which 13 civilians were driven to be executed. Finally, the court did not find any evidence that the defendant Lončar had known anything about Milošević's decision to kill the civilians or any evidence that could prove he had taken part in it.

The court made this decision and explained that **the testimony of a cooperating defendant, who accuses all the other defendants, is not enough for a convicting judgment**. Therefore, the cooperating defendant's testimony had to be verified and evaluated together with all the other evidence and testimonies of other defendants and witnesses. The court accepted the testimonies of defendants Lončar, Opačić and Milinković, evaluating them as logical, persuasive and supported by witnesses' testimonies. However, the court did not accept those parts of the testimony of the cooperating defendant in which only he accuses the other defendants.

301 CPC, Article 326, para. 1.

HLC findings

i. Search for missing persons through war crimes prosecution

This is the first case of war crimes in Serbia which has resulted in finding missing persons. During the investigation in April 2013, on the basis of the information provided by the defendant Žarko Milošević, and in cooperation with the OWCP, the State Prosecutor's Office of the Republic of Croatia (hereinafter: the DORH) and the Commissions for Missing Persons of Serbia and Croatia, the mortal remains of 13 victims from Sotin, who were killed on 27 December 1991, were found.[302] After that, Milošević made an Agreement on testifying with the OWCP, which was accepted by the court on 17 July 2013.

ii. Applying the Agreement on testifying and the evaluation of the cooperating defendant's testimony

Agreeement on testifying of the defendant has been applied in war crimes cases since 2012.[303] So far, this is only the second agreement which has been made between the OWCP and war crimes perpetrators.[304] The aim of this institute is to prove the indictment points more easily and quickly by means of the defendant's testimony and to mitigate the sentence for the defendant. However, it seems that the application of this institute **in this case has not been effective,** since most of the defendants were acquitted by the first instance judgment. The reason for this is the fact that the court did not believe those parts of testimony of the cooperating defendant Milošević in which he accuses the defendants Opačić, Lončar and Milinković. However, at the same time, the court did not provide a clear and persuasive explanation for this.

Namely, when the court acquitted the three defendants it did not accept the testimony of the cooperating defendant Milošević. However, it did accept the defendants' defence, stating it was "persuasive"[305] and "logical,"[306] while "the statements of the cooperating defendant Žarko Milošević were illogical and unconvincing to the court."[307] The court failed to provide an explanation why one

302 The OWCP, Press release for the *Sotin* case regarding the finding of the place where the mortal remains of the killed civilians are located, 19 April 2013, available in Serbian at: http://tuzilastvorz.org.rs/html_trz/VESTI_SAOPSTENJA_2013/VS_2013_04_19_CIR.pdf

303 CPC, Article 608.

304 First agreement on the testimony of the defendant was made in January 2013 between the OWCP and one of the defendants in the *Qyshk/Ćuška* case.

305 E.g. see evaluation of the defence of Mirko Opačić on page 136, evaluation of the defence of Dragan Lončar on page 135 and evaluation of the defence of Miroslav Milinković on page 140 of judgment of Higher Court in Belgrade K-Po2 No. 2/14 dated 26 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 9 October 2015.

306 Ibid.

307 E.g. see evaluation of the defence of Miroslav Milinković on page 139, evaluation of the defence of Dragan Lončar on page 135 of judgment of Higher Court in Belgrade K-Po2 No. 2/14 dated 26 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 9 October 2015.

testimony was considered logical and convincing, and the other one not; the court only mentioned those points of the defence it accepted.

Since the court assessed the defendants' testimonies as being more persuasive than those of the cooperating defendant, it had to **state the cooperating defendant's motives for falsely testifying against the defendants**.

This issue is especially important if we bear in mind the fact that the cooperating defendant's testimony incriminated mostly himself. Also, any decision of the court about the existence of the criminal responsibility of the persons he accused would not have any influence on the Agreement reached. By deciding the way it did, the court completely ignored the fact that, while confirming the Agreement on the testimony of the defendant, it had already assessed the mentioned Agreement, which included the cooperating defendant's testimony, and confirmed it. Moreover, according to the Agreement on testifying of the cooperating defendant, he is obliged to say everything he knows in the main hearing and he is also obliged to answer all the questions he is asked. Otherwise, he risks the agreement reached with the OWCP being terminated by the court.[308] On the other hand, the other defendants can defend themselves in any way, even by telling lies, so the court had to explain in detail why it believed the defendants' testimonies and not that of the cooperating defendant.

In his defence, the defendant Opačić said that Milošević's statements of accusation against him were not true. He added that he did not take part in deciding about the execution of the civilians, saying it was not a topic on the premises of the local community and claiming he did not chair that meeting.[309] This defence was persuasive and logical for the court since it was confirmed by the testimonies of witnesses Lazar Tintor and Vinko Trkulja, who were present on the premises of the local community at the time and confirmed that Milošević was lying when he said that there had been a discussion about the killing of the civilians on the premises.[310] **However, the judgment misses an analysis of a fact by which it was *logical* that witnesses Tintor and Trkulja would say that Milošević was not telling the truth, since the cooperating defendant mentioned these persons as the ones who took part in deciding which Croatian inhabitants were going to be executed.**[311] On the other hand, the court assessed the statement that the defendant Opačić, the local community president, did not chair the meeting as logical and possible.

As to the defendant Milinković, who was the commander of Sotin, the court found the testimony of witness Milošević "unconvincing" and "illogical", according to which Milinković knew that the civilians were going to be killed. Moreover, according to the testimony, he approved using the military truck

308 CPC, Article 362, para. 2 item 1.
309 Judgment of the War Crimes Department of the Higher Court in Belgrade K-Po2 No. 2/14 dated 26 June 2015, p.118 available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 20 November 2015.
310 Ibid. p. 119.
311 Ibid. p. 38.

and the driver who would take them to the execution site. The testimony of the cooperating defendant was unconvincing for the court, since it was contrary to the testimony of the defendant Milinković that he "might have approved using the truck", but he did not check what purposes it was going to be used for since he was busy. The court did not explain why the testimony of the cooperating defendant was not logical. Furthermore, it did not explain why the testimony of the defendant Milinković was logical and persuasive. This unexplained conclusion of the court is especially questionable if we take into consideration that Milinković himself testified that his position as the commander of the place meant that "**no actions or activities whatsoever could be taken without his approval.**"[312]

The court also accepted the statement of the defendant Lončar – that he was present at the execution site, but did not participate in the killing, adding that the cooperating defendant Milošević had not told him they were going to kill the civilians – as persuasive and logical.[313] The reason why the court did not accept the testimony of the cooperating defendant that accused the defendant Lončar was no more than the following: that the testimony of the cooperating defendant was contrary to Lončar's and his brother's defence. In other words, **not only did the court believe the defendant and not the cooperating defendant, but it believed the testimony of a close relative of the defendant Lončar; that relative did not have any immediate findings about the killing of the civilians**. It is almost unnecessary to emphasize that the court should have assessed the testimony of a witness who did not have any immediate knowledge about the abovementioned event with special attention, quite apart from the fact that the witness was the defendant's brother.

iii. Selective indictment

The indictment did not include the responsible persons or an important part of the events in Sotin during the relevant period – the forced displacement of Croatian civilians. The testimonies of the defendants and of a large number of witnesses clearly show that Croatian civilians were systematically expelled from Sotin in the relevant period. It is unquestionable that there was a list of Croatian civilians in the local community and that there was a meeting in which it was decided what Croatian civilians would be evicted from Sotin. Also, the provision of the buses and their undisturbed passage through checkpoints held by the JNA and their arrival at Šid were points of the meeting. During the proceedings, it was determined who had taken part in these activities apart from the defendants. However, the indictment for the criminal act had not been raised.

iv. Inappropriate mitigating circumstances at sentencing

In conclusion, the court can be criticized for evaluating the **time lapse since the criminal act was**

312 Transcript from the main hearing dated 5 February 2015, p. 36, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/03/03-05.02.2105.pdf, accessed on 21 November 2015.

313 Judgment of the War Crimes Department of the Higher Court in Belgrade K-Po2 No. 2/14 dated 26 June 2015, p. 135 available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_Sotin.pdf, accessed on 20 November 2015.

committed and the family situation of the defendant Dragan Mitrović as mitigating circumstances. These, according to the HLC, are not circumstances which should be considered as mitigating when it comes to this type of criminal act [see general finding 4].

III. Case *Bijeljina II*[314]

CASE OVERVIEW	
Case current phase: appellate proceedings	
Date of indictment: 4 June 2014	
Trial commencement date: 13 February 2015	
Acting Prosecutor: Dušan Knežević	
Defendant: Miodrag Živković	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Vinka Beraha Nikićević (Presiding Judge) Judge Vera Vukotić Judge Vladimir Duruz
Number of defendants: 1 **Rank of the defendants:** low rank - no rank **Number of victims:** 3 **Number of questioned witnesses:** 6	**Number of trial days in the reporting period:** 9 **Number of questioned witnesses in the reporting period:** 6
Key events in the reporting period: Acquittal in retrial	

314 Case *Bijeljina II*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/Bijeljina_II.html This case against the defendants Dragana Jović, Zoran Đurđević, Alen Ristić and Miodrag Živković was transferred to B&H by the Republic of Serbia on the basis of the Agreement between Serbia and Montenegro and B&H on legal assistance in civil and criminal matters. Since the defendant Živković was not available to the state authorities at a certain time, the proceedings against him were separated.

The course of proceedings

Case overview, year 2014 – 2015

Factual description from the indictment

The defendant is accused of having searched the house of Ramo Avdić and taken money and jewelry on 14 June 1992 in Bijeljina, as a member of a volunteer unit which was part of the Army of the Republic of Srpska (VRS). The defendant committed the criminal act as part of a three-member group of the VRS[315] and one local inhabitant.[316] Then the defendant, threatening with a gun in the presence of Ramo Avdic, his wife and sons, forced his daughter N.F. and his daughter-in-law H.A. to take off their clothes. The defendant and other members of the VRS present raped them in turn. One of the VRS members then killed Ramo by shooting him in the mouth with a rifle. Having done so, they left the house and took N.F. and H.A. with them. They took them naked and barefoot through the town and then on to the house of Rosa Todorović. They then robbed her, took some money and jewelry, and a car in which they headed out of the town, taking N.F. and H.A. with them. In the village of Ljeljenča they stopped the car and raped N.F. and H.A. again. After that, they continued their drive, leaving N.F. and H.A. on the road.[317]

Defence of the defendant

The defendant confirmed having been at the crime scene, but denied having taken part in the crime. He also said that he had told the defendants Jović and Đurđević to stop raping the women, after which he left the house. He was wearing a white tracksuit that night.[318]

Witnesses in proceedings

The victims Fata and Hurem Avdić and N.F. did not want to talk about the critical event, saying they found it extremely hard.[319] They did not change their previous statements given in Case *Bijeljina I*, when they said that five armed persons visited their house, one of whom was a civilian, with the other

315 The War Crimes Department of the Appellate Court in Belgrade, judgment K.Po2 6/12 dated 25 February 2013, Dragan Jović, Alen Ristić and Zoran Đurđević were convicted for the same criminal act and sentenced to 20 years in prison – Dragan Jović, 10 years in prison – Alen Ristić and 13 years in prison – Zoran Đurđević, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Drugostepena-presuda.pdf, accessed on 17 November 2015. The proceedings against the defendant was separated, since he was not present to the state authorities.

316 Judgment of the Supreme Court of the Republic of Srpska, Danilo Spasojević was sentenced to 5 years in prison for this criminal act.

317 The OWCP indictment No. KTO 6/14 dated 4 June 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/09/Optuznica_Bijeljina_II.pdf, accessed on 17 November 2015.

318 Transcript from the main hearing dated 13 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/13.02.2015..pdf, accessed on 17 November 2015.

319 Transcript from the main hearing dated 19 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/19.02.2015..pdf, accessed on 3 December 2015.

four wearing uniforms. The victims Fata Avdić and N.F. said that the civilian was "an inhabitant of Bijeljina" (the defendant Danko Spasojević), while the Hurem Avdić described him as the person who was wearing a black jacket. The victims H.A. and Nedžad Avdić did not testify, but they did previously notify the court about their decision, explaining they had had a very difficult time since their last testimony. Also, it took almost a year for the H.A. to recover from the psychological trauma caused by the testimony.[320]

Witnesses Dušan Spasojević[321] and Dragoljub Lazić,[322] members of the Police Department of Bijeljina, who took statements from the victims, the defendants and other co-perpetrators a day after the critical event, did not confirm that the defendant was wearing a white tracksuit. They were not sure what he was wearing. However, witness Lazić said he did not believe the tracksuit was exclusively white, because he would remember that – "if a person is dressed in white, that is something you notice."[323]

First instance judgment

On 14 April 2015, the Higher Court passed a judgment which acquitted the defendant Miodrag Živković due to lack of evidence. The court established that the critical event did happen and there was no doubt about that. However, there was no evidence that the defendant committed the act of rape and sexual perversion against the victims. This was established since the victims, while testifying in the proceedings against the previously convicted co-perpetrators, could not identify the persons who raped them. Also, neither of the victims recognized the defendant Živković, while they recognized the other co-perpetrators – Dragan Jović, Zoran Đurđević and Alen Ristić, in the photos. The victims mentioned the persons in uniforms who came to their house and a civilian too, yet nobody mentioned the person wearing a tracksuit.[324]

The court accepted the defendant's testimony that he was present during the critical event, but did not take part in it; he also added he wore a tracksuit on that occasion.[325] The court also established that the witnesses Dušan Spasojević and Dragoljub Lazić confirmed the defendant's statement that he was not wearing a uniform but a tracksuit at the relevant period. Furthermore, the court concluded there was no evidence that the defendant had agreed with the acts of the others or accepted them as his own.

320 Ibid.

321 Transcript from the main hearing dated 9 April, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/09.04.2015..pdf, accessed on 3 December 2015.

322 Ibid.

323 Ibid p. 17.

324 Report from the judgment announcement dated 14 April 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Bijeljina_II_Izvestaj_sa_objave_presude_14_04_2015.pdf, accessed on 3 December 2015.

325 Transcript from the main hearing dated 14 April 2015, p. 6, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/14.04.2015..pdf, accessed on 30 December 2015.

The Appellate Court judgment

On 28 September 2015 the Appellate Court rendered its judgment which overturned the first instance judgment and remitted the case to the first instance court for retrial.[326]

The Appellate Court established that the first instance court had determined the facts wrongly. Also, it had not properly explained the key findings of the first instance judgment that there was no reliable evidence that the defendant Živković had committed the criminal act.

Retrial and judgment

No evidence was presented in the retrial. The defendant only repeated his previously stated defence.

On 24 November 2015, the Higher Court again acquitted the defendant Miodrag Živković due to lack of evidence. Explaining the judgment, the court stated the same reasons it was governed by the last time it acquitted the defendant. This judgment was not yet available to the public at the time of the writing of this report, and it will therefore be analyzed in the following HLC report.

HLC findings

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i. Deviation from international standards of prosecution of sexual violence in war

Explaining the acquittal, the Presiding Judge Vinka Beraha Nikićević said that the court did not find evidence which would prove that the defendant Miodrag Živković committed the act of "rape and sexual perversion" against the victims. The court accepted his statement that he was at the crime scene, without a weapon, and not wearing a uniform but a white tracksuit.

During the trial, the court, prosecution and defence treated the issue of the clothes the defendant was wearing at the crime scene as crucial for solving this case. Namely, all the victims said that four persons in uniform and one civilian came to their house; yet none of the victims mentioned the person in the white tracksuit. Moreover, when the victims talked about the persons who raped them, they only talked about the persons who were wearing uniforms.

In the first instance proceeding, the court thought it was **logical that the** victims **could not be precise regarding the issue of the clothes of the perpetrators because of "the dramatic situation" they were in**; moreover, the court thought the persons in uniforms presented a striking image for the victims, stating that this was the reason they mentioned them. However, the Appellate Court found this explanation unacceptable, emphasizing that it was "not true to life" for the victims not to have mentioned that one of the perpetrators was wearing a white tracksuit if in fact he had been.

326 The War Crimes Department of the Appellate Court in Belgrade judgment, Kž1 Po2 2/15 dated 28 September 2015.

The court insisting on the victims remembering such details 25 years after the crime, i.e., by making this issue essential for the case outcome, is, according to the HLC, a "not true to life" and unreasonable request contrary to the international practice of processing sexual violence in war. While testifying, the witnesses in this case were clearly distressed – they made it clear to the court that they had health issues and that talking about the events was very hard for them. Besides, during the first trial **both the first instance court and the Appellate Court accepted that the crime happened at night and there was no electricity, which made the event even more traumatic for the victims.**

The issue of credibility of memory of sexual violence victims and their ability to reproduce details have been comprehensively discussed by leading experts from the field of psychology; and it was definitively resolved in the ICTY practice: "The Trial Chamber thinks **it is unreasonable to expect persons who survive such dramatic experience [sexual violence] to remember tiny details of events**, such as date or time. Furthermore, it is unreasonable to expect them to remember each particular element of a complicated and traumatic sequence of events […] The Trial Chamber is more interested in the events that happened than the exact date when they happened."[327]

ii. Unclear reasons for acquittal of the defendant for the charges of co-perpetration

The first instance judgment lacks a detailed analysis of the defendant's defence and the reason why the court accepts it. Namely, the defendant remained silent during the investigation and did not give his version of the event before the main hearing. The first instance court concluded there was not enough evidence to prove the defendant acted as a co-perpetrator, i.e., there was no evidence to prove that the defendant acted in a way which approved the action of the others or accepted those actions as his own, "**apart from the fact that he was present**." However, such a conclusion contradicts the determined facts. The Appellate Court stated the following: "The conclusion of the first instance court is unclear despite the unquestionable facts stated in the judgment: all the persons from the vehicle – which the defendant was driving – came to the house and entered it carrying weapons; according to their own testimony, they had a certain aim they began to accomplish – searching for weapons and money; all of them took part in it or stood in the corridor holding weapons, while the others were in rooms; no one did anything to protest against the actions of the others; they left the house in the same way they entered it; they worked together on solving the problem of pulling the car; they went to the house of Rosa Todorović; the events that followed near the village of Ljeljenča, including hiding behind the car when another car would pass; during all the abovementioned actions, no one protested or opposed, either by attitude or behaviour." Then the Appellate Court emphasizes that **it is unclear why the first instance court "concludes the defendant cannot be considered a co-perpetrator**." In this regard, it is clear that the first instance court in its judgment did not provide an adequate explanation why it cannot be concluded that Živković acted as a co-perpetrator, on the basis of the determined facts which the Appellate Court points out. Taking into consideration such direct criticism by the Appellate

327 First Instance Judgment of the ICTY in *Kunarac* case paras. 113 and 115.

Court and the fact that no new evidence was presented in the retrial, it is unclear why the first instance court again acquitted the defendant.

iii. Unprofessional conduct of defence attorney

During the closing arguments in the retrial, the defence attorney acted unprofessionally by using the courtroom to present his political views. In that manner, he expressed his gratitude to the Trial Chamber because "it was brave enough to acquit a Serb for war crimes charges", adding that "according to this indictment, everyone was doing everything, as the OWCP often states in indictments in which Serbs are the indictees." He also wondered "who was going to pay for convicting judgments against Serbs."[328] According to the Criminal Procedure Code, the court should have stopped such behaviour and reprimanded the defence attorney, in accordance with the law. Should he have continued behaving in that way, the court should then have stopped the closing argument,[329] since it insulted both **the victims and the dignity of the court**.

328 Report from trial of 20 November 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/11/BijeljinaII-Izvestaj_sa_sudjenja_u_pon.postupku_%2020.11.2015.pdf, accessed on 3 December 2015.

329 CPC, Article 413, para 6.

IV. Case *Sanski Most*[330]

CASE OVERVIEW	
Case current phase: appellate proceedings	
Date of indictment: 2 April 2013	
Trial commencement date: 12 June 2013	
Acting Prosecutor: Mioljub Vitorović	
Defendant: Miroslav Gvozden	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Bojan Mišić (Presiding Judge) Judge Mirjana Ilić Judge Dragan Mirković
Number of defendants: 1 **Rank of defendants:** low rank-no rank **Number of victims:** 6 **Number of questioned witnesses:** 10	**Number of trial days in the reporting period:** 9 **Number of questioned witnesses in the reporting period:** 8
Key events in the reporting period: First instance judgment	

330 Case *Sanski Most*, reports from the trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/sanski_most.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendant Miroslav Gvozden is charged with having killed six Croatian civilians (Petar Topalović, Milo Topalović, Mato Matoš, Marija Šalić, Dragica Šalić and Mando Matoš) and trying to kill Pilja Šalić, on 5 December 1992 in the villages of Tomašica and Sasina (the Municipality of Sanski Most, B&H) together with the VRS members Milo Gvozden,[331] Ostoja Gvozden, Bojan Gvozden and Zoran Šimčić (a minor),[332] following a previously reached agreement to avenge the defendant's deceased brother Radoslav Gvozden.[333]

This case was transferred to the OWCP from the Cantonal Court in Bihać after the Protocol on cooperation between Serbia and Bosnia and Herzegovina on war crimes was signed.

Defence of the defendant

The defendant denied having committed the criminal act, stating he has never been a VRS member. He admitted having been at the crime scene, but denied killing the civilians. He testified and said that two days before the crime happened, he went to his birth place of Usorke, 10 km away from the villages of Sasine and Tomašica, for the funeral of his killed brother Radoslav, whose nickname was "Black". His cousins Ostoja, Mile and Bojan Gvozden and Zoran Šimšić were at the funeral and spoke about revenge.[334] On the day of the crime, Mile Gvozden asked him to take a rifle and go to the village of Sasine, together with Ostoja and Bojan Gvozden. They were wearing uniforms and had rifles; the defendant was wearing ordinary clothes and had an automatic gun, which belonged to his deceased brother Radoslav. Entering Tomašica, a man and a woman were immediately killed. There was a horse cart nearby; two men and a boy of 6-7 were sitting on it. The men on the cart were killed, and the defendant told the boy to run. He did not shoot anyone. This event left a very strong impression on him since he was a civilian, and therefore he did not remember who shot on that occasion. He remained there, while the others went to a house. He then heard shots, but said he did not know who shot or whether someone was killed or not.

331 Not available to state authorities.

332 Ostoja Gvozden, Bojan Gvozden and Zoran Šimčić were awarded a repentant witness status before the Cantonal Court in Bihać (in exchange for an exemption from criminal prosecution and testimony against their accomplices).

333 The OWCP Indictment No. KTO 2/13 dated 2 April 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/06/Optu%C5%BEnica.pdf, accessed on 6 April 2015.

334 Transcript from the main hearing dated 12 June 2013, p. 21, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_12.06.2013..pdf, accessed on 6 April 2015.

Witnesses in the proceedings

Bojan Gvozden and Zoran Šimšić, who were questioned as witnesses, accused the defendant of having shot Pilja Šalić, who was on the horse cart, and also of having taken part in the killing of a married couple by name of Matoš.[335] Witness Ostoja Gvozden described the events in a similar manner.[336]

The witness Marinko Topalović said that he was on the horse cart together with his father Milo Topalović and Pilja Šalić at the time of the event. He recognized the defendant as one of the persons who was present at the time. He thought he was the person who shot.[337]

Delays in trial

At the end of 2013, there was a delay in the main hearing, because the Belgrade Bar Association submitted a letter announcing that lawyer Branimir Gugl, the defence attorney, had been removed from the Directory of Lawyers. Given that the defendant did not have the funds to hire a lawyer himself, the court appointed a defence attorney to the defendant *ex officio*.

Not one single main hearing was held in 2014. Namely, the defence attorney, who was appointed *ex officio*, wanted the case to be returned to the investigation phase after he had received the indictment. The reason for this request was the following: during the investigation, the defendant did not have a defence attorney, since Branimir Gugl, who acted as the defence attorney at the time, was not a lawyer. The pre-trial chamber then decided to return the case files to the OWCP, asking it to bring an order on conducting the investigation in three days. The OWCP thought the pre-trial chamber's decision was unlawful, since once confirmed an indictment cannot be returned to the investigation phase, especially since the investigation in this case had already been conducted, following the order of the Cantonal Prosecutor's Office in Bihać. Therefore, the OWCP returned the case to the pre-trial chamber for reconsideration. Having considered this remark, the chamber accepted the OWCP's statements. However, the proceedings could not be continued in 2014 due to the lawyers' strike. The main hearing continued on 23 February 2015.

335 Summary of Bojan Gvozden and Zoran Šimšić testimony, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/06/1.-Sanski-Most-Izve%C5%A1taj-sa-su%C4%91enja-12.06.2013-lektorisano.pdf, accessed on 6 April 2015.

336 Summary of Ostoja Gvozden testimony, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/06/SanskiMost-14-06-2013.pdf, accessed on 6 April 2015.

337 Transcript from the main hearing dated 11 September 2013, p. 12-13, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_11.09.2013..pdf , accessed on 6 April 2015.

Proceedings overview, year 2014 – 2015

First instance judgment

On 10 September 2015 the Trial Chamber rendered its judgment[338] which found the defendant Miroslav Gvozden **guilty of killing three Croatian civilians:** Mile Topalović and the married couple, Mato and Manda Matoš, and **sentenced him to 10 years in prison**. As to another three Croatian civilians, who were murdered in the VJrd of Petar Topalović's house – the murder Gvozden is also charged with – the Chamber found that he did not take part in it. According to the Chamber, these civilians were shot by Mile Gvozden. The defendant, although physically present in the VJrd, did not have an awareness of this event and was not there because he was acting by a previously made agreement. Only after this event did he develop awareness and wish to kill civilians, according to the court.

HLC findings

i. Disrespect of the Law on Free Access to Information of Public Importance[339]

At the time of writing this report, the HLC did not have access to the first instance judgment so it could not analyze it since the Higher Court refused to provide it to the public because it is still not final. **Such action by the Court directly opposes the position of the Commissioner for Information of Public Importance**, regarding the availability of non-final judgments of the Higher Court. Namely, the Commissioner determined that the refusal of the Higher Court to deliver non-final judgments to the HLC was unlawful.[340]

Furthermore, contrary to the Commissioner's decision,[341] the court continued with its practice of excessive anonymisation in this case. Namely, acting upon the HLC requests for the transcripts to be delivered, the court completely redacted the names of witnesses and victims. Therefore, one cannot determine who the witnesses are; as to the victim/witnesses, one cannot determine which member of their family got killed.[342] Therefore, instead of transcripts, the HLC had to use daily reports from trials and the summarized testimonies of the witnesses in this report.

338 Report from judgment announcement, dated 10 September 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Sanski_Most-Izvestaj_sa_objavljivanja_presude_10.09.2015.pdf, accessed on 16 November 2015.

339 More on anonymization practice can be seen in general finding 13 of this report.

340 Decision of Commissioner for Information of Public Importance and Protection of Information on Persons No. 07-00-00625/2012-03 dated 14 October 2013.

341 Decision of Commissioner for Information of Public Importance and Protection of Information on Persons No. 07-00-00337/2014-03 dated 17 March 2014.

342 Transcript from the main hearing, dated 14 June 2013, p. 65-66, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/sanski_most_14.06.2013..pdf, accessed on 9 April 2015.

i. Unjustified delay in the proceedings

The negligent behaviour of the defence attorney Branimir Gugl caused the initial delay of the proceedings, since he deceived both his client and the court. Namely, a disciplinary measure was imposed on Gugl – he was removed from the Directory of Lawyers from 2009 to 2011, and did not request to be re-registered afterwards. According to the CPC provisions, only a lawyer is entitled to be a defence attorney of the defendant,[343] and the defendant must have a defence attorney during the whole proceedings, if charged for a criminal act punishable with an 8-year or more severe sentence.[344] Since the defendant is charged for a war crime against civilians – a crime punishable with a 20-year imprisonment[345] – he had to have a defence attorney during the whole proceedings. Since the defendant's attorney was a person who was not registered in the Directory of Lawyers, this was seen as if the defendant had not had a defence attorney. Therefore, all the procedural actions which had been taken so far, had to be repeated so that the defendant could have the right to defence.

Besides, the defence attorney's decision to ask for a reinvestigation, as well as the unlawful decision of the Pre-trial chamber that had accepted it, caused another delay in the proceedings. Apart from the fact that the CPC allows the indictment to be issued without conducting an investigation,[346] the Pre-trial chamber completely ignored the fact that there were no problems with the defence attorney in the investigation phase – which could be verified by carefully examining the case files. Namely, Gugl became the defendant's attorney after the investigation had been carried out.

343 CPC, Article 73, para. 1.
344 CPC, Article 74, item 2.
345 CC FRY, Article 142.
346 CPC, Article 331, para.5.

V. Case *Skočić*[347]

CASE OVERVIEW	
Case current phase: appellate proceedings	
Date of indictment: 30 April 2010	
Trial commencement date: 14 September 2010	
Acting Prosecutor: Milan Petrović	
Defendant: Damir Bogdanović, Zoran Đurđević, Zoran Alić, Đorđe Šević, tomislav Gavrić and Dragana Đekić	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Vinka Beraha Nikićević (Presiding Judge) Judge Vera Vukotić Judge Bojan Mišić
Number of defendants: 6 **Rank of the defendants:** low rank - no rank **Number of victims:** 32 **Number of questioned witnesses:** 46	**Number of trial days in the reporting period:** 12 **Number of questioned witnesses in the reporting period:** 6
Key events in the reporting period: First instance judgment in retrial	

347 Case *Skočić*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/skocici.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants are charged with having destroyed a mosque in the village of Skočić (the Municipality of Zvornik, B&H) by using explosives on 12 July 1992, as members of a paramilitary group called "Sima's Chetniks". They then gathered the Roma inhabitants into a house – among them children, women and male adults – and took all their valuables from them. They beat them and killed one man. They ordered two men, a grandfather and his grandson, to take off their clothes and perform oral sex on each other. The defendant Sima Bogdanović cut off the grandson's penis with a knife. At the same time, the victims "Alpha", "Beta" and "Gama", of whom two were minors, were raped several times, and the defendant Sima Bogdanović took out two gold teeth of "Alpha" using pliers. All the people were then taken to the village of Malešić, where "Alpha", "Beta" and "Gama" were separated from the group. The others were then driven to a pit near the village of Šetići, in the place named Hamzići, where they were individually taken out from the vehicle and killed by knives and gun shots. Their corpses were thrown into the pit.

On that occasion they killed 22 civilians and wounded Zijo Ribić, an eight-year-old boy at the time. They forcibly detained "Alpha", "Beta" and "Gama" in Malešić and then took them to the villages of Klisa, Petkovci and Drinjač, forced them to work, beat them, raped and sexually tortured until January 1993.[348]

Having identified three more members of the paramilitary group "Sima's Chetniks", the OWCP raised an indictment against Zoran Alić[349] on 23 February 2011 and against Zoran Đurđević and Dragana Đekić[350] in December 2011, so joint proceedings were conducted against all the defendants.

The defendant Sima Bogdanović died in August 2012, and therefore the criminal proceedings against him were ceased.[351]

348 The OWCP indictment No. KTRZ 7/08 dated 30 April 2010, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/SKOCIC%20-%20za%20veb%20sajt/Optuznica%20protiv%20Sime%20Bogdanovica,%20Damira%20Bogdanovica,%20Zorana%20Stojanovica,%20Tomislava%20Gavrica%20i%20Djordja%20Sevica%20-%2030.04.2010..pdf, accessed on 15 April 2015.

349 The OWCP indictment dated 23 February 2011, available in Serbain at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/SKOCIC%20-%20za%20veb%20sajt/Optuznica%20protiv%20Zorana%20Alica%20-%2023.02.2011..pdf, accessed on 15 April 2015.

350 OWCP indictment No. KTRZ 11/11 dated 22 December 2011, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Optuznica-protiv-Dragane-Djekic-i-Zorana-Djurdjevica.pdf, accessed on 15 April 2015.

351 OWCP indictment No. KTRZ 7/08 dated 4 December 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/Izmenjena-Optuznica-Skocici1736.pdf, accessed on 15 April 2015.

First instance judgment

On 22 February 2013 the Higher Court department[352] passed a judgment which found the defendants guilty and sentenced them to prison: Zoran Stojanović and Zoran Đurđević to 20 years, Zoran Alić and Tomislav Gavrić to 10 years, Dragana Đekić to five years, Damir Bogdanović to two years, while Đorđe Šević, who was previously sentenced to five years for a war crime in another case,[353] was sentenced to a unified prison sentence of 15 years.[354] As to the unified indictment the defendant Stojanović was charged with, the court found that inhuman treatment and outrage against personal dignity were not proved. Namely, he was charged with having ordered the victims in Hamdija's house, Mehmed and Esad Aganović (grandfather and grandson) to take their clothes off and perform oral sex on each other. The defendant Đorđe Šević was excluded from the charge of rape of "Alpha" and "Beta" and involvement in the killing of the victims in the place called Hamzići, since this was not proved during the proceedings.[355]

The HLC presented a detailed analysis of the first instance judgment in its Report on war crimes trials in Serbia in 2013.[356]

Case overview, year 2014 – 2015

Second instance judgment

On 14 May 2014 the Appellate Court department[357] passed a judgment which dismissed the OWCP appeal, suspended the criminal proceedings against the defendant Zoran Stojanović – who had died in the meantime – and **quashed the first instance judgment, returning the case to the first instance court for retrial**.[358]

The Appellate Court overturned the first instance judgment, since it thought that the wording of the judgment was incomprehensible and contradictory and not properly and clearly explained, because

352 Chamber: Judge Rastko Popović (Presiding Judge), Judges Vinka Beraha Nikićević and Snežana Garotić Nikolić.

353 Final judgment of the District Court in Belgrade No. K.br. 1419/04 dated 15 July 2005, Đorđe Šević was sentenced to 15 years in prison for the criminal act of a war crime against civilians, committed in Skočić.

354 War Crimes Department of the Higher Court in Belgrade judgment in *Skočić* Case No. K.Po2 42/2010 dated 22 February 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf, accessed on 15 April 2015.

355 More on the first instance judgment in the Report on war crimes trials in Serbia in 2013, which is available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf

356 For a detailed analysis of the first instance judgment, see in the Humanitarian Law Center (Belgrade, HLC, 2013) *"Report of war crimes trials in Serbia in 2012"* available in English at http://www.hlc-rdc.org/wp-content/uploads/2013/02/Report-on-war-crimes-trials-in-Serbia-in-2012-ENG-FF.pdf, p. 53-63, accessed on 12 April 2015.

357 Chamber: Judge Siniša Važić (Presiding Judge), Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović, Miodrag Majić.

358 The War Crimes Department of the Appellate Court in Belgrade judgment in *Skočić* Case No. Kž1 Po2 6/13 dated 14 May 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 15 April 2015.

of which the factual state remained incorrectly and incompletely established.

The first instance court's opinion was assessed as unacceptable regarding the definition of co-perpetration as a form of the defendants' participation in the crime. According to the Appellate Court, specific actions which the defendants undertook were not clearly described in the wording of the judgment, and those actions had to be closely connected to the executed actions. The Appellate Court found the following conclusion of the first instance court unacceptable: the conclusion which says that the consent of the defendants with the executed actions lay in the fact that they did not oppose these actions or protect any of the victims or help them. Thus, the opinion was that any presence of a unit member and his failure to act could be a war crime in itself.

Another reason why the first instance judgment was overturned was that the executed action – inhuman treatment, for which the defendants were found guilty – had not been legally analyzed.

Finally, the Appellate Court thought the decisions on maximum criminal penalties determined for the defendants Zoran Alić and Dragana Đekić were not properly reasoned. Namely, Alić and Đekić were minors at the time of the crime and therefore the Law on Juvenile Offenders and Criminal Legal Protection of Minors applied to them. This Law prescribes that the maximum juvenile imprisonment is five years, but it can be 10 years for those criminal acts for which the prescribed imprisonment is 20 years or more.[359] Since the first instance court sentenced them to maximum imprisonment, it had to explain in detail the reasons for doing so, according to the Appellate Court.

Retrial

The retrial began on 2 September 2014. On 16 June 2015 the court **acquitted all the defendants**.[360] Explaining this decision, the court stated that it had determined that there was no evidence which proved the defendants committed the criminal act they were charged with.[361]

The OWCP filed a complaint against this judgment so the final decision will be made by the Appellate Court.

359 The Law on Juvenile Offenders and Criminal Legal Protection of Minors *"Official Gazette" No. 85/2005* Article 29.

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

361 War Crimes Department of the Higher Court in Belgrade judgment in the retrial in *Skočić* Case No. K Po2 11/14 dated 16 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 3 December 2015.

HLC findings

i. Inadequate protection of sexual violence victims

The first instance proceedings were marked by the extremely disturbing testimonies and turbulent psychological reactions during testimony of the victims – protected witnesses "Alpha", "Beta" and "Gamma". The questioning of the protected witnesses was marked by the **inapropriate behaviour of the defendants,** who shouted at them in a vulgar manner and asked questions aimed at discrediting and traumatizing them further. Despite the legal obligation to protect the witnesses' integrity, the Presiding Judge did not sanction the defendants formally. He reprimanded them informally instead.

Moreover, the **necessary psychological support was lacking** during the proceedings, since the Service for Support and Assistance to Witnesses and Victims at the Higher Court Department does not have a psychologist; furthermore, the persons working with witnesses were not properly trained to work with sexual violence victims.[362]

The **protected witness "Gamma" refused to testify in the retrial,** which is a clear indicator of the deficiencies in the system of support and protection of victims. The victims made the same decision in the *Bijeljina II* Case.

ii. The acute problem of co-perpetration

The decision of the Appellate Court in this case reinforced the impression among the professional public that there was an essential difference in the application of the co-perpetration institute between the departments of the Appellate Court and the Higher Court in Belgrade. This is just **one of many cases in the last three years in which first instance judgments have been overturned due to the Appellate Court's findings that the first instance courts failed to concretize each defendant's actions** when qualiying their participation in the crime as co-perpetration.[363]

The Appellate Court emphasized that the actions of each defendant had to be precisely determined and explained in detail. In its judgment, the first instance court stated that the defendants Alić, Đurđević and Đekić, together with other unknown members of the unit, destroyed a mosque in the village of Skočić, where "one part" of the unit took part in destroying the mosque, while the "other part" acted as guard, among them the defendant Alić. The judgment did not state who those defendants were or what specific actions they took. As to the defendant Alić, who allegedly stood guard at the crime scene, the Appellate Court found that a clear and logical explanation regarding his involvement in the

362 More on support provided to victims and witnesses in the War Crimes Department of the Higher Court can be seen in *Ten years of war crimes prosecuting in Serbia - Contours of justice (analysis of war crimes prosecution 2004-2013)* HLC 2014, p. 54-61, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/10/Analiza_2004-2013_eng.pdf, accessed on 19 November 2015.

363 The first instance judgments were overturned for the same reasons in the Cases *Lovas, Beli Manastir* and *Qyshk/Ćuška*.

crime was lacking. The Appellate Court took such stance since his defence – that "there was no need to stand guard at the crime scene, since this was a village surrounded by territory under the control of Serbian forces" – has not been confuted in the reasoning of the judgment. Such a position of the Appellate Court can be considered rigid, since it means that co-perpetration can exist only if all the actions committed by each co-perpetrator are presented very precisely.

Standing guard is a very precise action, which is performed on the basis of division of roles. The first instance court clearly stated that "[they] were guarding and watching in case some soldiers of the opposing side in the armed conflict would come."[364] The defence of the defendant Alić, where he said that there was no need to keep guard since it was a territory under Serbian control did not need to be additionally confuted, since it had already been confuted in the reasoning of the first instance judgment in the defence of the defendant Stojanović, who said: "The order was to search the village to check that there was no Muslim army […] The order was given by the commander, i.e. Sima Bogdanović."[365] These statements of the defendant Stojanović clearly show there was an order to act, there was a division of roles and that the defendants agreed with the actions of others and accepted the crime as their own.

iii. Racist remarks of the Appellate Court

According to the Appellate Court, in the first instance judgment regarding the defendant Dragana Đekić, clear evidence to show what constitutes her inhuman treatment was not given. The rationale of the first instance court was considered insufficient - the reasoning stating that the defendant took some jewelry from "Beta", to which the defendant was emotionally attached, at a time of rape, beating and torture, thus causing the victims to suffer mentally and representing an attack her human dignity. Besides, the Appellate Court says that "in the appeal, Đekić's defence attorney indicates that the first instance court did not provide clear evidence regarding the emotional connection of the victim and the jewelry; moreover, **it did not try to determine the origin of the jewelry especially when one considers the fact that a Serbian village nearby had been massacred**"[366] [the HLC italics]. This position of the Appellate Court is racist since it *a priori* implies the jewelry taken from the victim did not belong to her, and could have originated from allegedly massacred Serbian victims, thus making her and other victims either possible perpetrators of the massacre or at least some soulless thieving Roma who took the jewelry from the massacred Serbian victims and therefore, could not have any emotional connection with the jewelry whatsoever. The HLC has issued a statement regarding this position of the Appellate Court.[367]

364 War Crimes Department of the Higher Court in Belgrade judgment in *Skočić* Case No. K.Po2 42/2010 dated 22 February 2013, p. 77, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Prvostepena-presuda-Skocic.pdf, accessed on 15 April 2015.

365 Ibid, p. 22.

366 Judgment of the War Crimes Department of the Appellate Court in *Skočić* Case No. Kž1 Po2 6/13 dated 14 May 2014, p. 13, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 15 April 2015.

367 The HLC statement dated 14 July 2014, *Racist attitudes of the Appellate Court in Skočić Case,* available in English at http://www.hlc-rdc.org/?p=27178&lang=de, accessed on 19 November 2015.

This position of the court cannot be relativized in any way if one takes into consideration that **during the proceedings, no evidence regarding the existence or the perpetrators of such a massacre was ever presented**, nor regarding the connection of "Gamma" – who was 15 years old at the time – with the alleged massacre. The President of the Appellate Court reacted to the HLC statement, saying that the HLC criticism is on the basis of a statement "taken out of context", adding the disputed statement is exclusively a legal issue, not referring to the disputed part of the Appellate Court decision.[368]

iv. Inconsistency in the arguments of the Appellate Court

The Appellate Court's arguments for overturning the judgment are not only advanced on the basis of non-legal positions, but are inconsistent as well. Thus, as to the defendant Zoran Alić, the Appellate Court objected to the first instance court saying that the latter did not explain the defendant's standing guard during the demolition of the mosque and the killing of 27 Roma civilians in the place of Hamzići, since the defendant, in his statement, said there was no need for a guard, because "Skočić was surrounded by Serbian-controlled territory." However, the Appellate Court did accept the defence of the defendant Dragana Đekić, who said "a Serbian village nearby was massacred", which implies that the whole surrounding area was not "under Serbian control". Thus, **the Appellate Court based its reasons for overturning the judgment on contradictory facts**."

v. The line of least resistance of the first instance court

The acquittal brought by the first instance court in the retrial is a simplified conclusion on the lack of evidence on the criminal responsibility of the defendants. **All the issues marked as disputable by the Appellate Court in the first instance judgment were simply assessed as unproven by the court in the retrial**. Thus, the court passed the burden of deciding in this case to the Appellate Court, because the Appellate Court would have to finally adjudicate the case, since the judgment had already been overturned once.[369]

In this manner, the court concluded there was no evidence which would prove that the defendant Zoran Alić was guarding the site during the demolition of the mosque in Skočić. The court found that "guards are a armed group of men in a certain disposition with the aim to protect persons, facilities and materialist technical assets, whose work is regulated by special rules of service…"[370] and ignored other evidence, such as the fact that this unit was acting following a set pattern[371] and the fact that the

368 Statement of the Appellate Court President in Belgrade dated 15 July 2014, *Regarding the statement of the Humanitarian Law Center in relation to the Appellate Court judgment brought in the case publicly known as "Skočić"* available in Serbian at: http://www.bg.ap.sud.rs/cr/archive/vesti-i-saopstenja/2014/7 accessed on 19 November 2015.

369 CPC, Article 455, para. 2.

370 War Crimes Department of the Higher Court judgment in the retrial in *Skočić* Case No. K Po2 11/14 dated 16 June 2015, p. 39, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 3 December 2015.

371 Transcript from the main hearing dated 19 March 2015, p.6-8, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Transkript_19_03_2015.pdf, accessed on 19 November 2015.

attack on Skočić was conducted following the order of the unit commander. The court accepted the defendant's defence, which was that he was not mounting guard, but simply standing and smoking a cigarette. The judgment lacks a logical and clear explanation as to why the court does not accept the defendant's statement which says he was not in the place where the civilians had been killed, but at the same time accepts the statement that he was present, but only stood and smoked.

vi. Findings of the court which damage its reputation

In the first instance judgment in the retrial, the court also found that inhuman treatment in taking the jewelry from "Gamma" was not proved, and neither were the acts of forcing the victims to wash things, prepare food and clean for the defendants. The court found that these actions could not be considered inhuman treatment, since there was no evidence they were a serious attack on human dignity or that they caused severe mental or physical suffering to the victims - that is, that "**the above mentioned actions did not cause severe humiliation and degradation**."[372] Moreover, as to the detention of the victims in Malešić, the court specifically stated that it based its conclusion regarding the absence of inhuman treatment on the fact that the victims also ate the food and enjoyed washing clothes and cleaning house:[373]

Код постојања околности да су оштећене повремено спремале храну, правиле палачинке и крофне и да им, како то наводи ошт. „Алфа" нико није бранио да једу када су спремале храну, да су прале туђу одећу, при чему је логично да су у датим условима свакако морале да перу и сопствену одећу, те да су водиле рачуна о чистоћи кућа у којима су и саме боравиле, по становишту овог суда нема доказа да су такве радње довеле до тешких душевних патњи.

[SIC: In regards to the circumstances that the victims occasionally prepared food, made pancakes and doughnuts and that, as stated by "Alpha", no one prevented them from eating the food they prepared; that they washed others' clothes, but it is logical that in these circumstances they certainly had to wash their own clothes; and that they were responsible for the cleanliness of the houses in which they too stayed; according to the opinion of this court there is no evidence that these acts lead to severe mental suffering]

In this way, the court totally ignored the context of events – a 15-year old girl was robbed of her jewelry while members of her family were being killed and raped at the same time; i.e., the women were detained, raped on a daily basis and physically abused, believing that the members of that very unit were the ones who killed their loved ones.

372 Judgment of the Higher Court in the retrial in *Skočić* Case No. K Po2 11/14 dated 16 June 2015, p. 42, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 3 December 2015.

373 Ibid, p. 55.

Moreover, in its judgment the court superficially calls on "the ICTY positions", although it drastically differs from ICTY practice and the practice of other bodies regarding evidentiary standards regarding inhuman treatment.[374] Namely, the judgment says: "In the opinion of this court, not every action committed against the victims […] can be inhuman treatment; it is necessary that the actions […] cause severe mental suffering."

Apart from the fact that the court belittles the suffering of these women, it also ignores the ICTY standards: "violation of personal dignity […] does not have to directly jeopardize the victim's physical or mental well-being; it is enough to cause real and permanent suffering which stems from humiliation or ridicule."[375] Moreover, the International Committee of the Red Cross (ICRC) explains the meaning of inhuman treatment in the following way: "It does not necessarily mean conduct which is an attack on the physical integrity or health […] Certain measures like separation of civilians from the outside world, especially their families […], should be considered inhuman treatment."[376]

In cases of inhuman treatment, the ECHR has emphasized the "seriousness of the violation": "[the seriousness of the violation] is assessed on the basis of all the circumstances of a case, such as the nature and context of the act, its duration, physical and mental effects, and sometimes the sex, age and health state of the victim."[377] Moreover, the ECHR concluded that: "When it comes to a person deprived of liberty, any application of physical force that is not strictly caused by the person's conduct, violates human dignity."[378]

Finally, cases of incarceration of women in private homes and other facilities for sexual exploitation and housework were not rare during the war in B&H. Not only did the ICTY and the B&H Court[379] qualify these acts as inhuman treatment, but prosecuted such cases as slavery and a crime against humanity. Namely, the ICTY found that "the features of enslavement include elements of control and ownership, control or limit of the individual's autonomy, freedom of choice or freedom of movement [...] Further indicators of enslavement include exploitation, forced or compulsory work or services, often free of charge and often, though not necessarily, accompanied by physical suffering, sexual intercourse, prostitution and trafficking."[380]

374 Ibid, p. 42.
375 *Prosecutor v. Aleksovski,* Case No. IT -95-14/1-T, Judgment, 25 June 1999, para. 56.
376 ICRC Commentary on the III Geneva Convention MKCK, para. 627; ICRC Commentary on the II Geneva Convention, par. 268, First instance judgment of the ICTY in case *Prosecutor v. Mucić et al.,* para. 521-522.
377 ECtHR, A v. United Kingdom, Judgement 23 Sept. 1998, Eur. Ct. H.R., para.20 (citing: Costello-Roberts v. United Kingdom, Judgement 25 March 1993, 247-C Eur. Ct. H.R. (Ser.A) 1993).
378 ECtHR, *Ribitsch v. Austra,* 21 EHRR 573, 1996, para. 38.
379 See cases of the B&H Court, the second instance judgment in *Samardžić* Case; the first and the second instance judgment in Janković case; the first and the second instance judgment *Kujundžić* Case.
380 The first instance judgment of the ICTY in case *Prosecutor v. Kunarac et al.,* para. 542.

VI. Case *Beli Manastir*[381]

PREGLED PREDMETA	
Case current phase: appellate proceedings	
Date of indictment: 23 June 2010	
Trial commencement date: 1 November 2010	
Acting Prosecutor: Snežana Stanojković	
Defendants: Zoran Vukšić, Slobodan Strigić and Branko Hrnjak	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Dragan Mirković (Presiding Judge) Judge Mirjana Ilić Judge Bojan Mišić
Number of defendants:: 3	
Rank of the defendants: low rank	**Number of trial days in the reporting period:** 6
Number of victims: 24	**Number of questioned witnesses in the reporting period:** 2
Number of questioned witnesses: 68	
Key events in the reporting period: First instance judgment in the retrial	

381 Case *Beli Manastir*, reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/beli_manastir.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Zoran Vukšić, Slobodan Strigić, Branko Hrnjak and Velimir Bertić were charged with having killed, unlawfully detained, applied measures of intimidation and terror, torture and inhumane treatment on, and violated the bodily integrity of Croatian civilians in Beli Manastir, from August to December 1991, being at the time members of the Special Purpose Unit of SUP Beli Manastir (Republic of Croatia).[382]

The indictment includes the following events: (1) The abuse and torture against civilians in SUP Beli Manastir; (2) The attack on the civilian population in the village of Kozarac[383] (where Ivo Malek was killed, and Josip Vido and Matilda Vranic were wounded); (3) The killing of Adam Barić and wounding of Ana Barić in settlement of Sudaraš; (4) The killings of Vinko Čičak and his three sons, Anto, Mate and Ivan, near "Karaševo", an abandoned farm near Beli Manastir.

Defence of the defendants

The defendants Zoran Vukšić, Slobodan Strigić and Velimir Bertić **denied committing the crime**, while the defendant **Branko Hrnjak admitted** having committed the crime, but stated he had not done it voluntarily.

Judgments after the first trial

On 19 June 2011 the Trial Chamber[384] passed **the first instance judgment, which found the defendants guilty on all counts** and sentenced Vukšić to the maximum sentence – 20 years in prison -, and Strigić to 10, Hrnjak to five and Bertić to one and a half years.[385] Explaining the judgment, the Presiding Judge stated that persons who were superior to the defendants were responsible for this too, since they knew about certain crimes but did not punish them, which later contributed to the crime against the Čičak family.[386]

382 The OWCP Indictment No. KTRZ5/09 dated 23 June 2010, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Zoran_Vuksic_i_dr/Beli_Manastir_optuznica.pdf, accessed on 3 April 2015.

383 The village of Kozarac is 10 km southeast from Beli Manastir.

384 Chamber: Judge Dragan Mirković Presiding Judge, Judges Olivera Anđelković and Tatjana Vuković.

385 War Crimes Department of the Higher Court in Belgrade, judgment in Case *Beli Manastir*, K.Po2 No. 45/2010. dated 19 June 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Prvostepena-presuda.pdf, accessed on 3 April 2015.

386 Transcript from the judgment announcement, dated 19 June 2012, p. 15, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/39-19.06.2012-presuda1.pdf

Deciding on the appeals, the Appellate Court passed the second instance judgment on 29 March 2013 which **confirmed the first instance judgment regarding the defendant Bertić**, and overturned the first instance judgment regarding the defendants Vukšić, Strigić and Hrnjak and **returned the case to the first instance court for retrial**.[387] Besides, the court stated that key facts regarding the killing of the Čičak family were not sufficiently explained, that is, there was a discrepancy between the defence of Branko Hrnjak and the material evidence and the opinion of the medical expert.[388]

Retrial

The retrial began before the amended Trial Chamber[389] on 25 September 2013. Two experts were questioned – Dr Dušan Dunjić, an expert in medicine, and Milan Kunjadić, a ballistics expert. They were questioned in order for them to fully explain all the details which were important for determining the manner the Čičak family was killed, on the basis of which one could assess the statements in the defendants' defence.

Proceedings overview, year 2014 – 2015

The closing arguments of the parties were scheduled for February 2014, but the Trial Chamber decided to reopen the main hearings in order to question the medicine and ballistics experts and obtain a further explanation of their findings.

In 2014, only one day of the main hearing was held, when the experts were questioned. Neither of the experts changed their testimony, and the ballistics expert additionally explained his findings by precisely defining the type of ammunition used.

First instance judgment in the retrial

On 29 May 2015 the Higher Court passed the judgment[390] which found the defendants Vukšić, Strigić and Hrnjak guilty and **sentenced them to the same sentences as in the first instance judgment**: Vukšić to 20 years, Strigić to 10 and Hrnjak to five years.

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387 The War Crimes Department of the Appellate Court in Belgrade, judgment No. Kž1 Po2 7/12 dated 29 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Drugostepena-presuda.pdf, accessed on 3 April 2015.

388 In his defence, Hrnjak said the defendant Vukšić stabbed Mate Čičak in the neck, but did not shoot him. When talking about the injuries the deceased Mate received, Dušan Dunjić a medical expert, said that Mato suffered a shooting injury to the head. Moreover, according to the photo documentation which was made when the bodies of the Čičak family were found, it was concluded that all the victims were found in one place. However, Hrnjak stated that Vukšić killed the last member of the Čičak family in another location, i.e. approximately 10 metres from the van. He added that, having killed the abovementioned persons, they returned to Beli Manastir, not moving the bodies of the victims. The first instance court did not analyze this difference between the Hrnjak defence and the material evidence.

389 Chamber: Judge Dragan Mirković Presiding Judge, Judges Mirjana Ilić and Bojan Mišić.

390 The War Crimes Department of the Higher Court in Belgrade, judgment in Case *Beli Manastir* K.po2 No. 9/13 dated 29 May 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Prvostepena_presuda_u_ponovljenom_postupku_Beli_Manastir.pdf, accessed on 16 October 2015.

The HLC asked the Higher Court President to record the announcement of the judgment. However, the request was denied without any explanation.

The Trial Chamber found the defendant Vukšić guilty of the killing of Adam Barić and the attempted murder of his wife Ana Barić, of the attack on the civilians in the village of Kozarac and of wounding Josip Vid, a civilian; he was also found guilty for inhumane treatment and violation of the bodily integrity of persons who were detained in the premises of the SUP Beli Manastir.

Regarding the killing of Vinko Čičak and his three sons, it was determined without any doubt that they were taken to the abandoned farm of Karaševo from the Police Station Beli Manastir, where they were detained for some time. The court determined that Vukšić and Madžarac took Mate Čičak from the vehicle first. Then the defendant Vukšić stabbed Mate in the neck using a knife. After that, Vukšić, Madžarac, Strigić and Hrnjak first took Ivan and then Vinko Čičak from the car. They took them to the place where Mate Čičak had been previously killed. The defendant Vukšić killed them by firing from a gun. Finally, all four of them took Ante Čičak from the vehicle and took him to the same place. There, Vukšić shot him with the gun; after he fell, the defendant Strigić shot more shots from his automatic rifle, just as he had with the other victims before.

During the sentencing, **the court considered the family circumstances as mitigating circumstances for the defendants, and also the lapse of time from the commission of the crime**. The absence of any previous criminal record was a mitigating circumstance for Strigić and Hrnjak. Conduct before court was a mitigating circumstance for Branko Hrnjak, since he admitted the crime and expressed sincere repentance. The aggravating circumstances were the motives, the circumstances under which the crime had been committed and the severity of the consequences. Earlier convictions were considered aggravating circumstances for Vukšić. As to the defendant Hrnjak, the court did not find any aggravating circumstances.

HLC findings

i. The superiors were not charged despite the evidence

Although in the first announcement of the judgment, the Trial Chamber pointed out that the persons superior to the defendants were responsible for this crime too,[391] the OWCP did not amend the indictment to include them. Namely, **the Trial Chamber concluded that the defendants' superiors knew certain crimes had taken place; however, they did nothing to punish them, thus contributing to the crime against the Čičak family**.

391 Transcript from the judgment announcement dated 19 June 2012, p. 15, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/39-19.06.2012-presuda1.pdf, accessed on 8 May 2015.

Non-processing of the higher ranking members of the armed forces after ten years of war crimes trials before domestic courts is a chronic problem in the work and credibility of the OWCP, and the basic criticism addressed to the OWCP by the international public[392] [for more, see general finding 1]

ii. Prohibition on recording the judgment announcement

On 26 May 2015, the HLC sent a request to the Higher Court President in Belgrade to approve a video recording of the public announcement in this case. The HLC based its request in accordance with the Law on War Crimes, which states that "the recording of the main hearing with the aim of public presentation can be approved by the court president after he/she consults the parties."[393] Aleksandar Stepanović, the Higher Court President, replied without any explanation whatsoever that the request "is not approved."

The Law on War Crimes does not require an explicit explanation for its decision to ban the recording of the trial. Nevertheless, explanation of a judicial decision is an unquestionable standard of the rule of law and the human right to a fair trial. In its practice, the ECtHR says the following: "Public scrutiny over the delivery of justice can only exist with the provision of an explained decision."[394] Moreover, the CPC says that "the decision of the Trial Chamber on the exclusion of the public must be explained and publicly announced."[395] Since the prohibition to record a public trial, essentially represents a restriction on its public nature, the provision of the CPC should have been analogously applied in this case.

The amendments to the Law on War Crimes from 2009 has made it easier to record these cases in comparison to some other court proceedings, because the need to introduce the public to the facts and evidence concerning these crimes is now recognized. However, for 12 years the public in Serbia has not had a chance to see a single testimony of a victim, perpetrator or witness of war crimes participating in such cases. The public of Serbia has not had a chance to see an announcement of a judgment, either. Unlike Serbia, war crimes trials are regularly recorded in B&H and Croatia and are shown throughout the media.

392 Fred Abrahams, Dispatches: In Kosovo, Justice Welcome, but Incomplete, 14 February 2014, available at: http://www.hrw.org/news/2014/02/18/dispatches-kosovo-justice-welcome-incomplete, accessed on: 13 May 2014; Bogdan Ivanišević, Despite the circumstances: Criminal proceedings for war crimes in Serbia (Belgrade: International Center for Transitional Justice, 2007), p. 8; European Commission, Report on Serbia progress for the year 2013, 16 October 2013.

393 The Law on War Crimes, Article 16a.

394 E.g., see Judgment of the ECtHR in Case *Suominen v. Finland* (No. *37801/97), 1 July 2003, para. 37.*

395 Article 365 of the CPC.

Hearings before the War Crimes Department of the Appellate Court in Belgrade

I. Case *The Tuzla Column*[396]

CASE OVERVIEW	
Case current phase: appellate proceedings (retrial)	
Date of indictment: 9 November 2007	
Trial commencement date: 22 February 2008	
Acting Prosecutor: Milan Petrović	
Defendant: Ilija Jurišić	
Criminal act: use of forbidden means of combat, CC FRY, Article 148	

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

Number of defendants: 1	
Rank of the defendants: middle rank	**Number of trial days in the reporting period:** 2
Number of victims: at least 101	**Number of questioned witnesses in the reporting period:** 1
Number of questioned witnesses: 100	

Key events in the reporting period:

Hearings before the Appellate Court

396 *The Tuzla Column* Case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/tuzlanska_kolona.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendant Ilija Jurišić is charged with having issued an order in Tuzla (B&H) to attack the convoy of the JNA which was peacefully passing through Tuzla on 15 May 1992. The defendant was a duty officer within the Operational Headquarters of the Public Security at the time. On that occasion, at least 51 members of the JNA were killed, while at least 50 of them were wounded. The indictment of the OWCP qualified this attack as the use of forbidden means of combat, because the **agreements on the peaceful withdrawal of the JNA units** from B&H and Tuzla were violated by this attack.[397] In particular, the act is qualified as perfidy, that is, "Acts inviting the confidence of an adversary to lead him to believe that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence".[398]

Defense of the defendant

The defendant said he had not had any knowledge whatsoever of the agreement between the commander of the barracks and the Tuzla authorities in relation to the army's withdrawal from Tuzla, adding that he had not had any command authority either. Having received the information from the members of the police that they were being shot at from the military convoy, he only passed on the order of his superior Meša Bajrić:"If shot at, respond in the same manner."

Judgments at the first trial

The court accepted all the allegations of the indictment, found the defendant guilty and sentenced him to 12 years in prison by the first instance judgment of 28 September 2009.[399] Owing to the failure of the first instance court which failed to determine a series of decisive facts, such as the existence of the agreement on withdrawal and the defendant's authority, the Appellate Court,[400] deciding on the appeals of the defense attorneys and the OWCP, had to start the main hearings by presenting evidence

397 The OWCP indictment No. KTRZ 5/04 dated 9 November 2007, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Tuzlanska_kolona/Optuznica-Tuzlanska_kolona.pdf, accessed on 17 April 2015. Specified indictment of the OWCP No. KTRZ dated 18 September 2009, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/Precizirana-optu%C5%BEnica.pdf, accessed on 17 April 2015.

398 Article 37 of Additional Protocol I of the Geneva Conventions.

399 Judgment of the District Court in Belgrade in *the Tuzla Column* Case No. KV.br.5/2007 dated 28 September 2009, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_prvostepena_presuda-28.09.2009..pdf, accessed on 17 April 2015.

400 Chamber: Judge Siniša Važić, Presiding Judge, judges Sonja Manojlović, Omer Hadžiomerović, Sretko Janković and Miodrag Majić.

which the first instance court had failed to present. On 11 October 2010, the Appellate Court issued a decision which granted the defense appeal, revoked the judgment and remanded the case to the first instance court for retrial - but a retrial before a completely changed trial chamber.[401] The Appellate Court concluded, among other things, that **the existence of the agreement on withdrawal had not been reliably determined**.

A detailed analysis of the first trial was provided by the HLC in its Report on war crimes trials in Serbia in 2010.[402]

Retrial

In the retrial of 2 December 2013, the War Crimes Department of the Higher Court[403] issued a judgment identical with that of the first trial, and **sentenced the defendant to 12 years in prison**.[404]

Proceedings overview, year 2014 – 2015

Deciding on appeals, **the Appellate Court decided to reopen the hearings**. During 2015, only a military expert was questioned.

Mile Stojković, the military expert, did not change his previous statement, saying there was a clear intention to attack the JNA convoy, which was indicated by the manner and speed of the action, and the resulting consequences – the killing and wounding of a large number of soldiers and severe material damage.

Moreover, he stated that in situations when there is a commander in the Operational Headquarters, the duty officer does not have command authority. The military expert evaluated the order issued at the time of the event as an order of little importance. In other words, the expert practically **denied the allegations**, primarily those regarding the command authority of the defendant Ilija Jurišić. Moreover, the expert largely questioned the effect of the order passed on by the defendant.

401 Judgment of the War Crimes Department of the Appellate Court in *the Tuzla Column* Case No. KŽ1 Po2 5/10 dated 11 October 2010, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_drugostepena_odluka.pdf, accessed on 17 April 2015.

402 See: Humanitarian Law Center, Report on war crimes trials in Serbia in 2010 (Belgrade: HLC 2011), p.18-20, available in English at http://www.hlc-rdc.org/wp-content/uploads/2012/03/Reports-on-war-crimes-trials-in-the-Republic-of-Serbia-2010.pdf, accessed on 17 April 2015.

403 Chamber: Judge Dragan Mirković, Presiding Judge, judges Mirjana Ilić and Bojan Mišić.

404 Judgment of the War Crimes Department of the Higher Court in Belgrade in *the Tuzla Column* Case No. K.Po2 53/10 dated 2 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013..pdf, accessed on 17 April 2015.

HLC findings

i. Unclear factual state by the first instance court

The first instance court again failed to clarify the decisive facts for issuing the judgment in the retrial, although the Appellate Court indicated those when revoking the first judgment. Namely, **it is unclear how the defendant Ilija Jurišić knew that there was an agreement on withdrawal from the barracks, made between the representatives of authorities in Tuzla and the barracks commander Mile Dubajić** on 15 May 1992, as stated in the judgment. The same explanation as in the first trial was given in the retrial for this conclusion of the court - that is, it is not logical that the defendant, being a member of the Operational Headquarters, was not familiarized with the army's withdrawal from Tuzla.

The court could not obtain the Agreement on the peaceful withdrawal of the JNA from B&H. However, it did conclude that the absence of written evidence does not mean the agreement was not made, since the withdrawal of the JNA from B&H was a familiar item of information, known throughout the media. Moreover, numerous JNA units, withdrawing from B&H, passed through Tuzla before the critical event. The court concluded that even if there was no such agreement, it would not influence in any way the existence of this criminal act. According to the court, perfidy "occurs when there is an agreement between the conflicting parties, which is then violated by one of them"[405], which the court determined, on the basis of the presented evidence.

Another **unclear issue was the defendant's command authority**, as well as the issue of the evaluation of the real order given by the defendant - that is, whether it was an order to attack or, by its content and the circumstances in which it was given, a defensive order. Furthermore, what was its influence on the whole course of events if it was issued when the shooting had already taken place, according to many witnesses? When issuing the judgment in the retrial, the trial chamber was governed by the same positions as the previous chamber, as was actually confirmed by the Presiding Judge at the announcement of the judgment: "The trial chamber has not changed the statements presented by the Presiding Judge on 28 September 2009."[406]

ii. Wrong application of the rules of international humanitarian law

The OWCP qualified the act Jurišić is charged with as the war crime of "perfidy". The OWCP did not explain the qualification of the act in the indictment, yet it only stated that "the perfidious plan" existed, adding that "the agreement and decision [on peaceful withdrawal] created trust within the JNA that it would not be attacked while withdrawing". The OWCP also stated there was "an intention to betray

405 Ibid, p. 35.

406 Transcript of the judgment announcement in the retrial of 2 December 2013, p.6, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/02.12.2013.pdf, accessed on 18 April 2015.

the trust created." The courts did not question this qualification. Namely, the courts' conclusion was as follows: the attack on the JNA column was a perfidious act because it violated the agreement on the peaceful withdrawal of the JNA, which created the trust within the latter party that it would not be attacked.

Article 37 I of the Additional Protocol to the Geneva Convention formulates it in the following way: "Acts inviting the confidence of an adversary **that lead him to believe** that he is entitled to, or is obliged to accord, protection under the rules of international law applicable in armed conflict, with intent to betray that confidence, shall constitute perfidy." The Protocol further mentions the examples of other perfidious acts, such as feigning that someone is incapable of fighting, or is a civilian or has another protected status. All examples stated in the Protocol are in relation to cases of betrayal of confidence, with regard to the protection which certain categories of persons are entitled to by the Geneva Conventions. Therefore, it is unclear whether this article can be applied at all in cases such as *Tuzla Column*, in which the trust was *not* on the basis of protected status, but of the agreement on withdrawal.

The customary rules of international humanitarian law indicate that the application of an article of the Protocol on perfidy is not at all provided for in such cases. Namely, there are two differentiated rules: 1) perfidy – which corresponds to the definition in Protocol I and the definition applied in this case[407] and 2) "making an agreement to suspend combat with the intention to suddenly attack the opponent who relies on the agreement"[408]. The fact that international law separates these two situations clearly indicates that **attacking the opponent after having made an agreement on the cessation of combat, which was allegedly the situation in the *Tuzla Column* case, is not the same as perfidy**. Moreover, the ICRC and the International Criminal Court hold the same opinion. They think that classifying the violation of the agreement as perfidy would be an unfounded expansion of the definition of perfidy.[409]

Therefore, in its indictment the OWCP relied on the wrong rules of international law, that is, the Protocol which is inapplicable; and yet the court did apply it, thus violating the criminal code and opening the way to the use of regular and extraordinary legal remedies. There is no doubt that the OWCP, the Higher Court and the Appellate Court had to explain the qualification of the act, its elements and relation with the proven facts during the proceedings. The OWCP also had to rely on customary international law in its indictment for the relevant criminal act.

407 The International Committee of the Red Cross, The database of customary international humanitarian law, Rule 65, available at http://www.icrc.org/customary-ihl/eng/docs/v1_rul_rule65

408 Ibid, Rule 64.

409 Prosecution of the International Criminal Court, report on the situation in the Republic of Korea (2014), para. 55, available at https://www.icc-cpi.int/iccdocs/otp/SAS-KOR-Article-5-Public-Report-ENG-05Jun2014.pdf

iii. *Mens rea*

Whether the crime is perfidy or the making of an agreement on the cessation of fire with the intent to attack the opponent who relies on the agreement, both these acts require specific intent – that is, that the agreement be concluded, that another action be made in order to gain trust, *with the intention* to attack the other side or to decrease its readiness for fight and defense, and then to attack the opponent. So, if the agreement is signed in good faith or even just partially in good faith, there can be none of these two crimes.[410]

It is extremely difficult to prove the necessary subjective element for any of the two abovementioned acts, especially in circumstances where the existence of the agreement itself is not proven. Despite this, the examination and explanation of this element is missing both in the indictment and the judgments. It is obvious that **the OWCP does not know the type of psychological relationship necessary for the existence of some of these criminal acts**. Namely, the indictment stated that the defendant issued an order to attack "with the intent to betray the trust created", but this is the only time when the indictment mentions the psychological relationship between the defendant and the act. In order to have any of these two crimes, there has to be intent at the time of concluding the agreement, and not at the time of the attack. In all three judgments the courts uncritically accepted the OWCP's wrong qualification of the criminal act.[411]

iv. Unprofessional work of the OWCP and the first instance court

One of the key "facts" on which the prosecution relied during the whole proceedings was the existence of the Agreement on peaceful withdrawal of the JNA from B&H, which the defendant allegedly violated. However, the Agreement was never submitted to the court. The report of 30 May 1992 of the UN Secretary-General Boutros-Ghali confirms that such an agreement had never existed, and adds that the meeting held in Skopje, between the B&H and FRY representatives, did not result in an agreement.[412]

Moreover, the Deputy Prosecutor in this case before the Westminster Court in London **admitted that such an Agreement was not signed**, when being asked in the proceedings before this Court

410 Ibid, para. 56.

411 Judgment of the District Court in Belgrade in the *Tuzla Column* Case No. KV.br.5/2007 dated 28 September 2009, p.142, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_prvostepena_presuda-28.09.2009..pdf, accessed on 17 April 2015; Judgment of the War Crimes Department of the Appellate Court in the *Tuzla Column* Case No. KŽ1 Po2 5/10. dated 11 October 2010, p.5-6, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/tuzlanska_kolona_drugostepena_odluka.pdf, accessed on 17 April 2015; Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Tuzla Column* Case No. K.Po2 53/10 dated 2 December 2013, p.41-42, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013..pdf, accessed on 18 November 2015.

412 Report by the UN Secretary General Boutros-Ghali S/24049 of 30 May 1992.

concerning the extradition of Ejup Ganić.[413] Although the defense proposed presenting this judgment as evidence, the court did not accept it.[414] Accordingly, the first instance court brought the conviction twice, without establishing the facts. Therefore, the Appellate Court had to open evidentiary proceedings twice in order to correct the obvious failures in the work of the first instance court.

v. Duration of the proceedings and the defendant's detention

The proceedings against the defendant have been conducted for eight years, and he was detained for more than three years - since May 2007, when he was arrested at "Nikola Tesla" Airport in Belgrade, until October 2010, when the Appellate Court revoked the first instance judgment.

vi. Regional cooperation

The investigation in this case was simultaneously conducted in Serbia and B&H. Immediately upon the defendant's arrest, the B&H Ministry of Justice requested his extradition and transfer of the case. However, the request was denied.[415] Parallel investigations of prosecutions from the region were conducted in other cases as well, such as that of *Dobrovoljačka Street.*[416] Apart from the fact that these parallel investigations **are an unreasonable spending of resources for effective prosecution of war crimes, they are typically used for political purposes in order to create a balance between cases where the victims are of Serbian nationality and those where the victims are of non-Serbian nationality.** At the beginning of 2013, the Protocol on Cooperation between the OWCP and the B&H Prosecution was concluded. One of its main aims is to avoid parallel investigations. Pursuant to the provisions of the Protocol, within three months since its signing both parties are obliged to inform each other of the proceedings conducted against the nationals of the other, and to do so in all future cases.[417]

413 Translation of the Westminster court decision, available in Serbian at http://www.slobodnaevropa.org/content/ejup_ganic_srbija_izrucenje_sud_presuda/2122565.html, para. 37, accessed on 18 April 2015.

414 Judgment of the War Crimes Department of the Higher Court in Belgrade in the *Tuzla Column* Case No. K.Po2 53/10 dated 2 December 2013, p.43, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Prvostepena_presuda_u_ponovljenom_postupku_02.12.2013.pdf, accessed on 18 November 2015.

415 See: Humanitarian Law Center, Report on war crimes cases in Serbia in 2008 (Belgrade: HLC 2009), p.16, available in English at http://www.hlc-rdc.org/wp-content/uploads/2013/07/23-Feb-War-Crimes-Trials-in-Post-Yugoslav-countries.pdf, accessed on 1 June 2015.

416 OWCP, "The request for investigation against Ejup Ganic and others" (press release), 26 February 2009.

417 Protocol of the Prosecution of Bosnia and Herzegovina and the Office of the War Crimes Prosecution of the Republic of Serbia on the prosecution of perpetrators of war crimes, crimes against humanity and genocide, signed on 31 January 2013 by the War Crimes Prosecutor of the Republic of Serbia Vladimir Vukčević and Deputy Chief Prosecutor of B&H Jadranka Lokmić Misirača.

II. Case *Ovčara*[418]

CASE OVERVIEW
Case current phase: appellate proceedings
Date of indictment: 24 May 2004
Trial commencement date: 9 March 2004
Acting Prosecutor: Dušan Knežević
Criminal act: war crimes against prisoners of war, CC FRY, Article 144
Optuženi: Miroljub Vujović, Ivan Atanasijević, Stanko Vujanović, Milan Lančužanin, Jovica Perić, Milan Vojnović, Predrag Milojević, Goran Mugoša, Đorđe Šošić, Miroslav Đanković, Predrag Dragović, Nada Kalaba and Saša Radak.

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

Number of defendants: 13	
Rank of the defendants: low and middle rank	**Number of trial days in the reporting period:** 6
Number of victims: 200	**Number of questioned witnesses in the reporting period:** 4
Number of questioned witnesses: 120	

Key events in the reporting period:
Hearings before the Appellate Court in the repeated appellate proceeding.

418 *Ovčara* Case, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/ovcara.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

The defendants are charged with having killed 200 war prisoners from the Vukovar Hospital who had previously handed over their weapons, after having inflicted bodily injuries on them and treated them in an inhumane manner, on 20 and 21 November 1991, as members of the TD Vukovar and "Leva Supoderica" Volunteer Unit, which were part of the JNA in Vukovar. The crime took place at "Ovčara" Farm.[419]

The first trial (2005 – 2006)

On 12 December 2005 the District Court in Belgrade[420] passed a judgment and sentenced 8 defendants to 20 years in prison for war crime against prisoners of war. Predrag Madžarac was sentenced to 12 years, Goran Mugoša to five and Nada Kalaba to nine years in prison. The same judgment acquitted the defendants Marko Ljuboja and Slobodan Katić from criminal responsibility.[421] On 18 October 2006 the Supreme Court[422] of Serbia issued a judgment which revoked the first instance judgment and remanded the case to the first instance court for retrial.[423]

419 Indictment of the OWCP No. KTRZ No. 4/03 dated 24 May 2004, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-MILAN_LANCUZANIN_I_DR-24.05.2004.pdf, accessed on 28 December 2015; Indictment of the OWCP No. 4/04 dated 26 May 2004, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-PREDRAG_DRAGOVIC-26.05.2004.pdf accessed on 28 December 2015; Indictment of the OWCP No. KTRZ 3/03 dated 4 December 2003, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/SR-BEOGRAD-OVCARA-MIROLJUB_VUJOVIC_I_DR-04.12.2003.pdf, accessed on 28 December 2015. The proceeding was suspended to Mirko Vojnovic, who died in 2004. The defendants Spasoje Petkovic and Bozo Latinovic were awarded the status of witness-associates. Due to the illness of the defendant Milan Bulic, the proceedings against him were separated, and finished - see the judgments of the Supreme Court of Serbia Kz I R.Ž. 2/06 of 9 February 2006. The defendant Milan Bulic was validly sentenced to two years in prison.

420 Chamber: Vesko Krstajić, Presiding Judge, judges Gordana Božilović Petrović and Vinka Beraha Nikićević.

421 Judgment of the District Court in Belgrade No. K.V. 1/2003 dated 12 December 2005, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/Presuda-Ovcara-12_12_2005_.pdf, accessed on 10 November 2015.

422 Chamber: Judge Janko Lazarević, Presiding Judge, judges Nikola Latinović, Slobodan Gazivoda, Dragomir Milojević and Sonja Manojlović.

423 Judgment of the Supreme Court of Serbia No. Kž. I. R.z. 1/06 dated 18 October 2006, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/SR-BEOGRAD-OVcARA-18.10.2006..pdf, accessed on 10 November 2015.

The second trial (2009 – 2010)

In the retrial before a new trial chamber,[424] a unified proceeding was conducted against Saša Radak[425] and Milorad Pejić[426], against whom the OWCP had already in the meantime raised indictments for the same crime. On 12 March 2009 the Court passed a judgment which convicted seven defendants, including Saša Radak, sentencing them to 20 years in prison, and the defendant Milan Vojnović to 15 years, Jovica Perić to 13 years, Nada Kalaba to nine years, the defendant Milan Lančužanin to six years and the defendants Goran Mugoša and Predrag Dragović to five years. The defendants Slobodan Katić, Predrag Madžarac, Vujo Zlatar and Milorad Pejić were acquitted.[427]

Deciding on the appeals of the OWCP, the defense attorneys and defendants, in 2010 the Appellate Court in Belgrade[428] passed a judgment which overturned the first instance judgment by increasing the sentence for the defendant Nada Kalaba, sentencing her to 11 years in prison, and mitigating the sentence for Ivan Atanasijević, sentencing him to 15 years in prison.[429]

Constitutional appeal of Saša Radak

The defendant Saša Radak filed a constitutional appeal on 15 October 2010 against the first instance judgment of 2009 and the Appellate Court judgment in Belgrade of 2010 for violations of the right to life, of the right to inviolability of physical and mental integrity, of the right to liberty and security, of the right to a fair trial, of the special rights of a defendant and the right to freedom and security in criminal law provided under the Constitution, as well as the right to a fair trial under Article 6, item 1 of the European Convention for the protection of human rights and fundamental freedoms.

424 Chamber: Judge Vesko Krstajić, Presiding Judge, judges Vinka Beraha Nikićević and Snežana Nikolić Garotić.

425 Indictment of the OWCP No. KTRZ 4/03 dated 13 April 2005, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/Optuznica_Sasa_Radak-13.04.2005.pdf , accessed on 10 November 2015.

426 Indictment of the OWCP No. 4/03 dated 8 April 2005, available in Serbian at http://www.hlc-rdc.org/images/stories/pdf/sudjenje_za_ratne_zlocine/srbija/Miroljub_Vujovic_i_dr/Optuznica_Milorad_Pejic_08.04.2008.pdf. accessed on 10 November 2015.

427 Judgment of the District Court in Belgrade No. K.V. 4/06 dated 12 March 2009, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/PRESUDA_Ovcara_prvostepena_u_ponovljenom_postupku.pdf, accessed on 10 November 2015.

428 Chamber: Judge Siniša Važić, Presiding Judge, judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović and Miodrag Majić.

429 Judgment of the War Crimes Department of the Appellate Court in Belgrade No. Kž1 K.Po2 1/2010 dated 23 June 2010, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/Ovcara_drugostepena_-presuda_u_ponovljenom_postupku_23.06.2010..pdf, accessed on 10 November 2015.

Decision of the Constitutional Court of Serbia

On 12 December 2013 the Constitutional Court of Serbia[430] accepted Saša Radak's constitutional appeal against the judgment of the Appellate Court in Belgrade.[431] According to the Constitutional Court, the abovementioned judgment of the Appellate Court **violated the right to a fair trial for the defendant Saša Radak, that is, it violated the right that an impartial court decide on the charges against him, since Judge Siniša Važić had participated in passing the Appellate Court judgment which confirmed the conviction against him**. Namely, Judge Važić was President of the District Court in Belgrade and decided on requests regarding the exemption of judges acting in this case – requests filed by defense attorneys – and at the same time, he was President of the pre-trial chamber of the same court, and therefore took part in bringing the decision which awarded the status of cooperating witness to the defendant Petković, as well as the decision which extended custody to all defendants, including Radak. The multiple engagements of Judge Važić in the first instance proceedings and the decisions he brought at the time, according to the Constitutional Court, were circumstances that raise doubts as to his impartiality as President of the Appeals Chamber in the relevant case.

The decision of the Constitutional Court ordered the Appellate Court to re-open proceedings on the appeal made by the defendant Saša Radak against the first instance judgment of the District Court in Belgrade. Furthermore, it emphasized that this decision is binding for the other defendants in this case as well. The HLC gave a detailed analysis of the Constitutional Court's decision in its Report on war crimes trials in Serbia for 2013.[432]

Requests for the protection of legality

After the decision of the Constitutional Court had been made, the defense attorneys of the defendants Miroslav Đanković, Miroljub Vujović, Stanko Vujanović, Nada Kalabe, Đorđe Šošić, Predrag Milojević, Saša Radak, Milan Vojnović, Predrag Dragović and Milan Lančužanin filed requests for the protection of legality on the grounds of violation of the right to a fair trial.

On 19 June 2014 the Supreme Court of Cassation[433] passed a judgment which accepted the submitted request for the protection of legality as founded, even for the defendants Ivan Atanasijević, Jovica Perić

430 Chamber: Judge Dragiša B. Slijepčević, Presiding Judge, judges Olivera Vučić, Marija Draškić, Bratislav Đokić, Goran Ilić, Agneš Kartag Odri, Katarina Manojlović Andrić, Milan Marković, Bosa Nenadić, Dragan Stojanović, Sabahudin Tahirović, Tomislav Stojković and Predrag Ćetković.

431 Decision of the Consitutional Court No. Už -4451/2010 dated 12 December 2013, published in the *Official Gazette RS* No. 54/2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/ODLUKA_Ustavnog_suda_po_zalbi_Sase_Radaka.pdf, accessed on 10 November 2015. godine.

432 For more details, see: HLC, Report on war crimes trials in Serbia in 2013 (Belgrade: HLC, 2014), p.85-89. available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 10 November 2015.

433 Chamber: Judge Dragiša Đorđević, Presiding Judge, judges Zoran Tatalović, Radmila Dičić Dragičević, Maja Kovačević Tomić and Predrag Gligorijević.

and Goran Mugoša, whose attorneys had not submitted any requests for the protection of legality[434]. The Supreme Court of Cassation annulled the final judgment of the Appellate Court in Belgrade in the *Ovčara* Case and remanded the case to the Appellate Court for retrial.[435]

Proceedings overview, year 2014 – 2015

Repeated appeals proceedings

On 1 December 2014 the Appellate Court[436] reopened the appeals proceedings and decided to open a hearing. The hearings began on 15 June 2015, during which the defendants presented their defense again[437]. Later on, four witnesses were questioned during the proceedings, of whom two were cooperating witnesses. The hearings will continue with further presentation of evidence.

HLC findings

i. 11 years without a final ruling

The Constitutional Court annulled the final judgment three years after the final adjudication of the most important and most complex domestic war crimes case – not because of the bias of the judge acting in the case, but of the "existence of an objective reasonable fear for [his] bias".[438] Logically, the Supreme Court of Cassation then had to accept the requests for the protection of legality and annul the final judgments of the Appellate Court. Namely, one of the reasons for submitting a request for the protection of legality stipulated by law is the violated human right of the defendant, guaranteed by the Constitution.[439]

The ICTY transferred this case to the domestic judiciary and it is the first and, so far, the most complex war crimes case conducted in Serbia. The inability of the domestic judiciary to finally solve this case 13 years after the indictment is, above all, agony for the victims' families, who reluctantly placed their trust in the courts in Serbia.

434 Article 489 para. 2 of the CPC determined the following: the SCC, if it finds there are reasons for which the decision in favor of the defendant was brought, as well as for other defendants who did not submit requests for the protection of legality, shall act ex officio as if such requests existed.

435 Judgment of the Supreme Court of Cassation No. K33 PZ 2/2014 dated 19 June 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Presuda_Vrhovnog_Kasacionog_suda_19_06_2014-.pdf, accessed on 10 November 2015.

436 Chamber: Judge Sretko Janković, Presiding Judge, judges Sonja Manojlović, Nada Hadži Perić, Omer Hadžiomerović, Miodrag Majić.

437 Report from trial of 15 June 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/1.Ovcara-Izvestaj_sa_sudjenja_15.06.2015.pdf, accessed on 10 November 2015.

438 For more details, see: HLC, Report on war crimes trials in Serbia in (Belgrade: HLC, 2014), p.85-89, available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 10 November 2015.

439 CPC, Article 485 para. 1 item 3.

Final judgments in cases before the War Crimes Departments

I. Case *Tenja II*[440]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 22 June 2012	
Trial commencement date: 29 September 2012	
Acting Prosecutor: Snežana Stanojković	
Defendant: Žarko Čubrilo	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Sonja Manojlović (Presiding Judge) Judge Jasmina Vasić Judge Nadežda Mijatović Judge Nada Hadži Perić Judge Vučko Mirčić
Number of defendants: 1 **Rank of the defendants**: low rank – no rank **Number of victims:** 11 **Number of questioned witnesses:** 43	**Number of trial days in the reporting period:** 5 **Number of questioned witnesses in the reporting period:** 5
Key events in the reporting period: Final acquitting judgment	

440 Case *Tenja II*, reports from the trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/tenja2.html. This case was transferred to the Republic of Serbia on the basis of the Agreement on Cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide, concluded between the OWCP of the Republic of Serbia and the DORH.

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Žarko Čubrilo, a member of the TD, is charged with having taken out 11 Croatian civilians from an improvised prison located in the cinema hall "Partizan" in the village of Tenja (the Municipality of Osijek, Republic of Croatia) in the first half of July 1991. He then ordered two TD members to tie the prisoners' hands. The tied prisoners were then put into a truck, which he drove near the cattle cemetery in Bobota.[441] Upon arrival, Čubrilo ordered the civilians to step outside. While they were leaving the truck, he shot each civilian in the head.[442] The bodies of the civilians have not been found yet.

The same indictment charged Božo Vidaković, the commander of the IV Troop of the Tenja TD , for killing a war prisoner Đuro Kiš, a member of the Ministry of the Interior of the Republic of Croatia, on 7 August 1991 in the corridor of the cinema hall in Tenja. At the time of the killing, Đuro Kiš's hands were tied by barbed wire. Božo Vidaković is also charged with having unlawfully detained seven Croatian civilians in a house in the period from 7 July to the end of August (Marija Knježević, Marko Knežević, Manda Banović, Franjo Fuček, Nedeljko Gotovac, Elizabeta Gotovac and Franjo Gotovac). He kept the civilians in that house until the end of August 1991, then put them into a white van and took them in an unknown direction. They have been missing ever since. In February 1992 witness Đoko Bekić saw several corpses in a field in Tenja and recognized Nedeljko, Elizabeta and Franjo Gotovac among them. The bodies of Marija and Marko Knežević and Mando Banović were found and exhumed on 28 February 1998 from a grave in Betin Dvor, not far from Tenja.

The defendants' defence

Čubrilo and Vidaković denied committing the crimes they are charged with. Čubrilo said he was not in Tenja in the relevant period and added he had never been a TD member or had weapons. He did hear that the Croatian civilians had been killed by Milan Macakanja, Savo Jovanović and Jovo Ličina.[443] Vidaković defended himself by saying he could not have killed Đuro Kiš, since that day he did not come to the cinema hall in Tenja, where Kiš was held. He heard about the killing the day after. Also, he denied having detained the seven civilians and taken them in an unknown direction.[444]

441 Bobota is a village towards Vukovar, 12 km from Tenja.
442 The OWCP indictment No. KTO 1/12 dated 22 June 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/10/Optuznica-TENJA-2.pdf, accessed on 14 October 2015.
443 Transcript from the main hearing dated 29 October 2012, p. 37-63, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/01-29.10.2012.pdf, accessed on 13 October 2015.
444 Ibid, p. 4.-37.

Case overview, year 2014 – 2015

Separation of the proceedings

For reasons of expediency, on 17 April 2014 the court separated the proceedings for the defendant Božo Vidaković due to his health issues (he has difficulties in moving and is on the list for hips operation).[445]

Witnesses in the proceedings

Key prosecution witnesses were former TD members Jovo Ličina and Branislav Knežević, and Milan Macakanja, a member of the Civilian Defence.

Witness Jovo Ličina witnessed the killing of 11 civilians who were killed near the cattle cemetery in Bobota.[446] He said that he and Savo Jovanovic – a deceased member of the TD – reported to the headquarters after his commander "Tešo" had ordered him to. The defendants Čubrilo and Milan Macakanja were already there. Using the truck with the civilians in it, which Macakanja was driving, they went to Silaš,[447] then to Bobota and then to a forest. When the truck stopped, Čubrilo opened a side of the cargo part of the truck. The civilians stepped out one after another and he killed them by shooting from a rifle. During that time, Macakanja was in the truck and Jovanovic and he were standing next to the truck, each on one of its sides.

Witness Milan Macakanja witnessed to have been in the truck which was driving the civilians on the relevant day. Branislav Knežević picked Milan up while he was going to visit his son, who was wounded. The defendant Čubrilo was in the truck cab with him. During that time, Savo Jovanović and Jovo Ličina were in the cargo part of the truck. Branimir Knežević left the truck in Silaš. Savo was driving the truck towards Bobota, while Jovo Ličina stayed back with the civilians. Savo was driving following Čubrilo's instructions until they stopped in a forest. The witness, Čubrilo and the deceased Jovanović went out from the truck. He turned around and saw how the deceased Jovanović threw the tied civilians out from the truck and saw Čubrilo shoot them as soon as they fell to the ground. Jovo Ličina was in shock by what he saw. After that, they returned to Bobota again.[448]

Witness Branislav Knežević said he acted following orders, so he came in front of the cinema hall in Tenja to transport the civilians who were detained in the cinema hall and take them to the prison in Silaš. He cannot remember who ordered him to do so and does not know who he was driving, since

445 CPC, Article 31, para. 1.

446 Transcript from the main hearing, dated 10 February 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/04/12-10.02.2014..pdf, p. 2-41., accessed on 15 October 2015.

447 Silaš is a village 10 km from Tenja towards Vukovar.

448 Transcript from the main hearing dated 10 December 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/02/02-10.12.2012.pdf, p.6-42, accessed on 13 October 2015.

he had not been present when those people were put in the truck. He drove them to Silaš. He does not know who was with him in the truck. He left the truck in Silaš and hitchhiked to Tenja. His truck was later brought to Tenja.[449]

First instance judgment

On 6 April 2015 the Trial Chamber acquitted[450] the defendant Žarko Čubrilo from charges of war crime against civilians.

The court concluded that **the presented evidence does not indicate with enough certainty that the defendant committed the act he is charged with** and therefore, due to the lack of evidence, he was acquitted. The Trial Chamber found that the statements of key prosecution witnesses were contradictory not only with each other but with the testimonies of other witnesses and the victims, as well. Namely, the testimonies of these witnesses differed in many important points – whether the defendant was actually present in Tenja on that day or not, whether he took part in taking the Croatian civilians from the cinema in Tenja or not, who were the persons present, how many civilians were there, what was their sex, who drove the truck to the crime scene, who saw that and finally, how they returned to Tenja.

Evaluating the testimonies of the two witnesses, Jovo Ličina and Milan Macakanja, the court established that they matched only when it came to the shooting – both of them saw the defendant shoot the civilians leaving the truck. However, their testimonies differed in everything else; not only when compared to each other, but in comparison with the testimonies of other witnesses, too. The court considered the differences in testimonies to be important ones, and it could not attribute them to the time distance. Moreover, the court took into consideration the fact that there was **a court proceeding against these witnesses at the courts of the Republic of Croatia for the killing of these 11 Croatian civilians**. Therefore, their testimonies were assessed as aimed at reducing their own degree of responsibility.

Second instance judgment

The OWCP filed an appeal against this judgment, challenging it because of incorrectly established facts and the lack of explanation of key events.

Deciding on the appeal, the Appellate Court passed a judgment on 23 December 2015 which dismissed the OWCP appeal as ungrounded and confirmed the acquittal. At the time of publishing this report, the judgment has still not been made available to the public.

449 Transcript from the main hearing dated 10 July 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/09/08-10.07.2013..pdf, p. 6-18, accessed on 15 October 2015.

450 Judgment of the War Crimes Department of the Higher Court in Belgrade, K.Po2 1/2012 dated 6 April 2015 in Case *Tenja II*, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda-TENJA-2.pdf, accessed on 15 October 2015.

HLC findings

i. Delays in trial

In 2013 two members of the trial chamber were transferred to the Appellate Court. Several months passed before new judges were appointed. In 2014 there was a delay in the trial due to a nearly two-month absence of one of the chamber members on sick leave; afterwards, there was a lawyers' strike. However, the Presiding Judge managed to mitigate the consequences of the delay by demonstrating good preparation and efficient proceedings management. Namely, the Presiding Judge had assessed well the duration of testimony of each witness who was to be questioned, so he grouped them, and it took only three trial days to question 23 witnesses. Moreover, by deciding to separate the proceedings for the defendant Božo Vidaković, the Trial Chamber eliminated the possible delay of the proceedings, since this defendant did not often appear before the court due to health issues.

ii. Unclear reasons for acquittal

The HLC thinks that the first instance court gave too much significance to differences in the testimonies of key witnesses Ličina and Macakanja, when rendering the acquittal. It is true that the differences existed, yet that was logical if one considers the age of witness Ličina (77 years old) and the time passed since the event. However, **the court ignored the fact that their testimonies matched in the most significant part – that the defendant killed the Croatian civilians**.

An additional argument of the court for not accepting their testimonies is that "there are proceedings in Croatia against these witnesses for killing Croatian civilians." However, **the court presented not a single piece of evidence on the basis of which it would be determined that there had indeed been proceedings initiated against these witnesses**. Besides, the court did not sufficiently value the testimonies of other witnesses, which confirmed the testimonies of witnesses Macakanja and Ličina. Namely, Branislav Knežević said that the defendant Žarko Čubrilo was also in the truck which was transporting the civilians. He stated this while testifying in the County Court in Osijek in the proceedings against Boško Surla. However, he did not remember this in the main hearing.[451] The court found this statement unconvincing, without explaining further.[452] Moreover, witness Jovo Rebrača, who was the Tenja TD commander at the time, said that Milan Macakanja told him immediately after the event that the civilians had been killed; when asked who did it, he replied that the defendant Čubrilo was with them.[453] It was illogical of the court not to accept the indirect findings of a witness regarding the involvement of the defendant in the killing of the civilians, which the court found about

451 War Crimes Department of the Higher Court in Belgrade judgment K.Po2 1/2012 dated 6 April 2015 in Case *Tenja II*, p. 12-13, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda-TENJA-2.pdf, accessed on 15 October 2015.

452 Ibid p. 32.

453 Ibid. p. 20.

right after the event. Yet, at the same time, the court accepted the indirect findings of the victims who did not hear that the defendant was involved in the killing of their family members. This uneven and selective assessment of the presented evidence indicates the court did not comprehensively review all the relevant facts in these proceedings.

iii. Case badly prepared by the OWCP

There is no doubt that the OWCP is responsible for the acquittal too. Namely, the indictment in this case is the first one to have been brought by the OWCP in accordance with the provisions of the new CPC.[454] Examining the indictment, the court had observed certain drawbacks, so it made the OWCP correct them three times. The corrections were about the OWCP's failure to state the reasons for key facts, that is, to state the evidence on the basis of which it could be concluded that the defendants had committed the act as regards every important criminal element. This indicates the OWCP issued the indictment carelessly, without having assessed seriously the validity of the evidence included in it.

The OWCP should not have based the indictment on the testimonies of compromised witnesses. Namely, the court did not believe the testimonies of the two key witnesses-eyewitnesses Jovo Ličina and Milan Macakanja, since allegedly there were proceedings against these two witnesses for killing the very civilians who were the subject of these proceedings before courts in Croatia. On the other hand, if the OWCP was convinced of their authenticity, then it should have presented adequate evidence in order to convince the court, as well. The OWCP has "lost cases" by relying on compromised witnesses in some other cases too (e.g. see Case *Čelebići*).

454 Criminal Procedure Code, *Official Gazette of the Republic of Serbia No. 72/2011, 101/2011, 12/2012, 32/2013,45/2014*, in war crimes cases first implemented on 15 January 2012.

II. Case *Sremska Mitrovica*[455]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 5 March 2013	
Acting Prosecutor: Dušan Knežević	
Acting Chamber Judge Mirjana Ilić (Presiding Judge)	
Defendant: Marko Crevar	
Criminal act: war crime against prisoners of war, CC SRY article 144	
Number of defendants: 1 **Rank of the defendant:** low rank – no rank **Number of victims:** 2 **Number of questioned witnesses:** 0	**Number of trial days in the reporting period:** 1 **Number of questioned witnesses in the reporting period:** 0
Key events in the reporting period: Judgment approving the guilty plea agreement	

455 Case *Sremska Mitrovica,* reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/sm_marko_crevar.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Marko Crevar, a member of the TD of the JNA at the time, is charged with having tortured prisoners of war – members of the Croatian National Guard (ZNG), at the Admission Centre at Sremska Mitrovica Prison on 27 February 1992; they had been imprisoned in Vukovar.[456]

Proceedings overview, year 2014 – 2015

Judgment

On 18 February 2015 the Higher Court in Belgrade passed the judgment accepting the guilty plea agreement[457] for a war crime against prisoners of war, which was executed by the defendant Marko Crevar and the OWCP, and sentenced him to one year and six months in prison.[458]

This is the second concluded guilty plea agreement for a war crime.[459]

HLC findings

i. Unreasoned decision on the sentence

The Higher Court sentenced Marko Crevar to one year and six months in prison.[460] According to the CPC, the court shall accept a guilty plea agreement in its judgment if it finds that the sentence envisaged in the agreement is in accordance with the criminal code. However, **the judgment does not explain the court's conclusion that the sentence proposed is in accordance with the criminal code**. Since the minimum penalty provided by law for committing a war crime is five years in prison, it remains unclear how the court found that the sentence of a year and a half in prison is in accordance with the criminal code. If the Court found that there were particularly mitigating circumstances justifying a sentence lower than the minimum prescribed by law, such a decision would be formally

456 Indictment KTRZ-1/09 dated 5 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Optuznica_05.03.2013.pdf, accessed on 19 October 2015.

457 Judgment of the War Crimes Department of the Higher Court in Belgrade in the Case *Sremska Mitrovica*, Spk. Po2 No. 1/15 dated 18 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_15-18.02.2015.pdf, accessed on 19 October 2015.

458 Ibid.

459 The OWCP concluded the first guilty plea agreement to a war crime with the defendant Milan Škrbic in 2013, whereas the previous agreements had referred to assistance in hiding Hague indictees.

460 Judgment of the War Crimes Department of the Higher Court in Belgrade in the Case *Sremska Mitrovica*, Spk. Po2 No. 1/15 dated 18 February 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/10/Presuda_15-18.02.2015.pdf, accessed on 19 October 2015.

in compliance with the criminal code, but it was necessary for the court to justify such a decision.[461]

According to the CPC, a written judgment does not have to contain a rationale if the sentence is imprisonment of up to three years.[462] However, the judgment must contain a "partial rationale" if a guilty plea agreement to a crime is accepted, and it must contain the reasons which lead the Court to accept the agreement.[463] Since the CPC provides that the court must establish the legality of the sentence when accepting the agreement, the court undoubtedly had to explain the sentence at least in part.

Finally, the CPC does not require the court to omit the rationale entirely; it only suggests that the court "does not have to" provide it. Given that this is only the second guilty plea agreement to a war crime, that the public did not have access to the proceedings and that there are many unknown things about the application of this institution, the court, in spite of the legal possibility, should have avoided this certainly easier option.

ii. Unexplained qualification of the crime

The judgment does not contain the reasoning of the court's conclusion that it was an internal or non-international armed conflict - such a qualification appears only in passing. The court took such a qualification uncritically from the indictment, which also does not contain an explanation. The War Crimes Department of the Appellate Court has often noted in its practice that the judgment must specify the type of armed conflict, adding that such a conclusion must be reasoned.[464] The court had reasoning from the judgments in the *Ovčara* case at its disposal, which was also related to the crimes in Vukovar, and in which the conflict in Croatia during the relevant period was also qualified as non-international.[465]

Despite the qualification of the conflict as *non-international*, it was indicated that the defendant violated the rules of international law contained in the Third Geneva Convention on Treatment of Prisoners of War, which **applies exclusively to an *international* armed conflict** (except in one

461 Goran P. Ilić, Miodrag Majić, Slobodan Beljanski and Aleksandar Trešnjev, *Commentary on the Criminal Procedure Code,* third changed and revised edition, Official Gazette (2013), p. 731.

462 CPC Article 429, para. 1, Item 2.

463 CPC Article 429, para. 3, Item 2.

464 Decision of the War Crimes Department of the Appellate Court in Belgrade in the Case *Bytyqi Brothers* Kž1.Po2 7/2010 dated 1 November 2010, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Odluka-Apelacionog-suda-o-prvostepenoj-presudi.pdf, p. 2, accessed on 6 April 2015. Judgment of the War Crimes Department of the Appellate Court in Belgrade in the Case *Beli Manastir* Kž1 Po2 7/12 dated 29 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Drugostepena-presuda.pdf. p.6, accessed on 6 April 2015. Judgment of the War Crimes Department of the Appellate Court in Belgrade in the Case *Skočić,* Kž1 Po2 6/13 dated 14 May 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, p. 9-10, accessed on 6 April 2015.

465 Judgment of the War Crimes Department of the Appellate Court in Belgrade in the Case *Ovčara* Kž1.Po2-1/2010 dated 23 June 2010, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/05/Ovcara_drugostepena_-presuda_u_ponovljenom_postupku_23.06.2010..pdf , para. 73, accessed on 5 November 2015.

exceptional situation, see below). The court completely assumed this qualification in its judgment.

In order for the court to apply the Third Geneva Convention in the context of a non-international armed conflict, it has to be a very limited exception, which would mean that the parties to the conflict agreed to provide such a status for the detainees. This exception was applied in the *Ovčara* case, with a detailed explanation of the decision and the evidence supporting the fact that it was such an exception – the conflicting parties referred to the captured soldiers as prisoners of war in their mutual written communication, the perpetrators were aware that the victims were members of the opposing party, they referred to them as prisoners of war, etc.[466]

However, if the existence of such an exceptional situation had not been proven, then in this case only the rules of international law applicable in non-international conflicts could have been applied - Article 3 Common to the Geneva Conventions and Additional Protocol II, which require that persons detained for reasons in connection with a conflict must be treated humanely in all circumstances. The Prosecution of the ICTY referred to these provisions in the case of *Mrkšić and others*, related to the events in Vukovar, as well as this case.

Bearing in mind the delicacy of the application of international law in this specific context as described above, and the fact that the application of international law has proved to be one of the most problematic issues in the practice of the War Crimes Department, the court should have provided a rationale for its judgment, although it was not strictly obliged to do so by the law.

466 Ibid.

III. Case *Bihać I*[467]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 8 April 2013	
Trial commencement date: 26 June 2013	
Acting Prosecutor: Snežana Stanojković	
Defendant: Đuro Tadić	
Criminal act: war crime against a civilian population CC FRY Article 142	
Acting Chamber	Judge Siniša Važić (Presiding Judge) Judge Sonja Manojlović Judge Sretko Janković Judge Omer Hadžiomerović Judge Miodrag Majić
Number of defendants: 1 **Rank of the defendant:** low rank - no rank **Number of victims:** 19 **Number of questioned witnesses:** 26	**Number of trial days in the reporting period: 2** **Number of questioned witnesses in the reporting period:** 0
Key events in the reporting period: First and second instance judgments	

467 Case *Bihać*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/Bihac.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Đuro Tadić is charged to have committed a war crime against civilians on 23 September 1992 in Duljci (Bihać Municipality, B&H), as a member of the Rajinovac Company of the VRS, together with Zoran Tadić, Jovica Tadić, Zoran Berga, Željko Babić,[468] Svetko Tadić[469] and the deceased Slobodan and Gojko Đurić. They were in army and police uniforms, armed with automatic weapons, masked with hats and socks over their heads. By means of two passenger vehicles they came to Duljci, where Bosniak civilians were picking plums. They fired several bursts towards the civilians, and when they saw that some of the civilians were hiding in the barn, they threw a grenade at the barn and stabbed some of the civilians with knives. Eighteen civilians were killed on that occasion and their bodies were then set on fire.[470]

Defense of the defendant

The defendant Đuro Tadić denied committing the crime, stating he was present at the site of killing of the civilians, but did not shoot.[471] During the presentation of his defense, the defendant changed his statement several times, stating that the relatives who accused him of this crime and who pleaded guilty before the court in Bihać, did so only to receive lower sentences.

Proceedings overview, year 2014 – 2015

First instance judgment

The Higher Court Department passed the judgment on 6 February 2014 in which the defendant Đuro Tadić **was found guilty, and sentenced him to 10 years in prison**.[472] The judgment confirmed all charges from the indictment and that the event of 23 September 1992 in Duljci happened after the death of Serbian fighters, among whom was Toma Tadić, brother of the defendant. This was the reason for revenge against the local Bosniak civilians.

468 Zoran Tadić, Jovica Tadić, Zoran Berga and Željko Babić were finally sentenced before the Cantonal Court in Bihać for the same crime, on the basis of the Guilty Plea Agreement.

469 At the time of the raising of this indictment, Svetko Tadić was unavailable to the state authorities, but the OWCP indicted him for the same crime on 9 October 2014.

470 The OWCP indictment KTO 3/13 dated 8 April 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Optu%C5%BEnica-DJuro-Tadic-B&Hac.pdf, accessed on 20 April 2015.

471 Transcript of the main hearing dated 26 June 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Transkript_26.06.13..pdf, accessed on 6 November 2015.

472 Judgment of the War Crimes Department of the Higher Court in Belgrade in the Case *Bihać* No. K. Po2 5/2013 dated 6 February 2014, anonymized version available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Prvostepena_presuda_06.02.2014..pdf, accessed on 20 April 2015.

In determining the sentence, the court took the defendant's personal and family circumstances as mitigating circumstances, as well as the fact he was 65 years old and had not been previously convicted. As aggravating circumstances, the court considered those under which the crime was committed, its weight, and the fact that the survivors as the injured parties feel great trauma even today because of the loss of their loved ones.

Second instance judgment

Deciding on the appeals, the Appellate Court in Belgrade passed a judgment on 12 December 2014 upholding the appeal of the OWCP and **changed the first instance judgment by sentencing the defendant Đuro Tadić to 13 years in prison**. The appeal of his defense attorney was rejected in its entirety as groundless[473].

The Appellate Court increased the punishment of the defendant, because it determined that the first instance court in its sentencing **had not sufficiently appreciated the established aggravating circumstances** for the defendant, namely the severity of the crime and its consequences, as well as the circumstances under which the crime was committed, that is – on that occasion 18 people were killed, mostly women and elderly men, and a 13-year-old girl. Also, the Appellate Court found that the fact that the crime was committed out of revenge against people who represented no danger whatsoever was not sufficiently appreciated as an aggravating circumstance, as well as the fact that they did not even know the victims, and that the members of the victims' families even today feel major trauma and consequences because of the loss of their loved ones.

HLC findings

i. Cooperation between Serbia and B&H in prosecuting war crimes

These proceedings are another example of cooperation between Serbia and B&H in prosecuting war crimes. The OWCP took over prosecution in this case from the Cantonal Court in Bihać, given that the defendant, who is a citizen of the Republic of Serbia residing in Serbia, was not available to the Bosnian court [see general finding 2].

ii. The effective conduct of the proceeding by the court

In these proceedings, a total of 26 witnesses were questioned, five of whom testified by means of a video-link from the B&H Court. Bearing in mind the occupancy of courtrooms in the Higher Court

473 Judgment of the War Crimes Department of the Appellate Court in Belgrade in the Case *Bihać*, Kž1 Po2 4/14 dated 12 December 2014, available in Serbianat http://www.hlc-rdc.org/wp-content/uploads/2015/02/Bihac_Drugostepena_presuda_12_12_2014.pdf, accessed on 20 April 2015.

and the need to harmonize the appointments for questioning the witnesses and to free time for appointments in the B&H Court, and that the first instance proceedings were completed in just seven months, it is obvious that these proceedings were well-prepared, in order to respect the principles of cost efficiency and trial within a reasonable time.

iii. A clear first instance judgment

The first instance judgment is clear, concise and comprehensible, without unnecessary repetitions. The court provided clear reasons for each established fact and explained in detail the differences in the testimonies of witnesses on specific facts and the significance of these differences. The court also provided a detailed legal analysis of the established factual state, emphasizing the following individual items: the application of the criminal law and the rules of international law, the link between the crime and the armed conflict, the status of protected persons, the application of a more lenient law, as well as the form of participation of the defendant in the crime; and the court produced a detailed reasoning on the actions of the defendant as a co-perpetrator.[474]

An accurate explanation of co-perpetration in this case is especially important, if one bears in mind that in the last few years the Appellate Court has quashed a number of judgments for war crime cases in which co-perpetration appears as a mode of participation of the accused in the crime, precisely because this mode of liability is not adequately described or reasoned, and because the judgments lack clear reasons for the fulfilment of objectives and the subjective conditions for the existence of co-perpetration.[475]

iv. A positive example of assessment of aggravating circumstances

In these proceedings, both the Higher and the Appellate Courts devoted time to a careful assessment of aggravating circumstances in their judgments. Special consideration of the consequences that survivors feel because of the loss of their loved ones as an aggravating circumstance, is a positive example of how other courts should act. In fact, in cases of war crimes, the courts have not previously

474 Judgment of the War Crimes Department of the Higher Court in Belgrade in Case *Bihać* number K. Po2 5/2013 dated 6 February 2014, p. 111-113, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/01/Prvostepena_presuda_06.02.2014..pdf, accessed on 20 April 2015.

475 For example, see Judgment of the War Crimes Department of the Appellate Court in Case *Prijedor*, No. Kž1 Po2 11/10 dated 20 February 2011, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/02/Odluka-Apelacionog-suda-po-prvostepenoj-presudi-28.02.2011..pdf, accessed on 21 April 2015; the Judgment of the War Crimes Department of the Appellate Court in the Case *Skočić*, No. Kž1 Po2 6/13 dated 14 May 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf;Decision of the War Crimes Department of the Appellate Court in Belgrade No. Kž1 Po2 3/13 dated 9 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/Lovas_Resenje_Apelacionog_suda_09.12.2013..pdf, accessed on 21 April 2015. Judgment of the War Crimes Department of the Appellate Court in the Case *Skočić* No. Kž1 Po2 6/13 dated 14 May 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, accessed on 21 April 2015.

regarded the suffering of the surviving family members as an aggravating circumstance.[476] Deeming these circumstances as aggravating is also a part of the practice of the ICTY[477] and the B&H Court.[478]

476 For example, see Judgment of the District Court in Belgrade in Case *Đakovica,* K.v.br 4/05 dated 18 September 2006, p. 38; the Judgment of the District Court in Belgrade in Case *Prijedor,* Kpo2 4/2011 dated 28 November 2011, p. 37; the Judgment of the War Crimes Department of the War Crimes Department of the Higher Court in Belgrade in Case *Stara Gradiška,* Kpo2 no. 32/2010 dated 25 June 2010, p. 36; the Judgment of the War Crimes Department of the Higher Court in Belgrade in Case *Tenja (Radivoj),* Kpo2 38/2010 dated 17 November 2010, p. 48; the Judgment of the District Court in Belgrade in Case *Ovčara II*, K.V no. 2/2005 dated 30 January 2006, p. 50; the Judgment of the War Crimes Department of the Higher Court in Belgrade in Case *Zvornik II*, Kpo2 No. 28/2010 dated 22 November 2010, p. 301-303; Judgment of the District Court in Belgrade in Case *Suva Reka*, K.V. 2/2006 dated 23 April 2009, p. 188-190; Judgment of the District Court in Belgrade in Case *Podujevo II*, K.V 4/2008 dated 18 June 2009, etc.

477 Judgment of the Trial Chamber in the Case *Prosecutor against Milan Lukić and Sredoje Lukić* (IT--98-32/1-T) dated 20 July 2009, para. 1066, Judgment of the Trial Chamber in the Case *Prosecutor against Tihomir Blaškić* (IT -95-14-T) dated 3 March 2000, para. 787.

478 *Novak Đukić,* Judgment of the Court of Bosnia and Herzegovina No.: X-KR-07/394 dated 12 June 2009, *Dragan Damjanović. Judgment of the Court of Bosnia* and *Herzegovina* No. X-KR-05/51 dated 15 December 2007, *Mejakić Željko and others.* Judgment of the Court of Bosnia and Herzegovina X- KR-06/200 dated 30 May 2008,

IV. Case *Čelebići*[479]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 17 May 2013	
Trial commencement date: 11 September 2013	
Acting Prosecutor: Milan Petrović	
Defendant: Samir Hondo	
Criminal act: war crime against a civilian population, CC SRY article 142	
Acting Chamber	Judge Siniša Važić (Presiding Judge) Judge Sonja Manojlović Judge Sretko Janković Judge Omer Hadžiomerović Judge Miodrag Majić
Number of defendants: 1 **Rank of the defendant:** low rank - no rank **Number of victims:** 16 **Number of questioned witnesses:** 11	**Number of trial days in the reporting period:** 1 **Number of questioned witnesses in the reporting period:** 0
Key events in the reporting period: Second instance judgment	

479 Case *Čelebići*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/celebic.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Samir Hondo, a member of the B&H Army and a guard in the detention camp "Čelebići" (the Municipality of Konjic, B&H) where Serbian civilians were detained in the period June – August 1992, is charged with having repeatedly beaten the detained civilians, including Zoran Đorđić. The indictment also stipulates that the defendant, together with the other guards, participated in the torture of civilians, among them Rajko Đorđić and Boro Mrkajić, by closing them in a manhole, where they choked due to the lack of air, fainted and endured high-intensity agony.[480]

Defense of the defendant

The defendant stated that he really was a guard in the detention camp of "Čelebići" in the relevant period, but did not beat or otherwise injure any of the detainees. The defendant claimed that Zoran Đorđić (the injured party in this proceeding) falsely accused him because he reported Zoran to the police for blackmail. Namely, Đorđic asked for money from the defendant and his sister in order not to report him for the crimes the defendant allegedly committed in the detention camp of "Čelebići".

Witnesses in the proceeding

The witnesses Zoran Đorđić[481] and Boro Mrkajić,[482] former detainees, accused the defendant of beating them, together with other guards, and for closing Mrkajić in the manhole. However, other witnesses, former detainees Rajko Đorđić,[483] Željko Živak,[484] Čedo Ćećez,[485] Vaso Mrkajić[486] and Dragan Đorđić,[487] claimed that the defendant had not beaten or closed the detainees in the manhole. Witness Mitar Kuljanin confirmed the testimony of the defendant that the witness Zoran Đorđić blackmailed him, as well as other persons.[488]

480 The OWCP indictment KTO 6/13 dated 17 May 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/09/Optuznica-Celebici.pdf, accessed on 5 April 2015.
481 Transcript of the main hearing dated 19 September 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-19.09.2013..pdf, p. 27-93, accessed on 5 April 2015.
482 Transcript of the main hearing dated 20 September 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-20.09.2014..pdf, p. 30-61, accessed on 5 April 2015.
483 Ibid, p. 1-28.
484 Transcript of the main hearing dated 30 September 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-30.09.2013..pdf, p. 1-40, accessed on 5 April 2015.
485 Transcript of the main hearing dated 19 September 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-19.09.2013..pdf, p. 3-25, accessed on 5 April 2015.
486 Transcript of the main hearing dated 28 October 2013, available in Serbian at dc.org/wp-content/uploads/2014/08/Transkript-28.10.2013..pdf p. 32-50, accessed on 5 April 2015.
487 Transcript of the main hearing dated 18 November 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-18.10.2013..pdf, p. 1-35, accessed on 5 April 2015.
488 Transcript of the main hearing dated 28 October 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Transkript-28.10.2013..pdf, p. 1-21, accessed in April 2015.

First instance judgment

The Department of the Higher Court passed a Judgment on 22 November 2013 which acquitted the defendant Samir Hondo.[489]

The court found the testimony of Zoran Đorđić, a key witness of the prosecution, unconvincing, contrary to the testimonies of other witnesses, and motivated by a desire to harm the defendant. The court found his testimony as compromised by the testimonies of the other witnesses, particularly the testimonies of witnesses who were gathered in the Center for Investigation of War Crimes in B&H and the Police Administration in Konjic. In their testimonies, several witnesses stated that Zoran Đorđić blackmailed not only the defendant Samir Honda, but also other people. He said that he would report them as perpetrators of war crimes in the detention camp of "Čelebići" if they failed to pay the demanded sums of money. The court also rated the testimony of the witness Boro Mrkajić as unconvincing. When describing the events in which the defendant allegedly beat prisoners or closed them in the manhole, he spoke about it in general, without precisely specifying what the defendant did. Other witnesses, who testified on the same events, accurately described how other guards beat and tortured them, but did not mention the defendant as one of them.

Appeal of the OWCP

In the appeal, the OWCP disputed **the legality of the evidence collected by the defense of the defendant,** which was presented during the main hearing. These are the judgment of the B&H Court in the proceedings against Eso Macić, who was convicted for a war crime committed in the detention camp of "Čelebići",[490] the transcripts of the trial in that case, the testimonies of the defendant Samir Honda and witnesses that were given at the Centre for Investigation of War Crimes in B&H and the Police Administration in Konjic in the proceedings which were conducted pursuant to the reports against the witness Zoran Đorđić. The OWCP held that all the evidence was not acquired pursuant to the provisions of the CPC, and that it was not acquired as original documents or certified copies, therefore they could not have been used in these proceedings.[491] The OWCP appeal also pointed out that the first instance court **violated the provisions of the CPC on the cross-examination of witnesses** during the examination of witness Zoran Đorđić[492], by allowing the defense attorney of the defendant Samir Honda to ask the witness questions which were related to his testimony given in the case against Eso Macić before the B&H Court. Finally, the OWCP appeal emphasized that the first instance court made a mistake when it considering the testimony of the witness Zoran Đorđić as unacceptable.

489 Judgment of the War Crimes Department of the Higher Court in Belgrade in Case *Čelebići* K-Po2 8/13 dated 22 November 2013, anonymized version available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/01/celebic_prvostepena_presuda.pdf, accessed on 5 April 2015.

490 Judgment of the B&H Court - Section I No. S11K25941OKRL dated 15 November 2010.

491 CPC, Article 139, para. 1.

492 CPC, Article 98, para. 3.

Proceedings overview, year 2014 – 2015

Second instance judgment

Deciding on the appeal of the OWCP, **the Department of the Appellate Court issued the judgment on 9 June 2014[493] which dismissed the OWCP appeal as unfounded and confirmed the first instance judgment.** In the opinion of the Department of the Appellate Court, **a small formal deficiency in obtaining certain evidence does not constitute a deficiency in the evidentiary procedure of such importance to automatically mark this evidence as invalid**. This was especially so, when one bore in mind that the evidence was obtained by the defense, which did not have many channels of communication with international authorities, and the fact that the OWCP did not dispute the authenticity of the documents obtained this way, which would be the only substantial obstacle in the use of photocopies of the documents.

The Appellate Court **concluded that the rules on cross-examination were not violated** because the cross-examination served to confront the witness with his previous statements, so that the defense could cast doubt on the testimony of such a witness. Finally, when deciding on the OWCP appeal in relation to the testimonies of witnesses Zoran Đorđić and Boro Mrkajić, the Department of the Appellate Court held that **the first instance court had correctly assessed his testimony as unconvincing and compromised**.

HLC findings

i. The effective conduct of the proceedings by the court

The whole proceedings in this case were completed in less than a year, making it the quickest completed war crimes trial so far. The reason for such an expeditious completion of the trial is the fact that this case was not a very complex one, with one defendant and a total of 11 witnesses. Also, the President of the first instance trial chamber, Snežana Nikolić Garotić, prepared and focused the presentation of evidence in a short period of time. So, guided by the principles of efficiency and economy, the witness Vaso Mrkajić, who lives in Chicago, was examined through an alternative video conferencing - Skype, from the premises of the Consulate of the Republic of Serbia in Chicago. **Previous cases of war crimes of similar complexity (with one defendant and about ten witnesses) lasted much longer – on average between 18 and 32 months**.[494]

493 Judgment of the War Crimes Department of the Appellate Court in Belgrade in Case *Čelebići*, Kž Po2 3/14 dated 9 June 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/08/Drugostepena_presuda_celebici_-09.06.2014..pdf, accessed on 5 April 2015.

494 Case *Prijedor*, War Crimes Department of the Higher Court in Belgrade, case No. K.Po24/2011, lasted for 32 months, Case *Prizren,* War Crimes Department of the Higher Court in Belgrade, case No. K.Po2 3/2013, lasted for 30 months, Case *Ovčara IV*, District Court in Belgrade, case No. KV.BR 9/2008 lasted for 18 months.

The defense attorney Slavisa Prodanović also contributed to the quick completion of the proceedings, because he prepared the defense well, obtained the documents favourable to his client on his own, and made certain facts indisputable, such as the existence of an armed conflict, the fact that the defendant was a member of the B&H Army and a guard in the Čelebići detention camp, and that the civilians were detained in the camp.[495]

ii. Unprepared case by the OWCP

The superficial work of the OWCP is obvious in this case, because **it started the proceedings with very unconvincing evidence and without a thorough verification of the key witness' credibility**. Starting proceedings without hard evidence about the liability of the defendant is a frequent occurrence in cases in which the defendants are non-Serbian and the victims are Serbian, which is why these cases usually end in acquittals.[496] However, such omissions in the work of the OWCP are not limited only to these cases (see the Case *Tenja II*).

iii. Lack of understanding of the institute of cross-examination by the OWCP

Bearing in mind the OWCP's complaints related to the violation of the rules on cross-examination, it is evident that **there is still a lack of understanding of this institute, although its application in cases of war crimes began on 15 January 2012**. In the appeal, the prosecutor pointed out that during the cross-examination, the court allowed the defense attorney to ask the witness questions not related to his statements in the present proceedings conducted against the defendant, but in a case against another suspect – Eso Macić, conducted before the B&H Court, whose testimony had not been accepted as evidence by the trial chamber, because the trial chamber thought the court would thus violate the rules on cross-examination.

Under the provisions of the CPC, the presiding judge shall disallow a question if it does not apply to the subject of the trial, with the aim to avoid undue delay on account of issues that are not related to the proceedings.[497] However, in this case there was an exception, which was **the exception to the prohibition of questions that serve to authenticate the testimony**. This exception applies to questions that aim to challenge the witness' credibility, including his discredit in terms of good faith, moral reputation and other characteristics and facts relevant to the reliability of the testimony. The purpose of cross-examination is to confront the witness with his earlier statements and cast doubt on the witness' testimony. The questions the defense attorney asked the witness, related to his

495 Judgment of the War Crimes Department of the Higher Court in Belgrade K.Po2 48/2010 dated 11 February 2014, p. 71, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/prvostepena_presuda_Cuska.pdf, accessed on 7 November 2015.

496 For example, see Case *Gnjilane Group* of the War Crimes Department of the Higher Court in Belgrade, available in Serbian at http://www.hlc-rdc.org/Transkripti/gnjilanska_grupa.html, accessed on 5 November 2015, Case *Prizren* of the War Crimes Department of the Higher Court in Belgrade, available in Serbian at http://www.hlc-rdc.org/Transkripti/kasnjeti.html, accessed on 5 November 2015.

497 CPC, Article 402, Para. 7.

statements given in other proceedings, were the questions which the defense used to challenge the conscientiousness and moral credibility of the witness, and that is why they were allowed by the first instance court. Otherwise, if in cross-examination questions not strictly related to the proceedings were generally prohibited, such an examination would have lost its point because, for example, it would not be possible to check even the perceptual abilities of a witness, his memory, orientation in time and space, etc.

V. Case *Ovčara V*[498]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 18 June 2012	
Trial commencement date: 15 November 2012	
Acting Prosecutor: Dušan Knežević	
Defendant: Petar Ćirić	
Criminal act: war crime against prisoners of war, CC SRY article 144	
Acting Chamber	Judge Sonja Manojlović (Presiding Judge) Judge Nadežda Mijatović Judge Sretko Janković Judge Omer Hadžiomerović Judge Miodrag Majić
Number of defendants: 1 **Rank of the defendant:** low rank - no rank **Number of victims:** 200 **Number of questioned witnesses:** 8	**Number of trial days in the reporting period:** 1 **Number of questioned witnesses in the reporting period:** 0
Key events in the reporting period: Second instance judgment	

498 Case *Ovčara V*, reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/ovcara_5.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Petar Ćirić was charged with a **war crime against prisoners of war**. The indictment alleged that Ćirić killed and abused the prisoners of war from the Vukovar Hospital on 21 November 1991, as a member of the TD Vukovar, which was active within the JNA. He was charged with having participated in the execution of prisoners at a place called Grabovo as a member of the firing squad and, upon returning from Grabovo, he was also charged with having participated in the execution of a last group of about ten prisoners of war in front of the hangar at Ovčara.[499]

Defense of the defendant

The accused stated he had not been at Ovčara at the time of the event.

First instance judgment

The Department of the Higher Court in Belgrade passed the judgment on 1 July 2013 in which the defendant Petar Ćirić **was found guilty of a war crime against prisoners of war** and sentenced him to 15 years in prison.[500] Since the defendant was earlier sentenced to 10 years in prison for the crime of rape by a final judgment of the District Court in Novi Sad,[501] the trial chamber imposed a concurrent sentence of 20 years in prison.

Proceedings overview, year 2014 – 2015

The final judgment of the Appellate Court

Having found a violation of the criminal code, the War Crimes Department of the Appellate Court passed a final judgment in November 2013 in this case which changed the first instance judgment and sentenced the defendant to 15 years in prison.[502]

499 The OWCP indictment No. KTRZ 6/11 dated 18 June 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/11/Optuznica-Petar-Ciric.pdf, accessed on 5 April 2015.

500 Judgment of the War Crimes Department of the Higher Court in Belgrade in the Case *Ovčara V*, K.Po2 14/2011 dated 1 July 2013, anonymized version available in Serbian at http://www.hlc-rdc.org/Transkripti/Ovcara_V_%20prvostepena_presuda_01_07_2013.pdf , accessed on 5 April 2015.

501 Judgment of the District Court in Novi Sad, K.br. 287/06, dated 19 October 2007.

502 Judgment of the War Crimes Department of the Appellate Court in Belgrade in the Case *Ovčara V,* Kž1 Po2 8/13 dated 3 November 2014, anonymized version available in Serbian at ww.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_3.11.2014..pdf, accessed on 3 April 2015.

HLC findings

i. Quickly completed proceedings

These proceedings are a continuation of the trial for the crime at Ovčara, for which the other perpetrators were convicted by a domestic court.[503] Therefore, in these proceedings it was not necessary to prove the existence of important facts such as the existence of an armed conflict, the status and identity of the victims, the capacity of the defendant, time, place and manner of the crime. These facts had already been established in earlier proceedings, and they were made indisputable by the parties in this proceeding. All this has affected the relatively quick completion of the first instance proceedings, because the only issue was the defendant's participation in the physical injuring and murdering of prisoners of war.

ii. Incorrect application of the CC by the first instance court

The judgment of the Appellate Court which changed the judgment of the first instance court is correct and lawful. In deciding on the sentence, **the first instance court incorrectly applied the criminal code** by sentencing the defendant to 20 years in prison, which was not possible pursuant to the rules of the then applicable law on concurrence of offenses. According to the provisions of the CC FRY, in determining a concurrent sentence, the sentence must be greater than any individual sentence, but at the same time it must not reach their sum, nor exceed 15 years in prison.[504] Only in cases when one of the sentences determined is 20 years in prison, the court can pronounce a concurrent sentence of 20 years in prison.[505] Bearing in mind that the defendant was already serving a sentence of 10 years in prison and the fact that both the first instance and appellate courts considered that a sentence of 15 years in prison was the appropriate sentence for this crime, there was no legal possibility to impose a more severe concurrent sentence.

iii. Assessment of aggravating circumstances

The Appellate Court dismissed the OWCP appeal as regards the length of the sentence of 15 years of the first instance proceedings. In the appeal, the OWCP requested the Appellate Court to change the first instance judgment and sentence the accused for crimes at Ovčara to 20 years in prison, or to a concurrent sentence of 20 years in prison pursuant to the then applicable CC. The Appellate Court concluded that the first instance court had properly weighed the aggravating and mitigating circumstances and determined the appropriate sentence.

503 Case *Ovčara,* District Court in Belgrade, War Crimes Chamber, case No. K.V. 4/2006, the defendant Miroljub Vujović and others, available in Serbian at http://www.hlc-rdc.org/Transkripti/ovcara.html, accessed on 20 April 2015. Case *Ovčara,* District Court in Belgrade, War Crimes Chamber, case No. K.V. 9/2008, the defendant Damir Sireta, available in Serbian at http://www.hlc-rdc.org/Transkripti/ovcara_4.html, accessed on 20 April 2015.

504 CC FRY, Article 48, para. 2, Item 3.

505 CC FRY, Article 48, para. 2, Item 2.

When taking into account the number of aggravating circumstances for the defendant established by the court, in particular the persistence in committing the crime expressed in the form of executions of prisoners in several groups, as well as the heaviness of the consequences, and that 200 prisoners were killed on that occasion, including women - some of them pregnant, the elderly and minors, and the fact that the defendant had a previous conviction, the sentence determined of 15 years in prison does not seem appropriate. In relation to the number of aggravating circumstances, the court dedicated unreasonably great significance to defendant's extenuating circumstances - his youth at the time of the crime (23) and his **family circumstances**.

VI. Case *Prizren*[506]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 11 May 2012	
Trial commencement date: 13 September 2012	
Acting Prosecutor: Dragoljub Stanković	
Defendant: Mark Kashnjeti	
Criminal act: war crime against a civilian population, CC SRY article 142	
Acting Chamber	Judge Sretko Janković (Presiding Judge) JudgeMilimir Lukić Judge Milena Rašić Judge Nada Hadži Perić Judge Miodrag Majić
Number of defendants: 1 **Rank of the defendant:** low rank - no rank **Number of victims:** 2 **Number of questioned witnesses:** 13	**Number of trial days in the reporting period:** 3 **Number of questioned witnesses in the reporting period:** 1

Key events in the reporting period:
Second instance judgment

506 Case *Prizren,* reports from trials and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/kasnjeti.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Mark Kashnjeti is charged with having stopped the vehicle carrying Božidar Đurović and Ljubomir Zdravkovic on 14 June 1999, together with other members of the KLA; he was in uniform and armed with an automatic rifle in Prizren (Kosovo). Kashnjeti ordered the parties to step outside the vehicle, searched them and took their personal documents, money and other valuables, tied their hands with a rope, and then, with other members of the KLA, took them at gunpoint to the VJrd of a house, occasionally hitting Božidar Đurović on the head and body using his rifle butt. He enclosed them in the VJrd for several hours, and then, together with Miroslav Jovanović, who had earlier been detained by unknown KLA members, drove them to the Prizren settlement of Ortokol and ordered them to go to Serbia.[507]

As one of the items of evidence proposed for presentation by the OWCP in the indictment was an insight into the photographs published in the daily newspaper "Kurir", in which one of the members of the KLA, who are shown standing next to Đurović and Zdravković, was labelled as the defendant Mark Kashnjeti.[508]

Defense of the defendant

The defendant Mark Kashnjeti defended himself by claiming that he had never been a member of the KLA, that he did not have a weapon and did not know the injured parties. He denied being the person standing next to the injured parties in the photo published in "Kurir". At the time of the event he was in Prizren, in the bookstore where his friends Lir Bytyqi and Kemal Baca worked.[509]

Witnesses in the proceedings

During the proceedings, the injured party Božidar Đurović claimed that he recognized the defendant, although he could not describe what the defendant looked like at the time of the event. He also stated that the people who had arrested him were aged between 25 and 30,[510] while at the time of the relevant event, the defendant was 46 years old. The other injured party, Ljubomir Zdravković, was unable to identify the defendant.[511]

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507 The OWCP indictment KTO 4/12 dated 11 May 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/09/Optuznica-Mark-Kasnjeti.pdf, accessed on 19 April 2015.

508 Daily newspaper "Kurir" dated 21 April 2012, "Criminal Kashnjeti recognized", available in Serbian at http://www.kurir.rs/prepoznali-zlocinca-kasnjetija-clanak-187978, accessed on 19 April 2015.

509 Transcript of the main hearing dated 13 September 2012, p. 10-18, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/02-13.09.2012.pdf, accessed on 19 April 2015.

510 Transcript of the main hearing dated 14 September 2012, p. 21, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/03-14.09.2012.pdf, accessed on 19 April 2015.

511 Transcript of the main hearing dated 13 September 2012, p. 24, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/02-13.09.2012.pdf, accessed on 19 April 2015.

Prosecution witness Milan Petrović, currently an employee of the War Crimes Investigation Service of the Serbian Ministry of the Interior, and the chief of the Service for Crime Prevention in the Ministry of Interior in Prizren until 14 June 1999, claimed that he recognized the defendant in the photograph, stating that, owing to his profession, he was skilled in remembering the appearances of people, and recognized the defendant because his appearance "is not typical for an Albanian."[512] He said that he saw the photo published in "Kurir" in 2000 and recognized the defendant in it.[513]

The defense witnesses Lir Bytyqi[514]and Kemal Baca,[515] confirmed the defense's argument that the defendant came to the bookstore where they worked every day, including at the time of the relevant event.

Judgments during the first trial

On 19 November 2012, the court passed a judgment in which the defendant Marko Kashnjeti **was found guilty, and sentenced him to two years in prison**, having accepted all the charges in the indictment.[516] Deciding on appeals, the Appellate Court[517] passed a decision on March 8 2013 which **overturned the judgment and remanded the case to the first instance court for retrial**.[518] Among other things, the Appellate Court found that the first instance court failed to conduct an anthropological expertise of the evidence, which would have determined whether the defendant was on the relevant photograph or not. Moreover, the defense's proposal to inspect the recording of "Klank Kosova TV" in order to verify the defendant's defense was groundlessly refused, because there was a person in the recording who claimed that a person from the photo was not the defendant.

First instance judgment in the retrial

In the first instance judgment in the retrial, **the court found Mark Kashnjeti guilty again and sentenced him to two years in prison**,[519] establishing the identity of the defendant, among other things, on the basis of an expert opinion that the person in the photograph is "probably the

512 Transcript of the main hearing dated 22 October 2012, p. 18, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/04-22.10.2012.pdf, accessed on 4 April 2015.

513 Ibid, p. 17.

514 Transcript of the main hearing dated 9 November 2012, p. 2-16, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/05-09.11.2012.pdf, accessed on 8 May 2015.

515 Transcript of the main hearing dated 22 October 2012, p. 30-53, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/04-22.10.2012.pdf, accessed on 8 May 2015.

516 Judgment of the War Crimes Department of the Higher Court in Belgrade in the Case *Prizren,* No. K.Po2 3/12 dated 19 November 2012, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/Decembar-28-2012-Presuda-Mark-Kashnjeti.pdf, accessed on 19 April 2015.

517 Chamber: Judge Siniša Važić, Presiding Judge, Judges Sonja Manojlović, Sretko Janković, Omer Hadžiomerović, and Miodrag Majić.

518 Judgment of the War Crimes Department of the Appellate Court in Belgrade in Case *Prizren,* Kž1 Po2 1/13 dated 8 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/04/April-11-2013-Apelacioni-sud-Resenje-Mark-Kasnjeti.pdf, accessed on 19 April 2015.

519 Judgment of the Higher Court in Belgrade in Case *Prizren,* number K. Po2 3/13 dated 21 June 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/02/Mark_Kashnjeti_prvostepena_presuda_u_ponovljenom_postupku_21.06.2013..pdf, accessed on 19 April 2015.

defendant",[520] although the expert witness Đurić said that the age of the person in the photo could not be determined, but that it was a "person aged between 25 and 50".[521] The HLC offered a detailed analysis of the judgment in its Report on war crimes trials in Serbia in 2013.[522]

Proceedings overview, year 2014 – 2015

Judgment of the Appellate Court (the final judgment)

The Appellate Court passed the judgment on 20 March 2015 which **finally acquitted the defendant of the charges**[523]. The court established that the evidence relied upon by the first instance court did not indicate with sufficient certainty that it was the defendant who undertook the incriminating acts he was charged with or that the defendant was the person in the indicated photo.

HLC findings

i. Groundless indictment

The original indictment said that the defendant "as a member of the KLA, in order to force the Serbs to leave the municipality of Prizren and so contribute to the fulfilment of a common overall goal - establishing total KLA control over the territory of Kosovo and Metohija and expulsion of the Serbian population from the area", ordered the injured parties "to go to Serbia if they wanted to stay alive".[524] The OWCP hardly offered any evidence for these allegations, so during the main hearing, especially after the statements of the injured parties that no one had threatened them with death unless they went to Serbia, the OWCP amended the indictment and said that the defendant was a member of the KLA and that "he did not quite treat the civilians humanely on every occasion".

ii. Unprofessional verification of the defendant's identity

Throughout the whole proceedings, the recognition of the defendant was disputable. Despite the absence of clear evidence about the identity of the defendant, the first instance court passed two judgments, and only at the end did the Appellate Court pass a final decision that corresponded to the

520 Transcript of the main hearing dated 17 May 2013, p. 5, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/17.05.2013.pdf, accessed on 4 November 2015.

521 Transcript of the main hearing dated 19 June 2013, p. 13, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/05/19.06.2013.pdf

522 For more details see: the HLC, Report on war crimes trials in Serbia in 2013 (Belgrade: HLC, 2014) p.31. available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, accessed on 19 April 2015.

523 Judgment of the War Crimes Department of the Appellate Court in Belgrade Kž1 Po2 dated 20 March 2015, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/06/Drugostepena_presuda_Mark_Kasnjeti.pdf, accessed on 16 September 2015.

524 The OWCP indictment No. KTO 4/12 dated 11 May 2012, p. 2, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/09/Optuznica-Mark-Kasnjeti.pdf, accessed on 19 April 2015.

evidence presented.

It is worthy pointing out that the witness Petrović, who works in the War Crimes Investigation Service, was proposed as the prosecution witness during the main hearing. As an explanation for why this witness had not been proposed in the preliminary hearing, the acting deputy of the OWCP stated that he previously had no knowledge of the information this witness had about the defendant, but added that he "went to a meeting with the witness who is now the head of the War Crimes Investigation Service and works on the KiM dossier; this person asked if he had charged Marko Kashnjeti and thus the conversation about him started."[525] It is unconvincing that the OWCP did not contact the witness who is the "head" of the War Crimes Investigation Service and works on the KiM dossier in connection with this case earlier, because it was this service that filed the criminal complaint in this case. This witness was proposed at a time when the recognition of the defendant was questioned because the injured party Đurović, who allegedly recognized him, described him as a person between the age of 25 and 30 at the time of the relevant event, but at the same time he was unable to describe his appearance at the relevant time. The injured party Zdravković, as well as the witness Jovanović, did not recognize the defendant.

Finally, the testimonies of the injured party Đurović and the witnesses Petrović and Jovanović about the alleged identification of the defendant had to be particularly thoroughly evaluated, since the controversial photograph was published in the media from the very moment of the defendant's arrest. The photograph had a clearly marked face alleged to be the face of the defendant.

525 Transcript of the main hearing dated 14 September 2012, p. 69, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/12/03-14.09.2012.pdf, accessed on 19 April 2015.

Final judgments in cases before courts of general jurisdiction

I. Case *Rahovec/Orahovac*[526]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 12 November 1999	
Trial commencement date: 20 June 2000	
Acting Prosecutor: Dimitar Krstev	
Defendant: Boban Petković	
Criminal act: war crimes against a civilian population CC FRY Article 142	
Acting Chamber	Judge Dragoljub Albijanić (Presiding Judge) Judge Dragoljub Đorđević Judge Zdravka Đurđević
Number of defendants: 2 **Rank of the defendants:** low rank – no rank **Number of victims:** 3 **Number of questioned witnesses:** 11	**Number of trial days in the reporting period:** 0 **Number of questioned witnesses in the reporting period:** 0
Key events in the reporting period: Second instance judgment of December 2013 [publicly available since 2014]	

526 Case *Rahovec/Orahovac*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/Rahovec/Orahovac.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Boban Petković was charged with having killed **Ismail Durguti** on 9 May 1999 at a place called Ria in Rahovec/Orahovac (Kosovo). Ismail was escaping from the village because of the conflict between KLA members and the VJ. Petković managed to catch up to him and then fired a shot to his head, using an official gun given to him by the defendant Đorđe Simić, a MoI member. After that, Petković went to a nearby house and killed the married couple Sezaria and Shefkija Miftari, by shooting from an automatic rifle. **The actions of the defendant Petković were qualified as murder, and the actions of the defendant Simić as aiding murder**.[527]

Defence of the defendants

The defendant Petković **initially admitted** to committing the crime, but then during the first first instance proceedings, **changed his defence,** saying he had been in the place of the crime together with the defendant; however, he had not killed anyone. The defendant Simić was **tried *in absentia***, so his defence, which he gave during the investigation, was read, and in it he denied giving the gun to the defendant, stating the opposite – that the defendant himself took the gun from him.

Judgments in three proceedings

The first instance judgment of 2000 **found the defendants guilty of committing murder**. Boban Petković was sentenced to four years and ten months, and Đorđe Simić to one year in prison.[528] The Supreme Court of Serbia **overturned the judgment** in 2001.[529]

The District Public Prosecutor in Požarevac amended the indictment in 2003 and **changed the legal qualification of the crime to war crime** against a civilian population.[530]

527 Indictment of the District Public Prosecutor in Požarevac Kt. 118/99-108, dated 12 November 1999, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/1.Rahovec/Orahovac-12.11.1999-optuznica1.pdf, accessed on 29 March 2015.

528 Judgment of the District Court in Pozarevac in Rahovec/Orahovac case K.96/99, dated 19 July 2000, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/2.Rahovec/Orahovac-19.07.2000-prva-prvostepena-presuda1.pdf, accessed on 29 March 2015.

529 Judgment of the Supreme Court of Serbia in *Rahovec/Orahovac* Case Kž I 1955/00, dated 18 December 2001, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/3.Rahovec/Orahovac-18.12.2001-resenje-o-ukidanju-prve-presude1.pdf, accessed on 29 March 2015.

530 Indictment of the District Public Prosecutor in Požarevac Kt. 118/99-108, dated 19 February 2003, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/4.Rahovec/Orahovac-19.02.2003-izmenjena-optuznica1.pdf, accessed on 29 March 2015.

The first instance judgment in the retrial from 2003 found Boban Petković guilty and **sentenced him to five years in prison. Đorđe Simić was acquitted of all charges**.[531] In 2006, the Supreme Court of Serbia **again overturned the judgment** and remanded the case for retrial.[532]

The second retrial, that is, the third proceedings in this case, lasted for five years; and yet, not a single trial day was held for two years. The new first instance judgment from 2013 was identical to the previous one - **Boban Petković was found guilty and sentenced to five years in prison, while Đorđe Simić was acquitted of charges**.[533]

Judgments of the Appellate Court from 2013

The judgments of the Appellate Court from 2013 finally adjudicated this case. These judgments of the abovementioned court are the third second instance judgments in this case.

The Appellate Court, through its separate judgment,[534] dated November 2013, **confirmed the acquittal part of the judgment regarding Đorđe Simić**.[535]

Boban Petković was found guilty by the Appellate Court judgment of December 2013,[536] but only for the killing of Ismail Durguti, not the married couple Miftari. He was **sentenced to a three-year imprisonment, which is below the statutory minimum of five years** prescribed for war crimes.[537]

Deciding on the sentence, the court found **mitigating circumstances** for the defendant Petković - no criminal record, the lapse of time since the crime, his financial and family situation, and "**the seriousness of the situation he was in at the relevant time**",[538] and therefore, "**taking into account**

531 Judgment of the District Court in Pozarevac in Case *Rahovec/Orahovac* K.br. 17/2002 dated 21 August 2003, available in Serbian at ww.hlc-rdc.org/wp-content/uploads/2012/02/5.Rahovec/Orahovac-21.08.2003-druga-prvostepena-presuda1.pdf9 March 2015.

532 Judgment of the Supreme Court of Serbia in Case *Rahovec/Orahovac* Kž. 1 13990/05 dated 25 May 2006, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/02/6.Rahovec/Orahovac-25.05.2006-resenje-o-ukidanju-druge-presude1.pdf, accessed on 29 March 2015.

533 Judgment of the District Court in Pozarevac in Case K.br. 25/11 dated 21 February 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/06/Treca_prvostepena_presuda_21_02_2013.pdf, accessed on 29 March 2015.

534 Deciding on the appeals, the Appellate Court decided that the Prosecutor's appeal, filed against the acquitting part of the judgment in relation to Đorđe Simić, was unfounded. The Appellate Court also decided that it was necessary to hold the main hearing regarding the appeal of the defense attorney of the defendant Boban Simić and examine a court witness in psychiatry. Therefore, through a special judgment, it rejected the Prosecutor's appeal and upheld the acquittal of the judgment in relation to Đorđe Simić.

535 Judgment of the Appellate Court in Belgrade in Case *Rahovec/Orahovac* Kž1 2889/13 dated 1 November 2013.

536 Judgment of the Appellate Court in Belgrade in Case *Rahovec/Orahovac* Kž1 6826/13, dated 18 December 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Rahovec/Orahovac_Presuda_Apelacionog_suda.pdf, accessed on 29 March 2015.

537 CC FRY, Article 142. para. 1.

538 Judgment of the Appellate Court in Belgrade No. Kž16826/13, dated 18 December 2013, p. 5, available in Serbian at rdc.org/wp-content/uploads/2015/04/Rahovec/Orahovac_Presuda_Apelacionog_suda.pdf accessed on 8 November 2015.

his mental status"[539] found that it was appropriate to mitigate the sentence below the statutory minimum.

HLC findings

i. Unprofessionalism of the court and Prosecutor's Office

Although this was a relatively simple case, including three victims and two defendants, it took 14 years to end this case. In 2008 only two trial days were held, and in 2009, 2010 and 2012 not a single one. In 2011, only one trial day was held.[540] It is undisputable that the defendants in this case **were deprived of the right to a trial within a reasonable time**.[541]

It was clear that both the court and the Prosecutor's Office were **unfamiliar with international and humanitarian law**. The indictments and first instance judgments do not indicate what type of armed conflict we are dealing with, and one cannot see who the participants of the conflict were, what international law norms were violated and what was the capacity of the defendant Petković. An analysis of earlier judgments and indictments was given by the HLC in the Report on War Crimes Trials in Serbia in 2013.[542]

ii. Unclear final judgment of the Appellate Court

Judgments in war crimes cases, as a minimum requirement, have to determine the type of the armed conflict, its participants, the capacity of the defendant, and the norms of international law violated, and to provide a detailed reasoning of all key facts.[543] The final judgment of the Appellate Court omitted almost all these elements.

Consequently, the judgment states that the Additional Protocol to the Geneva Convention relating to the Protection of Victims of International Armed Conflicts was violated, yet **nowhere does it say why**

539 Ibid.

540 Case *Rahovec/Orahovac,* District Court in Požarevac, available in Serbian at http://www.hlc-rdc.org/Transkripti/Rahovec/Orahovac.html, accessed on 29 March 2015.

541 CPC, Article 14.

542 For more details see: the HLC, Report on war crimes trials in Serbia in 2013 (Belgrade: HLC, 2014) pp. 80-82. available in English at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Report-on-war-crimes-trials-in-Serbia-in-2013-ff.pdf, p. 80-82.

543 Judgment of the War Crimes Department of the Appellate Court in Belgrade in Case *Bytyqi Brothers* Kž1.Po2 7/2010 dated 1 November 2010, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/07/Odluka-Apelacionog-suda-o-prvostepenoj-presudi.pdf, p. 2, accessed on 6 April 2015. Judgment of the War Crimes Department of the Appellate Court in Belgrade in Case *Beli Manastir* Kž1 Po2 7/12 dated 29 March 2013, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2013/12/Beli-Manastir-Drugostepena-presuda.pdf. p. 6, accessed on 6 April 2015. Judgment of the War Crimes Department of the Appellate Court in Belgrade in Case *Skočić,* Kž1 Po2 6/13 dated 14 May 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/07/Drugostepena_odluka_Skocici.pdf, p.9-10, accessed on 6 April 2015.

this is an international armed conflict. The court does not state who the participants of the armed conflict were – "on that day, there was mutual war activity – both from the members of the Republic of Serbia army and police, and the members of the Shqiptar armed formations KLA and UÇK."[544] Namely, apart from the RS police, the army of *Yugoslav Army* also participated in the conflict; while the KLA and UÇK are not *two* armed formations: the KLA is a translation of UÇK (Ushtria Çlirimtare Kosovës – Kosovo Liberation Army).

The judgment does not state how the court determined that it was not proved that the defendant had killed the married couple Miftari as well. It was only stated that none of the witnesses had any direct knowledge on this event, adding that the defendant's initial confession was not of such a quality as to base conviction on it. **Analysis of the defendant's confession was totally deficient,** as well as the court reasoning why it assessed it as being of low quality.

In its judgment, the court used insulting terms such as "shqiptar" and "shqiptarian". Since these terms are used in a pejorative sense in Serbia and are an insulting and discriminatory title for members of the Albanian people, an **unbiased court should not have been using them**.

Finally, when one observes the circumstances which are taken into consideration regarding the defendant in determining the sentence, one may notice that the **court did not mention any aggravating circumstances** whatsoever. Therefore, it is unclear whether the court found there were no aggravating circumstances for the defendant or simply failed to do so. It was necessary to explain this, since the rationale of the judgment stated the deceased Ismail Durguti was an elderly man, a civilian running from an area affected by war, and who was already in a bad condition, as he was wounded. **The murder of an old, wounded man trying to save himself are the kind of circumstances which a court would have to deem aggravating**, especially since the defendant was a Serbian MoI member, who should have been protecting civilians.

Mitigating circumstances were listed following the standard pattern: no criminal record, the lapse of time since the commission of the crime, the financial and family situation of the defendant, his mental status and "the seriousness of the situation he was in at the relevant time." The judgment completely lacked an explanation of the "mental status" and "critical situation" which the court considered as mitigating circumstances for the defendant.

Despite the lack of any explanation on the mitigating circumstances thus considered, the court found there was space to mitigate the sentence below the prescribed statutory minimum of five years. The judgment does not state what reasons the court was governed by when it estimated there was space to mitigate the sentence. Stating the reasons is an obligatory element of an acquittal

544 Judgment of the War Crimes Department of the Appellate Court in Belgrade Kž1 6826/13 dated 18 December 2013, p. 3, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2015/04/Rahovec/Orahovac_Presuda_Apelacionog_suda.pdf, accessed on 29 March 2015.

according to the CPC,[545] and **not stating the reasons is a substantial violation of the provisions for criminal proceedings**.[546]

545 CPC, Article 428, Article 10.
546 CPC, Article 438. para. 1, item 11.

II. Case *Miloš Lukić*[547]

CASE OVERVIEW	
Case current phase: final judgment	
Date of indictment: 14 June 1999	
Trial commencement date: 25 June 1999	
Acting Prosecutor: Mikica Milenković (District Public Prosecutor's Office in Prokuplje)	
Defendant: Miloš Lukić	
Criminal act: murder, CC RS Article 47	
Acting Chamber	Judge Vera Milošević (Presiding Judge) Judge Ljiljana Miljković Judge Slobodan Ljubić
Number of defendants: 1 **Rank of the defendants:** low rank – junior sergeant **Number of victims:** 1 **Number of questioned witnesses:** 19	**Number of trial days in the reporting period:** 1 **Number of questioned witnesses in the reporting period:** 0

Key events in the reporting period: second instance judgment
Second instance judgment

547 Case *Miloš Lukić*, reports from trial and case documents available in Serbian at http://www.hlc-rdc.org/Transkripti/morina.html

The course of proceedings

Proceedings overview to 2014

Factual description from the indictment

Miloš Lukić, a former member of the MoI of Serbia is **charged with the crime of murder**.[548] According to the indictment, Lukić killed a Kosovo Albanian, **Hamdija Maloku,** on 24 April 1999 in the village of Podujevo (Kosovo) with three shots at close range, using his official gun.[549]

Defence of the defendant

The defendant admitted killing Hamdija Maloku, but stated he was really in error, since he thought Maloku was a terrorist, and adding that he did not see Maloku was reaching for his ID. He was convinced Maloku was reaching for a gun he was intending to use.

Judgments in two proceedings

On 25 June 1999, the District Court in Prokuplje[550] rendered its judgment which **found the defendant guilty and sentenced him to a suspended sentence**, which established a two-year sentence with a three-year probation.[551] On 23 March 2000, the Supreme Court of Serbia **overturned the first instance judgment**, having determined that the legal conditions for the imposition of a suspended sentence had not been fulfilled, and therefore remanded the case for retrial.[552]

After the retrial, the District Court in Prokuplje rendered its judgment on 7 June 2001, which **found the defendant guilty and sentenced him to a year and a half in prison**.[553] The Supreme Court of Serbia

548 The defendant Miloš Lukić was a member of the MoI at the time of the crime. This fact was not stated in the indictment.

549 Indictment of the District Public Prosecutor's Office in Prokuplje in Case *Miloš Lukić* No. KT.br. 20/99 dated 14 June 1999, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/1-Optuznica-14.06.1999..pdf, accessed on 14 April 2015.

550 Chamber: Judge Branislav Niketić, Presiding Judge, Judge Aleksandar Stojanović, member, Marko Koprivica, Dragomir Nikolić and Jovan Severović lay judges.

551 Judgment of the District Court in Prokuplje in Case *Miloš Lukić* No. K br.58/99, dated 25 June 1999, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf, accessed on 14 April 2015.

552 Judgment of the Supreme Court in Serbia in Case *Miloš Lukić* No. Kž.I 1153/99, dated 23 march 2000, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/3-Resenje-VSS-o-ukidanju-prve-prvostepene-presude-23.03.2000..pdf, accessed on 14 April 2015.

553 Judgment of the District Court in Prokuplje in Case *Miloš Lukić* No. K.21/00 dated 7 June 2001, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/5-Druga-prvostepena-presuda-OS-u-Prokuplju-7.06.2001..pdf, accessed on 14 April 2015.

again overturned the first instance judgment[554] on 2 April 2002 and remanded the case for retrial.[555]

Proceedings overview, year 2014 – 2015

Third first instance judgment

The third retrial in this case ended on 20 February 2014 with a judgment of the Higher Court in Prokuplje, which found the defendant Miloš Lukić **guilty of murder and sentenced him to four years and six months in prison**.[556]

In determining the sentence, the court considered the following as aggravating circumstances: the defendant had committed the criminal act as a member of the police; there was a high degree of criminal responsibility indicated by his conduct and behaviour after committing the act, when he entered the police station facility in Podujevo (assault on one more person after committing the criminal act, resistance during arrest, smashing the glass of the entrance door of the police station, etc.) The court considered these mitigating circumstances as well: the **defendant is a family man, father of two,** and the fact that he "**accepted the obligation to serve in the police even in the most difficult circumstances.**"[557] The court found **there were particularly mitigating circumstances** in the commission of the act:

> "These are reflected in the fact that the victim appeared at the time and place where he encountered with the defendant, which to a certain extent **surprised the defendant**. At the same time, the defendant did not know the victim. What is more, the latter **was wearing a long black coat,** and an unfortunate coincidence was that the victim was standing next to the tree near the abandoned hospital building – which was **a critical spot** for members of the police and other official bodies of the Republic of Serbia […] "[558] [HLC italics]

Because of the particularly mitigating circumstances, the **court sentenced the defendant to four years and six months in prison, which is below the statutory minimum of the prescribed sentence**.[559] Such a decision of the court based on the existence of particularly mitigating circumstances for the defendant is contradictory both because of the previously determined aggravating circumstances

554 Judgment of the Supreme Court of Serbia in Case *Miloš Lukić* No. Kž. I 1120/01 dated 2 April 2002, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/6-Resenje-VSS-o-ukidanju-druge-prvostepene-presude-2.04.2002.pdf, accessed on 14 April 2015.

555 The HLC does not have the data on the course of the proceedings in the period from 2002 – 2012.

556 Judgment of the Higher Court in Prokuplje in Case *Miloš Lukić* No. K. 1/10 dated 20 February 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Treca_prvostepena_presuda_20.02.2014..pdf, accessed on 14 April 2015.

557 Ibid, p. 12.

558 Ibid, p. 13.

559 Statutory minimum is a five-year prison sentence.

and the official capacity of the defendant (a member of the special police unit). Namely, the court established that the defendant had been a member of the special police unit, with combat experience. Since he was a skilled policeman, an encounter with an elderly man wearing a long coat would surely not have surprised him in the way he stated in the main hearing.[560]

Third second instance judgment

On 9 October 2014, the Appellate Court in Niš **modified the first instance judgment in the part of the decision on sentence and sentenced the defendant to five years in prison**[561]. The judgment does not provide an explanation on aggravating circumstances for the defendant.

HLC findings

i. Duration of the proceedings and unlawfulness in the work of the Prosecutor's Office and the court

The proceedings against Miloš Lukić lasted for more than 15 years. Despite that, in 2012 only one trial day was held and in 2013 not one. In 2014, one trial day was held, when the case was concluded in the first instance proceedings.

Political opinions are present in the first instance judgments, which is unacceptable for a court. It was stated that "Podujevo was a specific place, full of terrorists who were attacking the police,"[562] and the defendant's belonging to "the special police unit with special purposes in clearing the area" was taken as a mitigating circumstance.[563] The judgment also had obvious contradictions. Thus, the court stated that "the victim was a terrorist,"[564] and later the court concluded that the defendant "was not really in error."[565]

560 Judgment of the Higher Court in Prokuplje in Case *Miloš Lukić* No K. 1/10 dated 20 February 2014, p. 9, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Treca_prvostepena_presuda_20.02.2014..pdf, accessed on 14 April 2015.

561 Judgment of the Appellate Court in Niš in Case *Miloš Lukić* No. K9 Kž.1.br.867/14 dated 9 October 2014, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_09.10.2014..pdf, accessed on 14 April 2015.

562 Judgment of the District Court in Prokuplje K.br. 58/99 dated 25 June 1999, p. 2 available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf., accessed on 9 November 2015, Judgment of the District Court in Prokuplje K.br. 21/00 dated 7 June 2001, p. 2, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/5-Druga-prvostepena-presuda-OS-u-Prokuplju-7.06.2001..pdf, accessed on 9 November 2015.

563 Judgment of the District Court in Prokuplje K.br. 58/99 dated 25 June 1999, p. 4 available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2012/04/2-Prva-prvostepena-presuda-OS-u-Prokuplju-25.06.1999..pdf, accessed on 9 November 2015.

564 Ibid p. 3.

565 Ibid p. 4.

ii. Unreasoned judgments

The decision of the Appellate Court to modify the first instance judgment contains not a single basic explanation. The judgment only states that "the first instance court did not properly assess the mitigating and aggravating circumstances for the defendant."[566] **What is missing is an explanation why the Appellate Court considers a five-year imprisonment appropriate**, when the aggravating circumstances for the defendant are the following: he committed the crime as a member of the police, his level of guilt was high and his behavior after the crime. Furthermore, the following was not explained: **why the court considered that a mitigating circumstance for the defendant was the fact that he "accepted [the obligation to serve the police] in the most difficult conditions**." The fact that a member of the police should be pursuing his profession cannot be a mitigating circumstance, since he is trained to act in such situations. Besides, the defendant's **family situation** was also considered a mitigating circumstance [for more on this, see general finding 4].

iii. Incompetence of the Prosecutor's Office

The actions of the defendant Miloš Lukić contained all the elements of the criminal act of a war crime against a civilian population, yet this act was qualified as murder. During the proceedings, the Prosecutor's Office knew that the critical event happened during the armed conflict; what is more, the Prosecutor's Office also knew that on one side of the conflict were the FRY army and members of the RS police, with the defendant belonging to the latter; that the crime place – Podujevo -, was affected by the armed conflict; that Maloku was 63 years old at the time, and wearing civilian clothes, without weapons or any other object that could jeopardize the defendant; that the victim was killed by the defendant intentionally; and that the act of killing a civilian, as a protected category, in the given circumstances, was a violation of international humanitarian law. Therefore, **the prosecution of the defendant Lukić should have been undertaken by the OWCP** in accordance with the Law on Public Prosecution, which enables the Republic's Public Prosecutor's Office to authorize a lower prosecution authority to act in certain proceedings.[567]

566 Judgment of the Appellate Court in Niš, 9Kž.1br. 867/14 dated 9 October 2014, p. 4, available in Serbian at http://www.hlc-rdc.org/wp-content/uploads/2014/12/Drugostepena_presuda_09.10.2014..pdf, accessed on 9 November 2015.

567 The Law on Public Prosecutor's Office, Official Gazette of the Republic of Serbia No. 116/2008, 104/2009, 101/2010, 78/2011, 101/2011, 38/2012 and 101/2013 Article 20 para.1.

Statistics for the years 2014 and 2015

TOTAL NUMBER OF WAR CRIMES CASES	2014	2015
Total number of cases before courts in Serbia	**24**	**22**
Total number of defendants before courts in Serbia	**84**	**85**
Total number of cases before the War Crimes Department of the Higher Court in Belgrade	**17**	**16**
Total number of defendants before the War Crimes Department of the Higher Court in Belgrade	**51**	**54**
Total number of cases before the War Crimes Department of the Appeals Court in Belgrade	**7**	**8**
Total number of defendants before the War Crimes Department of the Appeals Court in Belgrade	**25**	**35**
Total number of cases before courts of general jurisdiction	**4**	**4**
Total number of defendants before courts of general jurisdiction	**17**	**17**

JUDGMENTS IN WAR CRIMES CASES	2014	2015
WAR CRIMES DEPARTMENT OF THE HIGHER COURT IN BELGRADE		
Total number of judgments	**2**	**9**
Number of convicting judgments	**1**	**4**
Number of acquiting judgments	**0**	**5**
Number of convicting/acquiting judgments	**1**	**1**
Number of convicted defendants	**10**	**9**
Number of acquited defendants	**2**	**12**
COURTS OF GENERAL JURISDICTION		
Total number of judgments	**1**	
Number of convicting judgments	**1**	
Number of acquiting judgments		
Number of convicting/acquiting judgments		
Number of convicted defendants	**1**	
Number of acquited defendants		
WAR CRIMES DEPARTMENT OF THE APPEALS COURT IN BELGRADE		
Total number of judgments	**4**	**5**
Number of quashing judgments	**1**	**3**
Number of confirming judgments	**1**	**1**
Number of modifying judgments	**2**	**1**

CONFIRMED INDICTMENTS FOR WAR CRIMES	2014	2015
Total number of OWCP's indictments	**7**	**0**
Total number of indictees	**9**	**0**

Programme for the organisation and improvement of the OWCP

Candidate: Snežana Stanojković

I

To begin with, I would like to emphasize the fact that war crimes were committed in the armed conflicts in the region of of the former Yugoslavia, the first of which began 25 years ago, while the last one ended 16 years ago. A consequence of the above fact is that numerous crimes can no longer be prosecuted because the possible suspects or witnesses have died in the meantime. All of this obliges us, as candidates for the position of a War Crimes Prosecutor, to offer an answer in our programmes primarily to the question of how we will organize the workload in order to prosecute perpetrators in a more efficient manner, and thus forestall the effect of the progressive decrease of chances for prosecution.

As a rule, in those conflicts everything was permitted,, including mass violations of the laws and customs of war – acts against humanity and international law, with the evidence of the crimes and their perpetrators concealed immediately, in the years that followed and even now.

In accordance with what is stated above, I have made an effort to base my programme on a realistic perception of the state of things and of achievable expectations.

II

I have created my Work Programme for the position of the War Crimes Prosecutor on the basis of:

- **an analysis of the results achieved and the weaknesses demonstrated in the engagement of the Office of the Prosecutor to date,** particularly in view of the objectives set out in the documents on cooperation signed so far with competent prosecutors' offices in the region, and especially with the Prosecutor's Office / State Attorney's Office of the Republic of Croatia and the Prosecutor's Office of Bosnia and Herzegovina;

- **an assessment of the human and material resources of the Prosecutor's Office and in comparison** with the resources of the competent prosecutors' offices for war crimes in Bosnia and Herzegovina and the Republic of Croatia;

- **work estimates** provided by the competent bodies of the legislative and executive branches, the professional and general public, and international and non-governmental organizations, **and in particular the criticism relating to the work of the Prosecutor's Office**;

- **a consideration of various proposals for improving the work of the Office of the War Crimes Prosecutor – (OWCP),** particularly bearing in mind the realistic assessment that the issue of enhancing the prosecution of war crimes and, along with that, the work of the OWCP, will be an essential task which will be set in the EU accession negotiations within Chapter 23.

III

From the content of comprehensive analyses and assessments, and from consideration of several proposals for improving the work of the OWCP, I cite only the basic information and assessments that I think are the most important for an understanding of the most important tasks that I would set before myself as a Prosecutor, as well as before the OWCP Collegium and all employees of the Prosecutor's Office.

1. CAPACITIES AND RESOURCES

2. MEASURES AND ACTIVITIES FOR IMPROVING WORK EFFICIENCY

3. REGIONAL COOPERATION

4. INTERNATIONAL COOPERATION

5. BUILDING TRUST AND PRESERVING THE REPUTATION OF OWCP

IV

· CAPACITIES AND RESOURCES

AVAILABLE CAPACITIES

In consideration of the results achieved and the weaknesses demonstrated in the work so far, human and material resources are not an end in themselves, but necessary prerequisites for establishing enforceable measures and activities for the improvement of work, as well as for keeping the engagement of the OWCP at a realistic level.

I consider the abovementioned particularly important, because during the OWCP's twelve-year-long work, the authorities in the Republic of Serbia, and international and non-governmental organizations requested from the OWCP to perform numerous and complex tasks for which the OWCP did not have anywhere near the necessary human and material resources. The same situation is to be observed with the various current requirements for improvement of work and increase of OWCP efficiency. Such demands and expectations, often completely unenforceable, have been in some cases publicly accepted by the Prosecutor for War Crimes personally, and in particular by his Deputy, whose duty is to inform the public about the work of the OWCP.

COMPARISON

To illustrate the extent to which the restricted capacities have objectively limited the accomplishment of results in the work of this office, I will mention that in the Prosecutor's Office of Bosnia and Herzegovina, during the time of the adoption of a national strategy for war crimes cases in December 2008, 18 prosecutors were engaged in the work on war crimes cases. Today, the Chief Prosecutor of Bosnia and Herzegovina has at his disposal 33 prosecutors who handle war crimes cases.

As for the Prosecutor's Office of the Republic of Croatia, in the process of Croatian EU accession, on the basis of consultations with the European Commission within Chapter 23 and amendments to the Law on Application of the Statute of the International Criminal Court from 2011, it was established that four county courts had jurisdiction to act in cases of war crimes and four Prosecutor's Offices (Zagreb, Osijek, Rijeka and Split) were instituted accordingly.

IMPROVEMENT

I advocate that, as a precondition for the successful accomplishment of the tasks set before the OWCP and for a more efficient prosecution of war crimes, this Prosecutor's Office should be provided with equivalent working conditions and that, on this basis, the tasks of the OWCP be determined within the national strategy for the prosecution of war crimes.

Regardless of the limited capacities, I would immediately organize more efficient work on pending cases, with the human and material resources that I currently have at hand. Parallel to this, I would organize work on establishing a long-term strategy, which would, if it obtains the support of the State Prosecutorial Council and the Ministry of Justice, as well as the Ministry of Finance and the Government of the Republic of Serbia, within a limited time period – with a maximum of five years -, anticipate the necessary increase in personnel and material resources.

When it comes to human resources, I will primarily advocate that, on the basis of the existing Law on Public Prosecution, there should be an election of Deputy Prosecutors (3), but I would also advocate for additional deputy positions, in accordance with the envisaged dynamics of the Action Plan for Chapter 23, ''Judiciary and Fundamental Rights", which is confirmed by the European Commission and in accordance with the latest recommendations. A very important point for enhancing the work of the OWCP is the increase of the number of prosecutor's assistants, so that each acting Deputy Prosecutor could have, for any case, the help of at least one assistant.

As far as the material resources are concerned, I will focus on providing funds for the costs of investigation.

SERVICES

Taking into account the fact that the effectiveness of this Prosecutor's Office to a large extent depends on the results of the work of the War Crimes Investigation Service, the Military Security Agency and other bodies that have jurisdiction to determine the facts on committed war crimes and uncovering their perpetrators, I will advocate that the Ministry of the Interior of the Republic of Serbia determines the manner in which the War Crimes Investigation Service will be enabled to accomplish its tasks and exercise its duties. The current human resources of the unit do not guarantee its appropriate engagement upon the requests of the OWCP. In order to ensure the conditions for dealing better with the OWCP's requests, within the organization of the work, I will designate one deputy and oblige him or her to prepare a summary of the problems expressed so far, on the basis of information collected from all members of the Collegium. I will treat other services working on the detection of perpetrators of war crimes by applying the same principle.

COMMITTEE

Regarding the matter of personnel and material conditions for the work of the OWCP, I would particularly highlight the need to arrange immediately, in consultation with the competent ministry, for the documentation of the former Committee for the Collection of Data on Crimes Against Humanity and International Law to be returned to the premises in which it can be used by the Prosecutor's Office on a daily basis. This documentation, which was located in two offices in a building called ''SIV 3" and was placed at the disposal of the OWCP in 2008, was moved to a storage area of the SIV 3 building in late 2014 by the decision of the competent authority responsible for space distribution in that building, and with the consent of the Secretary of the OWCP, with the result that it is practically impossible to use the documentation. It is this documentation that is important for the work of the OWCP, particularly for the cooperation with prosecutors' offices in B&H and Croatia. I would particularly emphasize the fact that the collected documentation relates to Serbian victims.

In accordance with my previously stated opinions and standpoint, my priority task as a prosecutor will not be to organize activities for the development of the OWCP's work strategy in the future, but to organize a more efficient handling of the war crimes cases which we have in the prosecutor's office, and along with that, I will work on the improvement of the personnel and material conditions needed for more efficient work.

V

1. MEASURES AND ACTIVITIES AIMED AT ENHANCING WORK EFFICIENCY

I will explain the measures and activities I plan to execute in order to enhance work efficiency.

CREATING TEAMS ACCORDING TO SPATIAL CRITERIA

The first measure that I plan to take is to, bearing in mind the current practice according to which deputy prosecutors with the available number of prosecutorial assistants and associate investigators are grouped into teams dealing with war crimes cases related to certain territories of B&H, Croatia, Kosovo and Metohija, be more strict about their distribution, taking into account their current duties in the cases. Such a division would be permanent; deputies would be assigned cases in accordance with the area they deal with and this would relate to everyone except the first deputy, who could, in accordance with the prosecutor's decision, be put in charge of a smaller number of cases not related to a particular area. Generally, the main task before the first deputy would be to monitor the work of all three teams, in the following manner: the processors of cases would at least twice a week report on the status of the case, particularly on the existence of possible problems and issues that would require consultation with the first deputy or discussion in the meetings of the OWCP Collegium. In addition to working on specific cases of war crimes related to a particular area - that is to say, to a particular country and to the territory of Kosovo and Metohija - deputy prosecutors would, with their teams, monitor the overall communications with the Prosecutor's Offices of B&H and Croatia, and the EULEX Mission in Kosovo and Metohija (for example, the requirements for the verification of certain persons collecting information).

INCREASE IN NUMBER OF INVESTIGATIONS AND INDICTMENTS

The first task that I plan to set before the deputies grouped in the previously mentioned teams, in addition to the execution of current tasks, is to give them a month to determine whether they have cases in which they were involved during the preliminary investigations, in which they would be able, after undertaking additional measures and activities, to file indictments during 2016 or issue investigation orders in the first trimester, the first half of the year, the first 9 months or by the end of the year. I consider this task to be of particular importance because of the small number of investigations initiated in the OWCP since the adoption of the current Criminal Procedure Code. There is an assessment that in some cases unreasonable delays occurred in the opening of investigations, as well as postponements of a more decisive engagement in the conduct of preliminary investigations. In order to create conditions for a successful investigation, I will insist on the condition that all deputy prosecutors have to include in their annual work plan at least one investigation. According to the current state of affairs, there has been few investigations in the OWCP over the past years. I responsibly claim that there are conditions for me to insist on this.

AFFIRMATION OF PLEA BARGAIN AGREEMENTS

In the framework of the implementation of the new Criminal Procedure Code, I will insist primarily on a greater number of plea bargain agreements. During my previous work as a deputy war crimes prosecutor, I concluded the greatest number of plea bargain agreements. I believe that a faster and a more efficient prosecution of war crimes can be achieved through the application of the plea bargain notion.

SUBORDINATION, COOPERATION AND COMMUNICATION, APPLICATION OF BINDING ACTS

Considering the principle of subordination, I would emphasize that my primary objective would be cooperation with the State Prosecutor, which would reflect in my regular reporting to the State Prosecutor on all cases pending in the OWCP.

In relation to the War Crimes Investigation Service and the Military Security Agency, which work on the identification of the perpetrators of war crimes and gathering evidence, I will organize weekly working meetings in order for me to have an overview of the work being done and to have a complete picture at any moment about any case. In these meetings, I will primarily focus on work prioritization, following consultations with the State Prosecutor.

I will advocate that the Rules on Administration in the Public Prosecution Office be implemented in the OWCP in their entirety. In this area, I would not involve myself in a more detailed analysis of some particularities in these Rules.

IMPLEMENTATION OF ACTION PLAN

I point out that the OWCP will be implementing the Action Plan for Chapter 23, ''Judiciary and Fundamental Rights", which is consistent with the latest recommendations and endorsed by the European Commission in Brussels. In this context, I feel that the ''National strategy for prosecution of war crimes committed during and in connection with the armed conflicts in the former Yugoslavia for the period from 2015 to 2025" produced by the HLC with financial support from the EU, could only serve as a working paper. Its content is of such a nature that it represents an example of building castles in the air [*sic*], without taking into account the reality of the situation in the region, ranging from the material to the political conditions.

VI

3. REGIONAL COOPERATION

As I have already noted, when it comes to planning the measures which I would take in the event of being elected Prosecutor, I pay considerable attention to the analysis of past experiences in cooperation

with the Prosecutor's Office of the Republic of Croatia, Bosnia and Herzegovina and the EULEX Mission in Kosovo and Metohija. The Serbian Prosecutor's Office can completely fulfill its duties in the prosecution of war crimes only on the basis of effective cooperation with the competent prosecutors' offices in these countries. Effective cooperation primarily requires reviewing and qualitatively improving the cooperation, because past experience has been that jointly set and expected results were not achieved, especially in the part relating to the prosecution of those responsible for crimes committed against persons of Serbian nationality.

Considering that future cooperation between this prosecutor's office and the competent prosecutors' offices in other countries would be based on different experiences of past cooperation, but also requires an understanding of the specific issues and problems which will have to be resolved in that cooperation, it is necessary to particularly highlight these specific features.

VII

Cooperation with the Prosecutor's Office / State Attorney's Office /of the Republic of Croatia has lasted more than 10 years.

PROBLEMS, CHALLENGES

Some significant initial results were accomplished in the cooperation between the two prosecutors' offices, but instead of improving on this, the cooperation has now stagnated, and since the adoption of the ''Law on annulling certain legal acts of the judicial bodies of the former Yugoslav People's Army, the former Yugoslavia and the Republic of Serbia", real cooperation with the State Attorney's Office has been made practically impossible. The most objective evaluation of the current cooperation is that it continues as a common practice and habit, where certain data, documentation and information are exchanged, and certain results which continue to derive from that represent more a product of established good collegial relationships between individual deputy prosecutors in the county prosecutors' offices rather than a joint effort to solve the problems which have been encountered in accordance with the signed documents on cooperation.

Because the overall problems and almost every particular case of war crimes are immersed in the distinct political context, which cannot be ignored or neglected in any aspect of regional cooperation in prosecuting war crimes, I will reflect on some of the most prominent negative effects of political influence on the cooperation between the prosecutors' offices of Serbia and Croatia in war crimes cases. I consider this to be of particular importance, because the Republic of Croatia is a member of the EU, and the Republic of Serbia is trying to fulfil the preconditions for EU membership as quick as possible. However, it is clear that, when it comes to war crimes committed during the armed conflicts in Croatia, the Office of the War Crimes Prosecutor as a rule prosecutes the perpetrators who committed those crimes against Croatian civilians or prisoners of war, because they, as members of the military or police forces of the SAO Krajina (the Serbian Autonomous Region of Krajina) or

RSK (The Republic of Serbian Krajina) or the the JNA (Yugoslav People's Army) or some paramilitary forces, are substantially Serbian nationals residing in the Republic of Serbia. At the same time, the availability of some members of the Croatian army or police forces who committed war crimes against Serbian civilians is the exception, as in the case of the member of the Croatian Army Veljko Marić, which only confirms the rule mentioned herein. The Republic of Croatia raises concerns in the European Parliament about the competence of the Higher Court in Belgrade Department for War Crimes committed in the whole territory of the former Yugoslavia. Such an attitude is the product of the influence of a number of political factors in the Republic of Croatia, especially the extremely powerful lobby of various associations of ''homeland war veterans", who advocate the position that each member of some military or police unit must be registered as a war criminal, which has a great influence on the fact that an unvarying number of about 1,500 persons of Serbian nationality from Croatia are being subjected to different stages of criminal proceedings for war crimes. These and other political influences significantly hamper the process of prosecution of possible suspects for crimes committed against Serbs during the beginning of the armed conflicts in 1991 and during the military operations ''Flash" (''Bljesak") and ''Storm" (''Oluja"). I am going to attempt to prosecute immediately all war crimes committed during these military operations. In this section, I must emphasize that, according to the OWCP's current knowledge, on Croatian territory there is a mass grave containing the mortal remains of about 280 Serbian civilians.

IMPROVEMENT OF COOPERATION

These and the many other problems noted in the specific examples derived from the past cooperation with the Croatian Prosecutor's Office cannot be the reason for the OWCP to terminate cooperation. However, the Prosecutor and the OWCP as a whole must make a clear effort to render this cooperation really effective. Holding the position of Prosecutor would mean for me that I would insist on holding a working meeting with the Chief Prosecutor of the Republic of Croatia, together with an agreed number of his/her closest associates, immediately after being elected. There would be no press release to the general public about this meeting, but we would discuss specific problems and what we could do while the ''Annulment Law" is in effect, until the two countries resolve this issue on the state level. I will strive to make these working meetings a regular practice and to ensure that the deputies from the OWCP dealing with cases of crimes committed on the territory of Croatia participate in these meetings. Meetings such as the meeting between the Chief Prosecutors of the Prosecution Offices of B&H and Croatia and the Serbian War Crimes Prosecutor, held under the auspices of the UN Mission in Bosnia and Herzegovina in April 2015 in Sarajevo, when the guidelines on joint cooperation in war crimes cases and the search for missing persons were established, and the meeting regarding those guidelines held in July 2015 in Tuzla, make sense only if they do not remain purely public manifestations of the desire for cooperation. If these meetings are followed by clearly defined and specific activities by the OWCP and other prosecutors' offices, I will support and advocate such a relationship.

TRIAL IN ABSENTIA

Currently, there are numerous requests for assistance which the OWCP has sent through the Ministry of Justice to the competent authorities in the Republic of Croatia, which are not being dealt with. In this regard, I will require that the requests sent be promptly answered, and will insist that, if they do not intend to grant our requests, we must be sent a notification to that effect. In those cases when, after receiving the notification, they fail to act on our requests, I will initiate a trial in absentia, assuming the suspects to be unavailable to us and that in such cases the civilians of Serbian nationality are the victims. Taking all of this into consideration, I believe that the help of the State Prosecutor and the state itself will be necessary.

VIII

Cooperation with the Prosecutor's Office of B&H:

CASES IN WHICH PERSONS OF SERBIAN NATIONALITY ARE VICTIMS

It is necessary to obtain the information from the Prosecutor's Office in B&H about the cases that they have on their books in which civilians of Serb nationality are the victims. These data would include the information on the place and time of the event and the names of the victims or injured parties, so that we at the OWCP can engage in providing possibly available documentation and data related to these events, and acquire other available evidence (examination of witnesses who can be found in the territory of our country).

EXCHANGE OF INFORMATION AND DOCUMENTS

On the basis of the protocol on cooperation in the prosecution of perpetrators of war crimes, crimes against humanity and genocide, signed in 2013, certain documents were submitted by the Prosecutor's Office of B&H in order to launch criminal proceedings, which resulted in an investigation order against a certain number of persons. I will continue to insist on this form of cooperation.

TRANSFER OF CRIMINAL PROSECUTION

In addition to the forms of cooperation mentioned above, I maintain that a very successful cooperation is the one based on the Law on International Legal Assistance, which is primarily the assistance between two countries and thus between two prosecutors' offices. What I stated previously is based on my personal experience, because I was involved in processing such cases as a deputy prosecutor for war crimes, which resulted in 6 indictments brought before the War Crimes Department of the Higher Court in Belgrade.

Cooperation with EULEX Mission:

As regards Kosovo and Metohija, the cooperation between the EULEX police unit for war crimes, the EULEX Special Prosecutor's Office for war crimes and organised crime and the OWCP of the Republic of Serbia in investigations of war crimes in Kosovo and Metohija will be conducted in three directions:

MAIN DIRECTIONS OF COOPERATION

1. **Joint work on specific cases in the investigation stage,** which implies a previous agreement on carrying out the investigation, the selection of witnesses from the areas of Kosovo and Metohija and Serbia for each individual case, the joint examination of a witness in the presence of both parties, a definition of the perpetrators and agreement on where to start and complete specific criminal cases.

2. **Help given to one of the parties** in the investigation of crimes, which primarily consists of submitting documents, and identifying and questioning witnesses at the request of the other party in all cases which are under investigation on any side.

3. **Logistical assistance,** which includes encouragement of witnesses and help in bringing them before the Prosecution Office and the court.

In connection with the above, I will arrange for meetings, every month at least, between representatives of both sides, which would be held on a regular basis.

In addition, I will initiate consultations with the Republic Prosecutor's Office of the Republic of Serbia and the Ministry of Justice of the Republic of Serbia in connection with the signing of the **Protocol on Cooperation**, whose draft text is being prepared.

4. INTERNATIONAL COOPERATION WITH ICTY (INTERNATIONAL CRIMINAL TRIBUNAL FOR THE FORMER YUGOSLAVIA) AND MICT (INTERNATIONAL MECHANISM FOR CRIMINAL TRIBUNALS):

I will raise the cooperation with the Hague Tribunal and the MICT (colloquially known as the Residual Mechanism) to a higher level, as I believe that this cooperation is most important as regards the large body of evidence which was collected in the procedures that were conducted before the Hague Tribunal. In addition to the existing projects, I will advocate for projects that will further strengthen in general the cooperation between the two prosecutors' offices and the Hague Tribunal. I will also put forward a special proposal to amend the rules relating to witness protection measures laid down in the Rules of Procedure and Evidence, for which I will need the help of the Prosecutor's Office of the Republic of Serbia and the Ministry of Justice of the Republic of Serbia.

As liason prosecutor, I will make an effort to convey my experience from the Hague Tribunal to other deputy prosecutors, as well as to the other staff. First of all, I am talking about the use of

the EDS database, which can be accessed from Belgrade, but in the past has been hardly used. In addition, one of the priorities will be to complete the database in the OWCP, which can support searches according to the set criteria. In that way, the electronic sublimation [*sic*] of data and evidence can be performed.

For me, it will certainly be important to continue and improve the cooperation with the EU Special investigation team, which primarily implies logistical support in the form of calling and accessing witnesses in order to obtain statements from them.

I will intensify international cooperation through the competent Republic Prosecutor's Office, in order to improve efficiency in cases of war crimes, and in particular the cooperation with the most important judicial network in the EU - Eurojust.

IX

5. BUILDING OF TRUST AND PRESERVING REPUTATION OF OWCP

I will strive to preserve the reputation of the OWCP in public. I will regularly and in a timely manner inform the public about the performance of the OWCP, according to the envisaged communication strategy of the State Prosecutorial Council and the Republic Prosecutor's Office.

In the period from January 1st, 2016 to February 2nd, 2022 I will primarily advocate for finding every missing person on the territory of the former Yugoslavia.

Since I was involved in the regional cooperation during my past work in the OWCP, and participated in an ICTY project in 2010, as well as also dealing with the cases of Croatia, B&H, Kosovo and Metohija, which means that I have experienced every segment of work at the OWCP, I believe that this past experience and the results achieved confirm that I fulfil the conditions required to properly manage the OWCP.

During my career so far, I have established many contacts, primarily with Prosecutor Serge Brammertz and his closest associates (the prosecutors appointed to the Hague Tribunal, with whom I maintain personal communication), but also with the colleagues from the Prosecutor's Office of the Republic of Croatia, the Prosecutor's Office of Bosnia and Herzegovina, and the EULEX Mission in Kosovo and Metohija. On the basis of all of the above, I believe that I would personally contribute to a better and faster implementation of the programme set out herein to improve the work of the OWCP.

I hope I will have the opportunity to achieve better performance and improve the OWCP, because I believe that resolving the issues of war crimes is one of the important tasks for all of us, in order to progress and join the European Union.

Programme for the organisation and improvement of the OWCP

Candidate: Dejan Terzić

I INTRODUCTION

On the basis of Articles 15 and 31 of the Rules on Criteria and Standards for Assessment of Professionalism and Respectability of Candidates in the Process of the Nomination and Election of Public Prosecutors and with regard to the leading role of the Prosecutor for War Crimes defined by Article 4 Paragraph 2 of the Law on the Organization and Competences of Government Authorities in War Crimes Proceedings ("Official Gazette of the Republic of Serbia", number 67/03, 104/09), this Programme contains a short overview of the assessment of the current work of the Office of the War Crimes Prosecutor, as well as priorities, objectives and activities planned for the purpose of enhancing the work of the Prosecutor's Office in the period 2016-2022.

II CHALLENGES IN WORK OF OFFICE OF WAR CRIMES PROSECUTOR

Due to the fact that a lot of time has passed since the armed conflicts on the territory of the former Yugoslavia ended, the investigation and prosecution of war crimes are becoming very difficult. Evidence is scattered across the countries in the region, and it is difficult to access this evidence. And there is a huge problem reflected in the lack of unified and accurate statistical data on the number and the nature of pending cases of war crimes, which would serve to indicate the efficiency of the prosecution and are necessary for the planning relating to the investment into the human and material resources.

There is an additional problem, and that is the complexity of cases caused by the great number of accused, victims and witnesses. Because of simultaneous actions in a great number of complex cases, there is a chronic overload of the existing administration and material capacities.

There is a lot of room for enhancing inter-institutional, regional, and international cooperation.

III PRIORITIES AND OBJECTIVES

The work and the operation of the Office of the War Crimes Prosecutor should be enhanced during the forthcoming period by following these priorities:

- Strategic access to the enhancement of the efficiency of the Office of the War Crimes Prosecutor's work through the adoption and implementation of the National Strategy for the Prosecution of War Crimes, a special strategy of the Office of the War Crimes Prosecutor in accordance with the competences of the Prosecutor's Office, as well as the implementation of the relevant part of the Chapter 23 Action Plan;
- Preparation and application of case prioritization criteria;
- Enhancing security of cooperative witnesses;

- Enhancing witnesses' and victims' support systems;
- Strengthening administration and material capacities of the Prosecutor's Office.

Bearing in mind the identified priorities in the areas of operation, the objectives which the Office of the War Crimes Prosecutor should implement in the forthcoming period of six years are as follows:

1. Enhancement of efficiency of criminal prosecution of war crimes through:
   A. Strategic approach to the enhancement of criminal prosecution of war crimes
   B. Establishing criteria for the formulation of priorities in prosecutions
   C. Transferring cases from general jurisdiction prosecution offices to the jurisdiction of the Office of the War Crimes Prosecutor
   D. Creation of a regional war crimes database
   E. Strengthening of administration and material capacities of the Office of the War Crimes Prosecutor
   F. Affirmation of the application of new legal concepts
2. Enhanced witnesses and victims' support systems
3. Enhanced inter-institutional cooperation
4. Enhanced cooperation with ICTY
5. Enhanced regional and international cooperation
6. Enhanced transparency of the work of Office of the War Crimes Prosecutor.

1. Enhancing efficiency of criminal prosecution of war crimes

A) Strategic Approach to enhancement of criminal prosecution of war crimes

The great number and complexity of cases, the passage of time since the commission of crimes in question, as well as limitations regarding administration capacities of the Office of the War Crimes Prosecutor, mean that one should approach the issue of enhancing the work of the Prosecutor's Office following the principle of long-term strategic planning and clear prioritization. Besides the already existing problems in the work of the Office of the Prosecutor, the necessity of such an approach to the enhancing of its work also emerges from the tasks set before the OWCP in the process of the Republic of Serbia's accession to the European Union, which were defined by the Action Plan for Chapter 23, which establishes that the Office of the War Crimes Prosecutor is obliged to participate in the production of a National Strategy for the Prosecution of War Crimes and, on the basis of this strategic document, to produce and adopt a special Strategy of the Prosecution, which will define objectives and activities aimed at enhancing the work of this body in a more precise manner.

B) Establishing prosecution prioritization criteria

Since it has become clear that, owing to the passage of time, the number of war crimes committed on the territory of the former Yugoslavia and the complexity of evidence, it is impossible to investigate and prosecute all cases of war crimes in a short period of time, the task set before the Prosecutor's Office is to define and start implementing clear, specific and objective case prioritization criteria in

the shortest possible time.

C) Transferring cases from general jurisdiction prosecution offices to Office of the War Crimes Prosecutor

It is necessary to establish an exact number of cases of war crimes still pending before the courts of general jurisdiction and initiate their transfer to the jurisdiction of the OWCP, owing to the lack of capacities in the courts and prosecution offices of general jurisdiction to prosecute cases of war crimes. All cases of war crimes and other criminal offences which could be qualified as war crimes and which are pending before the courts and prosecution offices of general jurisdiction, will be transferred to the jurisdiction of the OWCP, which would lead to the strengthening of the OWCP's capacities.

D) Establishing regional war crimes database

The Prosecutor's Office should cooperate with the Prosecution Offices in the region and work with them on establishing and regularly updating a regional database on war crimes, which would facilitate the search and analysis of data, thus contributing to the rational use of human and material resources and the acceleration of the prosecution process.

E) Strengthening administration and material capacities of Office of War Crimes Prosecutor

Besides the preparation of case prioritization criteria, it is also necessary to strengthen the capacities of the Prosecutor's Office in order to be able to act. In that sense, it is necessary to elect additional deputy prosecutors and to hire prosecutors' assistants and advisers; this should be done in accordance with the number and dynamics foreseen by the Action Plan for Chapter 23.

Besides hiring additional staff, it is also necessary to distribute the existing staff and to put them through a continuous specialized training. In cooperation with the State Prosecutorial Council and the Judicial Academy, the Prosecutor's Office should make sure that the training in the field of war crimes and international humanitarian law receives constant financial support from the budget, instead of being financed on the basis of projects. It should also make sure that this training is continuous/periodical instead of ad hoc. Apart from the training in the aforementioned fields, the Prosecutor's Office also has to work on its employees' development in the fields of strategic planning, statistics, analytics, information technologies, and project management.

Besides strengthening administration capacities, the Prosecutor's Office also has to work on securing the material resources necessary for efficient work; for which, besides the budget of the Republic of Serbia, it should rely on the EU Instruments for Pre-accession Assistance, for which reason, there is a need for an efficient and continuous cooperation with the Ministry of Justice.

F) Affirmation of new concepts' application

A great number of cases and criminal proceedings which last for long periods of time point to the need for finding alternative ways to enhance the efficiency of the OWCP's work. One of these ways is to deliver guilty judgments on the basis of plea agreements previously concluded between the accused and the Prosecutor.

The advantages of concluding plea agreements are multiple. In this way, a criminal procedure ends and at the same time complicated cases are unburdened of their long procedures. Besides the principle of efficiency, the conduct and completion of a criminal case in this manner secures the full application of the principle of the cost-effectiveness of proceedings, considering the fact that in this way the costs of the proceedings are significantly reduced.

In this sense, the Prosecutor's active role in the initiative for signing plea agreements is very important, and therefore, this practice should continue. Because of the great number of advantages, the Prosecutor will attempt to conclude plea agreements in each particular case where the conditions set by the law are met.

2. Witnesses' and Victims' Support

Because of the significance of witnesses for cases of this kind and the specific nature of the things they have to testify about, it is very important to make the testifying experience the least painful possible, and without consequences for the mental health of the witnesses. In accordance with this and the standards contained in the EU Directive 2012/29/EU, which regulates the minimum standards regarding the rights, support and protection of victims, it is necessary to create a witness support and assistance service within the Office of the War Crimes Prosecutor, which would hire professionals of appropriate profiles, or at least a professional trained for executing tasks related to witness support.

3. Inter-institutional cooperation

An improved inter-institutional cooperation and coordination of government bodies, with their organizational units and specialized bodies, represent a necessary condition for efficient identification and investigation of war crimes. The Prosecutor's Office should initiate, stimulate and coordinate intensive cooperation with other relevant actors in this area.

A) War Crimes Investigation Service

Investigative acts undertaken by the War Crimes Investigation Service have a huge impact on the quality and the scope of the evidence material on which the Prosecution bases its charges. In that sense, the Prosecution will advocate for urgent adoption of common internal rules of procedure.

B) Witness Protection Unit

Since the safety of witnesses represents a precondition of their motivation to give statements and thus contribute to the efficiency of the investigation and prosecution of war crimes, the Office of the War Crimes Prosecutor should intend to continuously enhance the cooperation with the Ministry of the Interior Witness Protection Unit, and to adopt common internal rules of procedure.

C) Government of Republic of Serbia's Commission on Missing Persons

The Government's Commission on Missing Persons represents a long-lasting and irreplaceable partner of the Office of the War Crimes Prosecutor. The documents in the archives of the Commission represent a very important source of information relevant for the work of the Office of the Prosecutor.

The Commission offers an extraordinary contribution to the clarification of the crimes committed, since it provides the means for the examination of terrain, for the purpose of identifying locations of possible mass grave sites.

Bearing this in mind, the OWCP has to make sure in the forthcoming period that it maintains this interactive relationship between the Commission on Missing Persons and the Office of the War Crimes Prosecutor and governmental commissions for missing persons in the region, in order to reinforce the mechanisms which could accelerate the search for the persons who went missing in the armed conflicts on the territory of the former SFRY.

4. Cooperation with ICTY

The cooperation between the Office of the War Crimes Prosecutor and the International Criminal Tribunal for the Former Yugoslavia in the forthcoming period should be conducted in a number of directions:

- the continuation of the work of liaison officers, who should have a complete insight into the archives of the International Criminal Tribunal for the Former Yugoslavia and the Mechanism for International Criminal Tribunals, and analyze the documents and identify the ones which are relevant inasmuch as there is a need for them to be transferred to the OWCP; and doing all this in order to prosecute cases based on priority and serious charges of war crimes in a proper manner;

- the necessary continuation of the transfer of knowledge and experience from the International Criminal Tribunal for the Former Yugoslavia, in order to acquire general, but also specific, knowledge related to particular cases;

- the necessary continuation of periodical visits of advisers from the Office of the War Crimes Prosecutor to the premises of the International Criminal Tribunal for the Former Yugoslavia

and the Mechanism for International Criminal Tribunals, regarding national cases, and analysis of cases handled by the International Criminal Tribunal for the Former Yugoslavia Office of the Prosecutor.

5. Regional and general international cooperation

The continuation and development of the regional cooperation represents a necessary precondition of more efficient investigations in cases of war crimes. Bearing in mind the results which in this sense have been made to date through the exchange of evidence and as a result of the Palić Process, what is needed is for the Office of the War Crimes Prosecutor to take the necessary steps in the forthcoming period, which would be directed at:

- the continuation of the Palić process;
- the regular organization of meetings of war crimes prosecutors from the countries in the region;
- the establishment of a joint regional database on war crimes.

Besides the cooperation with judicial bodies in the countries in the region which deal with the prosecution of war crimes, what is of great significance for the efficient work of the OWCP is the exchange of knowledge and experience with the judicial officials and experts from international organizations and academia from all over the world, and particularly through participation in international conferences.

6. Transparency of work of Office of the War Crimes Prosecutor

In order to provide a sufficient amount of information relating to the work of the OWCP and investigations of war crimes to the expert and general public concerned, it is necessary to enhance the relations and openness of the Prosecutor's Office towards the media reporting on this topic, as well as direct accessibility to information. In this sense, the Office of the War Crimes Prosecutor should take the following steps:

- Implementation of the Communication Strategy
- Development of the web page of the Office of the War Crimes Prosecutor, which would contain all necessary information regarding the work of the Prosecution, and a special section dedicated to the presentation of "Basic information regarding communication with the media" and relevant information as to which data from the war crimes cases can be accessible to the public;

– Regular publication of comprehensive reports on the work of the Prosecutor's Office;

– Regular publication of special reports on the implementation of activities under the jurisdiction of the OWCP, which have been foreseen by the relevant strategic documents in the area of the prosecution of war crimes (Action Plan for Chapter 23, National Strategy, Strategy of the Public Prosecution);

– Adoption of recommendations of the Council of Europe relating to information and the media, as well as 18 principles relating to the provision of information on criminal cases;

– Enhancement of cooperation with civil society organizations through periodic meetings and exchange of ideas.

IV CONCLUSION

I believe that with the professionalism I have shown so far, my wide experience in this field and the results I have secured, as well as my knowledge of the current problems and needs of the Office of the War Crimes Prosecutor, I have demonstrated the ability to lead this Prosecution Office.

I also believe that the measures for the development of the work of the Office of the War Crimes Prosecutor presented in this Programme represent the best way to enhance the investigation and prosecution of war crimes, as well as making a contribution to the rule of law and the progress of the Republic of Serbia in its European Union accession process.

I hope that I would contribute by my work to the more efficient operation of the Office of the War Crimes Prosecutor and thus to the more efficient operation of the Judiciary as a whole in the Republic of Serbia.

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